

Presenting a live 90-minute webinar with interactive Q&A

Whistleblower Claims: Litigating Wrongful Termination and Retaliation, Violations of Public Policy

Recent Cases in Ohio, California, and DC

TUESDAY, FEBRUARY 15, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Whistleblower Claims:

Litigating Wrongful Termination and Retaliation, Violations of Public Policy

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Overview

- 1 Profile of a Whistleblower**
- 2 Federal Law & Biden Administration**
- 3 State Developments**
- 4 Practical Considerations**
- 5 Roundtable Discussion**

1

Profile of a Whistleblower

Profile of a Whistleblower

Who are the whistleblowers?

- **Sherron Watkins**, *Former VP of Enron*
 - Wrote letter to chairman Ken Lay in 2001 to tell him the company's accounting methods were improper.
- **Carmen Segarra**, *Bank Examiner at the Federal Reserve Bank of New York*
 - Was assigned watchdog duty inside Goldman Sachs and fired within 7 months; recorded 46 hours of conversation indicating the New York Fed was deferential to Goldman.
- **Robert Blatchford**, *former JC Penney employee*
 - Reported to CEO and Director of HR that the store was charging customers full price for sale items and collecting sales tax on nontaxable items.
 - Terminated by JC Penney after Blatchford publicized his claims on the *Today Show* in 2013.



Federal Whistleblower Laws Protecting Private Citizens

- Asbestos Hazard Emergency Response Act (AHERA)
- Clean Air Act (CAA)
- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)
- Consumer Financial Protection Act of 2010 (CFPA)
- Consumer Product Safety Improvement Act (CPSIA)
- Dodd-Frank
- Energy Reorganization Act (ERA)
- Federal Railroad Safety Act (FRSA)
- Federal Water Pollution Control Act (FWPCA)



Federal Whistleblower Laws Protecting Private Citizens

- International Safe Container Act (ISCA)
- Moving Ahead for Progress in the 21st Century Act (MAP-21)
- National Transit Systems Security Act (NTSSA)
- Occupational Safety and Health Act
- Pipeline Safety Improvement Act (PSIA)
- Safe Drinking Water Act (SDWA)
- Sarbanes-Oxley Act (SOX)
- Seaman's Protection Act, 46 U.S.C. §2114 (SPA)
- Section 402 of the FDA Food Safety Modernization Act (FSMA)

2

Federal Law and Biden Administration



No company with a class of securities registered under section 12 of the Securities Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company,...

Sarbanes-Oxley, 18 U.S.C. § 1514A

Sarbanes-Oxley | 18 U.S.C. § 1514A

“Discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and condition of employment because of any lawful act done by the employee ... to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders,”

- §1341—Mail Fraud
- §1343—Wire Fraud
- §1344—Bank Fraud
- §1348—Securities & Commodities Fraud



Whistleblowers and SOX

- **Who is protected:** Employees of publicly traded companies and contractors, subcontractors, and agencies of publicly traded companies.
- **What is “protected activity”:** Reports made to federal regulatory and law enforcement agencies, Congress, an employee’s supervisor, and internal corporate investigators. Also protects employees who participate or testify in SEC regulatory proceedings or other federal proceedings related to fraud against shareholders.
- **Agency:** U.S. Department of Labor Office of the Assistant Secretary Occupational Safety and Health Administration.
- **Statue of limitations:** A complaint filed under the SOX must be filed with the Department of Labor in writing within 180 days [formerly 90 days] of the time an employee learns that they will be, or have been, subjected to discrimination, harassment, or retaliation.



OSHA Cases

- ***Monohon v. BNSF Railway Co.***, No. 18-3346 (8th Cir. Nov. 4, 2021) (2021 U.S. App. LEXIS 32840; 2021 WL 5114271)
 - Holding objective reasonableness is not an element of a reporting-a-hazardous-safety-condition complaint under Federal Railroad Safety Act.
- ***Adkins v. CSX Transp., Inc.***, No., 18-0321 (S.D. W.V. Aug. 10, 2021) (2021 U.S. Dist. LEXIS 149351; 2021 WL 3518529)
 - Holding anti-retaliation clause within the Federal Railroad Safety Act applies only to those injuries “on duty.”
- ***Equistar Chemicals L.P.***
 - Holding the whistleblower’s activity, which included expressing concerns and objections about a proposed accounting practice they believed to be illegal, was protected under the Sarbanes-Oxley Act.

EEOC Charge Growth

The FY 2020 data show that retaliation remained the most frequently cited claim in charges filed with the agency—accounting for a staggering 55.8 percent of all charges filed—followed by disability, race and sex.

Fiscal Year	Total Charges	Retaliation Charges Filed (all statutes)	Percentage
FY2010	99,922	36,258	36.3%
FY2011	99,947	37,334	37.4%
FY2012	99,412	37,836	38.1%
FY2013	93,727	38,539	41.1%
FY2014	88,778	37,955	44.5%
FY2015	89,385	39,757	44.5%
FY2016	91,503	42,018	45.9%
FY2017	84,254	41,097	48.8%
FY2018	76,418	39,469	51.6%
FY2019	72,675	39,110	53.8%
FY2020	67,448	37,632	55.8%

Source: <https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2020>



Department of Labor Cases

- ***Walsh v. Midvale Paper Box Company, Inc. et al***, No. 3:21-cv-00977 (M.D. Pa. Jun. 1, 2021)
 - Currently before the Middle District of Pennsylvania, Department of Labor filed suit alleging the company's management illegally fired an employee who repeatedly asked her supervisor for safety gloves, because they believed she had reported the business to OSHA.
- ***Erhart v. Bofi Holding, Inc.***, 269 F. Supp. 3d 1059 (S.D. Cal. 2017)
 - Concluded that employer confidentiality agreements does not supersede federal whistleblower rights. Also held that whistleblowers can take company documents to disclose fraud to the government in certain cases.



Dodd-Frank Wall Street Reform and Consumer Protection Act

- “No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistle-blower in the terms and conditions of employment because of any lawful act done by the whistleblower...”
- In making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 *et seq.*), the Securities and Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), including section 10A9m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of title, United States Code, and any other law, rule, or regulation subject to the jurisdiction of the Commission.



Dodd-Frank Wall Street Reform and Consumer Protection Act

The Dodd-Frank Act SEC Whistleblower Program contained three major whistleblower laws:

- One covering the Commodity Exchange Act.
- One covering the Consumer Financial Protection Board.
- One covering the Security and Exchange Act.

Remedies Under SOX and Dodd-Frank for Retaliation

SARBANES-OXLEY

- “reinstatement with the same seniority status that the employee would have had, but for the discrimination”
- “the amount of back pay, with interest”
- “compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.”

DODD-FRANK

- “reinstatement with the same seniority status that the employee would have had, but for the discrimination”
- “2 times the amount of back pay otherwise owed to the individual, with interest”
- “compensation for litigation costs, expert witness fees, and reasonable attorneys’ fees.”



SEC Whistleblower Program

- A whistleblower must voluntarily provide the SEC with original information that leads to a successful enforcement action with monetary sanctions of over \$1 Million ordered.
- The SEC will pay 10% to 30% of the sanctions collected, depending on a number of factors.
- Dodd-Frank provided new SEC authority to protect whistleblowers against retaliation.



SEC Speaks: Final Rule 21F

- Adopted a presumption setting awards at the maximum 30% of the monetary sanctions collected for awards under \$5 million, which is applicable in the majority of cases.
- Expansion of the types of successful enforcement actions that qualify a whistleblower for an award to related actions including: deferred prosecution agreements, nonprosecution agreements, and settlement agreements outside the context of a judicial or admin proceeding.



SEC Speaks: Final Rule 21F

- Adoption of a provision by which claimants who submit three or more frivolous award claims may be permanently barred from the Commission's whistleblower program.
- Introduced a provision that prohibits a whistleblower from obtaining multiple recoveries through other whistleblower programs. The multiple-recovery rule prohibits whistleblowers who have been denied awards under other whistleblower programs from readjudicating issues before the SEC, and requires whistleblowers to waive their claims to awards under other programs prior to accepting an award from the SEC.

But Wait, *There's More*

Defined the "independent analysis" requirement under Section 21F of the Securities Exchange Act. The final rule specified the independent analysis requirement is satisfied where:

- “(1) the whistleblower's conclusion of possible securities violations derives from multiple sources, including sources that, although publicly available, are not readily identified and accessed by a member of the public without specialized knowledge, unusual effort or substantial cost; and (2) these sources collectively raise a strong inference of a potential securities law violation that is not reasonably inferable by the Commission from any of the sources individually.”

But Wait, *There's More*

Revised the definition of whistleblower to conform with the U.S. Supreme Court's 2018 decision in *Digital Realty Trust Inc. v. Somers*, defining a whistleblower as:

- “(i) an individual, ii) who provides the Commission with information 'in writing,' and iii) that relates to a possible violation of the federal securities laws (including any law, rule, or regulation subject to the jurisdiction of the Commission) that has occurred, is ongoing, or is about to occur.”



FY21 Whistleblower Program Highlights

Profiles of award recipients:

- Approximately 20% of the meritorious claimants in FY 2021 were based outside of the United States.
- Approximately 56% provided original information that caused staff to open an investigation or examination
- Approximately 60% of the award recipients in FY 2021 were current or former insiders of the entity about which they reported information of wrongdoing to the Commission
- Of those recipients, more than 75% raised their concerns internally to their supervisors, compliance personnel, or through internal reporting mechanisms, or understood that their supervisor or relevant compliance personnel knew of the violations, before reporting their information of wrongdoing to the Commission.



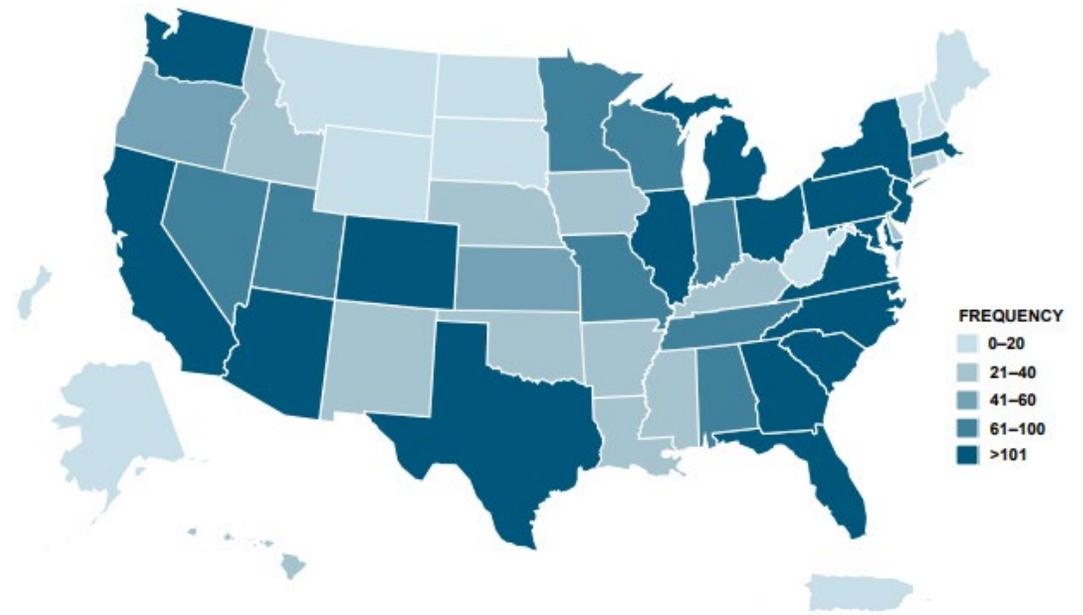
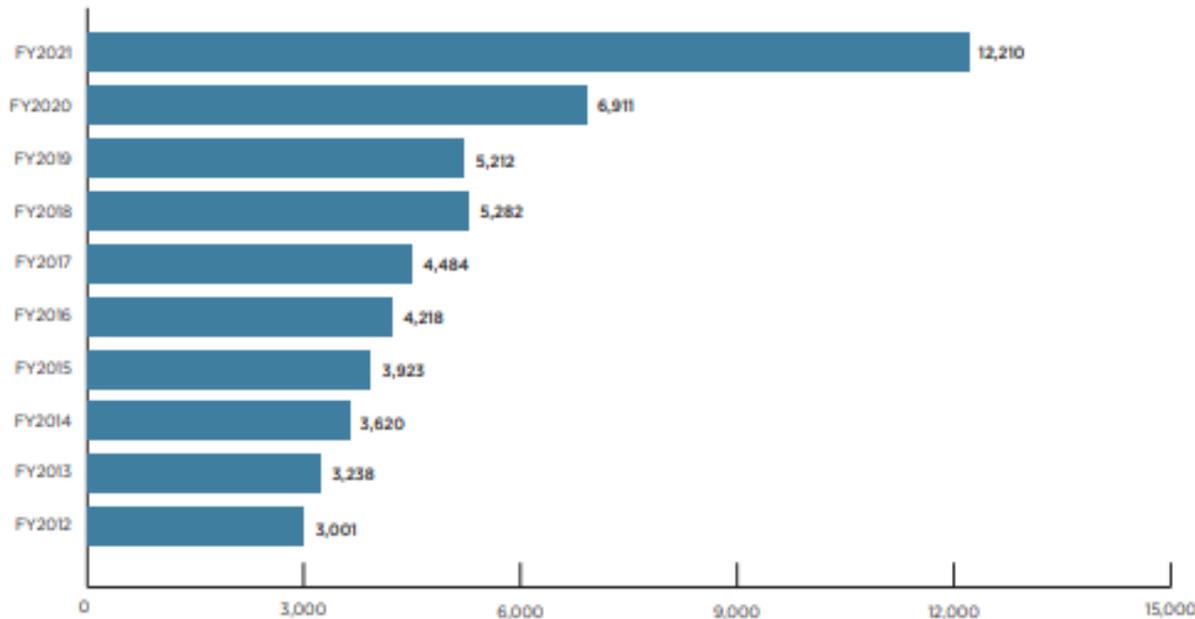
FY21 Whistleblower Program Highlights

Award Highlights from FY2021:

- In connection with 86 Covered Actions, the Commission ordered whistleblower awards of approximately \$564 million to 108 individuals.
- The Commission ordered awards to more whistleblowers in FY 2021 than in all prior years combined.
- Three of the largest awards in the history of the program were made, totaling more than a quarter of a billion dollars.

FY21 Whistleblower Program Highlights

In FY 2021, the Commission received over 12,200 whistleblower tips—the largest number of whistleblower tips received in a fiscal year.



Source: <https://www.sec.gov/files/owb-2021-annual-report.pdf>



Information that Leads to an SEC Action

- In order to be eligible for an award, a whistleblower's tip has to be sufficiently specific, credible, and timely to cause the staff to:
 - commence an examination,
 - open a new investigation,
 - reopen a closed investigation, or
 - inquire concerning different conduct as part of a current exam or investigation.
- SEC's successful judicial or admin action must have been based in whole or in part on the whistleblower's original information.



SEC Speaks: *In the Matter of Guggenheim Sec., LLC* (June 23, 2021)

- Commission charged the respondent with violating Rule 21F-17 by impeding employees from contacting the Commission.
- According to the order, language in the respondent's compliance manual and training materials prohibited an employee from contacting any regulator without prior approval from the respondent's legal or compliance department.
- Such prohibitions undermine the purpose of Section 21F to encourage individuals to report to the Commission.



Future of Sox Whistleblower Claims under Biden Admin.

- Gary Gensler sworn as Chair of SEC
- Whistleblower Protection Reform Act of 2021
- COVID-19 Whistleblower Protection Act: H.R. 7227
- Climate Change and ESG

3

State Considerations



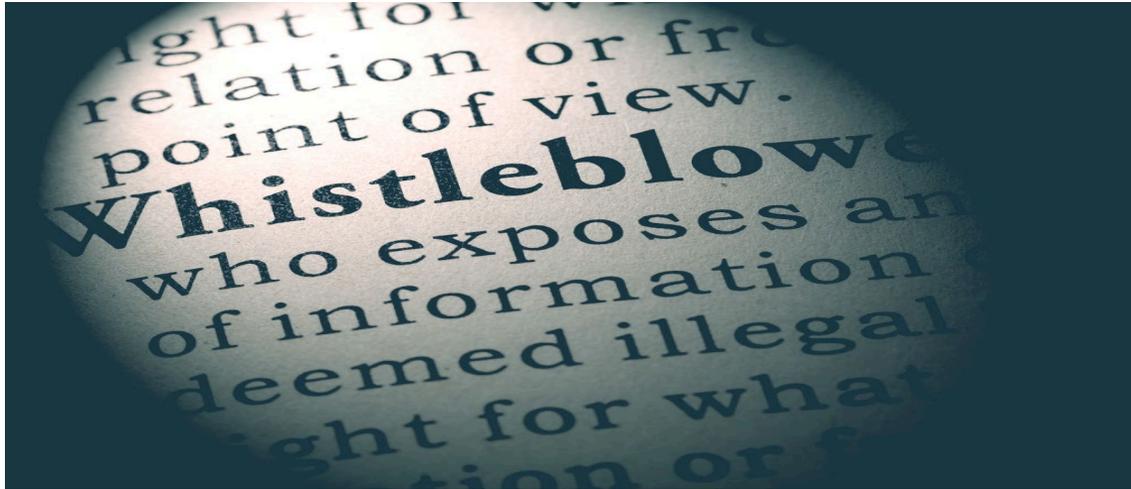
Whistleblower Claims

The States' Perspective

Presented by: Sarah N. Turner

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WHY DO STATES ENACT WHISTLEBLOWER LAWS?



Federal Whistleblower Protection Act of 1989

Whistleblower Protection Enhancement Act of 2012

STATE'S WHISTLEBLOWER PROTECTION ACT:

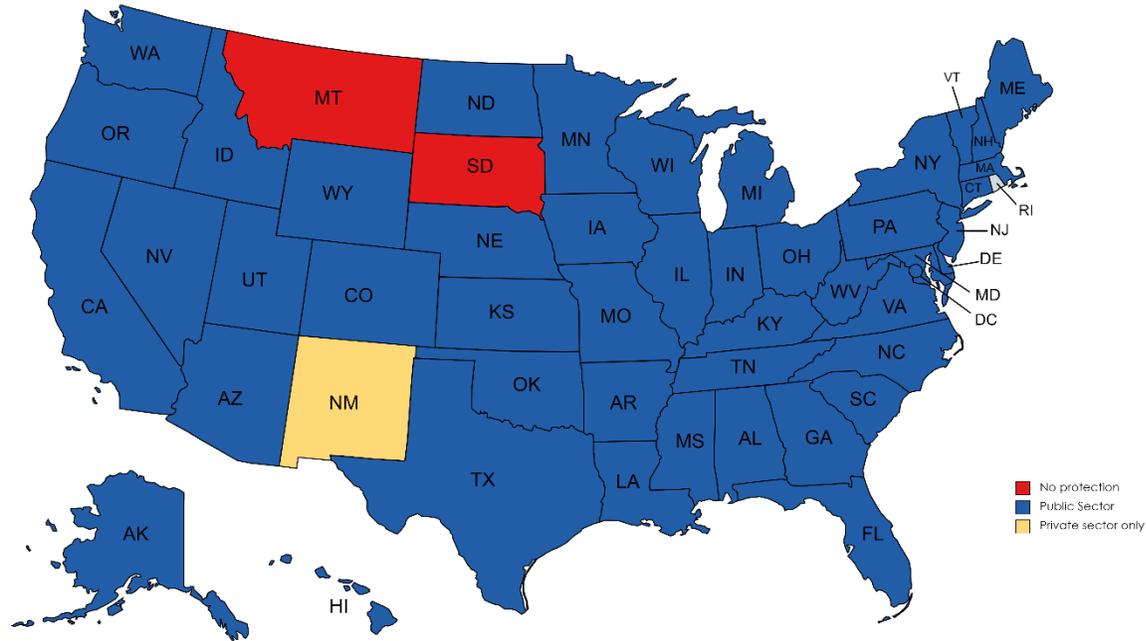
Variations Among States

- ▶ Protection for public or private sector employees.
- ▶ Type of wrongdoing that is reported (Safety, Medicaid Fraud, Environmental, False Claims Act . . .).
- ▶ To whom employee reports to (internally vs. outside agency).
- ▶ Manner in which employee reports.
- ▶ The law under which an employee reports.



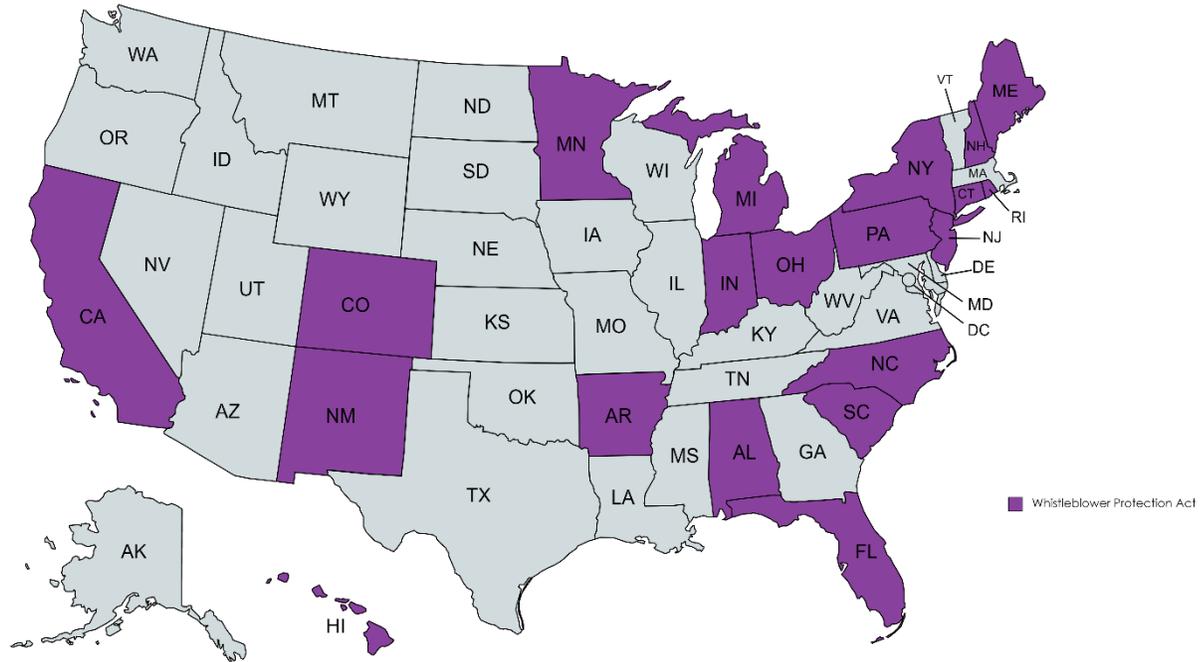
STATES' WHISTLEBLOWER PROTECTION:

Public Sector



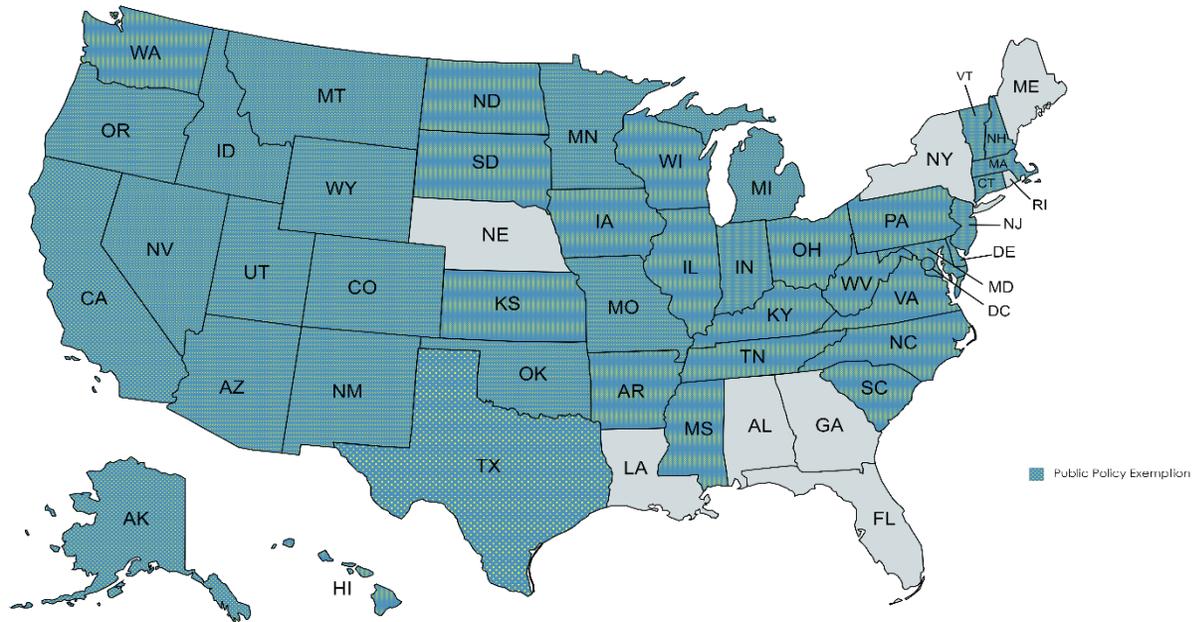
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STATES' WHISTLEBLOWER PROTECTION: Whistleblower Protection Act



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STATES' WHISTLEBLOWER PROTECTION: Public Policy Exemption



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PUBLIC POLICY EXEMPTION TO “AT-WILL”

43 out of 50 states have public policy exemption to “at-will” employment.

- ❑ Montana is the outlier - “at-will” is limited for the initial 6 month probationary period.

“At-will” means employer and employee can terminate employment for any reason at any time, so long as not for a discriminatory or other illegal purpose.

Generally protects employees from refusing to engage in illegal activity and the exercise of a statutory right.

- ❑ Examples include refusal to commit an illegal act; performing a public duty or obligation such as jury duty; exercising a legal right or privilege such as filing workers’ compensation claims; and in some (but not all) states for reporting employer misconduct (“whistleblowing”).

SPOTLIGHT ON: NEW YORK

PREVIOUS LAW

Whistleblower Statute, New York Labor Law § 740 (1984):

- “Creates and presents a substantial and specific danger to the public health or safety, or . . . constitutes healthcare fraud.”
- Whistleblower employee had to show “actual violation” and that the harm affected the public at large.
- 1 year statute of limitations and not entitled to a jury trial.

SPOTLIGHT ON: NEW YORK

NEW AND SIGNIFICANTLY EXPANDED WHISTLEBLOWER LAW

- Passed in 2021 and effective as of January 26, 2022.
- Bolsters protections for private-sector employees alleging retaliation, and employers face additional liability.
- Protected acts expanded from “actual violation” of laws pertaining to health and safety to a “reasonable belief” an employer’s activity or conduct is (i) in violation of a “law, rule or regulation,” including executive orders and judicial administrative decisions, rulings, and orders; or (ii) “poses a substantial and specific danger to the public health or safety.”
- Expands definition of “employee” to include former employees and independent contractors.

SPOTLIGHT ON: NEW YORK

NEW AND SIGNIFICANTLY EXPANDED WHISTLEBLOWER LAW

- Expands definition of “retaliatory actions” to include: (i) adverse employment actions against current employers; (ii) actions or threats that would adversely impact a former employee’s current or future employment; or (iii) contacting or threatening to contact immigration authorities on an employee or their family member.
- Employees must make a “good faith effort” to notify their employer unless there is an imminent and serious danger to public health; the employee reasonably believes reporting of the violation to the employer would result in the destruction of evidence, concealment, or harm to the employee; or the employee reasonably believe that their supervisor is already aware of the violation and will not correct it.
- Damages expanded to include front pay, civil penalties not to exceed \$10,000, and punitive damages (in addition to back pay). Statute of limitations is extended for 2 years and a right to a jury trial.

SPOTLIGHT ON: CALIFORNIA

Whistleblower Act: California Labor Code Section 1102.5

Protects all employees in private or public sector.

Defines whistleblower to be an employee who discloses information to a government or law enforcement agency, person with authority over the employee, or to another employee with the authority to investigate where the employee has reasonable cause to believe that the information discloses:

- A violation of a state or federal statute;
- A violation or noncompliance with a local, state or federal rule or regulation; or
- With reference to employee safety or health, unsafe working conditions or work practices in the employee's employment or place of employment.

** Definition also includes an employee who refuses to participate in an activity that would result in a violation of a state or federal statute.*

SPOTLIGHT ON: CALIFORNIA

Whistleblower Protection Act: California Labor Code Section 1102.5

Whistleblower protections include:

- An employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from being a whistleblower.
- An employer may not retaliate against an employee who is a whistleblower.
- An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of a state or federal statute.
- An employer may not retaliate against an employee for having exercised his or her rights as a whistleblower in any former employment.

Damages include reinstatement of employment and work benefits, lost wages, and other necessary steps to comply with law.

SPOTLIGHT ON: CALIFORNIA

Lawson v. PPG Architectural Finishes (Jan. 27, 2022)

The California Supreme Court recently clarified confusion among lower courts as to the proper standard in evaluating a whistleblower retaliation claim brought under Labor Code Section 1102.5. The Court held that the burden shifting method applied in state and federal discrimination cases was the wrong standard under this section. The proper standard was set forth in Labor Code Section 1102.6.

Widely viewed as an employee-friendly evidentiary framework, Section 1102.6 requires the **plaintiff** to set forth, by a preponderance of the evidence, that retaliation for an employee's protected activities was **a contributing factor** in a contested employment action. If the plaintiff can make this showing, the burden shifts to the **employer** to demonstrate, **by clear and convincing evidence**, that it would have taken the action in question for legitimate, independent reasons even had the plaintiff not engaged in protected activity.

SPOTLIGHT ON: CALIFORNIA

Lawson v. PPG Architectural Finishes (Jan. 27, 2022)

The Court held that Section 1102.6:

- (1) Recognizes employers may have more than one reason for an adverse employment action but if one of those reasons was because of the protected conduct then plaintiff met his or her burden; and
- (2) Was the “complete set of instructions” for presenting and evaluating whistleblower cases.

Employers, business owners, and defense counsel raised concerns that Section 1102.6 set the bar too low for plaintiff-employees. The Court responded by informing those who disagreed with their decision, to “take it up with the Legislature, not us.”

SPOTLIGHT ON: CALIFORNIA

Takeaways

- Employees only need to show protected activity contributed to employer's decision.
- Employers must establish reporting procedures and implement anonymous reporting procedures.
- Frequently train and communicate no adverse action against an employee for reporting alleged wrongdoings.
- Communicate and document performance concerns at the time of occurrence.

SPOTLIGHT ON: WASHINGTON

Whistleblower protection recognized under one of the four public policy exception to the at-will employment doctrine.

Employee must show that his or her, “discharge may have been motivated by reasons that contravene a clear mandate of public policy.”
Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 232, 685 P.2d 1081 (1984).

- To determine clear mandate of public policy courts look to prior judicial decisions or constitutional, statutory, or regulatory provisions.
- Courts also examine the degree of alleged employer wrongdoing, together with the reasonableness of the manner in which the employee reported, or attempted to remedy, the alleged misconduct.
- Courts also look to the employee and if he/she sought to further the public good and not merely private or proprietary interest in reporting the alleged wrongdoing.

SPOTLIGHT ON: WASHINGTON

Whether a plaintiff believes the issue of public policy to be true is not the focus, the focus for whistleblowing claims “is on the employer’s level of wrongdoing” and not the plaintiff’s “actions to address what he perceived as wrongdoing.” *Martin v. Gonzaga University*, 425 P.3d 837, 844 (2018).

COMPARE WITH

SPOTLIGHT ON: OREGON

ORS 659A.199 - Prohibited Conduct by Employer

Unlawful employment practice for an employer to discharge, demote, suspend or in any manner discriminate or retaliate against an employee with regard to promotion, compensation, or other terms, conditions, or privileges of employment for the reason that the employee has in good faith reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation.

To prove a violation the employee must establish a causal link between the complaint of a perceived or actual violation of a law, rule, or regulation, and the employer's adverse employment action. *Ossanna v. Nike, Inc.*, 290 Or.App.16, 27, 415 P.3d 55 (2018).

SPOTLIGHT ON: OHIO

House v. Iacovelli, 2020-Ohio-436, 2020 WL 696639 (Feb. 12, 2020)

Unlike courts in California, Washington, or Oregon, the Ohio Supreme Court made it more difficult for employees to prevail on wrongful termination under public policy exemption.

Under Ohio law to establish a public policy claim must show:

(1) there is a clear public policy manifested in a state or federal constitution, statute, administrative regulation, or common law; and

(2) under the circumstances a plaintiff alleges, her discharge would jeopardize that public policy.

In *House*, the Court declined to recognize a claim of an employee who was terminated after confronting her employer for failing to accurately report her earnings to the Bureau of Unemployment Compensation.

SPOTLIGHT ON: OHIO

House v. Iacovelli, 2020-Ohio-436, 2020 WL 696639 (Feb. 12, 2020)

In *House*, the employee was terminated after confronting her employer for failing to accurately report her earnings to the Bureau of Unemployment Compensation. The employee relied on Chapter 4141 as the source of her statutory public policy which imposes fines and penalties for an employer's failure to accurately report employee earnings, but “*does not include a personal remedy for a dismissed employee*”

The Court found the remedies contained in Chapter 4141 were “sufficient to protect society's interest and discouraged employer's from engaging in the prohibited behavior.”

SPOTLIGHT ON: OHIO

House v. Iacovelli, 2020-Ohio-436, 2020 WL 696639 (Feb. 12, 2020)

Dissent

This decision jeopardized the heart of the wrongful termination protections simply because the statute does not provide a remedy for an individual employee.

Their perspective of the public policy tort was to, “*create privately enforceable disincentives for private employers to use their power in the workplace to undermine important public policies.*”

“*The state would hardly ever be able to detect underreporting of unemployment taxes if it were not for employees alerting the bureau. Without protecting employees against retaliation, the Court majority does more to encourage underreporting than any provision in the law can do to discourage it.*”

STATE WHISTLEBLOWER PROTECTION: SUMMARY



Almost in every state there are a variety of protections afforded to employees who report alleged violations of the law and wrongdoings. The protection may be promulgated by statute, common law, or a combination, and what the employee is required to establish also differs depending on the state.

The many different state whistleblower laws mean employers must have an understanding of the whistleblower law for their respective states(s) and should consult with counsel before taking any adverse action after an employee complains about the workplace, or raises a workplace concern.

4

Practical Considerations



Practical Considerations: Private Litigation

- Strategies for litigation
- Internal Corporate Controls
 - Check internal controls.
 - Evaluate existing internal reporting systems.
 - Provide incentives.
 - Develop a plan to respond to reported information in no more than 120 days.
 - Develop, implement, and publicize a strong anti-retaliation policy, including training.
- Protective steps
- Minimizing risk



Protective Steps in a Pandemic

- Employers should review and enforce internal reporting procedures for employee complaints arising from the COVID-19, including concerns over health and safety or compliance with state and federal laws and regulations.
- OSHA has issued guidance for employers to facilitate training for employees regarding their right to report safety concerns, suggesting an anti-retaliation program that includes five elements:



Protective Steps in a Pandemic

1. Management leadership, commitment, and accountability;
2. System for listening to and resolving employees' safety and compliance concerns;
3. System for receiving and responding to reports of retaliation;
4. Anti-retaliation training for employees and managers; and
5. Program oversight.

Source: "Recommended Practices for Anti-Retaliation Programs," available at <https://www.osha.gov/Publications/OSHA3905.pdf>.

PRACTICAL GUIDANCE: GUIDELINES FOR EMPLOYERS



PRACTICAL GUIDANCE: GUIDELINES FOR EMPLOYERS

- (1) Listen to employees' concerns without judgment.
- (2) Do not vilify the employee raising concerns.
- (3) Leaders model the behavior you expect employees to follow: penalize wrongdoing, commit to get things right; and learn from mistakes.
- (4) Establish a protocol for dealing with reports of misconduct and non-compliance, including identifying an “ethics and compliance” position so employees have a specific person to report concerns.
- (5) Develop an internal investigation plan.
- (6) **Do NOT Retaliate - EVER!** Have a strict written policy prohibiting adverse action (demotion, termination, hostile work environment) for someone who has raised a concern about the company or organization.

5

Roundtable Discussion



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