Whistleblower Risks - It May Be Time to Reexamine Assumptions about their Management and Insurability

September 23, 2011 by EPSTEIN BECKER & GREEN, P.C.

Those concerned with managing or insuring risk are affected increasingly by the evolution of whistleblowing, especially as new laws and interpretations since 2009 have changed the stakes by redefining whistleblower protections and bounty award entitlements.

Virtually any risk management program written prior to the 2008 elections may need to be recalibrated to take account of new definitions introduced by whistleblower features of legislation nominally concerning healthcare and financial services, but in reality reaching much more broadly beyond the bounds of the industries ostensibly targeted. The subject matter of protected activity, the appropriate manner for an informant or tipster to communicate, the remedies for employment-related reprisals, and the opportunity to share in sanctions imposed by the government are part of laws enacted in the past two years that introduce entirely new rights and obligations or importantly amend existing ones.

Wholly apart from legislative initiatives, interpretations issued on the watch of a newly constituted Department of Labor Administrative Review Board could have the effect of reinventing Sarbanes-Oxley protected activity – if decisions issued particularly during 2011 are enforced and followed. In recent administrative decisions, the predicate that Sarbanes-Oxley's whistleblower protections are reserved for exceptional matters of material shareholder or securities fraud no longer holds, and the underlying focus of Sarbanes-Oxley as a post-Enron statute intended to protect the presumed "innocent investor" is disregarded. Equating reports of mail, wire and bank fraud with shareholder and securities fraud, the current Administrative Review Board has downplayed the legislative concern for activities that materially impact shareholders or securities markets and related protection of individuals who assist with valuable information. The consequence for now is that more companies are exposed to claims by individuals asserting that even garden variety reports in the course of performing their duties or otherwise should be within the ambit of Sarbanes-Oxley protection against unfavorable personnel actions.

For more information, see "Whistleblowers: A Risk Management View," (pdf) an article by Allen B. Roberts and Stuart M. Gerson featured in the August 22, 2011 issue of Insurance Advocate. Originally published by CINN Worldwide, Inc. in the Vol. 122, No. 14 edition of Insurance Advocate.