

***“An Overview of Whistleblower  
Laws and Rights”***

Thomas Carpenter, Director  
Nuclear Oversight Program  
Government Accountability Project  
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# Background on GAP

- The Government Accountability Project (GAP) is a non-profit, nonpartisan public interest law firm that specializes in protection for genuine whistleblowers, employees who exercise free speech rights to challenge institutional illegality, abuse of power or other betrayals of the public trust they learn of or witness on the job.

# Background on GAP

- GAP has led the public campaigns for passage of the Whistleblower Protection Act of 1989 (“WPA”)(federal employees); Military Whistleblower Protection Act (armed services members); numerous related statutes for private industry sectors such as nuclear weapons and nuclear power; and numerous state whistleblower laws.

# Overview on Whistleblower Laws

- This is no “catch-all” whistleblower protection act or law. Instead, there are many dozens of federal, state and agency laws and rules that contain vast differences in their scope of protection, remedies offered, and even enforceability.

# Overview on Whistleblower Laws

- Today's presentation will cover –
  - The federal Whistleblower Protection Act
  - State Whistleblower Protection, with an emphasis on the WA WPA
  - False Claims Act
  - Other Federal Whistleblower Protection laws
  - Sarbanes-Oxley Whistleblower Protection

# Whistleblower Protection Act

The federal WPA Covers only Federal Civil Servants, and is found in the Civil Service Reform Act. The first stop for most employees for a complaint is the Office of Special Counsel (OSC).

- Twelve prohibited personnel practices, including reprisal for whistleblowing, are defined by law at § 2302(b) of Title 5 of the United States Code (U.S.C.).

# Whistleblower Protection Act

- § 2302(b) provides that a federal employee authorized to take, direct others to take, recommend or approve any personnel action may not:

“engage in reprisal for whistleblowing – i.e., take, fail to take, or threaten to take or fail to take a personnel action with respect to any employee or applicant because of any disclosure of information by the employee or applicant that he or she reasonably believes evidences a violation of a law, rule or regulation;

# Whistleblower Protection Act

(continued)

- gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.

# Whistleblower Protection Act

- **Who is not protected by OSC from prohibited personnel practices?**

OSC has no jurisdiction over prohibited personnel practices committed against employees of -

- the Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, and certain other intelligence agencies excluded by the President;
- the General Accounting Office;
- the Federal Bureau of Investigation;
- the U.S. Postal Service (except for nepotism allegations); and
- the Postal Rate Commission.

# Whistleblower Protection Act

- Complaints Examining Unit (CEU). The CEU receives complaints filed with the Office of Special Counsel. The unit initially analyzes all allegations of prohibited personnel practices (as well as allegations of other activities prohibited by civil service law, rule or regulation).

# Whistleblower Protection Act

- General. Current and former federal employees and applicants for federal employment may report suspected prohibited personnel practices to the OSC. The matter will be investigated, and if there is sufficient evidence to prove a violation, the OSC can seek corrective action, disciplinary action, or both.

# Whistleblower Protection Act

- Corrective action. The OSC may enter into discussions with an agency at any stage of a pending matter in pursuit of a resolution acceptable to all parties. The OSC follows a policy of early negotiation to obtain appropriate corrective action (and/or disciplinary action) for apparent violations.

# Whistleblower Protection Act

- If an agency fails to remedy a prohibited personnel practice upon request by the OSC, corrective action may also be obtained through litigation before the Merit Systems Protection Board (MSPB). Such litigation begins with the filing of a petition by the OSC, alleging that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is about to occur.

# Whistleblower Protection Act

- Corrective actions that can be ordered by the MSPB include job restoration, reversal of suspensions and other adverse actions, reimbursement of attorney's fees, back pay, medical and other costs and damages.

# Whistleblower Protection Act

- If the OSC fails to act, or in the case of certain reprisals (i.e., transfers or terminations), an employee may file a claim directly with the MSPB for relief. A hearing officer is assigned and “make-whole” remedies are available for prevailing complainants. The track record for whistleblowers before the MSPB is dismal.

# State Whistleblower Protection

- **State Whistleblower Protection Laws**
  - Most states have some sort of statutory or common law "whistleblower" or anti-retaliation laws. The laws sometimes cover only state or municipal employees, or may only apply to private employees.

# State Whistleblower Protection

- These states and the District of Columbia have recognized a public policy exception to the "employment at will doctrine":
- Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, **Washington**, West Virginia, Wisconsin and Wyoming.

# State Whistleblower Protection

- Some states have explicit statutory protections for whistleblowers. These include: California, Connecticut, Delaware, Florida, Hawaii, Louisiana, Maine, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Rhode Island, Tennessee, and **Washington**.

# State Whistleblower Protection

- There are also state laws that offer special protections just for their own state or local government employees: Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, **Washington**, West Virginia, and Wisconsin.

# The Washington State Employee Whistleblower Act

- The Washington State law protects state government employee disclosures at Chapter 42.40 Revised Code of Washington (RCW).

# The Washington State Employee Whistleblower Act

- The Whistleblower Program, enacted by the Washington State Legislature in 1982, provides a means for state employees to report suspected improper governmental actions. These are any actions by a state employee or officer that violate state laws and rules, are an abuse of authority, are of substantial and specific danger to the public health or safety, or are a gross waste of public funds.

# The Washington State Employee Whistleblower Act

- All Washington state employees, in all branches of state government, may report a suspected improper governmental action through the Whistleblower Program. This includes temporary employees, classified and exempt civil service employees, and elected officials.

# The Washington State Employee Whistleblower Act

## How to File a Report of Improper Governmental Action

- Assertions of improper governmental action **must be** filed in writing with the State Auditor's Office.

# The Washington State Employee Whistleblower Act

## **The Investigative Process**

- Once the State Auditor's Office receives a report of improper governmental action, the whistleblower receives a written response, acknowledging receipt of the report. If the reported assertions fall under the provisions of the Whistleblower Act, a preliminary investigation is conducted within 30 days. Many investigations require more time and have to be extended.

# The Washington State Employee Whistleblower Act

- After the investigation, a final report is issued outlining the assertions and whether they were substantiated. The report also includes any agency corrective action planned to deal with the substantiated assertions. The whistleblower and all other involved parties receive a copy of the final report, which is a public document.

# The Washington State Employee Whistleblower Act

## **Protection From Retaliation**

- The whistleblower law provides that the identities of whistleblowers are kept confidential. It also provides remedies for retaliation.
- Employees who believe they have been subjected to retaliatory action resulting from reporting their assertions may file a claim with the Washington State Human Rights Commission. The commission will investigate the claim and take appropriate action.
- Civil penalties for retaliation may include a fine of up to \$3,000 and suspension for 30 days without pay.

# WA State: Tort of Wrongful Discharge

- Under Washington State case law – decisions made by judges in court cases – private employees who are wrongfully discharged may bring an action in court if the reason they were fired violates public policy, i.e., for whistleblowing.
- Several Hanford nuclear site whistleblowers have brought claims in court under this cause of action.

# False Claims Act

- Under the federal False Claims Act, Title 31 of the U.S. Code, section 3729, a person who blows the whistle is known as a relator.
- Under the False Claims Act, a person who blows the whistle is known as the qui tam "relator." Qui tam litigation under the False Claims Act also varies from cases in which only the Government prosecutes the fraudulent contractor.

# False Claims Act

- The False Claims Act allows a case to be brought in any federal court district in which one or more defendants can be found, resides, transacts business or in which any actions giving rise to the false claim occurred.
- There are often multiple federal judicial districts and divisions where a False Claims Act case can legitimately be filed--more choices than in traditional civil litigation.

# False Claims Act

- A False Claims Act case is filed under seal with service only upon the United States Attorney General and the local U.S. Attorney. A specialized False Claims Act document, known as the "relator's statement" or "disclosure statement" is served upon the Department of Justice, but not filed.

# False Claims Act

- Prior to the complaint's unsealing, the Government decides whether to "intervene," which means that it decides whether it will proceed with the action and conduct the case.
- The Department of Justice can elect to pursue claims through alternate remedies, including administrative proceedings to determine a civil monetary penalty.

# False Claims Act

- If it does so, the relator has the same rights in the alternate proceedings that he would have had if a False Claims Act case was pursued. If the Government declines to take over the action or to pursue alternate remedies, the qui tam relator can pursue the case.
- Even where the Government does not initially intervene in the action, the court may later permit intervention upon a showing of good cause.

# False Claims Act

- After the False Claims Act complaint has been sealed for a period of time, normally far more than the 60 days in the statute, the court orders service of the relator's complaint or, if applicable, an amended complaint filed by the Government, upon the defendant. Only then does the defendant learn of the existence of the qui tam case and the whistleblower-/relator's actual identity--frequently this is years after the case was filed.

# False Claims Act

Damages under the False Claims Act are potentially severe. A person who violates the act must repay three times the amount of damages suffered by the government plus a mandatory civil penalty of at least \$5,500 and no more than \$11,000 per claim, for all claims made after September 29, 1999.

# False Claims Act

- In the past thirteen years, hundreds of qui tam suits have been filed. These suits have resulted in almost four billion dollars in recoveries for the United States Treasury. The whistleblowers who filed these suits have received more than one hundred million dollars for their efforts.

# False Claims Act

## **Examples of False Claims Act cases:**

- **Medicaid and Medicare Violations**

- **Hospitals, nursing homes, doctors, home health care agencies, pharmacies, and laboratories that seek and receive reimbursement for Medicare and Medicaid funds are Government contractors subject to the False Claims Act. Billing for services not rendered or misrepresenting the type of services rendered, can trigger liability under the False Claims Act.**

# False Claims Act

## **Defense Contractor Fraud**

- Defense contracting fraud is perhaps the most traditional type of Government contract fraud addressed by the False Claims Act. Often, defense contracting fraud involves sophisticated, multi-billion dollar weapons systems and enormous Fortune 500 companies like GE, Boeing, Pratt & Whitney, Grumman, Lockheed Martin, etc. But, defense fraud can include ordinary items like computers, uniforms, vehicle parts, and office equipment.

# False Claims Act

## **False Statements of Contract Compliance**

- **Knowing presentation of claim for payment can be deemed equivalent to a false certification of compliance with such laws, rules, and regulations. If federal funding is conditioned on compliance with these contract provisions, such misconduct gives rise to a viable False Claims Act case.**

# False Claims Act

- False Claims Act cases have been brought to enforce federal labor and employment policies, which specify wage and benefit rates in the Service Contract Act. False certifications by a contractor stating that it is a small minority business entity also violates the False Claims Act.
- In United States ex rel. Stone v. Rockwell International Corp., the relator won a \$4.2 million jury verdict because Rockwell falsely stated how it handled environmental waste. Instead of cleaning up nuclear waste by mixing radioactive sludge into cement blocks as promised, the blocks fell apart and further contaminated the site.

# False Claims Act – Whistleblower Protection

- ***False Claims Act Whistleblower Employee Protections***

**In 1986, Congress added anti-retaliation protections to the False Claims Act. These provisions, which did not exist previously, are contained in 31 U.S.C. Sec. 3730(h):**

- **“Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of his employer or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.”**

# False Claims Act – Whistleblower Protection

- The protection against retaliation extends to whistleblowers whose allegations could legitimately support a False Claims Act case even if the case is never filed. The statute of limitations for Sec. 3730(h) claims is 6 years in most jurisdictions, but is currently shorter in California and a few other locations.

# False Claims Act – Whistleblower Protection

- The whistleblower plaintiff is entitled to reinstatement with seniority, double back pay, interest, special damages sustained as a result of discriminatory treatment, and attorneys fees and costs. There is federal jurisdiction for these whistleblower claims. To establish a Sec. 3730(h) retaliatory discharge claim, the whistleblower must engage in conduct protected by the False Claims Act.

# False Claims Act – Whistleblower Protection

- Second, the courts require a showing that the defendant have some notice of the protected conduct that the whistleblower was either taking action in furtherance of a qui tam action or assisting in an investigation or actions brought by the Government.
- Finally, the whistleblower must show that the termination was in retaliation for the protected activities. A False Claims Act qui tam case can include whistleblower claims and other legal claims based upon other state and federal laws.

# Other Federal Protection for Whistleblowers

- Unlike the False Claims Act, which allows a whistleblower to file a lawsuit in federal court, many of the federal whistleblower laws do not permit a whistleblower to go directly to court, but instead are to be pursued administratively.
- Congress designed many of these laws so that an individual, with or without an attorney, may make a simple complaint or "charge" of retaliatory discrimination to a federal government agency.

# Other Federal Protection for Whistleblowers

- If not resolved administratively, an administrative law judge may preside over the only evidentiary hearing that will take place.
- Some retaliation and whistleblower statutes are relatively "hollow," that is, they prohibit illegal employer retaliation, but do not allow the individual to pursue an administrative charge or file a lawsuit.

# Other Federal Protection for Whistleblowers

- Whistleblowers are cautioned, however, not to delay investigation of their possible legal remedies, as many of the laws have very short time limits.
- Some federal whistleblower statutes of limitations are as short as 30 days from the date of the alleged retaliation. A retaliation claim must be brought to the attention of the appropriate federal government official within that time period or cannot be pursued.

# Other Federal Protection for Whistleblowers

- Many federal whistleblower laws are administered by the U.S. Department of Labor (DOL).
- When a complaint is to be filed under these whistleblower laws, they should be filed in writing with the local OSHA (Occupational Safety and Health Administration of the Department of Labor) Office.

# Other Federal Protection for Whistleblowers

- However, the 50-plus federal whistleblower and retaliation laws vary dramatically and the Department of Labor/OSHA is not the intake office for all such claims.
- Some retaliation statutes provide that the EEOC is the proper intake agency. If neither OSHA nor the EEOC is the proper intake office, however, filing a claim with those agencies will likely not be sufficient to protect legal rights. Various federal statutes specify still other procedures, including some that have no mandatory administrative or other prerequisites and allow whistleblower or retaliation lawsuits to be filed directly in state or federal court.

# Sarbanes-Oxley

- The Sarbanes-Oxley Act of 2002 was enacted on July 30, 2002, in the wake of many corporate scandals that cost billions of dollars and sapped investors' confidence in corporate governance and securities markets. Title VIII of the Act includes provisions that prohibit discrimination against corporate whistleblowers who bring to light financial and other wrongdoing.

# Sarbanes-Oxley

- The Sarbanes-Oxley law includes a broad range of corporate accountability and transparency measures, including a requirement that corporate boards establish internal, independent audit committees.
- These audit committees must establish complaint procedures and accept anonymous complaints. See 15 U.S.C. § 78f.

# Sarbanes-Oxley

- The law also includes provisions for enhanced financial disclosures, as well as provisions addressing auditor independence and certification of financial statements by corporate officers.

# Sarbanes-Oxley

- Sarbanes-Oxley's whistleblower protection provisions create broad protection for employees of publicly-held companies (and their contractors, subcontractors and agents) who have a reasonable belief that fraud or other wrongdoing has occurred in violation of U.S. securities laws.
  - See 18 U.S.C. § 1514A.

# Sarbanes-Oxley

- A range of conduct is protected, including internal complaints, communications with Congress, contacts with government agencies, and participation in investigations of securities law violations.

# Sarbanes-Oxley

- Employees who suffer reprisals for engaging in protected conduct may file administrative complaints with the U.S. Department of Labor's Occupational Safety & Health Administration (OSHA) within 90 days of the alleged discrimination.
- Complainants may name the company as well as specific individuals in the complaint.

# Sarbanes-Oxley

- OSHA is required to determine whether there is reasonable cause to believe that the complaint has merit within 60 days of the filing of the complaint. 29 C.F.R. § 1980.105. If the complaint is found to have merit, OSHA can order relief including preliminary reinstatement.
- The relief may also include back pay, attorneys fees, and other compensatory damages. Employees who bring frivolous or bad faith claims may be subject to an award of attorneys' fees of up to \$1,000.

# Sarbanes-Oxley

- The ALJ's decision may be appealed to the DOL's Administrative Review Board (ARB) and then to the U.S. Courts of Appeals.
- Sarbanes-Oxley creates a right to a *de novo* jury trial if the Department of Labor is unable to issue a final order within 180 days of the filing of the complaint. This feature of the Act is modeled on federal equal employment opportunity laws, and is not replicated in other federal whistleblower statutes.

# Sarbanes-Oxley

- Sarbanes-Oxley also includes tough criminal provisions. One permits the Securities and Exchange Commission (SEC) to seek criminal penalties for violation of any provision of the Act.
- Another provision increases the criminal penalties for persons who retaliate against whistleblowers who provide truthful information to a law enforcement officer about violations of federal law.

# Sarbanes-Oxley

- The law provides that whistleblowers must prove that discrimination was a contributing factor in the challenged action by a preponderance of the evidence; in such circumstances, an employer may successfully defend against the claim only if it proves by clear and convincing evidence that it would have taken the same action against the whistleblower anyway.

# Sarbanes-Oxley

- Ultimately, the employee bears the burden of showing by a preponderance of the evidence that the employer's proffered reasons for the challenged action are a pretext for retaliation.

# Sarbanes-Oxley

- This new law covers thousands of companies and millions of employees, and creates a broad new exception to the at-will employment doctrine. It will benefit corporate shareholders, employees and consumers by increasing corporate accountability and transparency.
- In the wake of its enactment, many publicly traded companies have established new accountability policies, procedures and programs.

# Sarbanes-Oxley

- In the two years since the enactment of the Sarbanes-Oxley law, over three hundred individuals have filed claims with OSHA under the law's whistleblower protection provisions.
- Most of the complaints (56%) have been dismissed by OSHA. In twelve percent of the cases, OSHA found reasonable cause to believe that the complaint had merit.
- The complainant withdrew the complaint in twelve percent of the cases (most of these were settled), and twenty percent are still pending.

# Sarbanes-Oxley

- At least twenty cases have been filed in federal court. DOL administrative law judges and the federal courts have begun to issue decisions interpreting and clarifying the scope and nature of the law's whistleblower protection provisions.

# Conclusion

- The maze of whistleblower laws and rules represents a patchwork that may or not cover a specific employee or even a specific type of whistleblowing conduct.
- Every law is different. Some statute of limitations are only 30 days. Some are as long as six years. A prevailing employee may get access to a jury, and a full range of damages as compensation. Or, an employee may be limited to an openly hostile administrative court with very limited remedies.

# Conclusion

- There are excellent internet resources available to explore these issues, including links to available laws, clear and concise explanations, and an active attorney bar eager to talk to potential whistleblowers for representation.

**Government Accountability Project**

1511 3<sup>rd</sup> Avenue, Suite 321

Seattle, WA 98101

(206) 292-2850

[www.whistleblower.org](http://www.whistleblower.org)

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**National Office**

1612 K Street, N.W., Suite 1100

Washington, D.C. 20006

(202) 408-0034