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PPP Borrowers Beware: More Money Can Lead to More Problems

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Since the Small Business Administration's (SBA) Paycheck Protection Program (PPP) rollout in the early months of the COVID-19 pandemic, lenders have approved more than 9.8 million loans, totaling more than $762 billion, to help small businesses keep their workers on the payroll. More than 4.7 million of those loans have been approved in 2021 alone, signaling that companies are still in need of government assistance even as the country slowly reopens and more Americans are vaccinated. While the PPP has helped companies keep their workers, employers will naturally still have aggrieved employees who will assert employment claims.

The cash infusion that PPP loans provide to businesses comes with some well-known strings attached and some lesser-known potential liabilities. One potential liability issue that may be foreign to PPP recipients that do not regularly contract with the federal government is retaliation claims under the False Claims Act (FCA). The FCA prohibits, among other things, the submission of false claims or statements to the government. The FCA also includes a retaliation provision that states an employee is entitled "to all relief necessary to make that employee, contractor, or agent whole" if he or she is "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against" in the workplace because of his or her lawful acts in furtherance of an FCA action or an effort to stop an FCA violation. For example, last month, a former employee of Great Dane Petroleum Contractors, Inc. alleged that the company misused just under $3 million in PPP funds and fraudulently altered payroll records to show that employees out on leave were still working. The former employee filed an FCA retaliation claim alleging she was reprimanded, subjected to negative performance reviews,

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Practice Areas

Civil Fraud, False Claims, *Qui Tam* and Whistleblower Actions

Employment & Labor

White Collar Defense & Government Investigations experienced a hostile work environment, and was ultimately fired after she disclosed her concerns about Great Dane's use of PPP funds to her immediate supervisor and administrators.

With so many companies staying afloat with PPP funds, employers should be prepared to appropriately engage employees who raise concerns that funds were improperly obtained or used so that employers can avoid potential FCA liability. The failure to do so can have devastating effects on an employer's public image and bottom line. Damages in FCA retaliation cases may include double back pay, interest, and special damages, which includes litigation costs, attorneys' fees, and damages for emotional distress or other noneconomic harm. The FCA also allows employees who raise concerns about violations of the statute (i.e., whistleblowers) to bring *qui tam* suits on the government's behalf to enforce the FCA and share in the government's recovery if successful. Damages and penalties under the FCA's whistleblower provisions may include an award of up to three times the amount that was fraudulently obtained from the government as well as up to $11,000 in civil penalties per violation. Employers must, therefore, respond appropriately to fraud allegations to minimize the chance that an employment claim (i.e., FCA retaliation) metastasizes into a full-blown FCA *qui tam* action.

The Paycheck Protection Program and the FCA

The FCA was enacted to enhance the U.S. government's ability to recover losses sustained as a result of fraud against it. In 1986, amid a proliferation of government contractor fraud, the FCA was amended to provide the government with more effective enforcement tools and encourage those with information about government fraud to come forward. Violators face hefty damages and penalties for each false claim submitted to the government. *Qui tam* whistleblowers who bring suit under the FCA can receive between 15 and 30 percent of the total recovery. Thus, it is no surprise that whistleblower suits generate the bulk of the government's FCA-related recoveries year after year. In 2020, $1.6 billion of DOJ's $2.2 billion FCA suit recovery stemmed from *qui tam* suits.

Because the PPP is a government program that distributes government funds based on a business's certifications, companies risk FCA liability for conduct ranging from making false statements on loan applications to failing to appropriately segregate PPP funds or keep records of how the funds were used. This risk is more than hypothetical—shortly after the PPP rollout, and in light of public criticism of prominent businesses like Ruth's Chris Steak House and Shake Shack announcing their PPP fund receipt, DOJ announced a sweeping review of PPP loan "red flags." In his remarks at an FCA summit, Deputy Assistant Attorney General Michael D. Granston noted that DOJ intends to use the FCA as a tool to combat false representations regarding PPP loan eligibility, misuse of program funds, and false certifications pertaining to loan forgiveness. And in January 2021, DOJ announced its first settlement with a California-based internet retail company to resolve the company's alleged FCA and FIRREA violations—the company admitted that it made false statements in PPP loan applications to three different lenders.

So, what should an employer do when an employee alleges that he or she was retaliated against when raising concerns about the company's receipt of PPP funds?

Responding to an FCA Retaliation Claim

An employee will often include a retaliation claim along with a suite of other employment-related claims (e.g., discrimination, hostile work environment). While an employer may naturally focus on the "retaliation" aspect of an employee's allegations, especially when included with other employment claims, the employer should not gloss over the underlying allegations of fraud. A company should thoroughly investigate these allegations. This may require the company to broaden the scope of its investigation and involve departments or employees not directly connected to the complaining employee.

A company should also carefully consider who should investigate the underlying allegations of fraud. While employment claims are often investigated by a company's human resources department, outside counsel or in-house legal departments are often best suited to investigate fraud allegations. Additionally, investigations by outside counsel or in-house attorneys can best preserve privilege. This may be of critical importance if underlying fraud allegations turn into an FCA case.

When engaging with the complaining employee or his or her attorney, the company should endeavor to get as much detail about the alleged fraud as it can. If possible, the company should have the employee provide in writing any allegations of fraud he or she has. While this may not prevent an employee from filing a whistleblower action under the FCA, it could aid a company's defense of the action.

If an investigation does uncover potential issues, the company should carefully consider how to respond. In addition to returning any funds, the company should review disclosure obligations, remedial measures, and other steps.

Resolving an FCA Retaliation Claim

A company may choose to enter a settlement agreement with an aggrieved employee under which the employee agrees not to proceed with any FCA retaliation claim and other employment-related claims. When resolving an FCA retaliation claim, a company should keep a few things in mind. For instance, as a matter of public policy, an individual generally cannot release a non-retaliation FCA claim and a company cannot prevent such an individual from filing an FCA case.

Even more problematic from a company's perspective, a (non-retaliation) FCA claim must be filed under seal to allow the government time to investigate the allegations. Thus, an employee could have already filed an FCA claim and her employer would not even be aware of the case when settling the FCA retaliation and other employment claims.

Nonetheless, any settlement agreement should include representations from the employee that he or she has not filed or initiated any complaints or suits against the company. The settlement agreement should also include a representation that the employee is not aware of any other allegations against the company involving fraud. If an employee is unwilling to agree to these representations, it may be a signal that the employee has already filed an FCA suit.

Finally, a company should consider preserving the employee's files, including emails, longer than it normally would. FCA actions can remain under seal for months, if not years, while the government investigates the allegations. The complaining employee's files will be important in defending an FCA claim and should be preserved.

With the PPP exposing more companies to FCA liability, a company should proceed carefully when it receives allegations suggesting retaliation under the FCA. Such allegations may portend the beginning of an FCA investigation or case. By taking some of the steps mentioned above, a company can get ahead of a potential FCA case and best position itself to defend against any allegations.