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The Fine Art of Employment Law: From Compliance to the Courtroom

**Sculpting A Process For Whistleblower  
And Retaliation Claims**

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**Whistleblowers: Threat or Asset?**

Studies say that most employees do not blow the whistle for the money or to hurt the company, but because they perceive a wrong and want to correct it.

Most report internally and only go external when they perceive they are being retaliated against for making the internal report.

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**Impact of Corporate Ethics and  
Compliance Programs**

National Business Ethics Survey Report 2013:

- In organizations with effective, values-based ethics and compliance programs, employee reporting of wrongdoing increases by 61 percent.
- It is a good thing.

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## Proof of a Retaliation Claim - Employee's Burden

Burden on employee to show:

1. Employee, in good faith, engaged in activity protected by statute or common law,
2. Employer took adverse action against the employee, and
3. The employer took the adverse action because of the protected activity in which the employee engaged.

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## Proof of a Retaliation Claim

Protected activity may be:

- Active or passive
- Opposition or participation
- Internal, external or embryonic

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## Proof of a Retaliation Claim

Adverse action

- Is serious enough to be considered adverse if it might have dissuaded a reasonable employee from making or supporting a charge of discrimination.
- Need not be work-related

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## Proof of a Retaliation Claim - Shifting Burdens

Burden on employer to articulate a legitimate, non-discriminatory reason for the adverse action.

Burden on employee to show that the employer's reason is a pretext for discrimination or retaliation.

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## Proof of a Retaliation Claim

Not-so-effective defenses:

- What I don't know can't hurt me
- The devil made me do it
- Just her imagination . . . 🎵
- But it was off the clock
- Ostrich



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## Whistleblower Provisions – Employment Laws

- Title VII
- Age Discrimination in Employment Act
- Americans with Disabilities Act
- National Labor Relations Act
- Family and Medical Leave Act
- Employee Polygraph Protection Act
- Migrant and Seasonal Agricultural Workers Act
- Employee Retirement Income Security Act
- Uniformed Services Employment and Reemployment Rights Act

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## Whistleblower Provisions - OSHA

Occupational Safety and Health Act, Section 11(c):  
Protects employees from retaliation for exercising a variety of rights guaranteed under the Act, such as filing a safety complaint with OSHA or with their employers, participating in an inspection, etc.

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## Whistleblower Provisions - OSHA

### Protected Activities:

- Reporting a work-related injury, illness or fatality
- Disclosing improper employer practices or policies
- Filing a complaint under or related to the Act
- Requesting or participating in inspection or proceeding by OSHA
- Testifying in a proceeding related to the Act
- Exercising a right afforded under the Act
- Refusing to work or perform specific tasks

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## Retaliation

Any "adverse action" including, but not limited to

- Firing or laying off
- Blacklisting
- Demoting
- Denying overtime or promotion
- Reducing pay or hours
- Reassignment affecting prospects for promotion
- Denial of benefits
- Failure to hire or rehire
- Intimidation
- Making threats

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## Complaints

- Generally, complaints are made:
  - By the employee or his or her representative
  - Orally or written – only written for some statutes
  - Within 30 to 180 days after alleged adverse action, depending on statute violated
  - To the OSHA office in the geographical area where the employee resides or was employed, or where the violation occurred, but may be made to any OSHA office

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## “Employee” For OSHA Purposes

- Employee:
  - Employees of contractors and subcontractors of employer
  - Current and former employees
  - Individual who has applied for employment
  - Anyone whose employment may be affected by actions of company
  - Not necessarily an employee of the violating employer

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## Overview of DOL Investigative Process: Investigating/Adjudicating Claims

- Intake and pre-filing settlement negotiations
- Complaint and response
- Investigation
- Preliminary reinstatement order and kick-out provisions
- Administrative litigation
- Administrative review board

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## Whistleblower Provisions - OSHA

OSHA enforces the whistleblower provisions of the Occupational Safety and Health Act of 1970 plus 21 other laws including:

- consumer protection laws,
- transportation industry laws,
- environmental and nuclear laws, and
- investor protection laws.



## Whistleblower Cases Received FY 2005 – FY 2014

Statute	Cases Received: FY2005 – FY2014									
	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014
ACA	0	0	0	0	0	4	14	14	18	26
AHERA	2	0	1	1	6	6	3	4	3	3
AIR21	65	52	50	85	92	75	66	57	91	111
CFPA	0	0	0	0	0	0	6	14	28	47
CPSIA	0	0	0	2	4	6	2	5	4	6
EPA	56	60	51	51	46	46	42	54	67	52
ERA	52	53	23	41	48	50	50	50	64	39
FRSA	0	0	1	45	145	201	340	384	355	351
FSMA	0	0	0	0	0	0	17	22	54	51
ISCA	0	0	0	0	0	1	0	0	0	0
MAP21	0	0	0	0	0	0	0	0	1	10
NTSSA	0	0	0	18	15	14	17	14	17	14
OSHA	1194	1195	1301	1381	1267	1402	1667	1745	1710	1729
PSIA	3	7	1	3	3	2	6	2	7	6
SOX	291	234	231	235	228	201	148	169	177	145
SPA	0	0	0	0	0	0	5	9	5	7
STAA	271	241	297	357	306	306	314	346	368	463
Total	1934	1842	1866	2219	2160	2314	2698	2889	2969	3060

## Whistleblower Complaint Determinations FY 2005 – FY 2014

Statute	Cases Completed: FY2005 – FY2014									
	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014
ACA	0	0	0	0	0	1	11	18	11	25
AHERA	1	1	1	1	3	7	1	5	1	2
AIR21	66	54	46	65	71	65	49	66	83	93
CFPA	0	0	0	0	0	0	2	12	19	35
CPSIA	0	0	0	0	5	6	1	4	4	4
EPA	55	57	55	51	49	34	34	44	68	56
ERA	52	54	26	31	44	36	35	61	50	61
FRSA	0	0	0	18	53	119	165	354	391	393
FSMA	0	0	0	0	0	0	4	18	41	47
ISCA	0	0	0	0	0	0	1	0	0	0
MAP21	0	0	0	0	0	0	0	0	0	5
NTSSA	0	0	0	0	13	15	13	12	11	20
OSHA	1160	1229	1167	1255	1168	1144	1235	1653	1827	1794
PSIA	5	6	2	1	2	2	3	2	6	7
SOX	252	251	240	191	197	206	153	157	200	171
SPA	0	0	0	0	0	0	0	10	4	9
STAA	248	246	268	320	271	269	241	355	367	425
Total	1839	1898	1805	1938	1876	1904	1948	2771	3083	3147

## Whistleblower Provisions – Sarbanes-Oxley Act

“No [public] company..., or any officer, employee, contractor [or] subcontractor or agent of such company, ... may discharge, demote, suspend, threaten, harass, or ... discriminate against an employee in the terms and conditions of employment because of [whistleblowing activity].”

18 U.S.C. §1514A(a)

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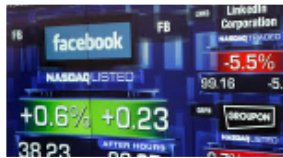
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## Whistleblower Provisions – Sarbanes-Oxley Act

Applies to:

- Publicly-held companies
- Private companies contracting with publicly-held companies



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## Whistleblower Provisions – Sarbanes-Oxley Act

Protects employees who report:

- Mail fraud
- Wire fraud
- Bank fraud
- Securities fraud
- Violation of any rule or regulation of the SEC
- Violation of any provision of federal law relating to fraud against shareholders

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## Whistleblower Provisions – Sarbanes-Oxley Act

Protects employees who provide information or assistance to:

- Federal regulatory or law enforcement agency
- Member of Congress or Congressional committee
- Anyone working for the employer who has “supervisory authority” over the employee
- Any person working for the employer who has the authority to investigate, discover, or terminate misconduct

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## Potential Remedies - Generally

Remedies may include:

- Payment of back wages with interest
- Job reinstatement with same seniority and benefits
- Other compensatory damages, including special damages
- Expert witness fees
- Punitive damages
- Reasonable attorney's fees

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## Potential Remedies – Incentive Rewards

Federal Incentive Reward Programs:

- False Claims Act
- IRS Whistleblower program
- Dodd-Frank Whistleblower Reward Program
- Commodities Exchange Act Whistleblower Reward Program
- Financial Institutions Reform, Recovery, & Enforcement Act

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## Avoiding Liability and Managing Employees

1. Determine what anti-retaliation laws apply to your company.
2. Ensure your anti-retaliation policy is broad enough to encompass applicable laws and specific enough to satisfy them.

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## Avoiding Liability and Managing Employees

3. Policy must:
  - Be well-publicized and
  - Include multiple avenues of appeal.
4. Practices must include:
  - Following up with the employee and
  - Tracking of complaints.

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## Avoiding Liability and Managing Employees

5. Treat complaints confidentially to the extent consistent with conducting a full investigation. Do not promise complete confidentiality.
6. Do not require employee making the complaint to keep it confidential.

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## Avoiding Liability and Managing Employees

7. Train your managers, supervisors and those who administer the policy.
8. Train HR/others how to receive and respond to complaints.

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## Avoiding Liability and Managing Employees

9. Exercise great care when considering disciplinary action against a whistleblower.
10. Document it all:
  - All employee discipline and reasons therefor
  - All employee complaints, steps to address, steps to resolve, follow up activities.

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## Final Questions

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Thank You!

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