

# The Unequal Web of Whistleblower Protections La Red Disegual de Proteccion para Denunciantes

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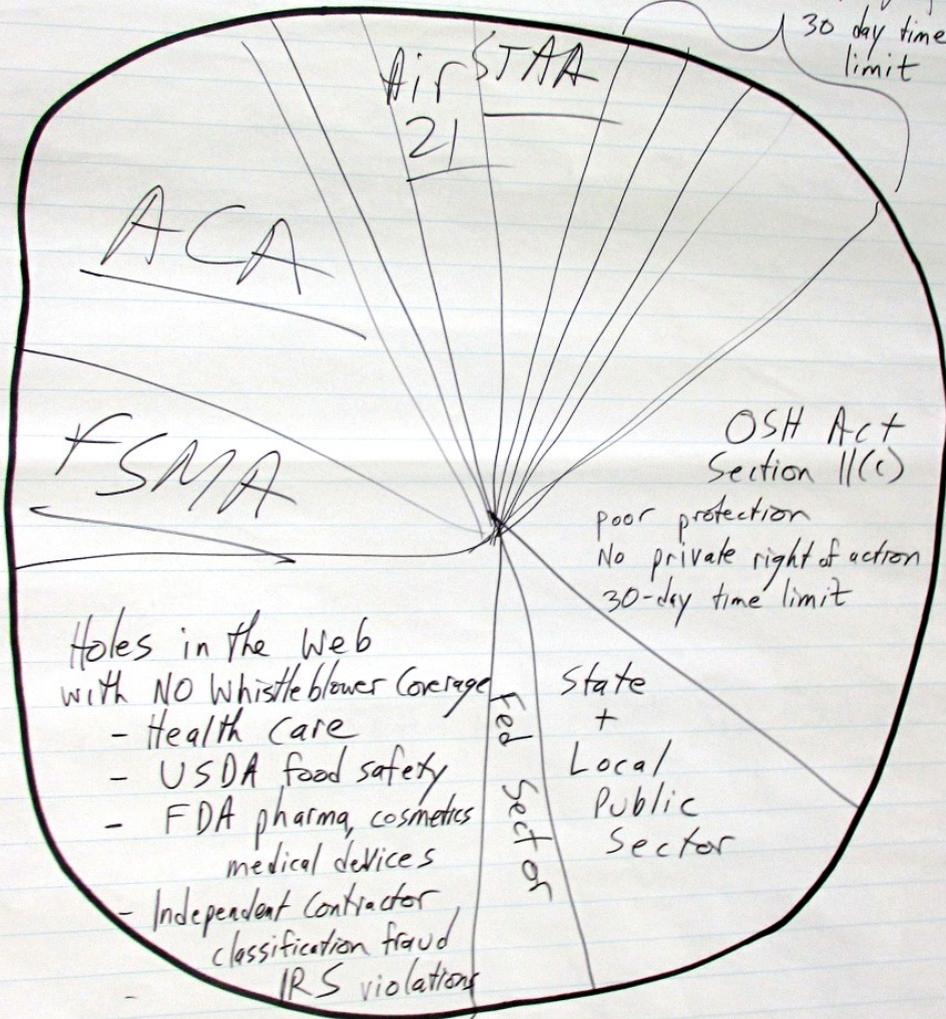
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# Overview / Sobrevista

- Scope of free speech
  - Private sector whistleblower protection laws and the uneven web of protection
  - “Reasonable Belief” standard
  - NLRA protections
  - Analysis: Why is this web so uneven?
- La zona de libertad de expresión
  - Protección para denunciantes y la red desigual in el sector privada
  - La doctrina del “Crecencia Reasonable”
  - Protecciones para actividades syndicales
  - Análisis: ¿Porque es la red tanto desigual?

# Free Speech



# Free Speech / Libertad de Expresión

- Industry by industry approach
  - Congress responds to dead bodies
  - But only to some dead bodies
  - Gaping holes remain
  - Trying to do it all in one law would unite employers in opposition
- Protocol de industria por industria
  - Congress responder a cuerpos muertes
  - Pero solamente algunos cuerpos muertes
  - Hay gran espacios vacios
  - Tratando una protección para todos va a unir la oposición

# Federal Whistleblower Protection Laws / Leyes Federales para Protección de Denunciantes

<http://www.kcnlaw.com/Most-legal-claims-have-time-limits.shtml>

[http://www.whistleblowers.gov/statutes\\_page.html](http://www.whistleblowers.gov/statutes_page.html)

[http://www.whistleblowers.gov/whistleblower\\_acts-desk\\_reference.pdf](http://www.whistleblowers.gov/whistleblower_acts-desk_reference.pdf)

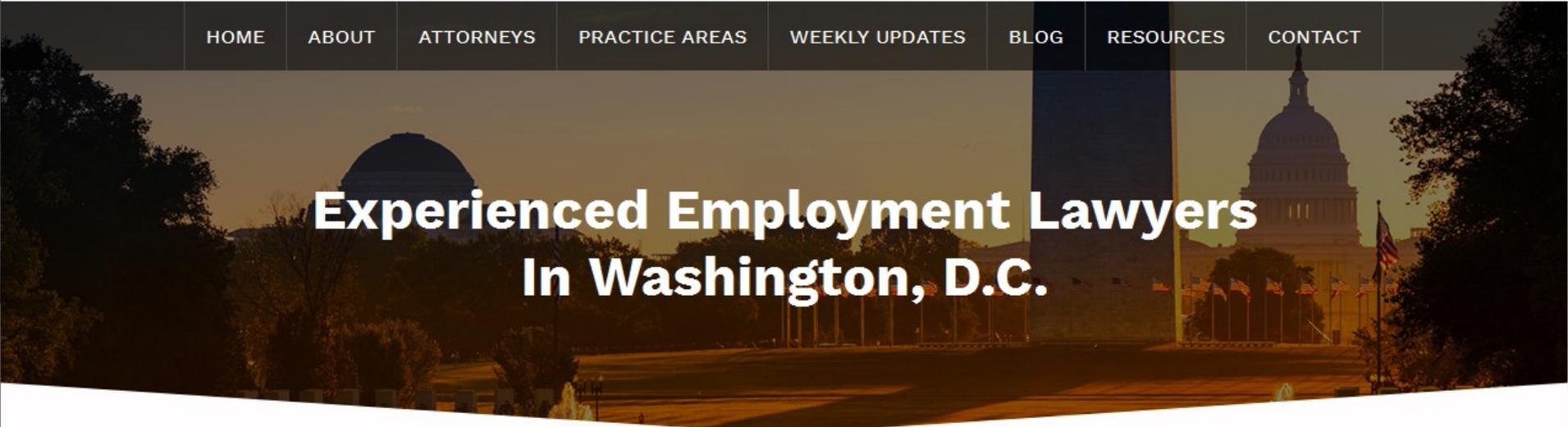


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## Most legal claims have time limits

### Federal Whistleblower Laws

**PRACTICE AREAS**

> Federal Employees

This chart is meant to call attention to the types of claims that employees should

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Whistleblower or Retaliation Statute	Legal Citation	Statute of Limitations (SOL)	Where to File
First Amendment	U.S. Const., 1 <sup>st</sup> Am.	State PI limit	state or fed ct.
Civil Rights Act of 1871	42 U.S.C. §§ 1981, 1983, 1985	State PI limit	state or fed ct.
Affordable Care Act (ACA)	29 U.S.C. § 218C; Section 1558 of P.L. 111-148; 29 C.F.R. Part 1984	180 days	DOL/OSHA
Age Discrimination in Employment Act (ADEA)	29 U.S.C. § 623(d)	180-300 days for administrative complaint; 2 years for court (3 years	EEOC/state employment discrimination agency; private cause of action in state or federal



**Occupational Safety and Health Administration  
 Directorate of Whistleblower Protection Programs (DWPP)  
 Whistleblower Statutes Desk Aid**

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compensatory	Punitive	Days	Venue	
<b>Section 11(c) of the Occupational Safety &amp; Health Act (OSHA) (1970)</b> [29 U.S.C. § 660(c)]. Protects employees from retaliation for exercising a variety of rights guaranteed under the Act, such as filing a S&H complaint with OSHA or their employers, participating in an inspection, etc. <b>29 CFR 1977</b>	30	Private sector U.S. Postal Service Certain tribal employers	90	No	Yes	No	Yes	Yes	15	OSHA	Motivating
<b>Asbestos Hazard Emergency Response Act (AHERA) (1986)</b> [15 U.S.C. § 2651]. Protects employees from retaliation for reporting violations of the law relating to asbestos in public or private non-profit elementary and secondary school systems. <b>29 CFR 1977</b>	90	Private sector State and local government Certain DoD schools Certain tribal schools	90	No	Yes	No	Yes	Yes	15	OSHA	Motivating
<b>International Safe Container Act (ISCA) (1977)</b> [46 U.S.C. § 80507]. Protects employees from retaliation for reporting to the Coast Guard the existence of an unsafe intermodal cargo container or another violation of the Act. <b>29 CFR 1977</b>	60	Private sector Local government Certain state government and interstate compact agencies	30	No	Yes	No	Yes	Yes	15	OSHA	Motivating
<b>Surface Transportation Assistance Act (STAA) (1982), as amended by the 9/11 Commission Act of 2007 (Public Law No. 110-053)</b> [49 U.S.C. § 31105]. Protects truck drivers and other covered employees from retaliation for refusing to violate regulations related to the safety or security of commercial motor vehicles or for reporting violations of those regulations, etc. <b>29 CFR 1978</b>	180	Private sector	60	210	Yes	Yes	Yes	Yes 250K cap	30	ALJ	Contributing



# OSHA Outcome Statistics

Outcome	
Merit	45
Settled	485
Settled "other"	313
Dismissed	1665
Withdrew	723
Fed Ct. "kick out"	106
Total	3337

# United States Chamber of Commerce

“Effective compliance programs rely heavily on internal reporting of potential violations of law and corporate policy to identify instances of non-compliance. These internal reporting mechanisms are cornerstones of effective compliance processes because they permit companies to discover instances of potential wrongdoing, to investigate the underlying facts, and to take remedial actions, including voluntary disclosures to relevant authorities, as the circumstances may warrant... Moreover, if the effectiveness of corporate compliance programs in identifying potential wrongdoing is undermined, their attendant benefits, such as promotion of a culture of compliance within corporations, as well as their value to enforcement efforts, will likewise be diminished.”

<http://www.sec.gov/comments/s7-33-10/s73310-110.pdf>

# Affordable Care Act

- A big hole in our web of protection is health care.
- The Affordable Care Act was passed with the Patient Protection Act
  - 29 CFR Part 1984; OSHA comments at 78 FR 13222
  - Under section 18C, an employer may not retaliate against an employee for receiving a credit under section 36B of the Internal Revenue Code of 1986 or a cost-sharing reduction (referred to as a “subsidy” in section 18C) under section 1402 of Affordable Care Act.
  - Certain large employers who fail to offer affordable plans that meet this minimum value may be assessed a tax penalty if any of their full-time employees receive a premium tax credit through the Exchange. Thus, the relationship between the employee’s receipt of a credit and the potential tax penalty imposed on an employer could create an incentive for an employer to retaliate against an employee. Section 18C protects employees against such retaliation.
  - Section 18C also protects employees against retaliation because they provided or are about to provide to their employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of or amendment made by title I of the Affordable Care Act .

# CSPIA and reasonable belief

- Consumer Product Safety Improvement Act (CSPIA), 15 U.S.C. § 2087
- Also covers:
  - Children's Gasoline Burn Prevention Act (Pub. L. 110-278, 122 Stat. 2602 (2008))
  - Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.),
  - Flammable Fabrics Act (15 U.S.C. 1191 et seq.),
  - Poison Prevention Packaging Act (15 U.S.C. 1471 et seq.),
  - Refrigerator Safety Act (15 U.S.C. 1211 et seq.),
  - Virginia Graeme Baker Pool and Spa Safety Act (15 U.S.C. 8001 et seq.)
- Excludes: Food, cars, tobacco, pesticides, firearms, aircraft, boats, drugs, medical devices and cosmetics. 15 U.S.C. § 2052(a)(5)

# CSPIA, Saporito and reasonable belief

- *Saporito v. Publix Super Markets, Inc.*, ARB No. 10-073, ALJ No. 2010-CPS-1, Decision and Order of Remand (ARB Mar. 28, 2012).
  - Publix supermarket operates a dairy plant in Deerfield Beach, Florida.
  - Thomas Saporito was a maintenance technician from July 24, 2007, until he was discharged on November 3, 2009.
  - GAP attorney Jonathan Cantú
  - E-mails to his supervisors saying that the outside contact surfaces of plastic milk bottles were being contaminated with harmful chemicals and waste from the conveyor system at the plant
  - Raised a concern about failure to maintain positive air pressure, and how that posed a risk of contaminating the milk
  - Fired November 3, 2009.
  - (The Food Safety Modernization Act became effective January 2011)

# CSPIA, Saporito and reasonable belief

- Remedial purpose
  - Congress found that “an unacceptable number of consumer products which present unreasonable risks of injury are distributed in commerce” and that “the public should be protected from these unreasonable risks.” 15 U.S.C.A. § 2051(a)(1), (2).
  - Consumer products killed 35,900 Americans in 2008
  - Logically, then, one of the CPSA’s expressed “purposes” is to “protect the public against unreasonable risks of injury associated with consumer products.” 15 U.S.C.A. § 2051(b).
  - Every whistleblower law has a remedial purpose

# CSPIA, Saporito and reasonable belief

- Reasonable belief
  - The ALJ erred in focusing strictly on the limit of the Commission's jurisdiction.
  - But limiting CPSIA-protected activity coverage entirely to the CPSC's jurisdiction leaves out a critical part of the CPSIA definition of protected activity: **reasonable belief**.
  - The CPSIA broadly defines protected disclosures to include disclosures "relating" to employer conduct that the employee "**reasonably believes** to be a violation of any provision of [the CPSIA] or any Act enforced by the Commission . . . ." 15 U.S.C.A. § 2087(a)(1)

# CSPIA, Saporito and reasonable belief

- Reasonable belief
  - Historically, the ARB has interpreted the concept of “reasonable belief” to require both a subjectively and objectively reasonable belief.
  - A **subjectively reasonable** belief means that the employee actually believed that the conduct he complained of constituted a violation of relevant law. See, e.g., Harp v. Charter Commc’ns, 558 F.3d 722, 723 (7th Cir. 2009) (SOX case).
  - An **objectively reasonable** belief means that a reasonable person would have held the same belief having the same information, knowledge, training, and experience as the complainant. Harp, 558 F.3d at 723. Often the issue of “objective reasonableness” involves factual issues and cannot be decided in the absence of an adjudicatory hearing. See, e.g., Allen v. Admin. Review Bd., 514 F.3d 468, 477-478 (5th Cir. 2008) (“the objective reasonableness of an employee’s belief cannot be decided as a matter of law if there is a genuine issue of material fact”)

# Reasonable Belief

- No actual violation needs to be shown
- Reasonableness of the belief depends on the employee's knowledge, training, experience and available information
  - Professional and sophisticated employees will not get much wiggle room
  - Unskilled workers will get more leeway
- See also, *Sylvester v. Parexel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -42, 2011 WL 2165854; slip op. at 14-15 (ARB May 25, 2011).
- Basis of reasonable belief does not have to be presented to the employer.
- “In sum, our ruling is narrow.”

# Food Safety Modernization Act

- Effective January 2011, 21 U.S.C. 399d
- 20 Million workers in the food industry
- Response to high-profile outbreaks related to various foods, from spinach and peanut products to eggs
- 3,000 to 5,000 Americans die each year from food poisoning
- Hospitalizes 128,000 more
- FSMA has a modern whistleblower protection

# Food Safety Modernization Act

- FMSA only covers food regulated by the FDA
  - Does not cover drugs, cosmetics or medical devices
  - Adverse drug reactions kill 63,000 Americans every year
  - Does not cover meat, poultry or eggs regulated by USDA
  - “Reasonable belief” does apply

# DOL time limits

- 30 Days
  - OSH Act 11(c); environmental laws
- 60 Days
  - MSHA, mine safety complaints
- 90 Days
  - AIR 21; Asbestos
- 180 Days
  - STAA, ERA, SOX, FRSA, NTSSA, PSIA, CPSIA, ACA, SPA, FSMA, CFPA and MAP21.

# Awards for Whistleblowers

- False Claims Act, 31 U.S.C. § 3729
  - “Little FCAs” under the Grassley Amendment
  - <http://www.taf.org/states-false-claims-acts>
- Dodd-Frank Act (for recoveries over \$1 million)
  - SEC
  - CFTC
- IRS (for recoveries of over \$2 million)

# NLRA / Protección Sindical

- National Labor Relations Act, 29 U.S.C. § 157
  - Guarantees an employee's right to share information with co-workers.
  - “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to **engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .**”

# NLRA

- The NLRA's remedial purpose is in 29 U.S.C. § 151:
  - The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions . . .

# NLRA

- The NLRA's prohibited practices are in 29 U.S.C. § 158(a):
  - It shall be an unfair labor practice for an employer
    - (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
    - (3) by discrimination . . . to encourage or discourage membership in any labor organization:

# NLRA

- Examples of application:
  - [http://www.huffingtonpost.com/entry/kiss-my-ass-miners\\_us\\_5706c643e4b0537661892e6c?9zw8dolx8h8xe0zfr](http://www.huffingtonpost.com/entry/kiss-my-ass-miners_us_5706c643e4b0537661892e6c?9zw8dolx8h8xe0zfr)
  - Coal mine's bonus plan for avoiding safety complaints
  - Employees tell owner Bob Murray to, "eat shit" and "kiss my ass."
  - NLRB finds protection
  - Tony Oppegard

# Analysis

- For public safety, the unevenness is not logical
- Understanding arises in the historical dialectic
  - Congress responds to perceived crisis
  - Holes reveal influence of certain capitalist interests
- Para seguridad publico, el sistema no es logico
- Intender por el dialectico historicamente
  - El Congreso responder a la percepcion de un crisis
  - Espacios vacios revelan la influencia de intereses capitalisticas particulares

# Referencias

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<http://www.taterenner.com/fedchart.php>
- Whistleblower Flyer for Low-Wage Worker Clinics  
<http://www.taterenner.com/WhistleblowerFlyer4clinics.pdf>