

# Employers should take a look at Ontario's whistleblower rules

Tips pay up to \$5M, anti-reprisal measures also built in, writes *Drew Hasselback*

The Toronto International Film Festival kicks off this week, and one of the big Hollywood films on offer is Oliver Stone's political thriller about whistleblower Edward Snowden.

Hollywood likes to tell the stories of those who blow the whistle because it's the right thing to do. Regulators are just as interested in the power of whistle blowing, but they realize the motivations of some tipsters can be more problematic.

We're about to see this unfold in the Canadian securities business. The country's largest provincial securities regulator, the Ontario Securities Commission, launched its new whistleblower office during the summer.

Most of the public attention on the program has focused on the OSC's offer to pay whistleblowers rewards of up to \$5 million for tips that result in successful enforcement actions. The program is not restricted to those who come to the OSC with clean hands. The payments can be available even if the whistleblower was complicit in the wrongdoing.

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In the meantime, corporate lawyers are doing their best to predict how the program will affect clients. Among the most important issues for employers are the anti-reprisal measures built into the OSC's program.

Provisions of Ontario's Securities Act give the OSC the power to take enforcement actions against employers who retaliate against tipster employees. They

also invalidate the provisions of any employment contracts that would prevent employees from reporting to the OSC, law enforcement or self-regulating authorities.

How might these protections work in practice? Jessica Bullock, a partner with Davies Ward Phillips & Vineberg LLP in Toronto, considers this in a recent note. Since Ontario hasn't yet seen a case that tests the limits of the protections, she looked at two recent matters emerging from the U.S. Securities and Exchange Commission's well-developed and active whistleblowing program. The U.S. program served as a model for Ontario's new whistleblower rules.

On Aug. 10, the SEC settled a case in which Atlanta-based building products distributor BlueLinx Holdings Inc. agreed to pay a US\$265,000 penalty. BlueLinx required departing employees to sign severance agreements that would have waived their rights to recover monetary rewards under any cash-for-tips program run by



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the SEC or any other U.S. federal agency.

Then on Aug. 16, Health Net Inc. of Woodland Hills, Calif. and the SEC agreed to settle a matter in which the company required outgoing employees to waive whistleblower awards as a condition of severance payments. About 600 employees signed such severance agreements with Health Net between August 2011 and June 2013. Health Net agreed to pay a penalty of US\$340,000 to the SEC.

The severance agreements caught the attention of the SEC because there's a regulation, SEC Rule 21F-17, that bars companies from requiring that employees waive the right to whistleblower awards. The rule states: "No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation."

In both settlements, the employers agreed to amend future severance agreements to omit the bans on whistleblower awards. The companies also agreed to make reasonable efforts to contact former employees who had signed such deals so employers can clarify that the agreements will not prohibit former employees from providing information to SEC staff or accepting SEC whistle blowing awards.

In Ontario, amendments to the Securities Act that protect whistleblowers were proclaimed into force on June 28. Section 121.5 of the act says an employer cannot take reprisal action against an employee who provides information to the OSC, a law enforcement agency or a self-regulating organization.

Bullock notes that in Canada, it's common for things like employment contracts, codes of conduct and severance agreements to contain confidentiality provisions. Yet subsection Section 121.5 (3) renders void any provision in an agreement that would preclude an employee from reporting information to regulators. It states: "A provision in an agreement, including a confidentiality agreement, between a person or company and an employee of the person or company is void to the extent that it precludes or purports to preclude the employee from ... providing information ... to the Commission, a recognized self-regulatory organization or a law enforcement agency."

Employers in Ontario must review their policies and agreements with employees to see whether they could potentially offend the OSC's whistleblower provisions, Bullock writes.

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Hollywood likes to tell the stories of those who blow the whistle, like former National Security Agency systems analyst Edward Snowden.

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