



WHISTLEBLOWING IN THE U.S.A.

The plot is a familiar one to movie fans – the heart-of-gold employee stumbles upon information that her employer is taking dangerous shortcuts and putting lives at risk. She tries to alert her supervisor and manager, but her livelihood and her very life are threatened by the powerful and heartless executives. Although she would like to forget what she knows and resume her happy life, her conscience intervenes. She outsmarts the evil executives, blows

the whistle, and saves the day. The movie ends with the heroine basking in the adoration of those who were spared as a result of her courageous actions. But when real life intervenes in the Hollywood fantasy, the circumstances are rarely as dire, the whistleblower is rarely as heroic, and the ending is rarely as happy. In real life, the whistleblower files a lawsuit seeking to recover money damages in payment for her good works.

Whistleblowing has become ingrained in American culture as a result of the glorification of whistleblowers in the media and the current anti-business sentiment in this country. Virtually every state in the union has adopted some form of whistleblower protection, and many of these statutes have been enacted within the last ten years. Individual state whistleblower statutes vary wildly in their application and scope, and it is important for employers and their representatives – everyone from legal counsel to first-line managers – to understand the potential exposure in their jurisdiction(s).

What type of employer is covered by the statute? What exactly qualifies as whistleblowing? Are there administrative procedures for whistleblower complaints and, if so, are they binding? How long does an employee have to bring a whistleblower claim? What types of damages are available to whistleblowers?

As with all other areas of employment related litigation, forewarned is forearmed when dealing with potential whistleblower claims. Here are a few questions that every employer should be able to answer about the whistleblower statute in its jurisdiction(s):

1. WHAT TYPE OF EMPLOYER IS COVERED BY THE STATUTE?

Of the fifty states and the District of Columbia, thirty-three states have enacted whistleblower provisions that protect only public and/or state employees. Some statutes apply strictly to employees of the state, while others extend to employees of municipalities and political subdivisions. The remaining seventeen states have adopted laws that protect both public and private employees. For those states that extend protection to private employees, several states exclude very small employers (for example, an employer with less than ten employees), requiring that a private employer have a minimum number of employees to be covered by the statute. Only one state has no formal whistleblower statute in place.

2. DOES THE SPEECH OR ACTION QUALIFY AS WHISTLEBLOWING?

Not every disgruntled employee who disagrees with a supervisor or employer is a whistleblower. Although the statutes vary somewhat in how they define whistleblowing, there is general agreement that the subject of the whistleblowing has to be a violation of a law, rule or regulation that is of concern to the public. Disputes that are personal to the employee, such as disputes over the terms and conditions of employment, do not qualify as whistleblowing. Moreover, if the employee's position requires that he report misconduct of others, those reports may not constitute whistleblowing in some states.

Generally, whistleblowers must show (1) that he or she reasonably believed that his or her employer's conduct was violating either a law or a rule or regulation promulgated pursuant to law; (2) that he or she performed a whistleblowing activity; (3) that an adverse employment action was taken against him or her; and (4) that there exists a causal connection between the whistleblowing activity and the adverse action. Many states utilize the familiar *McDonnell-Douglas* burden-shifting framework, requiring the plaintiff to make a prima facie case before shifting the burden to the employer to show a legitimate, non-retaliatory reason for the adverse action. If the employer can do so, the burden shifts back to the employee to show that the employer's reason is pretextual.

3. MUST THE PLAINTIFF EXHAUST ADMINISTRATIVE REMEDIES OR OTHER PREREQUISITES BEFORE FILING SUIT?

Many states provide no administrative framework within which to file a whistleblower claim and instead provide for a private right of action for whistleblowers in the state court system. Some of these states, despite the lack of any administrative process, do impose certain prerequisites upon whistleblower plaintiffs. For example, a few states require that the putative whistleblower provide the information to his supervisor, or at least make a good faith effort to do so. Other states require a written report by the whistleblower to either a supervisor or a specified officer within a government agency, such as the Attorney General. Those states that do have these prerequisites often impose a time limitation within which the whistleblower must report the allegedly wrongful conduct.

Another possible prerequisite exists in those states that require whistleblowers to follow the provisions of any collective bar-

gaining agreement or employment contract that may govern the employment relationship. Frequently, those agreements will specify a grievance or similar procedure that provides an exclusive remedy for all employee complaints, including whistleblower complaints.

In contrast, several states do require exhaustion of administrative remedies before a whistleblower may file a civil action. A precious few states provide only an administrative remedy and do not authorize a whistleblower to pursue damages in the state court system. The administrative scheme stands as the only avenue through which the whistleblower may seek compensation. For those states that require administrative exhaustion before filing a civil action, there is typically a limitations period for filing with the administrative body from the alleged act of retaliation and a limitations period for filing a civil action that begins to run from the conclusion of the administrative process.

Somewhere between the states that allow the whistleblowers to go immediately to court and the states that require exhaustion of administrative remedies are a handful of states that employ a hybrid approach, providing an administrative avenue for redress of whistleblower complaints which the employee may, or may not, utilize before going to court. In addition to providing a time limit within which the whistleblower must file with the administrative tribunal, these jurisdictions usually provide a statute of limitations that begins to run at the conclusion of the administrative process.

4. WHAT IS THE STATUTE OF LIMITATIONS?

The statute of limitations applicable to whistleblower claims varies widely from state to state, from ten days to three years. However, despite these broad differences, a significant majority of jurisdictions have a statute of limitations of 180 days or less for whistleblower claims. While ten days is the shortest limitations period, there are several states with 30, 90 and 180 day periods. As a general rule, the statute begins to run at the time of the allegedly retaliatory action by the employer and not at the time of the alleged whistleblowing activity. There are, however, a small handful of states that require a complaint to be made within two years of the whistleblowing activity, as opposed to two years from the date of the retaliatory action. It is much more common for the statute to establish a statute of limitations that begins to run with the first act of alleged retaliation.

5. WHAT DAMAGES ARE AVAILABLE?

There are two schools of thought regarding damages available to whistleblowers. The first school believes that damages should be awarded to make the whistleblower whole and limit damages to actual lost wages, lost benefits, and equitable relief such as reinstatement and/or restoration of seniority. The states subscribing to this school believe that the whistleblower should not suffer a loss because of his actions and should be returned to his pre-whistleblowing status. In contrast, the second school believes that, not only should the whistleblower be made whole, but there should be a windfall to the whistleblower as a reward for revealing wrongful conduct and a punishment to the employer for the retaliation against the whistleblower. Therefore, the second school authorizes the full panoply of tort damages, including compensatory damages, front and back pay, fringe benefits, attorneys' fees and costs, and some type of punitive or treble damages. These states reward whistleblowers for taking the risk of revealing wrongful conduct in the workplace and punish employers who retaliate against these employees. In addition to damages recoverable by the whistleblower, some statutes authorize imposition of a civil or criminal fine against the employer, payable to the state, for violation of the whistleblower protection statute. Typically, these statutes provide for a fine that is imposed for each violation.

An employer's awareness of the contours of the whistleblower protection statute in its jurisdiction(s) will assist the employer in managing employees who seek to cast themselves as whistleblowers. If an employer can accurately assess the claim, the response to the employee can either avoid or advance the employer's position in subsequent litigation.



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