

Labor X Tech: Know Your Rights!

2019-11-21

Presented by:

Tech Workers Coalition DC (TWC DC),

<https://techworkerscoalition.org/dc/>



Labor Working Group of the Metro DC Democratic Socialists of America.

<https://mdcdsa.org/>



This slideshow is available at:

www.taterenner.com/tech.pdf

Kalijarvi, Chuzi, Newman & Fitch, P.C.

By: Richard Renner
Kalijarvi, Chuzi, Newman & Fitch, PC
Washington, DC
(202) 331-9260
rrenner@kcnlaw.com
www.kcnfdc.com



Acknowledgments

Thank you to the following for their contributions:

NLRA info by:
Lindsey M. Williams
Pittsburgh Federation of Teachers
10 South 19th St, at River
Pittsburgh, PA 15203
(415) 431-5900
lindsey_williams@pft400.org

FCA and NDAA info by:
Jason Zuckerman
Zuckerman Law
Washington, D.C.
(202) 262-8959
jzuckerman@zuckermanlaw.com
www.zuckermanlaw.com

Agenda

- Whistleblower reward programs
- NLRA – unions and concerted activity
- Federal whistleblower protection laws
- State statutory and common law whistleblower protections
- Other issues, accommodation, paid leave, ethical supervising

Themes

- Hard to find all the options, so if that quiet voice is saying, “there oughta be a law...” ask around
- The boundaries are not so rigid. They move if you push on them.
- There are still some big gaping holes in our web of protection.

Free Speech

- Industry by industry approach
- Congress responds to dead bodies
- But only to some dead bodies
- Gaping holes remain
- Trying to do it all in one law would unite employers in opposition

Reward Claims

- Federal and state FCAs
- SEC and CFTC
- IRS
- FIRREA

Reward Claims – FCA

- Looking for big or numerous frauds against the government
- 30 states have “Little FCAs,” listed at <http://www.taf.org/states-false-claims-acts>
- Corporate fraud may affect state and local pension fund holdings
- Retaliation claims can be joined, or raised to the IG through NDAA, or both.

FCA example: James Glenn

- Reported that Cisco's VSM permitted unauthorized access and control, violating NIST cybersecurity standards
- Cisco kept on selling it anyway
- Cisco paid \$8.6 million to settle the case
- Glenn got a 20% award \$1.72 million in 2019.

Reward Claims – FCA

- First to file rule
- Whistleblowers must respect the seal – don't disclose possible or existing court case, except to your lawyer
- Assess client culpability
- No press release, serve only the government
- Public disclosure will add burden to show client is the original source
- Pleading with specificity, FRCP 9

SEC Whistleblower Program

- Voluntarily provides the SEC with **original information** about violation of the federal securities laws
- Information provided must lead to a **successful SEC action** resulting in an order of monetary sanctions **exceeding \$1 million**
- Need not be employed at the company to make an eligible disclosure
- Payment can range from 10% to 30% of collected sanctions

Key Facets of SEC Whistleblower Program

- Anonymity
- Protecting whistleblowers from retaliation
- Prohibition against gag clauses in employment agreements and company policies

Reward Claims – IRS

- For IRS recoveries over \$2 million
- Submit Form 211 <http://www.irs.gov/uac/Whistleblower-Informant-Award>
- Enter a notice of appearance with IRS Form 2848.
- Average duration is 8 years
- If the IRS denies a claim, an appeal to Tax Court is available. See Internal Revenue Code (IRC) Section 7623(b)
- Biggest award so far, \$104 million

Reward Claims – FIRREA

- Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 4203
 - Awards limited to \$1.6 million
 - Limited gov't investigation time
 - Unusual fees clause
- Can cover frauds against non-governmental entities
- Submit declaration to DOJ

NLRA

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

NLRA

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

NLRA

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

NLRA Coverage

- Employer is defined 29 U.S.C. § 152(2):
 - Not a government
 - Not under Railway Labor Act (RR and airlines)
 - Yes, non-profits are included
 - Must affect interstate commerce
 - Joint employers might all be liable

NLRA Coverage

- Employee is defined 29 U.S.C. § 152(3):
 - Not a truly independent contractor
 - Non-agricultural
 - Not domestic servants
 - Not supervisors or managers
 - Yes, employees can act in concert with the employees of other employers

NLRA: policies as ULPs

- March 18, 2015, NLRB General Counsel memo:
 - [Removed from NLRB web page](#)
 - the mere maintenance of a work rule may violate Section 8(a)(1) of the Act if the rule has a chilling effect on employees' Section 7 activity.
 - The most obvious way a rule would violate Section 8(a)(1) is by explicitly restricting protected concerted activity; by banning union activity, for example.

NLRA

- Even if a rule does not explicitly prohibit Section 7 activity, however, it will still be found unlawful if
 - 1) employees would reasonably construe the rule's language to prohibit Section 7 activity;
 - 2) the rule was promulgated in response to union or other Section 7 activity; or
 - 3) the rule was actually applied to restrict the exercise of Section 7 rights.

NLRA

- Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as with nonemployees, such as union representatives.
- Thus, an employer's confidentiality policy that either specifically prohibits employee discussions of terms and conditions of employment—such as wages, hours, or workplace complaints—or that employees would reasonably understand to prohibit such discussions, violates the Act.
- Similarly, a confidentiality rule that broadly encompasses "employee" or "personnel" information, without further clarification, will reasonably be construed by employees to restrict Section 7-protected communications. See Flamingo-Hilton Laughlin, 330 NLRB 287, 288 n.3, 291-92 (1999).

NLRA

- Examples of unlawful policies:
 - Do not discuss "customer or employee information" outside of work, including "phone numbers [and] addresses."
 - "You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer's] associates was obtained in violation of law or lawful Company policy)."

NLRA

- Examples of unlawful policies:
 - “Never publish or disclose [the Employer's] or another's confidential or other proprietary information.”
 - “Never publish or report on conversations that are meant to be private or internal to [the Employer].”
 - Prohibiting employees from “[d]isclosing ... details about the [Employer].”
 - “Sharing of [overheard conversations at the work site] with your coworkers, the public, or anyone outside is strictly prohibited.”

NLRA

- Examples of unlawful policies:
 - "Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information.. .. Do not discuss work matters in public places."
 - "[I]f something is not public information, you must not share it."

NLRA: Enforcement

- Statute of limitations for NLRB charges against employers is 6 months.
- NLRB staff like to help workers draft their charges, so allow additional time for this.
- NLRB has staff attorneys who will present cases to the ALJ.
- Workers have a right to their own attorney, but do not need to have an attorney.
- Normally, no attorney's fees are awarded.
- www.nlr.gov
- Enforcement is political

Federal Whistleblower Protections

- 22 statutes enforced through DOL
- Dodd-Frank
- Protections for government contractors (FCA, NDAA and 10 U.S.C. § 2409)
- A list is at: <https://kcnfdc.com/most-legal-claims-have-time-limits/>

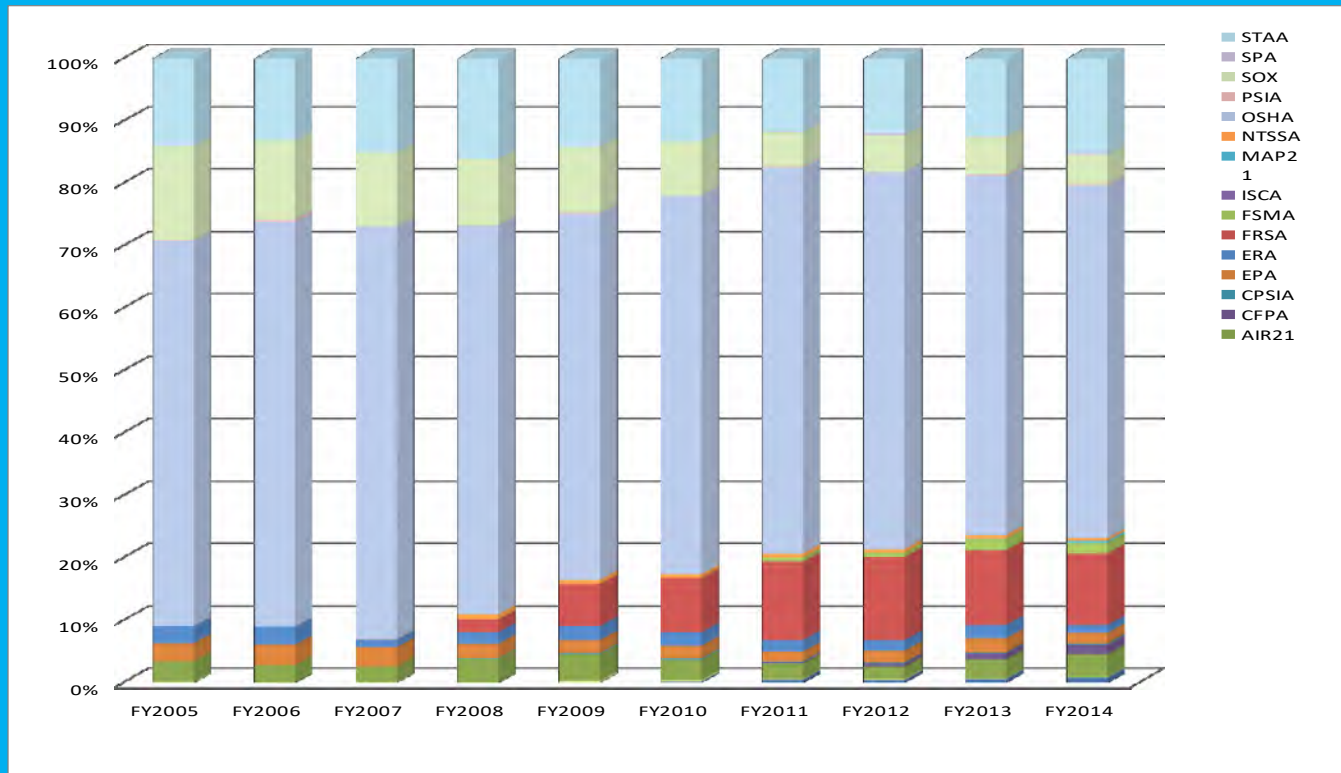
Federal Whistleblower Protections

- See OSHA desk aid for comparison of statutes
- Most of the DOL whistleblower laws set forth the following procedural scheme:
 - File at OSHA (SOL varies from 30 to 180 days)
 - OSHA investigates and under some of the laws, can order preliminary reinstatement
 - Discovery and hearing before ALJ
 - Appeal to ARB
 - Appeal to Circuit Court of Appeals
 - Some of the laws have a “kick out” provision

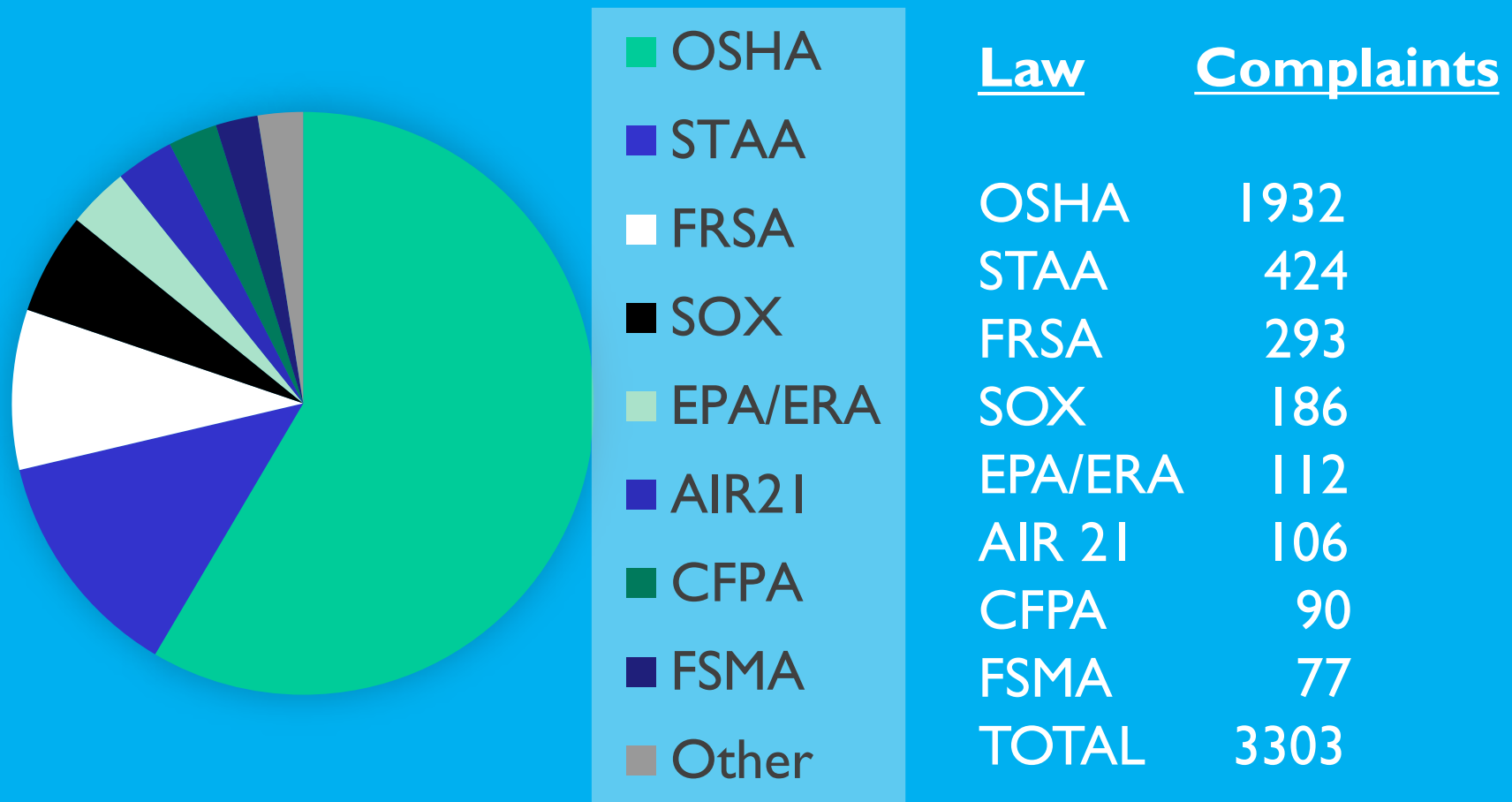
**Occupational Safety and Health Administration
Directorate of Whistleblower Protection Programs (DWPP)
Whistleblower Statutes Desk Aid**

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compensatory	Punitive	Days	Venue	
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

OSHA Statistics



Almost 60% of the 3000+ whistleblower complaints to OSHA annually are under Section 11(c) of the OSH Act



Source: OSHA Complaints Received FY 2017, available at <https://www.whistleblowers.gov/sites/default/files/3DCharts->

Federal Whistleblower Protections

Elements:

- Protected Conduct (reasonable belief)
- Adverse Action
- Knowledge (except for *per se* violations and employer's mistaken belief)
- Causation (motivating or contributing factor)

Reasonable Belief

- *Sylvester v. Parexel Int'l*, ARB No. 07-123, 2011 WL 2165854 (ARB May 25, 2011)
 - Disclosure of **potential violation** protected
 - A complaint need not allege shareholder fraud
 - SOX complainants no longer need to show that their disclosures “definitively and specifically” relate to the relevant laws
 - No magic words required (e.g., fraud or misrepresentation)
 - Reasonable but mistaken belief protected
 - No requirement to tell employer about the basis of the reasonable belief
 - No requirement to investigate (*Wadler v. Bio-Rad Labs., Inc.*, 916 F.3d 1176, 1188 (9th Cir. 2019); but see, *Wallace v. Andeavor Corp.*, 916 F.3d 423, 428 (5th Cir. 2019))

Federal Whistleblower Protections

DOL Advantages:

- Administrative investigation
- Employer's first response may contain helpful admissions
- Preliminary reinstatement can prompt favorable settlement
- SOX claims are not subject to arbitration
- No counterclaims at DOL (sanctions for frivolous claims are rarely imposed)

Federal Whistleblower Protections

DOL Disadvantages:

- 11(c) and environmental SOL: 30 days
- OSHA is swamped and slow
- OSHA investigation is not due process
- Pressing a legal issue may require going to ALJ
- Parties must be named for whole kick-out time period: *Tamosaitis v. URS, Inc.*, 771 F.3d 539, 547 (9th Cir. 2014))

OSHA Enforcement

“Reasonable Cause” Standard

OSHA’s investigation must reach an objective conclusion that a reasonable judge could believe a violation occurred. The evidence does not need to establish conclusively that a violation *did* occur.

“Although OSHA will need to make some credibility determinations to evaluate whether a reasonable judge could find in the complainant’s favor, OSHA does not necessarily need to resolve all possible conflicts in the evidence or make conclusive credibility determinations to find reasonable cause to believe that a violation occurred.”

See OSHA Whistleblower Investigations Manual (published 1/28/2016)

<https://www.whistleblowers.gov/policy/directives>

Protected Activity under SOX

- (1) Providing information, causing information to be provided, or otherwise assisting criminal investigators, federal regulators, Congress, complainant's supervisors, or people working for the employer who have authority to investigate, discover, or terminate misconduct regarding actions which complainant reasonably believes are violations of fraud laws or SEC rules and regulations. (18 USC Section 1514A(a)(1))
- (2) Filing, causing to be filed, testifying, participating in, or otherwise assisting in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of fraud laws or SEC rules and regulations. (18 USC Section 1514A(a)(2))

Distinctions Between Section 806 of SOX and Section 922A of Dodd-Frank (JZ)

	SOX	Dodd-Frank
Administrative exhaustion	Must file initially at OSHA	No administrative exhaustion requirement
Statute of limitations	180 days	3-10 years
Right to jury trial	Y	N
Exempt from mandatory arbitration	Y	N
Causation standard	Contributing factor	“but for” causation (although not sole cause)
Double back pay	N	Y
Special damages (emotional distress and reputational harm)	Y	N

Whistleblower Protections for Government Contractors

- False Claims Act, 31 USC 3730(h)
- Sections 827 and 828 of 2013 NDAA, 10 U.S.C. § 2409 and 41 U.S.C. § 4712

Being an ethical supervisor

- Respectful communication
- Focus on the mission
- Be mindful of adverse actions – they need legitimate non-discriminatory reasons (LDNRs)
- Join SHRM, Ethics & Compliance Initiative (ECI)

DC Paid Leave

- Company Size Determines Number of Sick Days:
 - 1-24 employees: 3 days
 - 25-99 employees: 5 days
 - 100+ employees: 7 days
 - Tipped workers: 5 days
- Effective July 2019: paid family leave, too.

Reasonable Accommodation

- What is a “disability”
 - Mental or physical
 - Affects major life activity
- Interactive process
- Essential job functions
- Must be willing to deviate from normal rules

False Claims Act

Whistleblower Protection



FCA Whistleblower Protection

31 USC 3730(h) protects:

- acts taken "in furtherance of an [FCA] action," and
- "other efforts to stop" FCA violations

Heightened pleading standard does not apply

Need not prove actual FCA violation

Need not file a *qui tam* claim

FCA Whistleblower Protection

No administrative exhaustion requirement

Need not file retaliation claim under seal

3 year statute of limitations

Available remedies include double back pay,
uncapped special damages (emotional distress
and reputational harm), reinstatement, and
attorney's fees

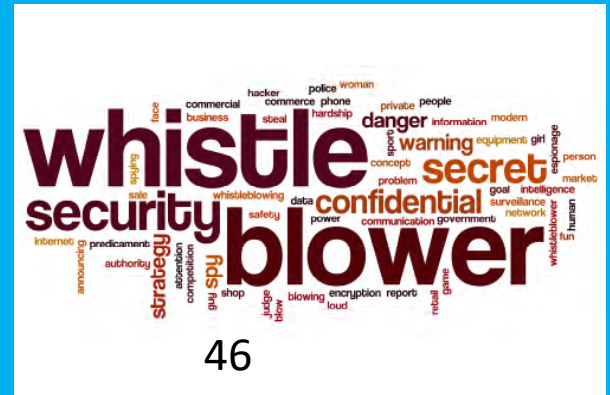
NDAA Whistleblower Provisions

Covers employees of nearly all government contractors, subcontractors and grantees, and personal services contractors

- Excludes contractors of Intelligence agencies

DoD, NASA, and Coast Guard Contractors, 10 U.S.C. § 2409

Contractors of other agencies, 41 U.S.C. § 4712



NDAA Protected Conduct

- Broad scope of protected conduct
 - Violation of law, rule, or regulation relating to federal contracts, including competition for or negotiation of a contract;
 - Gross mismanagement, gross waste of federal funds, abuse of authority; or
 - Substantial and specific danger to public health or safety

NDAA Retaliatory Adverse Actions

NDAA whistleblower provisions bar a broad range of retaliatory acts, including:

discharging;

demoting; or

otherwise discriminating against a whistleblower.

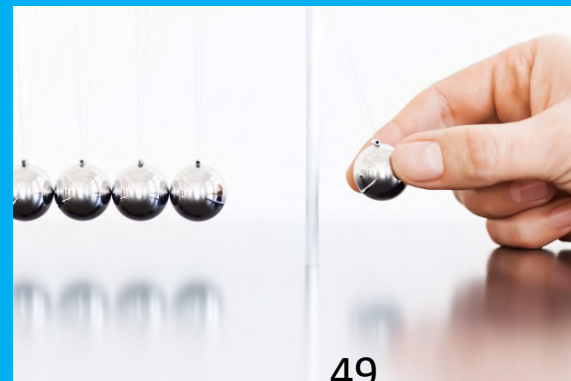


Causation and Affirmative Defense

“Contributing factor” causation

Knowledge and timing suffice (WPA standard)

Same-decision affirmative defense must be proven by clear and convincing evidence



Procedure

Must file initially with OIG

Complainant can remove to federal court 210 days after filing; and has 2 years from the date of exhaustion to file *de novo* action

OIG investigates and issues report

Not later than 30 days after receiving IG report, agency head required to act on findings

Contractors and grantees have 60 days from the issuance of an order to appeal to Circuit Court.

Remedies

Reinstatement

Back pay

Uncapped compensatory damages (emotional distress damages); and

Attorney fees and costs



Prohibition Against “Gag Clauses” in NDAs

Federal Acquisition Regulation 3.909

Effective January 2017

Prohibits confidentiality agreements that prevent employees from reporting waste, fraud, or abuse to the government



FCA or NDAA?



Distinctions Between FCA and NDAA

	FCA Anti-Retaliation Provision	Sections 827 and 828 of NDAA
Coverage	Employee, contractor, or agent	Employee of a contractor, subcontractor, or grantee/personal services contractor
Protected Conduct	Lawful acts done by the employee, contractor, agent or associated others 1) in furtherance of an action under the FCA or 2) other efforts to stop 1 or more violations	<ul style="list-style-type: none"> -Violation of law, rule, or regulation related to a federal contract -Gross mismanagement of a federal contract or grant -Gross waste of federal funds -Abuse of authority relating to a federal contract or grant -Substantial and specific danger to public health or safety
Administrative Exhaustion	File directly in federal court	Must file initially at OIG; can remove to federal court after 210 days
Causation Standard	"But for" causation (not sole factor)	Contributing Factor
Jury Trial	Y	Y
Damages	Double back pay, reinstatement, special damages (emotional distress damages and harm to reputation), attorney fees	Back pay, reinstatement, special damages, attorney fees
Statute of Limitations	3 years	3 years

State Statutory and Common Law Whistleblower Protections

- All praise to Montana for its Wrongful Discharge from Employment Act (WDEA), Montana Code Ann. 39-2-901
- and New Jersey, for its Conscientious Employee Protection Act (CEPA), NJSA 34:19, 1 year SOL
- Stay away from Georgia
- Time limits vary
- Vary on preempting statutory claims, protecting internal disclosures, redressing non-termination adverse actions
- See a chart at <http://www.taterenner.com/stchart.php>

State Statutory and Common Law Whistleblower Protections

- Possible advantages:
- Jury trials
- Favorable *voir dire*
- Punitive damages
- Court may prefer trials to summary judgment
- Usually no exhaustion requirement
- Legal doctrines may be more favorable. See, e.g., *Haas v. Lockheed Martin*, 396 Md. 469, 914 A.2d 735 (2006) (rejecting Ricks/Chardon Rule and joining Hawaii, California and New Jersey in using actual discharge, not notice, to start time to file)

State Statutory and Common Law Whistleblower Protections

- Possible disadvantages:

1. Some states limit scope of protection, remedies

As federal remedies expand, some states will constrict their tort remedies.

2. Whistleblower plaintiff might not be attractive to jury

3. Federal claims may permit removal to federal court

4. State courts may be less guided by the remedial purpose.

See, e.g., *Tamosaitis v. Bechtel Nat., Inc.*, 182 Wash. App. 241, 249, 327 P.3d 1309, 1313 (2014)

State Statutory and Common Law Whistleblower Protections

- Further disadvantages:
 - 5. No attorney fees or stingier attorney fees
 - 6. Many states do not apply a reasonable belief standard and instead require a showing of an actual violation; and
 - 7. Sometimes the causation standard is far more onerous than contributing factor (in some states, it is sole cause).
- Stay away from Georgia

Interaction with Reward Claims

- If retaliation claim is not under seal, it may open the door for employer discovery
- Breaching seal waives FCA reward, even if compelled
- May require AUSA intervention
- A general release is likely to waive FCA reward. Why bring a claim you cannot settle?

Interaction with Reward Claims

- Warning client about compliance with seal and potential unsealing
- Counseling current employee on internal whistleblowing where client has potential qui tam, IRS, SEC or CFTC reward claim

Claim and Forum Selection

- Choosing between federal and state claims causation standard
 - Burden to establish protected conduct
 - Remedies
 - Statutes of limitations
- Administrative exhaustion
- Maximizing Damages

Claim and Forum Selection

- Federal court removal option in some DOL whistleblower laws
- Arbitration
- Claim splitting and collateral estoppel
- Pleading whistleblower retaliation claims

Document Dilemmas

- Self-help discovery
 - *Vannoy v. Celanese Corp.*, ALJ Case No. 2008-SOX-00064, ARB Case No. 09-118 (ALJ July 24, 2013) (disclosing confidential company information to IRS can be protected under SOX)
 - *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1061-62 (9th Cir. 2011) (affirming damages for breach of confidentiality agreement for indiscriminate taking of 11GB of data, including privileged information and trade secrets)
 - SEC Rule 21F-17 prohibits actions that “impede communications to the Commission about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement ” or order.

Document Dilemmas

- Self-help discovery
 - *Niswander v. Cincinnati Insurance Co.*, 529 F.3d 714, 726 (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.*, 8 A.3d 209, 204 N.J. 239 (2010) (New Jersey Law Against Discrimination)
 - *Department of Homeland Security v. MacLean*, 135 S. Ct. 913, 190 L. Ed. 2d 771 (2015)

Using Company Documents in Whistleblower Case

- Current employees should be cautious when taking documents
 - Are you permitted to see the document?
 - Are there legal restrictions on the use of documents? Classified? Other laws?
 - Ideally, do not comingle personal and work data
 - Focus on access permitted by employer and reasonable belief of relevance
- Avoid mass, indiscriminate downloading
- Assume that employer will perform forensic analysis of client's work computer and network activity
- Privileged documents may require specific legal assessments
- If client potentially has privileged communications, warn DOJ/SEC/CFTC so that they can screen the documents using taint team

Using Company Documents in Whistleblower Case

- Determine early on what client possesses and how client obtained the information
- Warn client about gathering evidence post-termination or resignation
- If pursuing only retaliation claim, consider having current employee index key documents and provide the documents to in-house or outside counsel for preservation
- Consider retaining computer forensics expert to create bit-by-bit image of client's computer
- Work with SEC/CFTC/DOJ to shield client's identity when agency requests documents from employer

Additional Resources

- <https://kcnfdc.com/most-legal-claims-have-time-limits/>
- <https://www.whistleblowers.gov/>
- <https://www.oalj.dol.gov/>
- <https://techworkerscoalition.org/dc/>
- <https://mdcdsa.org/>

Richard R. Renner



KCNFDC.COM

Direct  202.466.8696

 rrenner@kcnlaw.com

 @KCNFDC



@Kalijarvi, Chuzy, Newman & Fitch, P.C.



Thank You