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Non-Sarbanes Oxley Whistleblower Protection

Richard R. Renner[1]
Kalijarvi, Chuzi, Newman & Fitch, P.C.
818 Connecticut Ave., NW, Suite 1000
Washington, DC 20006
(202) 466-8696 direct
(202) 331-9260 office
(202) 664-9056 mobile
1-877-527-0446 fax
rrenner@kcnlaw.com
www.kcnlaw.com

This paper provides an overview of whistleblower laws enforced by the U.S. Department of Labor (DOL), especially by the Occupational Safety and Health Administration (OSHA). My goal is to assist practitioners with claim identification, initiation, litigation and resolution.

I. Origins of the Department of Labor Whistleblower Program and Statutory Overview.

A. OSH Act, Section 11(c)

In 1970, Congress passed the Occupational Safety and Health Act (OSH Act). Legislators wisely anticipated that employees would be an important source of tips about unsafe practices in workplaces, but that they would be reluctant to speak up if they could be fired for doing so. Congress therefore included Section 11(c) of the OSH Act, 29 U.S.C. §660(c), which prohibits employers from taking reprisals against employees who raise safety concerns or participate in official investigations. Congress did not create a private right of action for the whistleblowers;

1 Richard's bio is available at http://www.kcnlaw.com/Attorneys/Richard-R-Renner.shtml

rather, only the Secretary of Labor is authorized to file enforcement actions in federal court if DOL finds violations. Congress also established a 30-day time limit for initial complaints. Even with these shortcomings, Section 11(c) complaints still make up most of the whistleblower complaints DOL receives.[2]

B. Mine Health and Safety Act

Also in 1970, Congress passed the anti-retaliation provision of the Federal Mine Health and Safety Act, now codified at 30 U.S.C. § 815(c). In *Phillips v. Interior Bd. of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938 (1975), Judge Wilkey captured the essence of whistleblower protection and held that the protection for causing a complaint to be filed with the government also protects internal whistleblowing:

> Safety costs money. The temptation to minimize compliance with safety regulations and thus shave costs is always present.[24] The miners are both the most interested in health and safety protection, and in the best position to observe the compliance or noncompliance with safety laws. Sporadic federal inspections can never be frequent or thorough enough to insure compliance. Miners who insist on health and safety rules being followed, even at the cost of slowing down production, are not likely to be popular with mine foremen or mine top management. Only if the miners are given a realistically effective channel of communication regarding health and safety, and protection from reprisal after making complaints, can the Mine Safety Act be effectively enforced.
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> n. 24 Responsible mine operators who comply with health and safety standards have an obvious interest in seeing uniform standards enforced throughout the industry: competitors who get away with cutting costs by cutting safety are really engaged in unfair competition; the temptation to meet it by engaging in similar tactics is ever-present.
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> ***
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> To hold that Phillips was not protected against discharge because he took the first prescribed step under the Kencar procedure to invoke the Mine Safety Act, to hold that only a miner's discharge after he reaches the Bureau of Mines with his complaint is protected by the Safety Act, would nullify not only the protection

2 Specifically, 1,932 of the 3,303 complaints received in FY 2017. See https://www.whistleblowers.gov/factsheets_page/statistics

against discharge but also the fundamental purpose of the Act to compel safety in the mines.

Today, mine safety whistleblowers are entitled to interim orders of reinstatement unless MSHA finds that the retaliation complaint is "frivolously brought." 30 U.S.C. § 815(c)(2). By contrast, employees bringing complaints under Section 11(c) of the OSH Act are not entitled to such interim relief.

C. Environmental laws

As the environmental movement led to a rash of lawmaking, Congress used Section 11(c) of the OSH Act and the Mine Health and Safety Act as models for creating whistleblower protections. Congress passed seven environmental laws with whistleblower protections: the Water Pollution Control Act (WPCA, commonly called the Clear Water Act), 33 U.S.C. 1367; Safe Drinking Water Act (SDWA), 42 U.S.C. 300j-9(i); Toxic Substances Control Act (TSCA), 15 U.S.C. 2622; Solid Waste Disposal Act (SWDA, also called RCRA), 42 U.S.C. 6971; Clear Air Act, 42 U.S.C. 7622; Energy Reorganization Act of 1974 (ERA, which includes atomic energy), 42 U.S.C. 5851; and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or "Superfund Law") , 42 U.S.C. § 9610. These laws gave whistleblowers ownership of their own claims and a right to litigate those claims before administrative law judges (ALJs). Still, complaints had to be filed within 30 days of each adverse action. See 29 CFR § 24.103(d).[3] Nuclear whistleblowers, by contrast, are allowed 180 days to file a complaint and are entitled to conspicuous posting of the OSHA poster about this protection. 42 U.S.C. § 5851(i).

Two environmental laws, the Safe Drinking Water Act, 42 U.S.C. §300j-9, and the Toxic

3 My article about the environmental laws is at http://www.taterenner.com/whistleblowers.php

Substances Control Act, 15 U.S.C. §2622, permit recovery of exemplary or punitive damages.

D. Transportation laws.

Congress used similar language in the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105, the 2000 Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121, the 2007 Federal Rail Safety Act (FRSA), 49 U.S.C. § 20109, the National Transit Systems Security Act of 2007 (NTSSA), 6 U.S.C. § 1142, and the Seaman's Protection Act (SPA), 46 U.S. C. § 2114. Together, these laws cover practically all transportation workers. The pattern points to a congressional desire to draw upon the established body of law for a broad scope of protection.

Two of these laws – NTSSA and FRSA – include election-of-remedies provisions that bar the complaint if the whistleblower has sought "protection under both this section and another provision of law for the same allegedly unlawful act[.]" 6 U.S.C. § 1142(e); 49 U.S.C. § 20109(f). The FRSA also protects "requesting medical or first aid treatment, or . . . following orders or a treatment plan of a treating physician[.]"49 U.S.C. § 20109(c)(2).

E. Sarbanes-Oxley Act (SOX) and reasonable belief.

While SOX is outside the scope of this panel, some SOX cases have set important precedents for all DOL whistleblower cases.

On May 25, 2011, DOL's Administrative Review Board (ARB) issued its most significant decision construing the scope of protected conduct under SOX, *Sylvester v. Parexel International, LLC.*, ARB No. 07-123, 2007-SOX-039, 042, 2011 WL 2165854, at *18 (ARB May 25, 2011). After inviting and receiving supplemental *amicus* briefs from divergent stakeholders, the ARB issued an *en banc* decision that swept away years of restrictive

applications of SOX and protected activities in general. Gone is the rule that protected activity is limited to disclosures of conduct that "definitively and specifically" relates to one of the six categories of unlawful acts set forth in the statute. Gone are the *Iqbal* and *Twombly* pleading standards for DOL complaints. Moreover, the days in which ALJs would grant motions to dismiss should now be largely gone. "SOX claims are rarely suited for Rule 12 dismissals." *Id.* at 13. The ARB explains:

> [such claims] involve inherently factual issues such as "reasonable belief" and issues of "motive." In addition, we believe ALJs should freely grant parties the opportunity to amend their initial filings to provide more information about their complaint before the complaint is dismissed, and dismissals should be a last resort.

In place of the old "definitive and specific" standard for determining whether an activity is protected, the ARB now uses the "reasonable belief" standard. The ARB noticed that the Senate Committee Report for SOX actually adopted this standard from *Passaic Valley Sewerage Commissioners v. Department of Labor*, 992 F. 2d 474, 478 (3d Cir. 1993). S. Rep. 107-146 at 19 (May 6, 2002). To be "reasonable," a belief must be sincerely held (subjective test) and objectively reasonable (objective test). Objective reasonableness "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009).

Importantly, a "reasonable belief" is determined based on the complainant's experience and observations, and not on what the complainant communicated to the employer. *Sylvester*, p. 15, citing, *Knox v. U.S. Dept. of Labor*, 434 F.3d 721, 725 (4th Cir. 2006). "Certainly, those communications [to the employer] may provide evidence of reasonableness or causation, but a

complainant need not actually convey reasonable belief to his or her employer." *Id*. citing, *Collins*, 334 F. Supp. 2d 1365, 1377-78 (N.D. Ga. 2004) (it is sufficient that the recipients of the whistleblower's disclosures understood the seriousness of the disclosures).

In a concurring opinion, Judge E. Cooper Brown said of the reasonable belief standard that, "This is not a demanding standard." *Sylvester*, p. 33. Employees are protected also when they raise concerns about future violations. "As we explained in *Sylvester*, disclosures concerning violations about to be committed (or underway) are covered as long as it is reasonable to believe that a violation is likely to happen." *Funke v. Federal Express*, ARB No. 09-004, ALJ No. 2007-SOX-043, slip op. 11 (ARB July 8, 2011),[4] citing *Sylvester*, ARB No. 07-123, slip op. 16.

F. Consumer protection whistleblower laws.

Five modern whistleblower laws protect consumers from dangerous products, unsafe food, unfair financial practices and reprisals for exercising rights under the Affordable Care Act.

The Consumer Product Safety Improvement Act (CSPIA), 15 U.S.C. § 2087, protects those who raise concerns within the jurisdiction of the Consumer Product Safety Commission (CPSC). Other statutes within the scope of this whistleblower protection include the Children's Gasoline Burn Prevention Act (Pub. L. 110-278, 122 Stat. 2602 (2008)), the Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.), the Flammable Fabrics Act (15 U.S.C. 1191 et seq.), the Poison Prevention Packaging Act (15 U.S.C. 1471 et seq.), the Refrigerator Safety Act (15 U.S.C. 1211 et seq.), and the Virginia Graeme Baker Pool and Spa Safety Act (15 U.S.C. 8001 et

4 Available at: http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/09_004.SOXP.PDF

seq.). Food, cars and some other consumer products are excluded.[5]

The Dodd-Frank Act included a new protection for whistleblowers raising concerns within the scope of the Consumer Financial Protection Bureau. 12 U.S.C. § 5567. Pursuant to 12 U.S.C. § 5481(14), this scope includes a variety of consumer protection laws involving mortgages, debt collection, electronic funds, discrimination, billing, and credit reports.[6] This law also generally makes unenforceable pre-dispute agreements that require arbitration of CFPA claims. 12 U.S.C. §5567(d).

The Food Safety Modernization Act (FSMA), 21 U.S.C. § 399d, protects twenty million Americans who work with food production, transport, storage, preparation or sales. Although the text of the FSMA limits the scope of protection to food safety concerns enforced by the Food and Drug Administration (FDA), the reasonable belief doctrine will often apply for those raising other concerns, such as concerns about meat, eggs and dairy products enforced by USDA.

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5 The CPSIA also excludes tobacco, pesticides, firearms, aircraft, boats, drugs, medical devices and cosmetics. 15 U.S.C. § 2052(a)(5). However, the ARB has held that a food safety whistleblower can find protection based on a reasonable belief that the CPSIA provided protection. *Saporito v. Publix Super Markets, Inc*., ARB No. 10-073, ALJ No. 2010-CPS-1, Decision and Order of Remand (ARB Mar. 28, 2012).

6 Specifically, these laws are the Alternative Mortgage Parity Act of 1982, 12 U.S.C. §§ 2801 et seq. (2006); the Consumer Leasing Act of 1976, 15 U.S.C. §§ 1667 et seq. (2006); most of the Electronic Funds Transfer Act, 15 U.S.C. §§ 1693 et seq. (2006); the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 et seq. (2006); the Fair Credit Billing Act, 15 U.S.C. §§ 1666 et seq. (2006); most of the Fair Credit Reporting Act, 15 U.S.C §§ 1681 et seq. (2006); the Home Owners Protection Act of 1998, 12 U.S.C. §§ 4901 et seq. (2006); the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq. (2006); parts of the Federal Deposit Insurance Act, 12 U.S.C. § 1831t(c)-(f) (2006); parts of the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6802-09 (2006); the Home Mortgage Disclosure Act of 1975, 12 U.S.C §§ 2801 et seq. (2006); the Home Ownership and Equity Protection Act of 1994, 15 U.S.C. § 1601 note (2006); the S.A.F.E. Mortgage Licensing Act of 2008, 12 U.S.C. §§ 5101 et seq. (2006); the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq. (2006); the Truth in Savings Act, 12 U.S.C. §§ 4301 et seq. (2006); section 626 of the Omnibus Appropriations Act, 2009, Pub. L. No. 111-8; and the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 (2006).

Refusing to violate standards or serve unsafe food would also be protected.

In 2012, Congress created a new whistleblower protection in the Moving Ahead for Progress in the 21st Century Act (MAP-21), P.L. 112-14, codified at 49 U.S.C. 30171.[7] MAP-21 protects the employees of motor vehicle manufacturers, part suppliers, or dealerships when they raise concerns about defects or other noncompliance with the safety, reporting and notification requirements. MAP-21 and the FSMA fill important holes left by the Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2087; 29 C.F.R. Part 1983. Since auto safety is regulated by the National Highway Traffic Safety Administration (NHTSA), and not the Consumer Product Safety Commission, the CPSIA protection offered nothing to auto safety whistleblowers. Now MAP-21 provides that protection.

Under MAP-21, the time limit to file an initial retaliation claim is 180 days. Once an employee shows the protected activity was a contributing factor in the adverse action, the employer can prevail only with clear and convincing evidence that it would have taken the same action without the protected activity. Once a case has been pending at DOL for 210 days without a final order, and the complainant has not caused that delay through bad faith, the complainant may file a civil action in U.S. district court and may demand a jury trial. MAP-21 does not provide for any punitive damages and does not provide any protection from forced arbitration agreements. If a complainant files a frivolous claim, DOL may order reverse attorneys' fees of up to $1,000.

G. Affordable Care Act.

Section 1558 of the Affordable Care Act, 29 U.S.C. § 218C, protects employees when

7 Available at: http://www.whistleblowers.gov/acts/map21.html

they receive a subsidy for health care insurance or take other actions to assist with enforcement of the insurance provisions of the Act. On October 16, 2016, OSHA issued final rules for handling whistleblower complaints under Section 1558 of the Affordable Care Act. See 29 CFR Part 1984, 81 FR 70620. OSHA's background statement contains a helpful description of the new employee protection:

> Section 1558 of the Affordable Care Act amended the Fair Labor Standards Act (FLSA) to add section 18C, 29 U.S.C. 218C (section 18C), which provides protection to employees against retaliation by an employer for engaging in certain protected activities.
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> 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 (Code) or cost-sharing reductions (referred to as a "subsidy" in section 18C) under the Affordable Care Act. ***
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> Since 2015, under section 4980H of the Code, certain employers (referred to as applicable large employers) must either offer health coverage that is affordable and that provides minimum value to their full-time employees (and offer coverage to their dependents), or be subject to an assessable payment (referred to as an "employer shared responsibility payment") payable to the IRS if any full-time employee receives the premium tax credit for coverage through an Exchange. Thus, the relationship between the employee's receipt of the premium tax credit and the potential employer shared responsibility payment imposed on an applicable large employer could create an incentive for an employer to retaliate against an employee. Section 18C protects employees against such retaliation.
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> 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; testified or are about to testify in a proceeding concerning such violation; assisted or participated, or are about to assist or participate, in such a proceeding; or objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee reasonably believed to be in violation of any provision of title I of the Act (or amendment), or any order, rule, regulation, standard, or ban under title I of the Act (or amendment). Among other provisions, title I of the Affordable Care Act includes a range of health insurance market reforms such as: The prohibition on lifetime and annual dollar limits on essential health

> benefits, the requirement for non-grandfathered plans to cover certain recommended preventive services with no cost sharing, and a prohibition on pre-existing condition exclusions.

Some employers reviewed their employees to determine which of them may expose the employer to tax penalties under the ACA. Some of these employees have been discharged, or had their hours reduced. Consider that, under other statutes, DOL and courts have recognized valid whistleblower claims arising from an employer's mistaken belief that the employee engaged in protected activity,[8] or an anticipation of future protected activity.[9] There is no reason employees should be denied similar protection under the ACA when their employer anticipates that their employment will lead to their participating in subsidies or other benefits or proceedings

8 Indeed, it is incorrect to say that a prima facie case of retaliation requires a showing of protected activity at all. An employer subjected to a law enforcement investigation might mistakenly retaliate against an employee who engaged in no protected activity. That employee is still protected from "discrimination" on account of identification, albeit mistaken, as a whistleblower. *Reich v. Hoy Shoe, Inc*., 32 F.3d 361, 368 (8th Cir. 1994); *Brock v. Richardson*, 812 F.2d 121, 123-25 (3d Cir. 1987); *Evans v. Baby Tenda*, 2001 CAA 4 (ALJ Sept. 30, 2002) (Complainant terminated in part on the mistaken belief that she had taken actions that actually had been taken by another employee; ALJ held that: "If an employer is free to fire anyone other than the [employee who actually engaged in the protected activity], then that employer is free to eviscerate the [Act].").

9 *Grant v. Hazelett Strip-Casting*, 880 F.2d 1564, 1570 (2nd Cir. 1989)(finding protected activity in attempting to gather evidence for a future lawsuit). The "filed or about to be filed" language in the anti-retaliation prohibition of the False Claims Act protects employees who are collecting information about possible fraud "before they have put all the pieces of the puzzle together." See, *e.g*., *U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731, 739-40 (D.C. Cir. 1998). In *MacLeod v. Los Alamos National Laboratory*, 94-CAA-18 (ARB Apr. 23, 1997), the complainant threatened to allege that she had not been properly supervised or certified , and that if she was going to be held accountable, then everyone up the line should be held accountable. The Board held that the threat to expose alleged wrongdoing was protected. While Complainant may not have exhibited the maturity or responsibility that her supervisor sought in an employee by failing to "take ownership" of the mistake, Complainant was making protected allegations and threats to expose wrongdoing by management. See also, *Saporito v. Central Locating Services, Ltd*., ARB No. 05-004, ALJ No. 2004-CAA-13 (ARB Feb. 28, 2006), slip op. At 10 (threat to report violations in the future is protected); *Oliver v. Hydro-Vac Services, Inc*., 91-SWD-1 (Sec'y Nov. 1, 1995) (Complainant was protected in that he was about to contact the authorities about his concerns).

under the ACA.

Note that Section 1557 of the ACA contains a broad anti-discrimination provision. As this section is part of Title I of the ACA, raising concerns about discrimination in health benefits would be within the protection of Section 1558.

Employees have 180 days to commence their ACA retaliation claims.

H. Time limits to file complaints.

Time limits to file complaints have been expanded to 90 or 180 days in modern laws, although Section 11(c) and the environmental laws still impose a 30-day time limit. Here is a chart of these laws and their time limits:

Time limit	Law	Citation
30 Days	Occupational Safety and Health Act	29 U.S.C. §660, Section 11(c)
	Federal Water Pollution Control Act (FWPCA)	33 U.S.C. §1367
	Clean Air Act (CAA)	42 U.S.C. §7622
	Comprehensive Environmental Response, Compensation and Liability Act ("Superfund Law" or CERCLA)	42 U.S.C. §9610
	Safe Drinking Water Act (SDWA)	42 U.S.C. §300j-9(i)
	Solid Waste Disposal Act (SWDA); including the Resource Conservation and Recovery Act (RCRA)	42 U.S.C. §6971
	Toxic Substances Control Act (TSCA)	15 U.S.C. §2622
60 Days	International Safe Container Act (ISCA)	46 U.S.C. §80507
60 Days	Mine Health and Safety Act (complaints go to MSHA)	30 U.S.C. §815(c)

90 Days	Asbestos Hazard Emergency Response Act (AHERA)	15 U.S.C. §2651(b)
	Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21)	49 U.S.C. §42121
180 Days	Other laws enforced by OSHA, including STAA, ERA, SOX, FRSA, NTSSA, PSIA, CPSIA, ACA, SPA, FSMA, CFPA and MAP21.	

In addition, Congress has attached independent whistleblower protections to a wide variety of laws. Many of these, such as the Fair Labor Standards Act, 29 U.S.C. § 215(c), the False Claims Act, 31 U.S.C. § 3730(h), and the banking laws, provide for a direct cause of action in federal court. Others, such as the National Labor Relations Act, 29 U.S.C. § 157, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a), and the Military Whistleblower Protection Act, 10 U.S.C. § 1034, create their own administrative procedures for enforcement.

Finally, building on the success of qui tam actions under the False Claims Act, some new laws are creating rewards for whistleblowers who help federal and state agencies collect funds, fines and penalties. These include the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 7 U.S.C. § 26; 17 C.F.R. 165 (commodities), and 5 U.S.C. § 78u-6; 17 C.F.R. Parts 240, 249 (SEC awards), and a whistleblower reward program at the IRS.

This paper is meant to provide an overview of whistleblower laws to assist practitioners with claim identification, and initiation of complaints in the correct forum. For those 22 laws enforced through DOL's program,[10] the complaint process begins with filing a claim with OSHA.

10 DWPP's informative desk reference of the laws within its jurisdiction is at: http://www.whistleblowers.gov/whistleblower_acts-desk_reference.pdf

II. The NRC requires a Safety Conscious Work Environment (SCWE).

The growth and development of internal compliance programs has set new industry standards. The Nuclear Regulatory Commission (NRC) promulgated 10 CFR Part 21 in 1977 to require the reporting of certain defects and noncompliance. It implements Section 206 of the Energy Reorganization Act of 1974 (ERA), as amended, relating to noncompliance. The ERA also contains a whistleblower protection at 42 USC § 5851. NRC also requires licensees to maintain a "safety conscious work environment" (SCWE) that encourages employees to participate in safety programs. 61 FR 24336.

III. Investigatory Process at OSHA

A. Directorate of Whistleblower Protection Programs (DWPP)

Late in 2012, OSHA established the Directorate of the new Whistleblower Protection Program (DWPP).[11] The Directorate has its own web page: http://www.whistleblowers.gov/ It is at:

> Directorate of the Whistleblower Protection Program (DWPP)
> U.S. Dept. of Labor, OSHA
> 200 Constitution Avenue, NW, Rm N-4624
> Washington, DC 20210
> (202) 693-2199
> Call OSHA Toll Free: 1-800-321-OSHA (6742)

Creating DWPP raised the visibility of whistleblower protection and signaled greater emphasis on OSHA's enforcement of those laws.

B. Filing an initial complaint.

No particular form of pleading is required for initial complaints at DWPP. See, for example, 24 CFR § 24.103(b). Although a pleading comparable to those in federal courts can be

11 See the August 1, 2011, report: http://www.whistleblowers.gov/report_summary_page.html

used, a simple letter is sufficient. Complaints can also be filed by phone, fax, or on-line. Complaints can be amended or supplemented.

While a whistleblower complaint filed at DOL need not meet *Iqbal-Twombly* plausibility pleading standard, it is important to describe the protected activities, list all the adverse actions, and identify all the responsible entities to ensure that the complainant exhausts administrative remedies at OSHA.

In *Tamosaitis v. URS Inc*., 771 F.3d 539 (9th Cir. 2014), the complainant amended a whistleblower complaint with OSHA under the Energy Reorganization Act to add additional respondents. The complainant waited over a year after filing the original OSHA complaint to file in federal court. Because the complainant had not waited a year after filing the amendment, the Ninth Circuit held that the federal courts did not have jurisdiction over the respondents added by the amendment. For the remaining respondent, however, the Ninth Circuit held that its claimed defense (reassigning Dr. Tamosaitis was necessary to keep customers happy) is not a legal defense. It also clarified that complainants do not have to prove retaliatory animus. Proving that protected activity was a contributing factor is sufficient.

In *Wallace v. Tesoro Corp*., 796 F.3d 468 (5th Cir. 2015), the Court held that individual protected activities must be explicitly pled in OSHA complaints to be preserved. The court also held that Wallace's concern that booking taxes as revenue violated securities laws was objectively reasonable, and did not have to be pled with specificity. At page 480, the Court added:

> an employee who is providing information about potential fraud or assisting in a nascent fraud investigation might not know who is making

> the false representations or what that person is obtaining by the fraud; indeed, that may be the point of the investigation. Leaving those employees unprotected would have grave consequences for the statutory scheme of employee protection embodied in § 1514A and would do so in a way that appears completely unrelated to whether a belief actually is reasonable.

Once a whistleblower complaint is filed, OSHA will typically forward a copy to the federal agency with enforcement authority over the issues raised in the protected activity. For example, an AIR 21 complaint will be forwarded to the FAA, STAA complaints to FMCS, food safety complaints to FDA, and so on, so the agency is aware of the underlying allegations (e.g., airline safety violations) and investigates accordingly.

C. Timeliness

In *Avlon v. American Express Co.*, ARB No. 09-089, ALJ No. 2008-SOX-51, Final Decision and Order of Remand (ARB May 31, 2011),[12] the ARB reversed an ALJ dismissal on timeliness, holding that the statute of limitations period starts with the "final, definitive and unequivocal notice of an adverse employment decision."[13] *Avlon*, p. 12.

12 Available at http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/09_089.SOXP.PDF

13 The ARB held that a statue of limitations in whistleblower cases starts to run when an employee receives "final, definitive and unequivocal notice of an adverse employment decision." *Snyder v. Wyeth Pharms.*, ARB No. 09-008, ALJ No.2008-SOX-055, slip op. At 6 (ARB Apr. 30, 2009); *Overall v. Tenn. Valley Auth.*, ARB Nos. 98-111, -128; ALJ No. 1997-ERA-053, slip op. at 40-41 (ARB Apr. 30, 2001), citing *Chardon v. Fernandez*, 454 U.S. 6 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become painful), and *Del. State Coll. v. Ricks*, 449 U.S. 250 (1980) (limitations period began to run when the employee was denied tenure rather than on the date his employment terminated). "The date that an employer communicates a decision to implement such a decision, rather than the date the consequences of the decision are felt, marks the occurrence of a violation." *Overall*, ARB

D. The Investigative Process

OSHA conducts investigations through a regional team of Whistleblower Investigators (WBIs) located throughout the country. The structure is regional: WBIs report to Regional Supervisory Investigators who, in turn, typically report to an Assistant Regional Administrator. If there is enough evidence to open an investigation, a WBI investigates the cases and is often also involved in attempting to resolve the case informally. The investigatory and settlement procedures are set forth in OSHA's Whistleblower Investigations Manual, which was updated in 2017.[14] If a case does not settle, OSHA issues findings, which take different formats depending on the statute. Some statutes also require OSHA to issue Due Process Letters before issuing final findings. DWPP statistics[15] show that from 2007 to 2017, OSHA issued 29,382 determinations, of which 533 were merit findings. Thus, merit findings issue at a rate of 1.8%. In total, 6,806 cases settled and another 533 "kicked out" to federal court.

E. Settlements at OSHA.

OSHA encourages early resolution and assists with those efforts. In addition to assisting with negotiation efforts, OSHA has an Alternative Dispute Resolution (ADR) Program[16] – which is essentially pre-litigation mediation. The program is separate from the Settlement Judge

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Nos. 98-111, -128, slip op. at. 40. "Final" and "definitive" notice is a "communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change." *Snyder*, ARB No. 09-008, slip op. at 6; *see also Halpern* v. *XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 3 (ARB Aug. 31, 2005). Unequivocal" notice is a "communication that is not ambiguous, i.e., free of misleading possibilities." *Ibid.; see also Halpern*, ARB No. 04-120, slip op. 3, *cf. Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1141 (6th Cir. 1994). See also, *Poli v. Jacobs Engineering Group, Inc.*, ARB No. 11-051, ALJ No. 2011-SOX-27, Decision and Order of Remand (ARB Aug. 31, 2012).

14 Available at: https://www.whistleblowers.gov/sites/default/files/CPL_02-03-007_annotated.pdf

15 Available at: https://www.whistleblowers.gov/factsheets_page/statistics

16 Available at: https://www.osha.gov/news/newsreleases/trade/08192015

Program of the Office of Administrative Law Judges (OALJ), which is available once cases are in litigation before the OALJ. Participating in the OSHA ADR program can result in a delay in issuance of an OSHA determination.

Settlement agreements reached through mediation (as other agreements should be) need to be submitted to OSHA for approval. The approval process assures that the agreement contains no restraints on future protected activities. In addition, OSHA evaluates whether a clause barring rehiring will preclude the complainant from working in his or her profession, although OSHA does not prohibit rehire bans in settlement agreements.

On August 23, 2016, DWPP issued a memorandum (attached) making clear that OSHA would not approve settlement agreements that restrict disclosures to the government, requires notification to the employer of protected activities, asserts that the complainant made no disclosures to the government, or that waives a right to receive a whistleblower award (for example, under the Security and Exchange Commission's (SEC's) program pursuant to the Dodd-Frank Act). The memo provides that OSHA may ask that a settlement agreement contain the following statement:

> Nothing in this Agreement is intended to or shall prevent, impede or interfere with complainant's non-waivable right, without prior notice to Respondent, to provide information to the government, participate in investigations, file a complaint, testify in proceedings regarding Respondent's past or future conduct, or engage in any future activities protected under the whistleblower statutes administered by OSHA, or to receive and fully retain a monetary award from a government-administered whistleblower award program for providing information directly to a government agency.

Under the 2012 Whistleblower Protection Enhancement Act (WPEA), 5 U.S.C. § 2302(b)(13), Congress requires that any non-disclosure agreement with a federal agency

contain the following statement:

> These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.

F. OSHA updates regulations.

OSHA has updated its regulations for several whistleblower statutes in recent years. See, for example, those for the Surface Transportation Assistance Act (STAA) on July 27, 2012, 29 CFR Part 1978; see notice at 77 Fed. Reg. 44121,[17] and for the Consumer Product Safety Improvement Act (CSPIA) on July 10, 2012. 29 CFR 1983; 77 Fed. Reg. 40494.[18] Changes include allowing OSHA to receive and record **oral complaints.** Having an OSHA investigator record a telephone call can meet the time limit for a complaint (which can be amended in writing later). 29 CFR 1978.103(b) ("No particular form of complaint is required. A complaint may be filed orally or in writing.") Also, complainants and their counsel should find it easier to receive materials submitted by the employer:

> 29 CFR Section 1978.104(c) provides that, throughout the investigation, the agency will provide the complainant (or the complainant's legal counsel if the complainant is represented by counsel) a copy of all of respondent's submissions to the agency that are responsive to the

17 Available at: http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/FEDERAL_REGISTER/77_FED_REG_44121.HTM

18 Available at: http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=23201

> complainant's whistleblower complaint, with confidential information redacted as necessary, and the complainant will have an opportunity to respond to such submissions; and
>
> 29 CFR Section 1978.104(f) provides that the complainant will receive a copy of the materials that must be provided to the respondent under that paragraph, with confidential information redacted as necessary.

In 2016, OSHA issued final rules for handling whistleblower complaints under the 2010 Seaman's Protection Act. See 29 CFR Part 1986. The new regulation makes clear that the SPA covers all ships flying American flags or owned by Americans. As mentioned above, in 2016 OSHA issued final rules for handling whistleblower complaints under Section 1558 of the Affordable Care Act. See 29 CFR Part 1984.

On July 10, 2012, OSHA issued final rules for handling whistleblower cases under the Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2087. The regulations are at 29 C.F.R. Part 1983. OSHA's discussion of three public comments is at 77 Fed. Reg. 40494.[19] The time for filing an initial OSHA complaint for a consumer product safety whistleblower remains 180 days. 15 U.S.C. § 2087(b)(1). After an OSHA determination, the time to request a hearing is thirty (30) days. 15 U.S.C. § 2087(b)(2)(A). The time to petition the ARB for review of an ALJ decision is just fourteen (14) days, and that petition must set out the legal issues for which review is sought. 29 C.F.R. § 1983.110(a).

19 Available at http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/FEDERAL_REGISTER/77_FED_REG_40494.HTM or http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/FEDERAL_REGISTER/77_FED_REG_40494.PDF

IV. Litigation

A. Office of Administrative Law Judges (OALJ) and the Administrative Review Board.

Most whistleblower laws enforced through DOL permit parties to seek *de novo* review of OSHA determinations through an ALJ hearing. A request for such a hearing must be filed within 30 days of receipt of the OSHA determination. The request can be faxed to the Chief ALJ at (202) 693-7365. It must also be served on each respondent and on OSHA. If OSHA issues an order of reinstatement under the modern whistleblower laws (ERA, STAA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, SPA, CFPA, FSMA, MAP21), the employer can appeal, but the reinstatement order goes into effect while the appeal is pending.

In 2015, OALJ issued a new set of procedural rules, currently codified at 29 CFR Part 18. This is the first major revision of the rules in 30 years. The revisions make significant changes in discovery, hewing more closely to the current Federal Rules of Civil Procedure. The National Employment Lawyers Association (NELA)[20] and this author[21] submitted comments, focusing on the problems associated with summary decisions and limits on discovery, and the need for addressing electronic discovery and filing. NELA suggested that OALJ consider adopting the Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action currently being implemented in federal district courts around the country.[22] Some ALJs now issue detailed discovery orders patterned on these protocols. One new rule, 29 CFR

20 Available at http://www.regulations.gov/contentStreamer?objectId=09000064811fa9cf&disposition=attachment&contentType=pdf

21 Available at http://www.taterenner.com/RennerComments20130204.pdf

22 See generally, *Pilot Project Regarding Initial Discovery Protocols For Employment Cases Alleging Adverse Action*, Federal Judicial Center (November 2011), available at: http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf.

18.32(a)(2), defines a "day" to end at 4:30 pm. Both NELA and this author objected to this proposal without success.

B. ARB review.

ALJ decisions, in turn, can be reviewed by DOL's Administrative Review Board (ARB). Petitions for review to the ARB must typically be filed within 14 days. Being even one day late can result in a loss of all further rights to appeal. The petition must generally set out the legal issues upon which review is sought. The ARB needs this list up front to assess whether to accept the case for review. If the ARB accepts the case for review within 30 days of the filing of the petition for review, it will issue a briefing schedule. If it does not accept the case for review, the ALJ's decision becomes a final order of the Secretary of Labor that can be appealed to the appropriate U.S. Court of Appeals. If the ARB reviews the case, it generally takes between six and 24 months to issue a final order. Orders are available from http://www.oalj.dol.gov/LIBARB.HTM, and they are digested at http://www.oalj.dol.gov/LIBWHIST.HTM.

Petitions for review to the ARB must list the legal issues for which review is sought. Failure to list an issue means the ARB "may" deem the issue waived. The comments explain that this time to file the petition can be extended upon motion. A safer practice may be to file a petition for review and seek an extension of time to complete or supplement the statement of legal issues for which review is sought, since being one day late in filing a petition for review can result in denial of review. *Prince v. Westinghouse Savannah River Co.*, ARB No. 10-079, ALJ No. 2006-ERA-1, Decision and Order Denying Motion for Reconsideration (ARB Feb. 2,

2011),[23] *aff'd* by Fourth Circuit in Case No. 11-1322, *cert. denied*, 01/14/2013 .

However, even if a party neglected to identify an issue in the petition for review, that does not prevent the ARB from addressing it to avoid a "manifest injustice." In *Avlon v. American Express Co*., ARB No. 09-089, ALJ No. 2008-SOX-51, Final Decision and Order of Remand (ARB May 31, 2011), AMEX sought reconsideration arguing that the timeliness issue was not raised in Avlon's *pro se* brief. The ARB denied reconsideration. *Avlon v. American Express Co*., ARB No. 09-089, ALJ No. 2008-SOX-51, Order Denying Reconsideration (ARB Sept. 14, 2011).[24] The ARB did not base its decision on Avlon's pro se status, but rather on the "manifest injustice" that would result from failing to correct the "central issue" of the ALJ's decision. Moreover, the ARB did not need any further fact-finding to resolve the timeliness issue.

C. Kick-outs to federal district court.

Certain statutes permit complainants to file de novo claims in U.S. district court when the DOL process fails to result in a final order within a statutory time limit. The time limits are set for the STAA, FRSA, NTSSA, CPSIA, ACA, SPA, CFPA, FSMA and MAP-21 (after 210 days), ERA (365), and SOX (180). CPSIA, ACA, CFPA and FSMA also permit a kick-out within 90 days of OSHA determinations.

In *Jones v. SouthPeak Interactive Corp*. 777 F.3d 658 (4th Cir. 2015), the court held that a four-year statute of limitations applies pursuant to 28 U.S.C. § 1658(a). In *Jordan v. Sprint*

23 All ARB decisions are available at: http://www.oalj.dol.gov/Public/ARB/REFERENCES/Caselists/ARBLIST_ALPHA3.HTM

24 Available at http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/09_089A.SOXP.PDF

Nextel Corp., 3 F. Supp. 3d 917 (D. Kan. 2014), the court concluded that no statute of limitations applies to kick-outs as they are "otherwise provided by law." Following *Jordan*, the DOL's practice is to wait until the whistleblower actually files a complaint in a U.S. district court before DOL dismisses its complaint.

Deciding whether, and when, to kick out is a tactical decision for complainants and their counsel. Factors considered include the costs, delays, familiarity with the tribunals, knowing who the ALJ is, the size of potential awards and the availability of jury trials.

V. Extraterritoriality

Employers are increasingly transnational, and discerning the application of U.S. law to a particular adverse action may deserve focused attention. An employment agreement reached in one country may affect employment performed in another country or in multiple countries. Protected activity may similarly disclose violations occurring in more than one country.

For the DOL whistleblower program, extraterritoriality has arisen mostly in AIR 21 and SOX cases, but it can arise under other statutes.

The Supreme Court recognizes a presumption against extraterritorial application of U.S. laws. *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010). While confirming that the presumption against extraterritoriality should apply "in all cases," the Supreme Court admits that the presumption "is not self-evidently dispositive, but…requires further analysis." *Morrison*, 130 S. Ct. at 2881, 2884. The *Morrison* Court espouses a "transactional" test to rebut the presumption against extraterritoriality in securities cases — "whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange." *Id*. at 2886.

The First Circuit's decision in *Carnero v. Boston Scientific Corp*., 433 F.3d 1 (1st Cir.

2006), rejected a claim of extraterritorial application because the employee produced no evidence that the U.S. parent company had directed his termination by e-mail or somehow otherwise controlled his employment. *Id.* at 2 (noting that the district court found that Carnero "had no contact with the defendant in Massachusetts" and that defendant did not "in any way direct or control" his employment); *see also* Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 Harv. J. on Legis. 425, 496 (2009).

Application of SOX to protected activity arising under the Foreign Corrupt Practices Act remains untested.

In *Villanueva v. Core Laboratories, NV*, ARB No. 09-108, ALJ No. 2009-SOX-6 (ARB Dec. 22, 2011) (en banc),[25] aff'd as *Villanueva v. U.S. Dep't of Labor*, 743 F.3d 103 (5th Cir. 2014), the ARB acknowledged that conduct abroad in some circumstances may have a sufficient territorial connection to the U.S. to be protected under SOX, although the ARB ultimately found no protected activity in that case.

On January 11, 2013, Chief ALJ Stephen L. Purcell overruled the respondent's motion to dismiss based on extraterritoriality in *Dos Santos v. Delta Airlines, Inc.*, 2012-AIR-00020, Order Denying Respondent's Motion to Dismiss (Jan. 13, 2013).[26] Although Jose Dos Santos worked in Paris during the relevant times, Judge Purcell noted that the retaliation involved denials of his requests for promotions to positions in Atlanta, Georgia.

25 Available at: http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/09_108.SOXP.PDF

26 Available at http://www.oalj.dol.gov/Decisions/ALJ/AIR/2012/DOS_SANTOS_JOSE_v_DELTA_AIR_LINES_INC_2012AIR00020_(JAN_11_2013)_072345_ORDER_SD.PDF

Chief Judge Purcell, at p. 19, also considered the case-by-case approach he found in *Villanueva v. Core Laboratories, NV,* ARB No. 09-108, ALJ No. 2009-SOX-6 (ARB Dec. 22, 2011) (en banc),[27] aff'd as *Villanueva v. U.S. Dep't of Labor*, 743 F.3d 103 (5th Cir. 2014). "Just as the ARB did in *Villanueva*, I decline the invitation to manufacture my own test for determining the territoriality of all complaints filed under Section 42121 of AIR21." *Id*. at 20. He then looked to AIR 21's remedial purpose. "I find that the general focus of AIR21 is to ensure the safety of the air traveling public by strengthening the United States' aviation system." *Id*. at 22. "So while the legislative history supports that the general focus of AIR21 is to bring about fundamental improvements in air safety, it also suggests that Congress intended to achieve that goal by regulating the air carriers that operate within the domestic aviation system and under the purview of FAA regulations." *Id*. Chief Judge Purcell looked to an earlier SOX case:

> In a pre-Morrison Section 806 case brought by a foreign-based employee of a foreign subsidiary of a publicly-traded company listed on the New York Stock Exchange, the ALJ in *Walters v. Deutsche Bank AG*, ALJ No. 2008-SOX-070, slip. op. at 2, 25 (ALJ Mar. 23, 2009) considered the extent to which a multinational company may be held liable under Section 806 for a retaliatory termination of an employee stationed overseas. In denying the respondents' motion for summary decision, the ALJ spent considerable time expounding on the predominant purpose of Section 806, concluding that because "the predominant purpose of Section 806 is fraud detection, not worker protection," it is improper to treat Section 806 as a traditional labor law. *Walters*, ALJ No. 2008-SOX-070, slip. op. at 11.

Chief Judge Purcell continued at p. 24: "As with Section 806 of SOX, Section 42121 of AIR21 provides an incentive to airline workers which promotes aviation safety inasmuch as 'it provides job security … as a means of encouraging employees voluntarily to take an action

27 Available at: http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/09_108.SOXP.PDF

Congress deems in the public interest.'" Quoting *Walters* at 13. In applying this approach to the Dos Santos case, Chief Judge Purcell observed at p. 26 that his aviation safety complaints addressed the safety of aircraft that fly between Paris and the U.S. Dos Santos also made complaints about retaliatory harassment to Delta officials in the U.S., and those officials did nothing to abate that harassment. However, "Neither the location of the employee's job, nor the location of the employer, is conclusive of the territoriality of this complaint, because, as explained above, Section 42121 is not chiefly a labor law." *Dos Santos* at 28. At page 29, Chief Judge Purcell concluded as follows:

> In sum, virtually all of the key elements of Complainant's complaint demonstrate a substantial connection with the United States' domestic aviation system, as he complained to U.S-based officials regarding violations of Federal aviation safety laws by an American air carrier, and he suffered retaliatory adverse actions that may be attributable to Respondent's management-level employees in the United States. As a U.S.-based airline that is indisputably subject to FAA regulations, Delta's alleged violation of FAA safety regulations is exactly the kind of non-compliance that Section 42121 aims to deter by empowering airline employees to report misconduct without fear of retaliation, and the ordinary enforcement of the instant complaint fits squarely within the AIR21's focus of ensuring aviation safety. Contrary to Respondent's belief, the physical location of Complainant's job is not decisive as to this complaint's territoriality.

This type of reasoning points the way to using U.S. whistleblower protections for employees working outside the United States. By connecting their protected activity to the remedial purposes of the U.S. law, workers anywhere in the world may find protection through the DOL.

In *Blanchard v. Exelis Systems Corp.*, ARB No. 04-113, ALJ No. 2004-STA-21, Decision and Order of Remand (ARB Aug. 29, 2017), the complainant worked for a U.S. Government contractor at the U.S. Air Force Base in Bagram, Afghanistan. The ARB, reversing

the ALJ, held that Blanchard's case did not implicate foreign law, but arose under U.S. law so that SOX would apply. The ARB holding in *Blanchard* has not yet been reviewed by any Court of Appeals.

VI. ARB addresses documents, confidentiality and adverse actions.

A classic employer defense in whistleblower cases is to attack the whistleblower for violating company confidentiality rules in making the disclosures at issue. In *Vannoy v. Celanese Corp*., ARB No. 09-118, ALJ No. 2008-SOX-64 (ARB Sept. 28, 2011), the ARB addressed the conflict between the protection of the law and the restraints of company policy. The law won. At pp. 15-17, the ARB explained how Congress clearly intended that employees would be protected in "lawfully" collecting inside information about violations of law, even though the conduct "may have violated company policy[.]"[28] The ARB cited to 17 C.F.R. § 240.21F-17(a), the SEC's new Dodd-Frank rule prohibiting employers from enforcing or threatening to enforce confidentiality agreements to prevent whistleblower employees from cooperating with the SEC. The ARB recognizes that the employee protection works within the context of other enforcement laws and needs to follow their contours to assure a continuity of protection.

Moreover, in *Vannoy*, p. 14, the ARB held that being placed on paid administrative leave can constitute an adverse employment action. The ARB revitalized the 1998 holding in *Van Der*

28 Courts have held that collecting evidence can be protected under other laws. *Grant v. Hazelett Strip-Casting*, 880 F.2d 1564, 1570 (2nd Cir. 1989)(finding protected activity in attempting to gather evidence for a future lawsuit); *Niswander v. Cincinnati Insurance Co*., 529 F.3d 714, 728 (6th Cir. 2008)(delivery of documents in discovery is protected if the employee reasonably believes the documents support the claim of a violation of law); *Quinlan v. Curtiss-Wright Corp*., 204 N.J. 239 (2010) (New Jersey Law Against Discrimination).

Meer v. Western Ky. Univ., ARB No. 97-078, ALJ No. 1995-ERA-038, slip op. At 4-5 (ARB Apr. 20, 1998) (although an associate professor was paid throughout his involuntary leave of absence, he was subjected to adverse employment action by his removal from campus). In the July 24, 2013, remand decision,[29] the ALJ awarded Mr. Vannoy $380,738 in economic and non-economic compensatory damages, plus interest and attorney's fees.

Another material issue for whistleblowers is the ability to keep confidential the fact that the whistleblower made official complaints. It can be particularly important that the confidentiality be maintained with respect to the perpetrators of the misconduct that is the subject of the whistleblower's complaint. In *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, -003, ALJ No. 2007-SOX-5, Decision and Order of Remand (ARB Sept. 13, 2011),[30] the ARB affirmed in part and reversed in part an ALJ dismissal. The ARB reversed on the issue of whether a disclosure of the whistleblower's name in a document retention email constituted an adverse action. The ARB noted, at pp. 5-6, that Menendez had taken care to assure that he was entitled to confidentiality of his identity under SEC and company policy. After the disclosure, Halliburton granted Menendez a paid administrative leave of six (6) months. After Halliburton and the SEC concluded their investigations (finding no violations requiring any action), Halliburton cancelled the paid leave and directed Menendez to return to work. Menendez resigned and brought a claim for constructive discharge. The ARB explained that *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), addressed the *degree* of

29 Available at http://www.oalj.dol.gov/Decisions/ALJ/SOX/2008/VANNOY_MATTHEW_v_CELANESE_CORPORATION_2008SOX00064_%28JUL_24_2013%29_121259_CADEC_SD.PDF

30 Available at http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/09_002.SOXP.PDF

actionable harm under Title VII. There, a plaintiff bringing a retaliation claim need only show the employer's challenged actions are "materially adverse" or "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." The ARB noted, however, that SOX's language goes farther than Title VII's, by providing that no company "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee." This language explicitly proscribes non-tangible activity, which expresses a congressional intent to prohibit a "broader spectrum of adverse action against SOX whistleblowers." The ARB added, "This difference in statutory construction convinces us that adverse action under SOX Section 806 must be more expansively construed than that under Title VII."

The ARB, at p. 23-24, discussed the importance of anonymous reporting under Section 301 in SOX's statutory scheme. "We consider Section 301 a critical component of SOX," the ARB said at p. 24. Considering the overall context of the case, the ARB concluded that, "Halliburton's action constituted adverse action[.]" *Id*. The ARB noted that after the disclosure of his role in reporting concerns, there was a "reluctance of Menendez's co-workers to associate with him[.]" *Id*. at p. 25. The ARB added, "Evidence of record strongly suggests that the exposure of Menendez's identity led inexorably to the circumstances and events that followed, including the isolation and loss of professional opportunities and advancement." *Id*. at p. 26. "Nevertheless, substantial evidence supports the ALJ's ultimate conclusion that Menendez was not constructively discharged." *Id*. at p. 28. The ARB also held that claims of "isolation, removal of job duties, demotion, and constructive discharge did not independently constitute adverse action." *Id*. at p. 33. On remand, the ALJ again dismissed Menendez's complaint, holding that

Halliburton proved by clear and convincing evidence that it had "legitimate business reasons" for disclosing Menendez's name. The ARB reversed this holding, found causation, and affirmed an alternative award of $30,000 in compensatory damages and attorney's fees.[31] In finding causation, the ARB relied on *Araujo v. N.J. Transit Rail Operations Inc.*, No. 12-2148, 2013 WL 600208, at *6, *10 (3d Cir. Feb. 19, 2013) ("It is worth emphasizing that the AIR-21 burden-shifting framework . . . is much easier for a plaintiff to satisfy than the *McDonnell Douglas* standard.").

VII. The uneven web of whistleblower protection.

There are still big holes in the web of whistleblower protections. In 2011, traffic accidents killed 32,367 people in America and injured 2,217,000 more.[32] Other consumer products killed 35,900 Americans in 2008.[33] Workplace accidents killed 4,609 Americans in 2011,[34] and injured about 3,000,000 more.[35] Foodborne illness kills about 3,000 Americans a year and hospitalizes 128,000 more.[36] U.S. commercial aircraft accidents with fatalities are a rarity. Each of these safety areas has a federal law focused on protecting whistleblowers.

In 1994, adverse drug reactions in U.S. hospitals caused 63,000 fatalities.[37] "Overall, 51 percent of approved drugs have serious adverse effects which are not detected prior to approval." JAMA 1998; 279:1571-1573. Adverse drug events cause 700,000 emergency room visits and

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31 *Menendez v. Halliburton, Inc.*, ARB No. 12-026, ALJ No. 2007-SOX-5, Final Decision and Order (ARB Mar. 20, 2013), available at: http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/12_026.SOXP.PDF

32 See http://www-nrd.nhtsa.dot.gov/Pubs/811754AR.PDF

33 See http://www.cpsc.gov/PageFiles/134720/2010injury.pdf

34 See http://www.bls.gov/news.release/cfoi.nr0.htm

35 See http://www.bls.gov/news.release/osh.nr0.htm

36 See http://www.fda.gov/Food/ResourcesForYou/HealthEducators/ucm095399.htm Another 48 million of us are sickened by foodborne illness each year.

37 See http://jama.jamanetwork.com/article.aspx?articleid=187436

cost $3.5 billion annually.[38] The CDC says that adverse drug events caused 120,000 hospital admissions, while American Medical News reports 400,000.[39] There is no federal law focused on protecting the employment of whistleblowers who raise safety concerns about medications, let alone protecting health care safety concerns generally. Similarly, there is no federal law that prohibits firing private sector employees for disclosing tax violations or misclassification of workers as independent contractors.

Advocates need to be aware of other avenues of protection. Food, product safety and auto safety whistleblowers are likely to raise issues that could affect consumer liability litigation. Identifying the trial lawyers handling these liability claims could be mutually beneficial for both the whistleblower and the injured consumer. Moreover, federal and state governments could be among the affected consumers. Advocates may benefit from considering whether qui tam litigation might be worthwhile under the False Claims Act.

Claims against publicly traded companies should raise an inquiry about whether the whistleblower's concerns touch on the company's public disclosures. Public disclosure issues might or might not have contributed to the employer's decision to impose the adverse action. If so, counsel might consider pursuing relief under the Sarbanes-Oxley Act (180 day time limit to file an OSHA complaint). Either way, counsel might consider submitting a whistleblower claim to the SEC. Whistleblowers can submit a Form TCR and then monitor the SEC announcements of recoveries that are eligible for whistleblower awards.

Mindful attention to the latest developments in whistleblower law will help connect

38 See http://www.cdc.gov/medicationsafety/basics.html
39 See http://www.amednews.com/article/20110613/profession/306139944/2/

prospective employment law clients to their best remedies. The attached chart of federal whistleblower laws may seem exhaustive, but it still leaves holes big enough for some of our greatest public health dangers. Our mindful attention will also help us focus attention on filling the holes in our uneven web.

Appendices

1. OSHA Desk Aid[40]

2. Chart of Federal Whistleblower Laws[41]

3. OSHA Whistleblower Complaint Form[42]

4. OSHA DWPP August 23, 2016, memo on settlement agreements

40 DWPP's informative desk reference of the laws within its jursidiction is at: https://www.whistleblowers.gov/sites/default/files/whistleblowers/whistleblower_acts-desk_reference.pdf .

41 Available from https://www.kcnlaw.com/Most-legal-claims-have-time-limits.shtml

42 Complaints can now be filed on-line at https://www.whistleblowers.gov/complaint_page

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	Compen-satory	Punitive	Days	Venue	
Section 11(c) of the Occupational Safety & Health Act (OSHA) (1970) [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. **29 CFR 1977**	30	Private sector U.S. Postal Service Certain tribal employers	90	No	Yes	No	Yes	Yes	15	OSHA	Motivating
Asbestos Hazard Emergency Response Act (AHERA) (1986) [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. **29 CFR 1977**	90	Private sector State and local government Certain DoD schools Certain tribal schools	90	No	Yes	No	Yes	Yes	15	OSHA	Motivating
International Safe Container Act (ISCA) (1977) [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. **29 CFR 1977**	60	Private sector Local government Certain state government and interstate compact agencies	30	No	Yes	No	Yes	Yes	15	OSHA	Motivating
Surface Transportation Assistance Act (STAA) (1982), as amended by the 9/11 Commission Act of 2007 (**Public Law No. 110-053)** [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. **29 CFR 1978**	180	Private sector	60	210	Yes	Yes	Yes	Yes 250K cap	30	ALJ	Contributing

Occupational Safety and Health Administration
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Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Safe Drinking Water Act (SDWA) (1974) [42 U.S.C. § 300j-9(i)]. Protects employees from retaliation for, among other things, reporting violations of the Act, which requires that all drinking water systems assure that their water is potable as determined by the Environmental Protection Agency. **29 CFR 24**	30	Private sector Federal, state and municipal Indian tribes	30	No	Yes	No	Yes	Yes	30	ALJ	Motivating
Federal Water Pollution Control Act (FWPCA) (1972) [33 U.S.C. § 1367]. Protects employees from retaliation for reporting violations of the law related to water pollution. This statute is also known as the Clean Water Act. **29 CFR 24**	30	Private sector State and municipal Indian tribes Federal sovereign immunity bars investigation of FWPCA complaints filed by federal employees	30	No	Yes	No	Yes	No	30	ALJ	Motivating
Toxic Substances Control Act (TSCA) (1976) [15 U.S.C. § 2622]. Protects employees from retaliation for reporting alleged violations relating to industrial chemicals currently produced or imported into the United States and supplements the Clean Air Act (CAA) and the Toxic Release Inventory under Emergency Planning & Community Right to Know Act (EPCRA). **29 CFR 24**	30	Private sector	30	No	Yes	No	Yes	Yes	30	ALJ	Motivating
Solid Waste Disposal Act (SWDA) (1976) [42 U.S.C. § 6971]. Protects employees from retaliation for reporting violations of the law that regulates the disposal of solid waste. This statute is also known as the Resource Conservation and Recovery Act. **29 CFR 24**	30	Private sector Federal, state and municipal Indian tribes	30	No	Yes	No	Yes	No	30	ALJ	Motivating

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Clean Air Act (CAA) (1977) [42 U.S.C. § 7622]. Protects employees from retaliation for reporting violations of the Act, which provides for the development and enforcement of standards regarding air quality and air pollution. **29 CFR 24**	30	Private sector Federal, state and municipal	30	No	Yes	No	Yes	No	30	ALJ	Motivating
Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (1980) [42 U.S.C. § 9610] A.k.a. "Superfund," this statute protects employees from retaliation for reporting violations of regulations involving accidents, spills, and other emergency releases of pollutants into the environment. The Act also protects employees who report violations related to the clean up of uncontrolled or abandoned hazardous waste sites. **29 CFR 24**	30	Private sector Federal, state and municipal	30	No	Yes	No	Yes	No	30	ALJ	Motivating

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Energy Reorganization Act of 1974, as amended by the Energy Policy Act of 2005 (Public Law No. 109-58) (ERA) [42 U.S.C. § 5851]. Protects certain employees in the nuclear industry from retaliation for reporting violations of the Atomic Energy Act. Protected employees include employees of operators, contractors and subcontractors of nuclear power plants licensed by the Nuclear Regulatory Commission, and employees of contractors working with the Department of Energy under a contract pursuant to the Atomic Energy Act. **29 CFR 24**	180	Statute provides coverage of NRC and its contractors and subcontractors, NRC licensees and applicants for licenses, including contractors and subcontractors Agreement state licensees Applicants for licenses from agreement states, including their contractors and subcontractors DOE and its contractors and subcontractors. However, ARB case law indicates federal sovereign immunity will bar investigation of ERA complaints filed against many but not all federal agencies.	30	365	Yes	No	Yes	No	30	ALJ	Contributing
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) (2000) [49 U.S.C. § 42121]. Protects employees of air carriers and contractors and subcontractors of air carriers from retaliation for, among other things, reporting violations of laws related to aviation safety. **29 CFR 1979**	90	Air carriers and their contractors and subcontractors	60	No	Yes	Yes	Yes	No	30	ALJ	Contributing

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	Compen-satory	Punitive	Days	Venue	
Sarbanes-Oxley Act (SOX) (2002), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Public Law No. 111-203) [18 U.S.C. § 1514A]. Protects employees of certain companies from retaliation for reporting alleged mail, wire, bank or securities fraud; violations of the SEC rules and regulations; or violations of federal laws related to fraud against shareholders. The Act covers employees of publically traded companies, including those companies' subsidiaries, and employees of nationally recognized statistical rating organizations, as well as contractors, subcontractors, and agents of these employers. **29 CFR 1980**	180	Companies registered under §12 or required to report under §15(d) of the SEA and their consolidated subsidiaries or affiliates, contractors, subcontractors, officers, and agents, and nationally recognized statistical rating organizations	60	180	Yes	Yes	Yes	No	30	ALJ	Contributing
Pipeline Safety Improvement Act (PSIA) (2002) [49 U.S.C. § 60129]. Protects employees from retaliation for reporting violations of federal laws related to pipeline safety and security or for refusing to violate such laws. **29 CFR 1981**	180	Private sector employers, states, municipalities, and individuals owning or operating pipeline facilities, and their contractors and subcontractors	60	No	Yes	Yes	Yes	No	60	ALJ	Contributing

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	Compen-satory	Punitive	Days	Venue	
Federal Railroad Safety Act (FRSA), as amended by Section 1521 of the 9/11 Commission Act of 2007 (Public Law No. 110-053), and Section 419 of the Rail Safety Improvement Act of 2008 (Public Law No. 110-432) [49 U.S.C. § 20109]. Protects employees of railroad carriers and their contractors and subcontractors from retaliation for reporting a work-place injury or illness, a hazardous safety or security condition, a violation of any federal law or regulation relating to railroad safety or security, or the abuse of public funds appropriated for railroad safety. In addition, the statute protects employees from retaliation for refusing to work when confronted by a hazardous safety or security condition. **29 CFR 1982**	180	Railroad carriers and their contractors, subcontractors, and officers	60	210	Yes	Yes	Yes	Yes 250K Cap	30	ALJ	Contributing
National Transit Systems Security Act (NTSSA), enacted as Section 1413 of the 9/11 Commission Act of 2007 (Public Law No. 110-053) [6 U.S.C. §1142]. Protects transit employees from retaliation for reporting a hazardous safety or security condition, a violation of any federal law relating to public transportation agency safety, or the abuse of federal grants or other public funds appropriated for public transportation. The Act also protects public transit employees from retaliation for refusing to work when confronted by a hazardous safety or security condition, or refusing to violate a federal law related to public transportation safety. **29 CFR 1982**	180	Public transportation agencies and their contractors and subcontractors, and officers	60	210	Yes	Yes	Yes	Yes 250K Cap	30	ALJ	Contributing

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	Compen-satory	Punitive	Days	Venue	
Consumer Product Safety Improvement Act (CPSIA) (2008) [15 U.S.C. § 2087]. Protects employees from retaliation for reporting to their employer, the federal government, or a state attorney general reasonably perceived violations of any statute or regulation within the jurisdiction of the Consumer Product Safety Commission (CPSC). CPSIA covers employees of consumer product manufacturers, importers, distributors, retailers, and private labelers. **29 CFR 1983**	180	Manufacturing, private labeling, distribution, and retail employers in the United States	60	210 or within 90 days of OSHA finding	Yes	Yes	Yes	No	30	ALJ	Contributing
Affordable Care Act (ACA) (2010) [29 U.S.C. § 218c*].* Protects employees from retaliation for reporting violations of any provision of title I of the ACA, including but not limited to discrimination based on an individual's receipt of health insurance subsidies, the denial of coverage based on a preexisting condition, or an insurer's failure to rebate a portion of an excess premium. **29 CFR 1984**	180	Private and public sector employers	60	210 or within 90 days of OSHA finding	Yes	Yes	Yes	No	30	ALJ	Contributing
Seaman's Protection Act, as amended by § 611 of the Coast Guard Authorization Act of 2010 (Public Law No. 111-281) (SPA) [46 U.S.C. § 2114]. Protects seamen from retaliation for reporting to the Coast Guard or another federal agency a violation of a maritime safety law or regulation. Among other things, the Act also protects seamen from retaliation for refusing to work when they reasonably believe an assigned task would result in serious injury or impairment of health to themselves, other seamen, or the public. **29 CFR 1986**	180	Private-sector employers—vessel on which seaman was employed must be American-owned, as defined; world-wide coverage	60	210	Yes	Yes	Yes	Yes 250 K Cap	30	ALJ	Contributing

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Consumer Financial Protection Act (CFPA) (Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203) (2010) [12 U.S.C. § 5567]. Protects employees performing tasks related to consumer financial products or services from retaliation for reporting reasonably perceived violations of any provision of title X of the Dodd-Frank Act or any other provision of law that is subject to the jurisdiction of the Bureau of Consumer Financial Protection, or any rule, order, standard, or prohibition prescribed by the Bureau. **29 CFR 1985**	180	Any person engaged in offering or providing a consumer financial product or service, a service provider to such person, or such person's affiliate acting as a service provider to it	60	210 or within 90 days of OSHA finding	Yes	Yes	Yes	No	30	ALJ	Contributing
FDA Food Safety Modernization Act (FSMA) (2011) [21 U.S.C. § 399d]. Protects employees of food manufacturers, distributors, packers, and transporters from retaliation for reporting a violation of the Food, Drug, and Cosmetic Act, or a regulation promulgated under the Act. Employees are also protected from retaliation for refusing to participate in a practice that violates the Act. **29 CFR 1987**	180	Any entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food	60	210 or within 90 days of OSHA finding	Yes	Yes	Yes	No	30	ALJ	Contributing

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Section 31307 of the Moving Ahead for Progress in the 21st Century Act (MAP-21) (a provision of Division C's Title I, the Motor Vehicle and Highway Safety Improvement Act of 2012) (2012). *Protects employees from* retaliation by motor vehicle manufacturers, part suppliers, and dealerships for providing information to the employer or the U.S. Department of Transportation about motor vehicle defects, noncompliance, or violations of the notification or reporting requirements enforced by the National Highway Traffic Safety Administration (NHTSA), or for engaging in related protected activities as set forth in the provision. **29 CFR 1988**	180	Motor vehicle manufacturer, part supplier, or dealership	60	210	Yes	Yes	Yes	No	30	ALJ	Contributing

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Most legal claims have time limits

Federal Whistleblower Laws

This chart is meant to call attention to the types of claims that employees should investigate. It is also meant to urge them to consult a lawyer to assess each claim before the time limits expire. "SOL" means "statute of limitations." It is the time limit to file a legal action. This chart is not updated on any regular basis, and it is not meant to establish an attorney-client relationship. Only by retaining an attorney can employees get answers they can legally rely on.

So, do not rely upon this table for legal advice. This summary table is provided for information only and to assist attorneys in legal research. It is not warranted to be accurate in any respect. This table cannot replace the need for independent research or legal advice regarding where, when, and how your claim can be brought. Further, the statutes of limitations herein may not apply to your case or situation, may no longer be applicable, and, like any employment-related law, are always subject to change at any time, by act of Congress, agency practice, the courts, or changing facts in the case itself. Thank you to Ann Lugbill for initiating the collection of the information on this page.

News Flash: New MAP-21 and NDAA laws, and ACA rules

In 2012, Congress created a new whistleblower protection in the Moving Ahead for Progress in the 21st Century Act (**MAP-21**), P.L. 112-14 (Enacted July 6, 2012),

PRACTICE AREAS

Federal Employees
Private Sector Employees
Foreign Service Employees
Employer Defense
Disciplinary & Adverse Actions -MSPB & Grievances
Security Clearances
Discrimination
Retaliation
Family & Medical Leave
Mediation & ADR
Wrongful Termination
Whistleblowers
Reductions in Force
FOIA & Privacy Act

codified at 49 U.S.C. 30171. MAP-21 protects the employees of motor vehicle manufacturers, part suppliers, or dealerships when they raise concerns about defects or other noncompliance with the safety, reporting and notification requirements. This Act fills an important hole left by the Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2087; 29 C.F.R. Part 1983. Since auto safety is regulated by the National Highway Traffic Safety Administration (NHTSA), and not the Consumer Product Safety Commission, the CPSIA protection offered nothing to auto safety whistleblowers.2 Now MAP-21 provides that protection. Under MAP-21, the time limit to file an initial retaliation claim is 180 days. Once an employee shows the protected activity was a contributing factor in the adverse action, the employer can prevail only with clear and convincing evidence that it would have taken the same action without the protected activity. Once a case has been pending at the Department of Labor for 210 days without a final order, and the complainant has not caused that delay through bad faith, the complainant may file a civil action in U.S. District Court, and may demand a jury trial. MAP-21 does not provide for any punitive damages, and does not provide any protection from forced arbitration agreements. If a complainant files a frivolous claim, the Department of Labor may order reverse attorney's fees of up to $1,000.

On the first business day of 2013, President Obama signed the National Defense Authorization Act of 2013 (**NDAA FY13**), Public Law No. 112-239. Section 827 makes some improvements to the protection for employees of military contractors, 10 U.S.C. Section 2409, and expands this provision to include NASA contractors. It sets a two-year statute of limitations. Section 828 creates a new whistleblower protection for employees of federal contractors (except those in the intelligence community). Effective July 1, 2013, whistleblowers can file complaints with the Inspector General of the agency involved within three (3) years of the adverse action.

On February 27, 2013, OSHA issued interim final rules for handling whistleblower complaints under Section 1558 of the Affordable Care Act (**ACA**). See 29 C.F.R. Part 1984; 78 FR 13222. This section amended the Fair Labor Standards Act (FLSA) to add section 18C, 29 U.S.C. 218C. The law now protects employees from retaliation by an employer for qualifying for an Obamacare subsidy (and thus exposing the employer to a tax penalty). OSHA's Whistleblower Protection Program (DWPP) explains that certain large employers who fail to offer affordable plans that meet the 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. It also protects employees who raise concerns about compliance with the insurance provisions of the ACA. The time limit to file complaints with OSHA is 180 days.

Whistleblower or Retaliation Statute	Legal Citation	Statute of Limitations (SOL)	Where to File
First Amendment	U.S. Const., 1st 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 if violation is willful)	EEOC/state employment discrimination agency; private cause of action in state or federal court
Americans with Disabilities Act (ADA)	42 U.S.C. §12203(a) 29 C.F.R. Part 1640	180-300 days (45 days for federal employees)	EEOC/state employment discrimination agency; private cause of action in federal court
American Recovery and Reinvestment Act (ARRA)	Pub. L. 111-5, Section 1553; 48 C.F.R. § 3.907, and sequence	None in statute	Inspector General of the funding agency
Animal Welfare Act and Regulations (AWAR)	7 U.S.C. §2146; 9 C.F.R. § 2.32(c)(4)	None in statute	Secretary of Agriculture

Asbestos Hazard Emergency Response Act of 1986	**15 U.S.C. § 2651**	**90 days**	**DOL/OSHA**
Asbestos School Hazard Detection & Control Act	**20 U.S.C. § 3608**	**None in statute**	**None stated.**
Atomic Energy and Energy Reorganization Acts	**42 U.S.C. § 5851**	**180 days**	**DOL/OSHA**
Bank Secrecy Act (BSA)	**31 U.S.C. § 5328**	**2 years**	**Federal District Court**
Bankruptcy	**11 U.S.C. § 525(b)**		
Civil Rights Act of 1964 (Title VII)	**42 U.S.C. § 2000e-3(a)**	**180-300 days; 45 days for federal employees**	**EEOC/state employment discrimination agency; private cause of action in federal court**
Civil Rights of Institutionalized Persons Act	**42 U.S.C. § 1997d**	**None in statute**	**No private cause of action for employees recognized**
Civil Service Reform Act	**5 U.S.C. § 2302; 5 C.F.R. Part 1201**	**30 days**	**MSPB; except for "mixed cases" under Title VII**
Civil Service Reform Act (FBI employees)	**5 U.S.C. § 2303**	**None.**	**DOJ Inspector General; OARM**
Civilian Employees of the Armed Forces	**10 U.S.C. § 1587**		**Secretary of Defense/OPM, MSPB**

Civil War Reconstruction Era Federal Civil Rights Statutes	**42 U.S.C. §§ 1981, 1983, 1985, 1985(2) (witness protection)**	**28 U.S.C. § 1658(a) applies 4-year statute of limitation to laws enacted after December 1, 1990; otherwise most analogous state law applies**	**Federal district court**
Clayton Act (antitrust)	**15 U.S.C. § 15(a)**	**4 years-see 15 U.S.C. § 15(b)**	**Federal District Court, generally no standing recognized for employees**
Clean Air Act	**42 U.S.C. § 7622; 29 C.F.R. Part 24**	**30 days**	**DOL/OSHA**
Clean Water Act	**33 U.S.C. §1311, 1367(a), (b) , 29 C.F.R. Part 24**	**30 days**	**DOL/OSHA**
Coast Guard whistleblower protection [Commercial Fishing Industry Vessel Act] and Seaman's Protection Act	**46 U.S. C. § 2114 (as amended 2010)**	**180 days**	**DOL/OSHA**
Commercial Motor Vehicles Program (see STAA)	**49 U.S.C. § 31105, 29 C.F.R. Part 1978**	**180 days**	**DOL/OSHA**

Comprehensive Environmental Response, Compensation and Liability Act ("Super Fund")	**42 U.S.C. § 9610** **29 C.F.R. Part 24**	**30 days**	**DOL/OSHA**
Congressional Accountability Act	**2 U.S.C. § 1301, 1402**	**180 days**	**Office of Compliance of Congress**
Consumer Credit Protection Act (garnishments)	**15 U.S.C. § 1674**		**DOL Wage & Hour**
Consumer Financial Protection Bureau (CFPB) (part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010); per 12 U.S.C. § 5481(14), coverage includes the Alternative Mortgage Parity Act of 1982, 12 U.S.C. § 2801; Consumer Leasing Act of 1976, 15 U.S.C. § 1667; most of the Electronic Funds Transfer Act, 15 U.S.C. § 1693; Equal Credit Opportunity Act, 15 U.S.C. § 1691; Fair Credit Billing Act, 15 U.S.C. § 1666; most of the Fair Credit Reporting Act, 15 U.S.C § 1681; Home Owners Protection	**12 U.S.C. § 5567; 29 C.F.R. Part 1985**	**180 days**	**DOL/OSHA**

Act of 1998, 12 U.S.C. § 4901; Fair Debt Collection Practices Act, 15 U.S.C. § 1692; parts of the Federal Deposit Insurance Act, 12 U.S.C. § 1831t(c)-(f); parts of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6802-09; Home Mortgage Disclosure Act of 1975, 12 U.S.C § 2801; Home Ownership and Equity Protection Act of 1994, 15 U.S.C. § 1601 note; S.A.F.E. Mortgage Licensing Act of 2008, 12 U.S.C. § 5101; the Truth in Lending Act, 15 U.S.C. § 1601; the Truth in Savings Act, 12 U.S.C. § 4301; section 626 of the Omnibus Appropriations Act, Pub. L. No. 111-8; and the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701.			
Consumer Product Safety Improvement Act (CPSIA)	**15 U.S.C. § 2087; 29 C.F.R. Part 1983**	**180 days**	**DOL/OSHA, bypass option to federal court after 210 days**
Contractor Employees of the Armed Forces	**10 U.S.C. § 2409**	**3 years (for IG complaint), then 2 years for filing in**	**Inspector General of contracting agency; bypass option to federal**

		court (eff. 2013-07-01)	court after 210 days
Credit Union Employee Protection	12 U.S.C. §1790b	2 years	federal court
Defend Trade Secrets Act	18 U.S.C. §1833(b)	N/A	immunity from liability
Department of Energy Defense Activities Whistleblower Protection	42 U.S.C. § 7239	30 days to report violation; 90 days to report retaliation	Office of Hearings and Appeals
Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Commodity Exchange Act reward)	7 U.S.C. § 26; 17 C.F.R. 165	Before anyone else files	Commodity Future Trading Commission
Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (employee protection, see "Consumer Financial Protection Bureau" above for a list of covered laws)	12 U.S.C. § 5567 (no regulations now, but compare with SOX regs at 29 C.F.R. Part 1980)	180 days	DOL/OSHA
Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (obstruction of justice)	15 U.S.C. § 78u-6(h)(1)(A) and 18 U.S.C. § 1513(e)	3 years from learning of violation and 6 years from the violation	federal court
Dodd-Frank Wall	15 U.S.C. § 78u-6;	Before anyone	Securities

Street Reform and Consumer Protection Act of 2010 (Securities Exchange Act reward)	**17 C.F.R. Parts 240, 249**	**else files**	**Exchange Commission**
Education Amendments of 1972 (Title IX)	**20 U.S.C. § 1681, and sequence, implied claim under *Jackson v. Birmingham Bd. Of Ed.*, 544 U.S. 167 (2005)**	**None, consider state statute of limitations**	
Emergency Medical Treatment and Active Labor Act (EMTALA)	**42 U.S.C. § 1395dd(i)**	**None in § 1395dd(i); 2 years under 42 U.S.C. § 1395dd(d)(2)(C); consider also state statutes of limitations**	**Federal or state court**
Employee Polygraph Protection Act	**29 U.S.C. § 2002** **29 C.F.R. § 801 *et seq.*, esp. 801-40**	**3 years**	**DOL/Federal District Court/State Court**
Employee Retirement Income Security Act (ERISA)	**29 U.S.C. §1132(a), 1140**	**3 years**	**Federal District Court**
Energy Reorganization Act	**42 U.S.C. § 5851** **29 C.F.R. Part 24**	**180 days**	**DOL/OSHA, kick-out to federal court after one year**
Equal Pay Act	**29 U.S.C. § 206(d)**	**2 years; 3 years if**	**DOL or Federal district court**

		"willful" violation	
Fair Labor Standards Act (wage & hour, child labor, minimum wage, overtime)	29 U.S.C. § 215(a)(3) 29 C.F.R. Part 783	2 years; 3 years if "willful" violation	DOL, Federal District Court, or state court
False Claims Act (FCA) (qui tam provision)	31 U.S.C. § 3730(b)	6 years; and before anyone else files	Federal District Court, under seal
False Claims Act (retaliation provision)	31 U.S.C. § 3730(h)	3 years	Federal District Court; see also NDAA
Family and Medical Leave Act "[FMLA"]	29 U.S.C. § 2615	2 years (3 years if "willful" violation)	DOL, Federal District Court, or state court
Federal Acquisition Regulations (FAR)	48 C.F.R. § 3.900, and sequence		Consider False Claims Act and Inspector General of the funding agency
Federal Bureau of Investigation (FBI) employees	5 U.S.C. § 2303; 28 C.F.R. Part 27	None.	DOJ Inspector General; then OARM
Federal Credit Union Act (FCUA)	12 U.S.C. § 1790(b)	2 years	Federal District Court
Federal Deposit Insurance Corporation	12 U.S.C. § 1831j	2 years	Federal District Court
Federal Deposit	12 U.S.C. § 1831k	none for	federal banking

Insurance Corporation		**reward**	**agency**
Federal Employers Liability Act (FELA)	**45 U.S.C. § 60**		Federal employees suffering retaliation for making a claim may consider a WPA claim under 5 U.S.C. § 2302(b)(8) and (9)
Federal Home Loan Banks, Resolution Trust Corporation	**12 U.S.C. § 1441a**		
Federal Mine Health and Safety Act	**30 U.S.C. 815(c)**	**60 days**	**FMSHRC**
Federal Railroad Safety Act (FRSA)	**49 U.S.C. § 20109; 29 C.F.R. Part 1982**	**180 days**	**DOL/OSHA, bypass option to federal court after 210 days**
Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), covering banks with insurance from the Federal Deposit Insurance Corporation (FDIC)	**12 U.S.C. § 1831j**	**2 years**	**federal court**
Food Safety Modernization Act (FSMA), Section 402	**21 U.S.C. 399d**	**180 days**	**DOL/OSHA**
Foreign Corrupt Practices Act (FCPA),	**15 U.S.C. § 78u-6; 17 C.F.R. Parts 240,**	**3 years from learning of violation and 6**	**SEC for reward or federal court for retaliation**

as enforced through Dodd-Frank	249; 15 U.S.C. § 78u-6(h)(1)(A)	years from the violation	
Foreign Service Act of 1980	22 U.S.C. § 3905		
Immigration Reform and Control Act of 1986	8 U.S.C. § 1324b; 28 CFR 68.4	180 days	USDOJ, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices
Intelligence Authorization Act of 2014	50 U.S.C. § 3341(j)	90 days	Employing agency
Intelligence Authorization Act of 2014	50 U.S.C. § 3234; PPD-19; ICD-120; DOD, Directive-Type Memorandum 13-008	None	Inspector General
IRS whistleblower rewards	26 U.S.C. § 7623; IRS Manual, Part 25	In time for IRS to collect; and before anyone else files	IRS Whistleblower Office, using Form 211
International Safe Container Act of 1977	46 U.S.C. § 1506	60 days	DOL/OSHA
Health Insurance Portability and Accountability Act of 1996 (HIPAA)	29 C.F.R. § 164.502(j)	N/A	Whistleblower defense to claims of HIPAA violations

Jones Act (Maritime employees) [See also Seaman's Protection Act]	**46 U.S.C. § 688**		**Federal District Court, common law maritime tort implied.**
Jury Duty Act (for service on federal juries)	**28 U.S.C. § 1875**		**Federal District Court**
Labor Management Relations Act	**29 U.S.C. § 301**	**Varies with state law, sometimes 180 days**	**Federal District Court**
Lloyd-LaFollette Act	**5 U.S.C. § 7211**	**None in statute**	
Longshoreman's and Harbor Worker's Compensation Act	**33 U.S.C. § 948(a); 20 C.F.R. 702.271(b)**	**None**	**DOL, ESA District Director**
Major Fraud Act of 1989	**18 U.S.C. § 1031(h)**	**None in statute, consider state limitations**	**Federal District Court civil**
Merit Systems Protection Board	**5 U.S.C. § 7701(e) (civil service); 5 U.S.C. §§ 1214(a)(3), 1221 (WPA IRA); 38 U.S.C. § 713 (VA SES)**	**30 days (civil service); 60 days (WPA IRA); 7 days (VA SES)**	**MSPB**
Migrant and Seasonal Agricultural Workers Protection Act	**29 U.S.C. §§1854, 1855**	**180 days**	**DOL**
Military Whistleblower	**10 U.S.C. § 1034**	**1 year, 10 U.S.C. § 1034(c)**	**Office of Inspector**

Protection Act		**(5)**	**General, administrative remedy only, no private cause of action**
"Mixed cases" for federal employees under the Civil Service Reform Act	**5 U.S.C. § 7702**	**30 days (MSPB) or 45 days (Agency EEO)**	**After 120 days, option to file in federal court**
Monetary Transactions (also called the Bank Secrecy Act)	**31 U.S.C. § 5328**	**2 years**	**Federal District Court**
Moving Ahead for Progress in the 21st Century Act (MAP-21)	**49 U.S.C. § 30171**	**180 days**	**DOL / OSHA**
National Credit Union Act (NCUA)	**12 U.S.C. § 1790b**	**2 years**	**Federal District Court**
National Defense Authorization Act of 2013 (NDAA FY13), for employees of federal contractors	**Public Law No. 112-239, Section 828, 41 U.S.C. § 4712, and sequence; 48 C.F.R. § 3.900, and sequence**	**3 years**	**Inspector General of the agency involved; then federal district court**
National Labor Relations Act	**29 U.S.C. §158(a)(4)**	**6 months**	**NLRB**
National Transit Systems Security Act of 2007 (NTSSA)	**6 U.S.C. § 1142; 29 C.F.R. Part 1982**	**180 days**	**DOL / OSHA**
Occupational Safety	**29 U.S.C. § 660(c),**	**30 days**	**DOL/OSHA-no**

and Health Act	**29 C.F.R. Part 1977 ("Part 11(c)")**		**private cause of action**
Patient Protection and Affordable Care Act	**29 U.S.C. § 218C**	**180 days**	**DOL/OSHA**
Pipeline Safety Improvement Act	**49 U.S.C. § 60129; 29 C.F.R. Part 1981**	**180 days**	**DOL/OSHA**
Privacy Act	**5 U.S.C. § 552a**	**2 years**	**Federal District Court**
Public Health Service Act	**42 U.S.C. §1201 et seq. (1988), 42 C.F.R. Part 50, Subpart A, 42 C.F.R. §§ 50.103, 104**		**Administrative, within funded private entity**
Racketeer Influenced & Corrupt Organizations Act ("RICO")	**38 U.S.C. § 1961-68; 18 U.S.C. §1513(e)**	**4 years (applies Clayton Act statute of limitations); 3 years from discovery (under Dodd-Frank)**	**Federal District Court**
Rehabilitation Act	**29 U.S.C. § 794,29 C.F.R. §§ 1614, 1641, Chapter 60**		**Administrative, DOL/OFCCP; EEOC**
Safe Containers for International Cargo Act	**46 U.S.C. §1506**	**60 days**	**DOL/OSHA**
Safe Drinking Water	**42 U.S.C. §300j-9**	**30 days**	**DOL/OSHA**

Act			
Sarbanes Oxley Act (SOX)	**18 U.S.C. § 1514A; 29 C.F.R. Part 1980**	**180 days**	**DOL/OSHA, kick-out to federal court after 180 days**
Seaman's Protection Act (SPA) as amended by Section 611 of the Coast Guard Authorization Act of 2010	**46 U.S. C. § 2114; 29 CFR Part 1986**	**180 days**	**DOL/OSHA**
Sick leave for employees of federal contractors	**EO 13706; 29 C.F.R. § 13.41**	**None in regs**	**DOL/WHD**
Solid Waste Disposal Act (including RCRA)	**42 U.S.C. § 6971, 29 C.F.R. Part 24**	**30 days**	**DOL/OSHA**
Surface Mining Control and Reclamation Act	**30 U.S.C. §1293; 30 C.F.R. Part 865**	**30 days**	**Department of the Interior, Office of Surface Mining Reclamation and Enforcement**
Surface Transportation Assistance Act (STAA)	**49 U.S.C. § 31105, 29 C.F.R. Part 1978**	**180 days to file with OSHA; wait 210 days, then file in court**	**DOL/OSHA/kick-out to court**
Toxic Substances Control Act	**15 U.S.C. §2622** **29 C.F.R. Part 24**	**30 days**	**DOL/OSHA**
Uniformed Services Employment and	**38 U.S.C. § 4301, et seq., 38 U.S.C.**	**None; 38 U.S.C. § 4327(b)**	**Administrative (Secretary of**

Reemployment Rights Act of 1994 (USERRA)	**§4311(b)**		**Defense, OPM) or private suit in Federal District Court**
[Federal] Water Pollution Control Act ("Clean Water Act")	**33 U.S.C. §1311, 1367(a), (b) , 29 C.F.R. Part 24**	**30 days**	**DOL/OSHA**
Welfare and Pensions Disclosure Act	**29 U.S.C. §1140**	**3 year**	
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21")	**42 U.S.C. § 42121; 29 C.F.R. Part 1979**	**90 days**	**DOL/OSHA, bypass option to federal court after 210 days**
Whistleblower Protection Act (federal government employees)	**5 U.S.C. § 2302(b)(8) & (b)(9)**	**None.**	**Office of Special Counsel**
Workforce Investment Act, ("Welfare to Work"), formerly Job Training and Partnership Act (JTPA)	**29 U.S.C. §1574(g) or 29 U.S.C. § 2934(f)**		**DOL-but see 29 C.F.R. Part 37, §§ 629.51, 637.11**

If you know of any changes to the law not shown on this chart, let us know.

U.S. Department of Labor
Occupational Safety and Health Administration
Notice of Whistleblower Complaint

OMB # 1218-0236

INFORMATION ABOUT FILING A WHISTLEBLOWER OR RETALIATION COMPLAINT WITH OSHA

FOR ALL EMPLOYEES:

OSHA administers the whistleblower protection provisions of more than twenty whistleblower protection statutes, including Section 11(c) of the Occupational Safety and Health (OSH) Act, which prohibits any person from discharging or in any manner retaliating against any employee because the employee has complained about unsafe or unhealthful conditions or exercised other rights under the Act. Whistleblower protection provisions administered by OSHA also protect employees from retaliation for reporting violations of various airline, commercial motor carrier, motor vehicle safety, consumer product, environmental, consumer finance, food safety, health insurance reform, nuclear, pipeline, public transportation agency, railroad, maritime and securities laws.

Each law requires that complaints be filed within a certain number of days after the alleged retaliatory action; the time periods vary from 30 days to 180 days. For example, Section 11(c) of the OSH Act requires that a complaint be filed within 30 days of the alleged retaliatory action and the International Safe Container Act requires that a complaint be filed within 60 days of the action. Visit the Whistleblower Protection Programs' website at www.whistleblowers.gov, or call 1-800-321-OSHA (6742), for more information about these time limits.

A complaint of retaliation filed with OSHA must allege that the complainant engaged in activity protected by the whistleblower provisions (such as reporting a violation of law), the employer knew about or suspected that activity, the employer subjected the complainant to an adverse action or threatened such action, and the protected activity motivated or contributed to the adverse action. Adverse actions include discharge, demotion, blacklisting, denial of promotion, harassment and generally any other action that would dissuade a reasonable employee from engaging in protected activity.

Upon receipt of a complaint, OSHA will contact the complainant to determine whether to conduct an investigation. It is very important that a complainant respond to such contact; if a complainant is unresponsive, OSHA cannot proceed with an investigation and the complaint will be dismissed. If OSHA proceeds with an investigation, the complainant will have an opportunity to offer documents and other evidence in support of the complaint, and the employer will be notified of the allegation and permitted to submit a response.

BY LAW, A COMPLAINANT'S INFORMATION, INCLUDING HIS/HER IDENTITY, MUST BE PROVIDED TO THE EMPLOYER. A WHISTLEBLOWER COMPLAINT FILED WITH OSHA CANNOT BE FILED ANONYMOUSLY.

If, after an investigation, the evidence supports the complainant's allegations and a settlement cannot be reached, OSHA will generally issue an order requiring that the complainant be reinstated and paid back pay and damages, if appropriate, which the employer may contest. In cases under the Occupational Safety and Health Act, Asbestos Hazard Emergency Response Act, and the International Safe Container Act, the Secretary of Labor may file suit in federal district court to obtain relief. Under other statutes, the Secretary may order relief for the complainant, but the employer may contest that decision before an administrative law judge.

FOR PUBLIC-SECTOR EMPLOYEES:

Coverage of public-sector employees varies by statute. If you are a public-sector employee and you are unsure whether you are covered under one or more of the whistleblower protection statutes that OSHA administers, call 1-800-321-OSHA (6742) for assistance, or visit www.whistleblowers.gov.

With the exception of employees of the U.S. Postal Service, public-sector employees (those employed as municipal, county, state, territorial or federal workers) are not covered by the Occupational Safety and Health Act. Non-federal public-sector employees may be covered in states which operate their own occupational safety and health programs approved by Federal OSHA. For information on the 27 federally approved State Plan States, call 1-800-321-OSHA (6742) or visit www.osha.gov/dcsp/osp/index.html.

All Federal agencies are required to establish procedures to assure that no employee is subject to retaliation or reprisal for the types of activities protected by Section 11(c). A federal employee who wishes to file a complaint alleging retaliation due to disclosure of a substantial and specific danger to public health or safety or involving occupational safety or health should contact the Office of Special Counsel - visit www.osc.gov.

Federal employees should also contact their agency's Designated Agency Safety and Health Officer (DASHO). See 29 C.F.R. 1960.6 for more information regarding DASHOs.

For assistance filing a complaint with a DASHO, federal employees may contact OSHA's Office of Federal Agency Programs. For contact information, visit www.osha.gov/dep/enforcement/dep_offices.html.

INSTRUCTIONS TO COMPLETE FORM

It is not necessary to use this form. OSHA will accept whistleblower complaints made orally (telephone or walk-in) or in writing, and in any language.

For your form to be properly filed, you must complete the fields that are marked as "required." Fields not designated as "required" are optional, but you are encouraged to complete the form as completely and accurately as possible. Briefly describe each allegation of retaliation (what happened?). If there is any particular evidence that supports your allegation, include the information in your description. If there is not enough space on the form, use the continuation sheets. However, as noted above, information contained in this complaint will be shared with the employer. Therefore, **DO NOT INCLUDE WITNESS NAMES OR THEIR CONTACT INFORMATION ON THIS FORM OR IN YOUR INITIAL COMPLAINT FILING.**

After you have completed the form, you may submit it to your local OSHA office by mail, fax, or hand-delivery. Contact 1-800-321-OSHA (6742) or visit www.osha.gov to locate a local OSHA office.

After you submit this form to OSHA, an OSHA representative will contact you.

PRIVACY ACT STATEMENT

This form requests personal information that is relevant and necessary to determine whether and how to conduct an investigation. OSHA collects this information in order to process complaints under its statutory and regulatory authority. Once a complaint is filed, the individual's name and information about the allegations of retaliation will be disclosed to the employer. During the course of an OSHA investigation, information contained in an investigative case file may be disclosed to the parties in order to resolve the complaint. During an investigation, information about the complaining party and the employer will not be released to the public except to the extent allowed under the Freedom of Information Act (FOIA). However, once a case is closed, it is possible that information contained in the complaint or a case file may be released to the public as required by the FOIA. Any such documents will be redacted as appropriate under the FOIA and the Privacy Act.

PAPERWORK REDUCTION ACT STATEMENT

According to the Paperwork Reduction Act, an Agency may not conduct or sponsor, and no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. Public reporting burden for this voluntary collection of information is estimated to be one hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Directorate of Whistleblower Protection Programs, Department of Labor, Room N4624, 200 Constitution Ave., NW, Washington, DC; 20210; Attn: Paperwork Reduction Act Comment. (This address is for comments only; do not send completed complaint forms to this office.)

OMB Approval # 1218-0236; Expires: 07-31-2016

PART 1 – EMPLOYEE INFORMATION

1. Name (last, first, middle initial) (*required*):

2. Present Address (Street, City, State, Zip) (*required*):

3. Telephone Numbers (include area code) (*at least one required*):

Home: ( )

Work: ( )

Cell: ( )

4. Email Address:

5. Preferred Method of Contact:	6. Best time to be contacted (include time zone):

7. Work Site Address at Place of Employment where Alleged Retaliation Occurred (Street, City, State, Zip):

8. Date of Hire at Place of Employment where Alleged Retaliation Occurred:

9. Job Title at Place of Employment where Alleged Retaliation Occurred:

10. Exclusive bargaining (union) representative (if any):

☐ Yes ☐ No ☐ I don't know

11. The person filing this complaint is (check one box):

☐ Employee ☐ Representative of Employee

☐ Other (specify)

If you are an authorized representative of the complainant, please complete Part 4 – Identification of Representative.

PART 2 – EMPLOYER CONTACT INFORMATION

12. Employer Name (*required*):

13. Name and Title of Management Person (for contact purposes only):

Name:

Title:

Phone:

14. Name and Title of Supervisor:

Name:

Title:

15. Employer Mailing Address (if different from worksite address in #7):

16. Employer Phone:	17. Employer Fax:
( )	( )

18. Employer Email:

19. Type of Business:

PART 3 – ALLEGATION OF DISCRIMINATION

Please answer the questions below in the space provided. If you need additional space, use the attached "Continuation Sheet."

20. What management person is responsible for the retaliation that you are reporting?

Name:

Position/Title:

21. What are the actions or events that you are reporting to OSHA? *You may check one or more of the boxes below, and/or describe the action(s) in the space provided.* (*required*)

□ Termination □ Discipline □ Demotion/Reduced Hours
□ Denial of Benefits □ Failure to Promote □ Negative Performance Evaluation
□ Failure to Hire/Re-Hire □ Harassment □ Suspension
□ Threat to Take any of the Above Actions □ Other (please describe):

22. When did the employer take these actions against you? *Please list all relevant date(s) to the best of your recollection. If you cannot remember the exact date(s), please put the approximate date(s).*

23. When did you first learn that the action(s) would be taken against you? *Please list all relevant dates(s) to the best of your recollection. If you cannot remember the exact date(s), please put the approximate date(s).*

24. What reason(s) did the employer give you for each of these actions?

25. Why do you believe the employer took these actions against you? *You may check one or more of the boxes below, and/or describe the reason in the space provided.*

□ Called/Filed with OSHA
□ Called/Filed with Another Agency
□ Complained to Management
□ Reported an Accident or Injury
□ Participated in Safety and Health Activities
□ Refused to Perform Task (please specify reason for refusal)
□ Testified or provided statement in investigation or other proceedings (please specify)
□ Other (please describe)

26. For any of the actions you listed in #25, please provide the relevant date(s) you engaged in that activity.

27. Do you believe the employer knew you engaged in the activity described in #25? If so, how do you think they learned of it?

28. Have you filed any previous complaints against this employer with OSHA regarding these or similar retaliatory actions?

☐ Yes ☐ No

If yes, please provide the complaint number and date filed.

Complaint Number:

Date filed:

29. Have you taken any other action(s) to appeal, grieve, or report this matter under any other procedure?

☐ Yes ☐ No

If yes, please list the agency/organization(s) with whom you have appealed/grieved/reported this matter, the date filed, the current status of the procedure, and any outcome:

30. How did you first become aware that you could file a complaint with OSHA?

☐ OSHA Website ☐ OSHA Poster ☐ News story ☐ OSHA Representative ☐ Union ☐ Other (please describe):

PART 4 – IDENTIFICATION OF REPRESENTATIVE

Complete this part if you are an authorized representative of the complainant. If an investigation is opened, you will be asked to submit a signed Designation of Representative Form that will be sent to you.

If you are filing this complaint on your own behalf, do NOT complete this part.

Name:

Title:

Organization Name (if any):

Union Affiliation (if any):

Address (Street, City, State, Zip Code):

Phone (day): ( )

Phone (cell): ( )

Email:

☐ By checking this box, I certify that the named employee has authorized me to act as their representative for purposes of this complaint.

PART 5 – CERTIFICATION

NOTE: It is unlawful to make any materially false, fictitious, or fraudulent statement to an agency of the United States. Violations can be punished by a fine or by imprisonment of not more than five years, or by both. See 18 U.S.C. 1001(a); 29 U.S.C. 666(g).

☐ By checking this box, I certify that the information in this complaint is true and correct to the best of my knowledge and belief.

Date:

CONTINUATION SHEET

Page No. __ of __

Part No. Continuation	Item/Question No.	Response

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the attention of:

AUG 23 2016

MEMORANDUM FOR: REGIONAL ADMINISTRATORS;
WHISTLEBLOWER PROGRAM MANAGERS

THROUGH: DOROTHY DOUGHERTY
Deputy Assistant Secretary

JORDAN BARAB
Deputy Assistant Secretary

FROM: MARYANN GARRAHAN, Director
Directorate of Whistleblower Protection Programs

SUBJECT: New policy guidelines for approving settlement agreements in whistleblower cases

As part of OSHA's administration of whistleblower protection statutes, OSHA reviews settlement agreements between complainants and their employers reached during the investigative stage to ensure they are fair, adequate, reasonable, and in the public interest, and that the employee's consent was knowing and voluntary. In reviewing these agreements OSHA sometimes encounters provisions that prohibit, restrict, or otherwise discourage a complainant from participating in protected activity related to matters that arose during his or her employment. In those cases, OSHA must ensure that such clauses are removed or clarified so that the agreements are lawful and consistent with the underlying purposes of the whistleblower protection statutes. Accordingly, below are updated criteria that OSHA will use to evaluate whether a settlement impermissibly restricts or discourages protected activity.

This guidance supersedes the guidance in Chapter 6, paragraphs XII.E.2 and 3 of the OSHA Whistleblower Investigations Manual, but does not otherwise change OSHA's policies with regard to review of settlements:

Criteria for Reviewing Private Settlements for Provisions that Restrict or Discourage Protected Activity

OSHA will not approve a "gag" provision that prohibits, restricts, or otherwise discourages a complainant from participating in protected activity. Protected activity includes, but is not limited to, filing a complaint with a government agency, participating in an investigation, testifying in proceedings, or otherwise providing information to the government. These constraints often arise from broad confidentiality or non-disparagement clauses, which complainants may interpret as restricting their ability to engage in protected activity. Other times, these constraints are found in specific provisions, such as the following:

a. A provision that restricts the complainant's ability to provide information to the government, participate in investigations, file a complaint, or testify in proceedings based on a respondent's past or future conduct. For example, OSHA will not approve a provision that restricts a complainant's right to provide information to the government related to an occupational injury or exposure.

b. A provision that requires a complainant to notify his or her employer before filing a complaint or voluntarily communicating with the government regarding the employer's past or future conduct.

c. A provision that requires a complainant to affirm that he or she has not previously provided information to the government or engaged in other protected activity, or to disclaim any knowledge that the employer has violated the law. Such requirements may compromise statutory and regulatory mechanisms for allowing individuals to provide information confidentially to the government, and thereby discourage complainants from engaging in protected activity.

d. A provision that requires a complainant to waive his or her right to receive a monetary award (sometimes referred to in settlement agreements as a "reward") from a government-administered whistleblower award program for providing information to a government agency. For example, OSHA will not approve a provision that requires a complainant to waive his or her right to receive a monetary award from the Securities and Exchange Commission, under Section 21F of the Securities Exchange Act, for providing information to the government related to a potential violation of securities laws.[1] Such an award waiver may discourage a complainant from engaging in protected activity under the Sarbanes-Oxley Act, such as providing information to the Commission about a possible securities law violation. For the same reason, OSHA will also not approve a provision that requires a complainant to remit any portion of such an award to respondent. For example, OSHA will not approve a provision that requires a complainant to transfer award funds to respondent to offset payments made to the complainant under the settlement agreement.

OSHA occasionally encounters settlements that require a breaching party to pay liquidated damages. As liquidated damages are sometimes unenforceable, OSHA reserves the right not to approve a settlement where the liquidated damages are clearly disproportionate to the anticipated loss to the respondent of a breach. OSHA may also consider whether the potential liquidated damages would exceed the relief provided to the complainant, or whether, owing to the

[1] Other statutes that establish award programs for individuals who provide information directly to a government agency include the Commodity Exchange Act, 7 U.S.C. 26(b); Foreign Corrupt Practices Act, 15 U.S.C. 78u-6(b); Internal Revenue Act, 26 U.S.C. 7623(b); and the Motor Vehicle Safety Whistleblower Act, 49 U.S.C. 30172.

complainant's position and/or wages, he or she would be unable to pay the proposed amount in the event of a breach.

When the above types of provisions are encountered, or settlements have broad confidentiality and non-disparagement clauses that apply "except as provided by law," employees may not understand their rights under the settlement. Accordingly, OSHA will ask parties to remove the offending provision(s) and/or add the following language prominently positioned within the settlement: "**Nothing in this Agreement is intended to or shall prevent, impede or interfere with complainant's non-waivable right, without prior notice to Respondent, to provide information to the government, participate in investigations, file a complaint, testify in proceedings regarding Respondent's past or future conduct, or engage in any future activities protected under the whistleblower statutes administered by OSHA, or to receive and fully retain a monetary award from a government-administered whistleblower award program for providing information directly to a government agency.**"