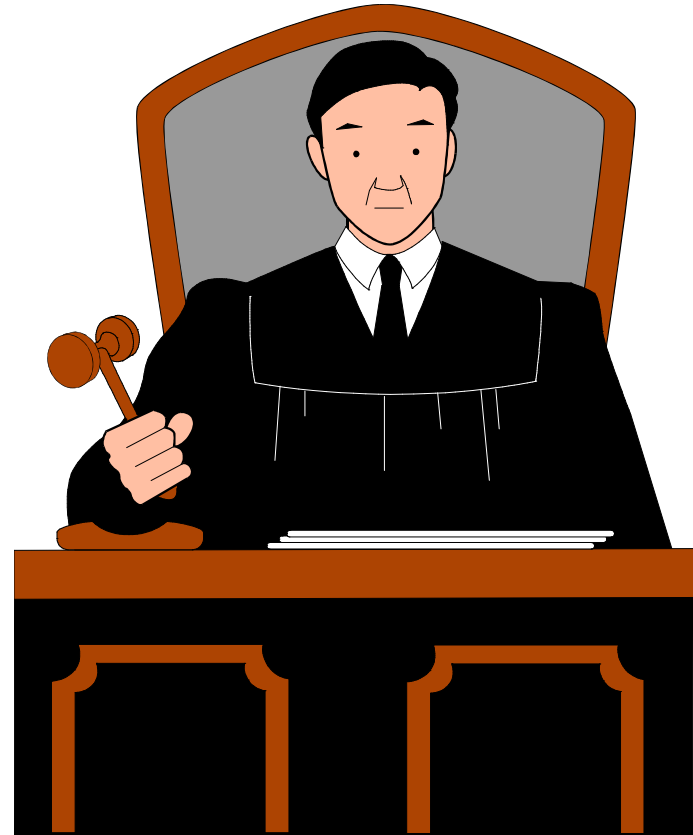


Whistleblower Protection Act

The Whistleblower
Protection Law ~ 1989

The Whistleblower Act ~
1994



Definition of Whistle-Blowing

- One who reveals wrong-doing within an organization to the public or to those in positions of authority.
- One who discloses information about misconduct in their workplace that they feel violates the law or endangers the welfare of others.
- One who speaks out, typically to expose corruption or dangers to the public or environment.

Characteristics of a Whistleblower

- ❖ Altruistically Motivated
- ❖ Utilitarian
- ❖ Uninterested in Altering Their Behavior
- ❖ Allows Own Attitudes and Beliefs to Guide them
- ❖ Often are Well Educated and Holds professional Positions

Effects of Whistle-Blowing

- Forced to leave organization/demotion
- Credibility ruined
- Family, health, and/or life in jeopardy
- Outrage and divisiveness of people directly or indirectly involved
- Physical or psychological isolation
- Organization experiences loss of money, restitution, productivity, and positive reputations.
- Incarceration

Who is a Whistleblower?

- Category of persons protected by statute
- Not a personal griping session
- Complaints about fraud, abuse, unsafe conditions, violations of law, etc.
- Receives certain employment protections, including protection from retaliation, right to reinstatement, back pay, sometimes more

Dodd-Frank Act (July 2010)

- The Dodd-Frank Wall Street Reform and Consumer Protection Act
- **Reaction to massive scandals in financial industry**
- Most provisions of the Act aimed at financial industry; but whistleblower rules are much broader
- Modeled after IRS whistleblower program started in 2006
- Created the “Office of the Whistleblower” in 2011

Dodd-Frank Whistleblower Rules

- Adopted by SEC to implement the Dodd-Frank Whistleblower provisions
- The Dodd-Frank Whistleblower provisions are among the most far-reaching changes enacted by the Act, and could have unpredictable effects
- SEC Chairman Mary Schapiro commented, “Too many people remain silent in the face of fraud,” and the new rules “are intended to break the silence of those who see a wrong.”

The Whistleblower Bounty

- A bounty paid to a whistleblower who voluntarily provides “original information” about a possible federal securities law violation that has occurred, is ongoing, or is about to occur
- 10 to 30 percent of any monetary sanctions collected if they exceed \$1 million
- **A whistleblower will become eligible for an award by:**
 - voluntarily providing information not previously known to SEC
 - that leads to a successful enforcement action
 - in which the SEC or authorities obtain monetary sanctions totaling more than \$1 million

Whistleblower Fun Facts

- Number of whistleblower complaints received by the SEC in FY 2014:
 - **3,620**
- Balance of SEC's Investor Protection Fund:
 - \$452 Million
- Largest single whistleblower payout to date:
 - **\$30 Million**
- **41% of workers surveyed said they have seen misconduct in the workplace**
- **21% of workers who reported misconduct say they experienced retaliation**

Limitations on Dodd Frank Whistleblower Claims

- Time Limit for Complaint – No more than 6 years after the violation; or **3 years after facts material to claim** are known or should have been known by the employee but **in no event more than 10 years after the violation.**
- Must be Original Information—independent knowledge or analysis that is not already known to the SEC, derived from hearing, government report or audit, or investigation, or derived from media.
- Certain Whistleblowers Excluded—including certain officers, directors, auditors, compliance folks.

Sarbanes-Oxley Whistleblower Provisions



Section 806

Who is Potentially Liable?

- Officers
- Employees
- Contractors
- Subcontractors
- Agents



Section 806

What Actions are Protected?

- Providing information or otherwise assisting in an investigation OR
- Filing, testifying, participating in or otherwise assisting in a proceeding that is
 - filed or
 - about to be filed (with any knowledge of the employer)

Section 806

What Investigations Are Covered?

Investigations involving violations of:

- Federal criminal law involving securities fraud, mail fraud, bank fraud, or wire, radio and television fraud
- SEC rules or regulations; or
- Federal law relating to fraud against shareholder

Section 806

Blowing the Whistle - To Whom?

- Federal regulatory or law enforcement agency
- Any member or committee of Congress
- Persons working for the employer:
 - Supervisory authority over employee
 - Authority to investigate, discover, or terminate misconduct

Section 806

What Retaliation is Prohibited?

- Employer may not:
 - Discharge
 - Threaten
 - Demote
 - Harass
 - Suspend
- In **any other manner discriminate** against an employee in terms and conditions of employment
- Because of any lawful act done by the employee in the whistleblowing

Section 1107

Criminal Penalties - Overview

- Very broad application
- Protection for providing to any law enforcement officer, any truthful information relating to any federal offense
- Applies to public and private companies
- Whistleblowing of violations of any federal law
- Employers and their agents may face:
 - Fines up to \$500,000 (\$250,00 for individuals)
 - Imprisonment up to 10 years

Preparing for a Whistleblower Complaint

Do's and Don'ts

- Develop and maintain a vigorous compliance program
 - Effective internal compliance programs are most valuable prophylactic measures
 - “Culture of compliance”
- Implement and Enforce a Whistleblower Policy
 - How to report?
 - How to handle/respond?
 - Facilitate disclosures/make it safe to report
 - Internal process to accepting, screening, and documenting complaints

Responding to a Whistleblower Complaint

Do's and Don'ts

- Promptly report allegations to General Counsel, Office of Compliance, or Senior Management
- Maintain appropriate levels of confidentiality
 - Who needs to know?
 - More importantly, who doesn't?
 - Confidentiality helps defeat retaliation claims

Responding to a Whistleblower Complaint

Do's and Don'ts

- Assess whether claims can or should be handled internally or whether outside counsel should be involved
 - Are the allegations credible?
 - Are the allegations serious? (true whistleblower scenario or tattling for violation of company policy?)
 - Is immediate action warranted?
 - Who is the accused? Internal or external?
 - Consider whether there are any conflict of interest issues that might necessitate outside assistance
 - Complaint relevant to financial reporting/audit committee?
- Investigate

Responding to a Whistleblower Complaint

Do's and Don'ts

- Consult with counsel regarding the retention of evidence and issuance of a litigation hold
- Create a plan for the investigation
 - What operations/divisions/groups are implemented?
 - Who will be interviewed?
 - Who will lead the investigation? Checks and balances
 - What documents and other evidence will be looked at?
 - What will the costs of the investigation be?
- Resolve the complaint
 - Appropriate corrective actions
 - Corrective Action Plan

Responding to a Whistleblower Complaint

Do's and Don'ts

- Ensure that no retaliation against whistleblower
 - Not just termination, but also transfer, demotion, slower career trajectory
 - Protection even where allegation is wrong: “reasonable belief” standard
- What about disciplinary action?
 - Allowed if complaint is made without justification and in bad faith, BUT very dicey
 - Timing is everything . . . Wait before taking action
- Severance/release/confidentiality agreement: consult with counsel