



# Top Ten Whistleblowing and Retaliation Events of 2021

Proskauer»

# Presenters

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# Introduction

The image shows the words "TOP 10" in large, three-dimensional, rusty metal letters. The letters are arranged horizontally on a dark, textured wooden surface. The metal has a weathered appearance with patches of orange rust and some blue-grey patina. The lighting is dramatic, coming from the side, casting shadows and highlighting the textures of the metal and wood.

# Introduction

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- Employers have a continued need to minimize the risk of whistleblower retaliation claims.
- Failure to handle these matters appropriately invites significant financial and reputational risks.
- Developments in 2021 highlight these risks:
  - Record whistleblower awards
  - Increased area of focus for legislatures
  - Novel court rulings on the scope of whistleblower protections

## 10. Theranos Whistleblower testified at Elizabeth Holmes' Trial

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- Former Theranos CEO Elizabeth Holmes was on trial in front of a jury for defrauding investors and duping patients about the efficacy of Theranos' blood testing technology.
- Erika Cheung, former lab technician, blew the whistle regarding the ineffectiveness of their blood testing devices and quality control tests.
- After reporting her concerns to the company's COO and a member of their board of directors and getting no response, Cheung blew the whistle to a Wall Street journalist.
- Cheung's whistleblowing activity had an enormous impact.
- On Jan 3, 2022, the jury found Holmes guilty on four charges.

## 9. OSHA's Whistleblower Program was Expanded

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- The program now covers reports of violations of antitrust and anti-money-laundering laws
- OSHA now investigates complaints of whistleblower retaliation under two new whistleblower statutes: the **Criminal Antitrust Anti-Retaliation Act (CAARA)**, and the **Anti-Money Laundering Act (AMLA)**.
  - **CAARA**: prohibits employers from retaliating against whistleblowers for reporting criminal antitrust violations to their superiors or the federal government or for participating in a criminal antitrust investigation or proceeding
  - **AMLA**: forbids retaliation against whistleblowers for reporting violations of these laws or for participating in a related investigation or proceeding



## 8. Fifth Circuit Affirmed Dismissal of a SOX Whistleblower Claim

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- *Moody v. American National Insurance Co.*:
  - Fifth Circuit affirmed the dismissal of a SOX whistleblower retaliation claim where the plaintiff failed to establish an employer-employee relationship with the defendant.
  - Plaintiff relied on *Lawson v. FMR LLC*, which held that SOX whistleblower protection extended to employees of contractors and subcontractors serving public companies.
  - In affirming the trial court's dismissal, the Fifth Circuit noted that *Lawson* made clear that SOX only covers "actions an employer takes against its own employees" and, therefore, "the whistleblower entitled to protection must be an employee of the retaliator."

## 7. NY Federal Court Held that SOX Whistleblower Protections Extend to Investors

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- *SEC v. Collector's Coffee Inc.*:
  - SDNY denied a defendant's motion to dismiss on the grounds that the SOX whistleblower protections are not limited to employees but also extend to shareholders.
  - Court found that the term “whistleblower” in Section 21F-17 applies to any individual who provides information regarding a securities law violation to the SEC. i.e., limited to employer-employee relationship.
    - **Rule 21F-17**: prohibits company actions that impede individuals from reporting alleged securities law violations to the SEC



## 6. New York Vastly Expanded its Whistleblower Statute

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- N.Y. Lab. Law § 740(2). An employer shall not take any retaliatory action against an employee, whether or not within the scope of the employee's job duties, because such employee does any of the following:
  - (a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that the employee ***reasonably believes*** is in ***violation of law, rule or regulation*** or that the employee ***reasonably believes*** poses ***a substantial and specific danger to the public health or safety***; or
  - (b) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such activity, policy or practice by such employer; or
  - (c) objects to, or refuses to participate in any such activity, policy or practice.

## 6. New York Vastly Expanded its Whistleblower Statute (cont'd)

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- No longer restricted to report of violations of the law that either "creates and presents a substantial and specific danger to the public health or safety, or ... constitutes health care fraud."
- Requires good faith reasonable belief instead of actual violation of law.
- Broadens definition of "employees" to include former employees, as well as independent contractors.
- Expands the definition of prohibited retaliatory actions and available remedies to include front pay, civil penalties up to \$10,000, and punitive damages.
- Extends statute of limitations extended from one to two years.
- Creates right to a jury trial.

## 6. New York Vastly Expanded its Whistleblower Statute (cont'd)

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- N.Y. Lab. Law § 741(2). Retaliatory action prohibited. . . . no employer shall take retaliatory action against any employee because the employee does any of the following:
  - (a) discloses or threatens to disclose to a supervisor, to a public body, to a **news media outlet, or to a social media forum available to the public at large**, an activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care or **improper quality of workplace safety**; or
  - (b) objects to, or refuses to participate in any activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care or **improper quality of workplace safety**.

## 5. Sixth Circuit Ruled that FCA Whistleblower Protections Extend to Post-Employment Retaliation

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- *US v. William Beaumont Hospital*:
  - Sixth Circuit held that the FCA whistleblower protection provision protects former employees from post-employment retaliation.
  - Decision creates circuit split with Tenth Circuit.



## 4. Oregon Federal Court Overturned a \$2.4 Million Jury Award on State Whistleblower Claim

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- *Ivie v. AstraZeneca Pharmaceuticals LP*:
  - Plaintiff alleged she was discharged for raising compliance issues about Defendant's marketing strategy with respect to certain pharmaceutical products and filed suit for retaliation.
  - Oregon trial court granted renewed motion for judgment as a matter of law, and overturned a jury award of approximately **\$2.4 million** for violation of Oregon's Whistleblower Protection Law.
    - 6-day trial
    - Award consisted of \$1.8 million for noneconomic damages and \$510,423 for economic damages
  - Court held that the Oregon Whistleblower Protection Law did not apply extraterritorially, and Plaintiff failed to introduce any evidence that the underlying facts or individuals at issue were connected to Oregon.
  - Court further found that upholding the jury verdict would violate the due process clause of the 14th Amendment because it prohibits the application of a state law that is only casually or slightly related to the litigation.

### 3. Potential Revisions to SEC Whistleblower Program Rules Following High Profile Lawsuit

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- *Thomas v. SEC*:
  - NY attorney filed a lawsuit in a DC district court alleging that the SEC's final rule violated the Administrative Procedure Act.
  - Plaintiff argued that the agency lacked authority to lower large awards or to deny awards better suited to a different whistleblower program.
  - SEC Chair subsequently announced directive to SEC staff to prepare potential revisions to two aspects of the final rule implementing changes to the commission's whistleblower program, which was adopted on Sept. 23, 2020.
  - Shortly after this announcement, the parties jointly moved to stay the case.

## 2. CA Federal Court Dismissed Whistleblower Claims after Trial

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- *Botta v. Pricewaterhouse Coopers LLP*:
  - Plaintiff alleged he was retaliated against by his employer for filing a complaint against his supervisors for willingly overlooking accounting errors.
  - California district court entered judgment in favor of the defendant on all claims following a bench trial, including whistleblower retaliation claims under SOX and California law.
  - Court found that Plaintiff was removed from the engagements for legitimate reasons and his violation of internal standards warranted discharge. Therefore, Plaintiff failed to establish that Defendant retaliated against him.
  - Additionally, the temporal proximity of four months between when the SEC opened the investigation and his termination was insufficient to establish a causal link.

# **1. SEC Whistleblower Office Surpassed \$1 Billion in Bounty Awards**

- In 2021, the SEC made more whistleblower awards -- \$564 million to 108 individuals – than in all other prior years combined.
  - In September, 2021, the SEC announced two awards totaling approximately \$114 million to two whistleblowers whose information and assistance led to successful SEC and related actions
- Since its inception in 2012, the Whistleblower Program has paid out over \$1 billion in awards.
- In 2021, they also received the largest number of whistleblower tips – over 12,200.
  - 76% increase since 2020



# What's Next?

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- Each of these events will likely have an impact reaching into 2022 and beyond.
- Whistleblower disputes and issues are here to stay.
- Compliance programs should be strengthened and enhanced.

# Top Ten Whistleblowing and Retaliation Events of 2021



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