Overview of Whistleblower Laws

Richard R. Renner
Kalijarvi, Chuzi, Newman & Fitch, P.C.
1901 L St. NW, Suite 610
Washington, DC 20036
(202) 466-8696 direct
(202) 331-9260 office
(202) 664-9056 mobile
1-877-527-0446 fax

Thad Guyer
T.M. Guyer and Ayers & Friends, PC
116 Mistletoe St.
Medford OR 97501
(541) 210-1305
Seattle: (206) 535-2395
Washington: (202) 417-3910
Fax: 1 (888) 866 4720
thad@GuyerAyers.com

Thank you

Lindsey M. Williams
Pittsburgh Federation of Teachers
10 South 19th St, at River
Pittsburgh, PA 15203
(415) 431-5900

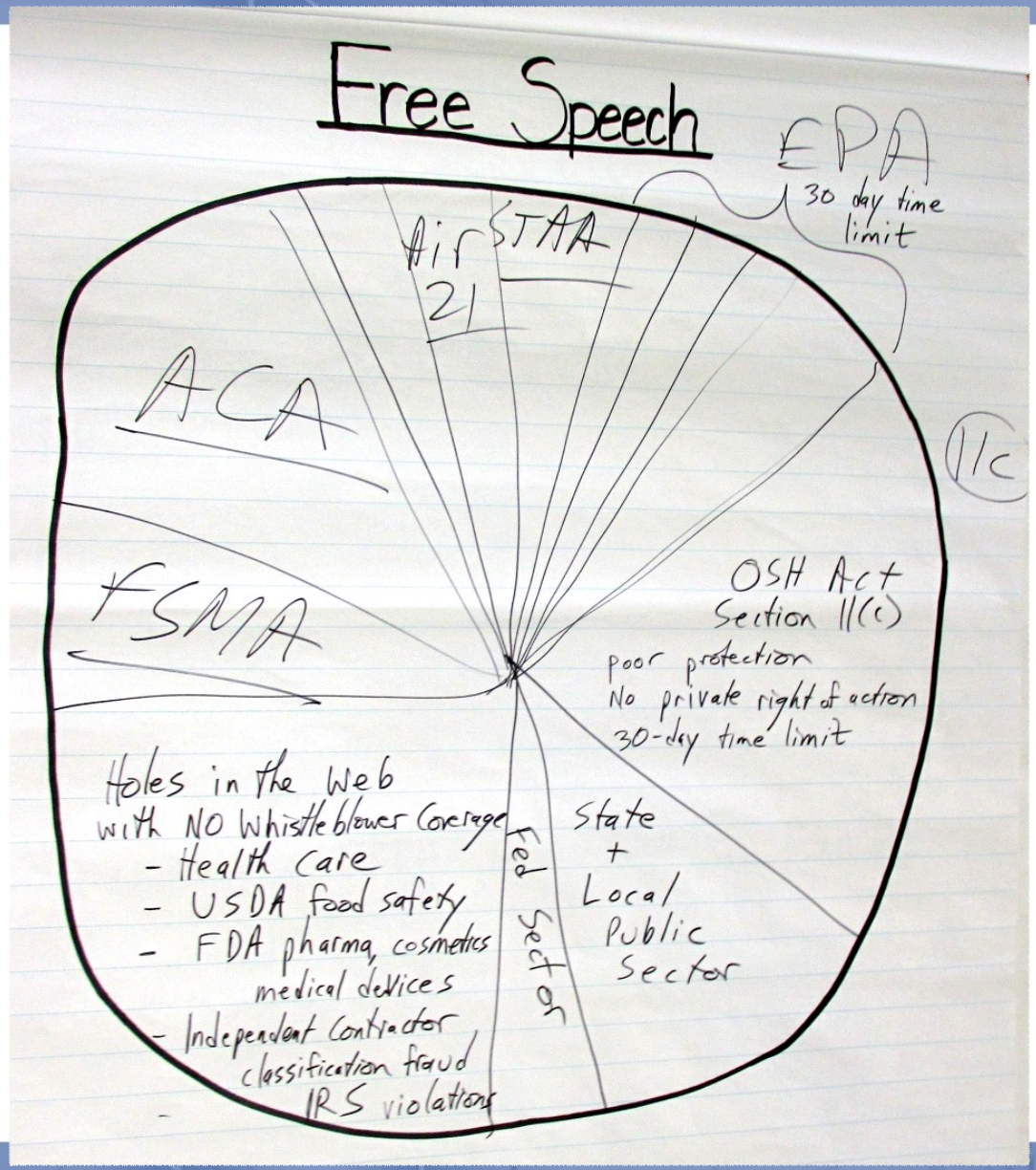
Jason Zuckerman
Zuckerman Law
1629 K Street, NW, Suite 300
Washington, DC 20006
(202) 262-8959 (phone)
(703) 459-9779 (SMS)
(202) 888-7555 (facsimile)
jzuckerman@zuckermanlaw.com
www.zuckermanlaw.com

Overview

- Scope of free speech
- Private sector whistleblower protection laws and the uneven web of protection
- “Reasonable belief” standard
- NLRA protections
- Gag clause vs. statutory protection
- Federal sector protections, WPA, EEO and mixed cases
- Filling in the gaps: CJTFA, AFA, OSHA 11(c), Paul Revere
- This slideshow is available at www.taterenner.com/ws.pdf

Objectives

- See the practical trade-offs in how whistleblower protections are created
- Find and apply whistleblower laws
- Consider issues lawyers look for in deciding whether to take whistleblower cases
- Be aware of unevenness in whistleblower protections
- Understand the “reasonable belief” doctrine
- Learn the federal sector protections, WPA, EEO and mixed cases
- Know the NLRA’s protections
- Think strategically to press for new whistleblower protections

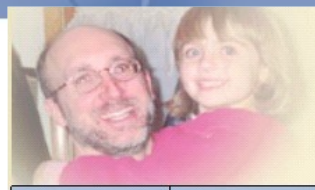

Free Speech
EPA
30 day time limit
Air 21
STAA
ACA
11c
FSMA
OSH Act
Section 11(c)
poor protection
No private right of action
30-day time limit
Holes in the Web
with NO Whistleblower Coverage
- Health Care
- USDA food safety
- FDA pharma, cosmetics medical devices
- Independent Contractor classification fraud IRS violations
Fed Section
State + Local Public Sector

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

Federal Whistleblower Protection Laws

- www.taterenner.com/fedchart.php
- http://www.whistleblowers.gov/statutes_page.html
- http://www.whistleblowers.gov/whistleblower_acts-desk_reference.pdf



Tate & Renner

Attorneys at Law

921 Loxford Terrace
Silver Spring, MD 20901
(202) 664-9056
rrenner@igc.org

Federal Whistleblower Laws

This chart of federal laws complements the Tate & Renner chart of state health and safety whistleblower rights. 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: Intelligence Authorization Act now protects security clearances

In 2014, Congress created a new whistleblower protection for security clearnaces in the Intelligence Authorization Act of 2014. Click here to read my blog about it. The time limit to initiate a retaliation claim under this new law is 90 days.

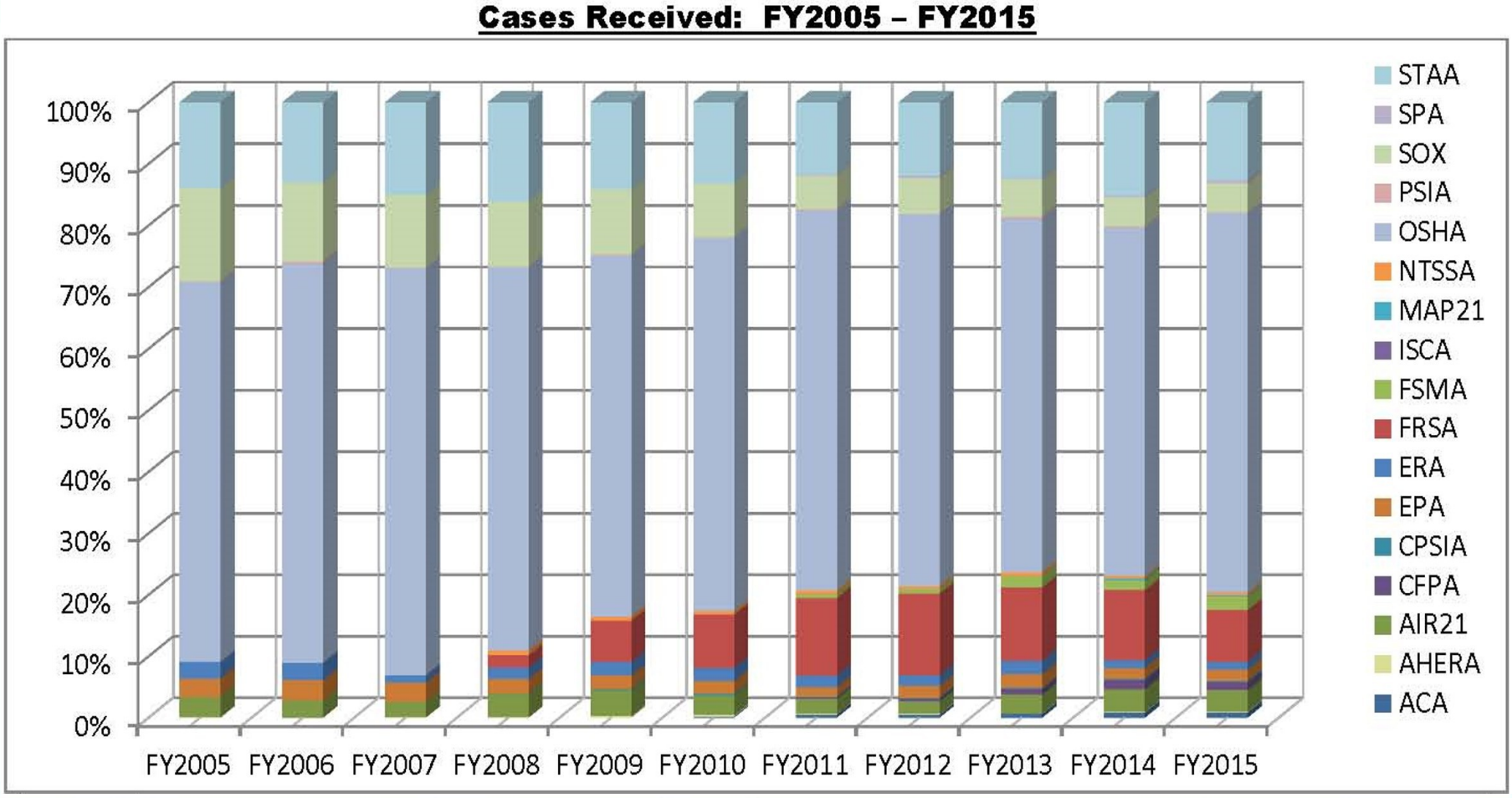
Whistleblower or Retaliation Statute	Legal Citation	Statute of Limitations (SOL)	Where to File
First Amendment	U.S. Const., 1st Am.	State PI limit	state or fed ct.
Civil Rights Act of 1871	42 U.S.C. §§ 1981, 1983, 1985	State PI limit	state or fed ct.
Affordable Care Act (ACA)	29 U.S.C. § 218C; Section 1558	180 days	DOL/OSHA

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*

Revised: 04/04/2013

OSHA Statistics



OSHA Intake Statistics

Statute	FY 2015	Statute	FY 2015
ACA	28	ISCA	0
AHERA	3	MAP21	7
AIR21	116	NTSSA	16
CFPA	43	OSHA	2026
CPSIA	8	PSIA	4
EPA	59	SOX	156
ERA	43	SPA	15
FRSA	276	STAA	417
FSMA	71	Total	3288

OSHA Outcome Statistics

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

Selected coverage issues

- OSH Act Section 11(c)
  - 1970, 29 U.S.C. §660(c)
  - No private right of action
  - Look for overlapping coverage with TSCA, or other laws
- Affordable Care Act and Title I
  - 29 U.S.C. § 218C
  - Title I is the insurance mandate
  - No employee protection for patient protection

Affordable Care Act

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

CSPIA and reasonable belief

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

CSPIA, Saporito and reasonable belief

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

CSPIA, Saporito and reasonable belief

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

CSPIA, Saporito and reasonable belief

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

CSPIA, Saporito and reasonable belief

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

Reasonable Belief

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

Food Safety Modernization Act

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

Food Safety Modernization Act

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

CFPB protections

- Consumer Financial Protection Bureau (CFPB)
- Created by Dodd-Frank in 2010, 12 U.S.C. § 5567
  - Coverage is set in 12 U.S.C. § 5481(14)

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).

SOX and Dodd-Frank

- Sarbanes-Oxley Act (SOX), Section 806, 18 U.S.C. § 1514A
- Dodd-Frank Act, direct claim for retaliation, 15 U.S.C. § 78u-6(h)
  - Protects a "whistleblower" for "making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002"
  - Defines "whistleblowers" as ones "who provide, information … to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u-6(a)(6).
- *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 627–28 (5th Cir. 2013), says internal disclosures are **not** protected.
- *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015), finds protection for all activities protected under SOX. No cert petition.

Seaman Protection Act

- Modernized law enacted in 2010, 46 U.S.C. §2114
- Adopts STAA procedure
- Interim rules issued 2013, 29 CFR Part 1986
- Final rules due this year will expand coverage to include all US flag ships, and ships owned by US citizens.
- Because of the DoD, DOT (MARAD) Maritime Security Program (MSP), a portion of international cargo ships remain under US flags

DOL time limits

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

OSHA referrals

- 29 CFR 1980.104(a)
  - **OSHA will provide an unredacted copy** of these same materials to the complainant (or complainant's legal counsel, if complainant is represented by counsel) **and to the Securities and Exchange Commission**.

OSHA investigations

- OSHA's Whistleblower Investigations Manual (2016) is at

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRE

http://www.whistleblowers.gov/regulations_page.html

- OSHA memorandum on "reasonable cause" standard

http://www.whistleblowers.gov/InvestigativeStandard20150420.html

Coping with delays

  - Persistent follow-ups, squeaky wheels
  - Directorate of the Whistleblower Protection Programs (DWPP), (202) 693-2199, 1-800-321-OSHA (6742)
  - "Constructive denial" appeal to OALJ (but not in kick-out cases)

OALJ practice

- File requests for hearing by fax: (202) 693-7365 (FAX)

http://www.oalj.dol.gov/HEADQUARTERS.HTM

- New Rules of Practice issued June 2015:

http://www.oalj.dol.gov/Public/RULES_OF_PRACTICE/REFERENCES/RE

- Digest of case law in the Whistleblower Library:

http://www.oalj.dol.gov/LIBWHIST.HTM

- ARB cases:

http://www.oalj.dol.gov/LIBARB.HTM

Kick-outs to federal court

- Permitted in 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.
- *Jones v. SouthPeak Interactive Corp*. 777 F.3d 658 (4th Cir. 2015), holds that 4-year statute of limitations applies pursuant to 28 U.S.C. § 1658(a).
- *Jordan v. Sprint Nextel Corp*., 3 F. Supp. 3d 917 (D. Kan. 2014), holds that no statute of limitations applies to kick-outs as they are "otherwise provided by law."

Kick-outs to federal court: Current DOL policy

- Following *Jordan*, current DOL practice is to require that whistleblower actually file complaint in U.S. District Court while DOL complaint is still pending.
- Whistleblower then gives prompt (within 7 days) notice to DOL (OSHA, ALJ or ARB).
- Only then will DOL dismiss for want of jurisdiction.
- Older regulations still reflect prior policies in which DOL sought notice *before* filing in federal court.
- Statutes control, not the regulations.

Direct causes of action

- No administrative exhaustion required; no agency help either.
  - Fair Labor Standards Act, 29 U.S.C. § 215(c)
  - False Claims Act, 31 U.S.C. § 3730(h)
  - banking laws, 31 U.S.C. § 5328, 12 U.S.C. § 1831j, 12 U.S.C. §1790b
  - Dodd-Frank Act, 15 U.S.C. § 78u-6(h)(1)(A)
  - ERISA, 29 U.S.C. § 2002

Awards for Whistleblowers

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

SEC enforcement

- https://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html
  - The SEC as the Whistleblower's Advocate
  - Chair Mary Jo White
  - April 30, 2015
  - “the SEC’s whistleblower awards program, ... has proven to be a game changer.”
  - The SEC has intervened in several private cases to argue that the anti-retaliation protections of Dodd-Frank should apply to individuals

FCA and NDAA

- Both provide retaliation claims for employees of federal contractors
- A comparison of the options, prepared by attorney Jason Zuckerman:

	FCA Anti-retaliation	NDAA Secs. 827 and 828
Citation	31 U.S.C. § 3730(h)	10 U.S.C. § 2409; 41 U.S.C. § 4712
Coverage	Employee, contractor, or agent	Employee of a contractor, subcontractor, or grantee
Statute of Limitations	3 years	3 years

FCA and NDAA

- by attorney Jason Zuckerman:

	FCA Anti-retaliation	NDAA Secs. 827 and 828
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	-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

FCA and NDAA

- by attorney Jason Zuckerman:

	FCA Anti-retaliation	NDAA Secs. 827 and 828
Administrative Exhaustion	No. File directly in court.	- Must file initially with the agency Inspector General - May kick-out to federal court after 210 days
Causation standard	"But for"	Contributing factor
Right to jury trial	Yes	Yes
Damages	Double back pay, reinstatement, special damages (emotional	Back pay, reinstatement, special damages, attorney fees

Other laws with other agencies

- National Labor Relations Act, 29 U.S.C. § 157, and sequence
- Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a)
- Military Whistleblower Protection Act, 10 U.S.C. § 1034
- National Defense Authorization Act, 41 U.S.C. § 4712

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 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

- March 18, 2015, NLRB General Counsel memo:
  - http://apps.nlrb.gov/link/document.aspx/09031d4581b3
  - 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

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

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.nlrb.gov

DOL on gag clauses

- *Vannoy v. Celanese Corp.*, ARB No. 09-118, ALJ No. 2008-SOX-64 (ARB Sept. 28, 2011)
  - 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[.]"
  - 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.
  - In a July 24, 2013, remand decision, the ALJ awarded Mr. Vannoy $380,738 in economic and non-economic compensatory damages, plus interest and attorney's fees.
  - http://www.oalj.dol.gov/Decisions/ALJ/SOX/2008/VANNOY_MATTHEW_v_CELAN

Other cases protecting against gags

- *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).
- *U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731, 739-40 (D.C. Cir. 1998)(Employees are protected "before they have put all the pieces of the puzzle together.").

Danger in New Jersey

- But see, *State v. Saavedra*, No. A-68-2013, 073793 (N.J. June 23, 2015)
  - *Quinlan* does not immunize public employee from criminal charges for official misconduct and theft by unlawful taking of public documents.
  - *Quinlan* does not govern the application of the criminal laws at issue in this appeal.
  - Saavedra may have "an affirmative defense ... at trial, that she has a claim of right or other justification based on New Jersey's policy against employment discrimination[.]"

Federal Sector

- Don’t forget that some private sector laws may apply:
  - CAA, CERCLA, and SDWA
- Federal Sector EEO laws have no anti-retaliation provisions
  - 42 U.S.C. 2000e-16 (Title VII)
  - 42 U.S.C. 633a (ADEA)
- The Supreme Court has found that retaliation claims are implied.
  - *Gomez-Perez v. Potter*, 553 U.S. 474 (2008)

WPA

- WPA does expressly prohibit retaliation for EEO activities
  - 5 U.S.C. § 2302(b)(1) (opposition)
  - 5 U.S.C. § 2302(b)(8) (disclosure of any violation)
  - 5 U.S.C. § 2302(b)(9) (participation)
  - *Clay v. Dep't of Army*, 2016 MSPB 12 (2016)
- OSC will normally not investigate claims based on EEO activity
  - 5 CFR 1810.1
- EEO retaliation can still be raised through the IRA process and appealed to MSPB
  - 5 U.S.C.A. § 1221(a)

Why use the WPA?

- Favorable burden of proof
  - 5 U.S.C. § 1221(e)(1) (contributing factor, temporal proximity)
  - 5 U.S.C. § 1221(e)(2) (affirmative defense by clear and convincing evidence)
  - *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012) (PEER's Paula Dinerstein)
  - *Petitioner v. Dep't of Interior*, No. 0320110050, 2014 WL 3788011 (July 16, 2014), pp. 10-11
  - *Savage v. Dep't of Army*, 2015 MSPB 51.
- No cap on comp damages, 5 U.S.C. § 1221(g)(1)(A)(ii)

Subgroup discrimination

- Why are women and minorities so well represented among whistleblowers?
  - Deviation from stereotype
- Subgroups are protected from discrimination
  - *Phillips v. Martin Marietta Corp*., 400 U.S. 542 (1971)
  - *Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("Congress never intended to give an employer license to discriminate against some merely because he favorably treats other members of the employees' group.")

Subgroup discrimination

- Enforcement of stereotypes is unlawful discrimination
  - *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)("stereotypes unsupported by objective fact," are "the essence of what Congress sought to prohibit")
  - *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505, 1507 (10th Cir. 1985), the nuclear plant could not escape liability when it fired a whistleblower alleging that he could not "get along" with co-workers.
  - Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

Individual Right of Action (IRA)

- 5 U.S.C. § 1221(a):

(a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302 (b)(8) orsection 2302 (b)(9)(A)(i), (B), (C), or (D), seek corrective action from the Merit Systems Protection Board.

  - No IRA for violations of 5 U.S.C. § 2302(b)(1)

WPA

- 5 U.S.C. § 2302(b)(1):

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

  - No IRA for violations of 5 U.S.C. § 2302(b)(1)

WPA

- 5 U.S.C. § 2302(b)(8):

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences —

(i) any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law ...

- Title VII is still a law covered by both (b)(1) and (8)

WPA

- 5 U.S.C. § 2302(b)(9)(A):

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—

(i) with regard to remedying a violation of paragraph (8); or

(ii) other than with regard to remedying a violation of paragraph (8);

- Only (9)(A)(i) can lead to an IRA appeal to the MSPB

WPA

- 5 U.S.C. § 2302(b)(9)(B)-(D):

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law

- All of (B) through (D) can lead to an IRA appeal to the MSPB

Mixed cases in US District Court

- 5 U.S.C. § 7702(a), expressly provides that "[n]otwithstanding any other provision of law" the district court has jurisdiction over any discrimination claim by "any employee" "who has been affected by an action which the employee or applicant may appeal" to the MSPB.
  - The statute does not require that the claim must be "directly appealable."
  - The WPA is part of the Civil Service Reform Act

Mixed cases in US District Court

- For “mixed cases” “the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board[.]” 5 U.S.C. § 7702(a)(2)
- Only one administrative avenue needs to be exhausted to preserve CSRA, WPA and EEO claims. 5 U.S.C. § 7702(f)
- The term “adverse personnel action” is not found at all in the “mixed case” statute, § 7702.

Mixed cases in US District Court

- Congress knows the difference between “directly appealable” actions and personnel actions that are “appealable to the Board”
  - At 5 U.S.C. § 1221(b), Congress specifically preserved the right of employees to appeal “directly” to the MSPB if the employee “has the right to appeal directly to the Board under any law[.]”
  - At 5 U.S.C. § 1221(a), Congress permits appeals of IRAs to the MSPB, but does not require that the personnel action must be “directly appealable.”

Mixed cases in US District Court

- If mixed cases were limited to the five adverse actions listed in 5 U.S.C. § 7512, then it would make no sense for § 7702(a)(1)(A) to permit mixed cases to be brought by applicants for employment who could not possibly have suffered one of the adverse actions listed in § 7512.
- Congress specified that jurisdiction applies in “the case of any employee or applicant for employment who has been affected by an action which the employee or applicant may appeal” to the MSPB. § 7702(a)(1)(A)

Mixed cases in US District Court

- Numerous cases hold that district courts possess jurisdiction over non-discrimination claims in mixed cases when agencies fail to meet the time limit in § 7702(e)(1)(B).
- *Ikossi v. Dep't of Navy*, 516 F.3d 1037, 1041–44 (D.C.Cir. 2008);
- *Seay v. TVA*, 339 F.3d 454, 471–72 (6th Cir. 2003);
- *Doyal v. Marsh*, 777 F.2d 1526, 1533, 1535–37 & n. 5 (11th Cir.1985);
- *Bonds v. Leavitt*, 629 F.3d 369, 379 (4th Cir. 2011).
- These cases did not require that employees start at, or ever actually use, MSPB jurisdiction.

Mixed cases in the agency

- Federal employees may bring “mixed cases” to district court, even if the original administrative complaints did not make this theory evident. *Bonds*, cited above.
- Making the legal theory evident is not required. *Johnson v. City of Shelby, Mississippi*, 574 U.S. ____, 135 S.Ct. 346, 347-48 (11-10-2014).
- There is no need to mention the WPA in EEO retaliation complaints, but the law should still apply.

Mixed cases in US District Court

- Agencies will rely on *Spruill v. Merit Sys. Prot. Bd*., 978 F.2d 679, 682 (Fed. Cir. 1992), and its progeny to argue that federal employees cannot bring a "mixed case" to federal district.
- *Spruill* relied on the pre-amendment version of 5 USC § 1221, which made only claims under 5 U.S.C. § 2302(b)(8) appealable to MSPB.
- The WPEA amended 5 USC § 1221 to address this concern and make participation claims appealable to MSPB when they arise under 5 U.S.C. § 2302(b)(9)(A)(i) (protecting "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation – (i) with regard to remedying a violation of paragraph (8)")

What is next?

- Civil Justice Tax Fairness Act
  - H.R. 3550, S. 2059
  - https://www.nela.org/NELA/index.cfm?event=showPage&pg=crtra
- Arbitration Fairness Act
  - S.1133, H.R.2087
  - https://www.nela.org/NELA/index.cfm?event=showPage&pg=mandarbitration
- Paul Revere Freedom to Warn Act
- Whistleblower Flyer for Low-Wage Worker Clinics
  - http://www.taterenner.com/WhistleblowerFlyer4clinics.pdf