Whistleblower Toolkit

TOOL A

Filing a Sarbanes-Oxley Whistleblower Complaint

Introduction

The Sarbanes-Oxley Act of 2002 resulted from the congressional response to problems highlighted in the corporate failures of Enron and WorldCom.[1] Trust and confidence in financial markets were eroded by the daily news of accounting irregularities and possible fraudulent acts occurring at major corporations around the country.[2] The legislation sought to establish a framework to deal with conflicts of interest that undermined the integrity of the capital markets. The act is applicable to public companies only.[3]

To secure the integrity of the capital markets, Congress determined that meaningful protections must be provided for whistleblowers.[4] Congress attempted to "protect the 'corporate whistleblower' from being punished for having the moral courage to break the corporate code of silence."[5] As Senator Patrick Leahy acknowledged during the debate regarding the act, "When sophisticated corporations set up complex fraud schemes, corporate insiders are often the only ones who can disclose what happened and why."[6]

Whistleblowers from publicly traded companies may access the protections provided in the statute in the event that they suffer retaliation or discrimination for reporting violations of the act.

This tool attempts to demystify how SOX is supposed to operate, based on OSHA's generic manual for its investigators and the Department of Labor's regulations.

Sarbanes-Oxley Act Whistleblower Protection in Plain English

SOX provides whistleblower protection for employees of publicly traded companies. No officer, employee, contractor, subcontractor, or other agent of a publicly traded company may fire, demote, suspend, threaten, harass, or in any other way discriminate against an employee with respect to job, job duties, or benefits because the employee has lawfully provided information either directly or indirectly or assisted in an investigation regarding any conduct which the employee believes to constitute mail, wire, bank, or securities fraud; any violation of rules or regulations of the Securities and Exchange Commission; or any federal law concerning fraud against shareholders to a federal regulatory or law enforcement agency, a member of Congress or a congressional committee, or a person with supervisory authority over the employee or another person with authority within the organization. The law further protects those who file, testify, participate, or assist in a proceeding that will be filed or has been filed regarding any of the previously mentioned violations with the knowledge of the employer.[7] (This is not to imply that the employee must seek consent of the employer, but the employer must be aware that the employee has raised concerns.)

Anyone who feels they have been either discharged or discriminated against by anyone in violation of the above may file a complaint with the secretary of labor. One must file a claim no later than 180 days after the date on which the violation occurs.[8] If the secretary of labor has not issued a final decision on the individual's complaint within 180 days of the filing, absent any bad faith of the complaining party, the complainant may file an action for de novo review in federal court in the appropriate district regardless of the amount in controversy.[9]

A complainant who prevails is entitled to all the relief necessary to adequately compensate the individual. The individual may be entitled to: compensatory damages or reinstatement with the same seniority he or she would have had absent the retaliation; back pay with interest; and compensation for damages that occurred because of the retaliation, such as litigation costs, expert witness fees, and reasonable attorney's fees. Complainants seeking protection under this law should be mindful that

they may have additional rights, privileges, or remedies under other laws, both state and federal, as well as rights under a collective bargaining agreement where applicable, which they may wish to exercise.[10]

OSHA Complaint Process

Complaint

Where an employee feels that he (or she—gender-specific language is used herein for simplicity) has been discharged or suffered other discrimination as a result of participation in activities covered under SOX, he may file a complaint with Occupational Safety and Health Administration within 180 days after an alleged violation of the act occurs.[11] The statutory time period for filing a complaint begins when the adverse action takes place. It is important to take note that the date of the adverse action is the date that the employee receives notice of the action, not the date the action is implemented.

For example, if an employee receives notice that he will be terminated on July 1 but is given 90 days to resign instead, the date of the adverse action is July 1. If the action is a continuing one, the time period begins with the last act. If the last day of the time period falls on a weekend, federal holiday, or a date that the Department of Labor offices are closed, the next business day will count as the final day.

Some circumstances may extend the time eligible for filing: for example, if the employer has actively concealed or misled the employee about the adverse action or the grounds for the action; the employee suffered a debilitating illness or injury and was unable to file; a natural disaster caused conditions that would make it impossible for a reasonable person to communicate with the appropriate agency in a timely manner; or the employee filed a timely complaint with another agency that cannot grant relief. One should be aware, however, that such circumstances are rare and the DOL will conduct a thorough investigation to determine if a circumstance provides for the time period to be extended.[12]

The complaint should be filed with the OSHA area director responsible for enforcement in the geographical area where the employee resides or was employed. It can also be filed with any OSHA officer or employee.

A directory of OSHA offices nationwide is available at *http://www.osha.gov/html/oshdir.html.* The address of the national office is:

National Office
US Department of Labor
Occupational Safety and Health Administration (OSHA)
200 Constitution Avenue NW
Washington, DC 20210

Although the act does not specify how the writing may be delivered, the employee should be sure to get a receipt of the actual date of filing. It is recommended that the employee retain certified mail receipts or facsimile transmittal sheets proving the date the complaint was filed. On occasion complaints may be misplaced or lost, and it will be necessary to prove that the filing was timely or risk dismissal because the statute of limitations has expired. The date of the postmark, facsimile transmittal, or e-mail communication will be considered the date of filing. If filed by any other means, the complaint is considered filed when the complaint is received.[13]

SOX complaints are generally received by the area office but may be received at the regional or national office. Complaints are sometimes received by referral from other government agencies or Congress.[14]

Although no particular form is required, the complaint must be filed in writing. It should include a full statement of the acts and omissions, with pertinent dates, that are believed to constitute the violations.[15] The complaint should include the full name, address, and phone number of the person filing the complaint as well as the name, address, and phone number of the employer.[16] In addition the employee should furnish copies of all documents that are relevant to the claim. Some examples are notices of adverse employment actions, performance appraisals, compensation information, grievances that may have been filed, job specifications or descriptions, employee handbooks, and collective bargaining agreements.

The employee should also keep careful records of the medical costs related to the claim and other costs that result from the claim. The employee should be mindful that if he has been terminated or laid off, he is obligated to continue to seek work and keep records of his earnings during this period. They may be used where appropriate to compute

back pay owed. Back-pay liability may also be affected by the employee's refusal of a bona fide offer of reinstatement.[17]

The employee should detail not only the adverse action but also the dates of such adverse action, with a summary of his experience. The summary should address the factors necessary to prove a prima facie case—namely that the employee has engaged in some protected activity and that the employer was aware of the employee's activity and took adverse action against the employee in response to the protected activity.[18]

If at all possible the complaint should address the statute that is applicable (e.g., Sarbanes–Oxley). If the employee states an incorrect statute or mistakenly identifies the statute, the receiving office will classify the complaint type. If applicable, the employee should also note that he has filed a complaint with another enforcement agency, such as the Securities and Exchange Commission.[19]

The complaint and any additional supplemental documentation must demonstrate a prima facie case, showing that the employee's protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. While there may be an opportunity to supplement the initial filings to demonstrate a prima facie case, the employee should make every effort to satisfy this burden in the initial filing.

A prima facie case is had when the employee can show that:

- the employee engaged in protected activity or conduct;
- the employer knew or suspected that the employee engaged in the protected activity;
- the employee suffered an unfavorable personnel action; and
- the circumstances are sufficient to infer that the protected activity was a contributing factor to the unfavorable action.

If the complaint and the supplemental documentation do not demonstrate a prima facie case, the employee will be advised and no further investigation will be done.[20]

Even though an employee may be able to demonstrate a prima facie case, an investigation will not be conducted if the employer can show by clear and convincing evidence that it would have taken the same

unfavorable personnel action in the absence of the employee's protected behavior or conduct.[21]

The decisions of the assistant secretary of labor for occupational safety and health ("assistant secretary") to dismiss a complaint without completing an investigation or OSHA's determination to proceed with an investigation are not subject to the review of the administrative law judge. Nor may the ALJ remand a complaint for completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error.[22]

Pre-Investigative Stage

When OSHA receives a complaint, the basic information and the filing date are recorded by the receiving officer and immediately sent to a supervisor. If the complaint is received at the national office or from another government agency, it is usually forwarded to the regional administrator for documentation.[23]

Upon receipt of the complaint, it will be reviewed for jurisdictional requirements, timeliness, and whether a prima facie case is demonstrated. The office may contact you to get additional information.[24] At times the Department of Labor may send a questionnaire to get supplemental data.[25]

If the office finds that the case cannot proceed to the investigation phase, it will explain the reason why. A SOX complaint that is untimely or does not meet a prima facie analysis cannot be closed administratively. The officer will explain to the employee that an impediment exists and will allow the employee to decide if he wishes to withdraw the complaint.[26]

At any time before the filing of objections to findings or a preliminary order, an employee may withdraw the complaint by filing a written withdrawal. OSHA, through the assistant secretary of labor, will then determine whether to approve the withdrawal. If the withdrawal is approved, the employer will be notified.[27] If the employee does not withdraw the complaint, the case will be docketed and a written determination issued.[28]

After the initial screening phase is complete, the complaint will be docketed. At that time OSHA will formally notify both the employee and the employer in writing of receipt of the complaint and its intention to

investigate.[29] OSHA, usually in the person of the OSHA supervisor, will notify the employer of the filing, the allegations, and the substance of evidence supporting the complaint. (Every effort is made to protect the identities of confidential informants.) The employer is notified of its rights.[30]

Simultaneously, the supervisor will request that the employer submit a written statement. The employer is also advised that it may designate an attorney or other representative.[31] Additionally, the employer will be advised that any evidence it may wish to submit to rebut the allegations in the complaint must be received within 20 days from receipt of the letter. The employer is also told that it may request a meeting during that 20-day period.[32] Another copy of the notice is mailed to the Securities and Exchange Commission.[33]

A case number is then assigned.[34] The case number identifies the region in which the case originates (from 0 to 10); the area office city number (according to the Worldwide Geographic Locator Codes); the fiscal year in which it was filed; and the serial number of the complaint for the area office and the fiscal year.[35]

The OSHA supervisor will send a letter to the employee, notifying him that the complaint has been reviewed and assigned a case number and an investigator; it will also include the investigator's name and contact information.[36]

Investigative Stage

An OSHA supervisor will assign the case to an investigator, although investigations that involve complex issues or unusual circumstances may be conducted by the supervisor or a team of investigators. Investigators will schedule investigations with the statutory time frames in mind. A SOX complaint has a time frame of 60 days.[37] Every effort is made to make a determination within 60 days; nevertheless there may be instances in which it is not possible to complete the determinations within the 60-day period.[38]

Generally, the investigator will make initial contact by phone. If the investigator finds that a prima facie case exists, she will proceed to a field investigation, during which personal interviews and evidentiary document collection are conducted. Site visits may be scheduled to interview

witnesses. Some testimony and evidence may be obtained by telephone, by mail, or electronically.[39] If the investigator finds that the employee has filed a whistleblower charge with another government agency simultaneously, she may contact the other agency to get additional information and avoid duplicative investigative efforts.[40]

The investigator will, of course, wish to interview the employee and the employer in person and obtain signed statements. It is to the employee's advantage to identify as many witnesses as possible who may be able to support his allegations. The identification should include complete contact information and details of what the witnesses may have seen.[41]

Witnesses are allowed to have a personal representative or an attorney present during any interview.[42] If there is a collective bargaining agreement, appropriate union officials may be interviewed. Witnesses may request confidentiality.[43] Investigations will be conducted in a manner that protects those who provide information on a confidential basis.[44] Nevertheless their identities will be kept in confidence only as allowed by law; if they testify in a proceeding, their statements may be required disclosures. Their identities may also be disclosed to another federal agency where appropriate; the investigator will request that the other agency keep the information confidential.[45] Confidentiality cannot be extended to the employee, however.[46]

After the investigator has spoken with the employer and taken its evidence, the employee and, where appropriate, the witnesses will be contacted to resolve any discrepancies. Upon completion of the collection of all evidence, the investigator will evaluate the evidence and make conclusions as to whether reasonable cause exists to believe that the employer has discriminated against the employee.

After completing the field investigation and discussing the claim with the OSHA supervisor and the solicitor of labor, the investigator will conduct a closing conference with the employee either in person or by phone. The discussion will allow the employee to ask questions as necessary. At this time the investigator will give her recommended determinations as well as explain how the determination was reached and what actions may be taken. During the conference the investigator must instruct the employee of his rights to appeal or object and the time

limit for filing. It should also be noted that the determination is subject to review by the solicitor of labor for the secretary.[47]

The investigator will write a final investigation report (FIR), which contains contact information for both the employee and the employer as well as contact information for their representatives, if designated. The FIR gives a brief account of the employee's allegations and the employer's defense. There will be a statement regarding the basis of coverage by the statute, a list of witnesses interviewed, and a list of potential witnesses not interviewed, complete with contact information and occupation. A narrative of the investigative findings must be included with exhibit references to evidentiary documentation.

The investigator will also give an analysis of the facts as they relate to the elements of a prima facie case. In cases in which the investigator recommends litigation, she will examine the strengths and the weaknesses of the case. Information regarding the closing conference, reasons for the findings, a description of the employee's reaction to the findings and whether he offered any new evidence or witnesses at the conference will also be included. If a recommendation of dismissal was given, notation is made that the employee was advised of appeal rights and objection procedures. If the case was settled, the FIR will contain an account of the settlement. Finally, the FIR will have the investigator's recommendations.[48]

After the investigator completes her investigation, the OSHA supervisor will review the file. If the recommendation is to approve a withdrawal, the supervisor will approve by signing the withdrawal form. (The employee may request a withdrawal of the complaint verbally, but it is recommended that the request be made in writing.) If the recommendation is for dismissal, the supervisor will prepare letters of dismissal to all parties, with information of the parties' right to object or appeal as required by law.[49]

If the supervisor determines that the claim warrants further investigation, the case will be returned for follow-up. The supervisor will forward the file to the regional administrator (or a delegate) to review the recommendations and the file and to sign the appropriate letter of determination. Copies of the determination and the complaint will be distributed to the Securities and Exchange Commission and the Office of Administrative Law Judges.[50]

Findings and Preliminary Orders

If the Department of Labor concludes that there is reasonable cause to believe that a violation has occurred, the assistant secretary of labor may issue a preliminary order for OSHA, providing relief to the employee. The preliminary order will include that relief necessary to make the employee whole, including: reinstatement with the seniority status the employee would enjoy had the violation not taken place; back pay with interest; and compensation for special damages resulting from the violation such as litigation costs, expert witness fees, and reasonable attorney's fees. If the employer can demonstrate that the employee is a security risk, reinstatement may not be appropriate.[51] Under such circumstances front pay may be available.

When it is determined that preliminary immediate reinstatement should be ordered, the OSHA supervisor will again contact the employer and provide the relevant evidence supporting the finding in favor of the employee. To ensure due process rights, the notification will describe the evidence relied upon to determine the violation, and copies of the relevant documents will be provided, including witness statements. Efforts will be made to keep the confidence of witnesses who requested confidentiality, but summaries of witness statements must include as much detail as possible. The employer is allowed to submit a written response, meet the investigator, and present rebuttal witnesses within 10 business days of receipt of OSHA's letter or at a later agreed-upon date.[52]

The findings and the preliminary order take effect 30 days after receipt by the employer unless an objection and a request for a hearing has been filed.[53] The assistant secretary may withdraw the findings or a preliminary order at any time before the expiration of the 30-day objection period, provided no objection has been filed, and substitute new findings or a new preliminary order. The date of the receipt of the substituted findings or preliminary order begins a new 30-day objection period.[54]

At any time before the findings or order becomes final, either the employer or the employee may withdraw their objections to the findings or order by filing a written withdrawal with the administrative law judge. The ALJ will decide whether to approve the withdrawal.[55]

Whether an objection is filed by any party to the preliminary reinstatement, any portion of a preliminary order requiring reinstatement is effective immediately upon receipt of the finding and the preliminary order. Enforcement may be had in the US district court in the appropriate jurisdiction.[56] Reinstatement is not stayed by the filing of an objection or request for a hearing.[57]

If no objection is filed regarding the findings or the preliminary order, the findings or preliminary order will become the final agency decision of the secretary of labor and is not subject to judicial review.[58]

Settlement

If the employee and the employer express the wish to explore settlement, the investigator will facilitate.[59] The parties may also use private alternative dispute resolution to aid them in settlement.[60] At any time after the filing of a complaint but before the findings and/or preliminary order are objected to or become a final order by operation of law, the case may be settled if the assistant secretary, the employee, and the employer agree to a settlement.[61]

Where possible 100 percent relief should be sought in settlement negotiations, although both parties are free to make concessions. An agreement may include provisions for reinstatement to the same or an equivalent job and restoration of seniority and benefits. The employer may offer front pay in lieu of reinstatement if the employee agrees. The agreement may include lost wages; deletion of warnings, reprimands, or negative references in the employee's personnel file; posting notices to employees about the settlement; other compensatory damages; and damages for pain and suffering.[62] Monetary damages may receive interest at the rate charged by the Internal Revenue Service for underpaid taxes. (This rate is computed by using the federal short-term rate established in the first month of each calendar quarter, plus three percentage points.)[63] Punitive damages may also be appropriate in cases where conduct was egregious.[64]

Any settlement agreement must be in writing. The employer must agree to comply with the statute and address the alleged retaliation. The agreement must specify the relief owed. The employer must also make a constructive effort to lessen any chilling effect. To ensure this, the

employer may be asked to publicly post the agreement or notice. To avoid this, the employer may need to demonstrate why notice to other employees is not necessary.[65]

Settlement agreements made during the investigative stage must be reviewed by the secretary of labor. Under SOX any settlement made before the issuance of a final order must be submitted to an administrative law judge for approval even though the case has not been submitted to the OALJ.[66]

If the employer does not comply with the settlement agreement, the noncompliance may be treated as a new instance of retaliation and precipitate a new case.[67]

Objections and Request for Review

Any party may retain private counsel, represent themselves in a hearing, or be represented by a person other than an attorney.[68] The OALJ does not have the authority to appoint counsel or refer the parties to attorneys.[69] Witnesses may also choose counsel, self-representation, or personal representation. If a party chooses a personal representative, the representative must submit an application to the ALJ with the applicant's qualifications. After a hearing on the matter, the ALJ may deny the privilege of appearing to any person who is deemed not to possess the requisite qualifications to represent others, is lacking in character, has engaged in unethical or improper professional conduct, or has engaged in an act involving moral turpitude.[70]

Parties may waive their right to appear for argument and instead submit evidence for a written record on which the decision will be based. Such a waiver should be made in writing and filed with the chief administrative law judge or the ALJ hearing the case. When all parties waive appearance, the ALJ will make a record of the written documents submitted by the parties and pleadings and will make a decision accordingly.[71]

Office of Administrative Law Judges

The chief administrative law judge will, upon receipt of a timely objection, notify the parties of the date, time, and place of the hearing.[72] Sarbanes-Oxley requires that an expedited hearing be held. Hearings

must be scheduled within 60 days from receipt of a request for hearing or order of reference. Decisions of the ALJ should be issued within 20 days after receipt of the transcript of any oral hearing or within 20 days after the filing of all documentary evidence if no oral hearing was conducted.[73]

Although the adjudication process is somewhat less formal than a court proceeding, the ALJ has all the powers necessary to conduct fair and impartial hearings. The ALJ may conduct formal hearings, administer oaths, and examine witnesses. Where necessary the ALJ may compel the production of documents and the appearance of witnesses in control of the parties as well as issue decisions and orders.[74] The ALJ may issue a default decision against any party failing without good cause to appear at a hearing.[75]

Persons participating in proceedings before the ALJ who disobey or resist any lawful order or process; misbehave during a hearing or obstruct a hearing; neglect to produce documents after an order; or refuse to appear, refuse to take the oath, or refuse examination may, where the statute allows, have such facts of their conduct certified to the federal district court having jurisdiction. The ALJ may request appropriate remedies.[76]

The ALJ has the authority to sanction parties just as any other judge. SOX provides that upon the determination by the secretary of labor that a complaint was filed frivolously or in bad faith, the employer may be awarded reasonable attorney's fees not to exceed $1,000 to be paid by the employee. The ALJ may award such at the request of the employer.[77]

Parties

Generally, the parties to the proceedings will be the employee and the employer. Other persons or organizations may participate as parties, however, if the ALJ determines that: the final decision could directly or adversely affect them or the class they represent; they will contribute materially to the disposition of the proceedings; and their interest is not adequately represented by the parties in the suit. Such additional persons or organizations must submit a petition to the ALJ within 15 days after they learn of or should have known of the proceedings. The petition must explain: their interest in the proceedings; how their participation as a party will contribute materially to the disposition of the proceedings;

who will appear for the petitioner; the issues the petitioner wishes to participate in; and whether the petitioner will present witnesses. They must also serve a copy on all parties. Other parties in the suit may object to the petitioner. The ALJ will determine if the petitioner may participate in the proceedings. If the ALJ denies the petitioner, the ALJ may treat the petition as a request to participate as amicus curiae.[78]

An amicus curiae brief can be filed only with the written consent of all the parties, by leave of the ALJ, or at the request of the ALJ. Neither consent nor leave is required when the brief is from an officer or agency of the United States, a state, a territory, or a commonwealth. The amicus curiae cannot participate in the hearing.[79]

Document Filing

Any documents that are filed with the ALJ must be served on all parties. In other words, the employee must send a copy of the document to all the named parties in the suit. Include on the document the case caption (e.g., *John Doe v. ABC Corporation*) the docket number, and a short title of the motion (e.g., Motion for Continuance). The signed documents should be mailed to the chief docket clerk or to the regional office to which the proceeding may have been transferred for a hearing. Remember that each document requires a proof of service stating when and how it was served to the other litigant(s).

When explicitly authorized one may also fax documents to the OALJ. Of course the fax should contain a cover sheet that identifies the sender, the number of pages sent, and the caption and the docket number of the case. Faxed documents should not exceed 12 pages inclusive of the cover sheet, the proof of service, and any and all accompanying exhibits. If prior permission has not been granted, one may file by fax and attach a statement of the circumstances that precipitated that the document be filed by fax. This does not ensure that the filing will be accepted, however.

It is extremely important to be cognizant of the time requirements. Time lines begin the day following the act or event.[80] Parties have 10 days after service of a motion or request in which to respond unless ordered otherwise by the ALJ.[81] If the last day of the time period is a Saturday, Sunday, or legal holiday observed by the federal government, the time

period concludes on the next business day. When documents are filed by mail, five days are added to the time period.[82]

Adjudication Process

The ALJ may require that one or more of the parties file a prehearing statement explaining their position. A prehearing statement identifies the name of the party who is presenting it and generally: issues involved in the proceeding; stipulations; disputed facts; witnesses and exhibits (other than those that are privileged); a brief statement of applicable law; conclusions to be drawn; suggested time and location of hearing as well as an estimate of the time required for the party to present their case; and other such appropriate information that complies with the ALJ's request.[83]

The ALJ may order a prehearing conference at his or her discretion or upon a motion from a party. These conferences may be conducted by telephone unless otherwise required. Generally, prehearing conferences are used to discuss simplification of issues; the necessity of amendments to pleadings; evidentiary matters; limitation of witnesses; settlement issues; and identification of documents or matters of which official notice may be requested; or to expedite disposition of the proceedings. Such conferences are reported stenographically unless the ALJ directs otherwise. Usually, a written order is generated following the conference unless the ALJ decides the stenographer's report is sufficient or the conference happens within seven days of the hearing.[84]

After the conclusion of a hearing, the record will be closed unless the ALJ directs otherwise. (If the hearing was waived, the record closes at a date set by the ALJ.) Once the record is closed, no additional evidence may be accepted into the record unless one can demonstrate new material evidence that was unavailable prior to closing.[85]

After the case has been heard, the ALJ will issue a recommended decision and order. Within a reasonable time after the filing of the proposed findings of fact, conclusions of law, and order, or within 30 days of receipt of consent findings, the ALJ will make a decision. The decision will include findings of fact and conclusions of law with reasons regarding each material issue of fact or law presented.[86] The ALJ will order the appropriate remedy.[87]

A determination that a violation has occurred will be had when the employee has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. If the employer demonstrates through clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior, relief will not be ordered for the employee.[88]

An employee who prevails on his claim shall be entitled to all relief necessary to make the employee whole. This includes compensatory damages; reinstatement with the same seniority status the employee enjoyed prior to the discrimination; back pay with interest where appropriate; and compensation for any special damages sustained as a result of the discrimination. Special damages may be the cost of litigation, expert witness fees, and reasonable attorney's fees.[89]

The decision of the ALJ will become a final order unless the Administrative Review Board issues an order notifying the parties that the case has been accepted for review within 30 days of the filing of a petition. If a petition for review is accepted, the decision of the ALJ will be inoperative unless the board issues an order adopting the decision. A preliminary order of reinstatement will be effective while the ARB considers the case unless the ARB grants a motion to stay the order. The ARB will review the case under a substantial evidence standard.[90]

The ARB will issue a final decision within 120 days of the conclusion of a hearing, which is the conclusion of all proceedings before the ALJ (which is 10 business days after the date of the ALJ's decision unless a motion for reconsideration was filed with the ALJ in the interim). If the ARB concludes that the employer has violated the law, the final order will provide for all the relief necessary to make the employee whole, including reinstatement to his former position with the seniority status he would have enjoyed had there been no discrimination; back pay with interest; and compensation for any special damages sustained as a result of the discrimination. Special damages include litigation costs, expert witness fees, and reasonable attorney's fees. If the ARB finds that there has been no violation of the law, the complaint will be denied. The employer who prevails on an allegation that the complaint is frivolous or in bad faith

may be awarded reasonable attorney's fees, although the fees may not exceed $1,000.[91]

Enforcement of Reinstatement Order

When a party fails to comply with a preliminary order of reinstatement or final order or the terms of a settlement agreement, the opposing party may file a civil action seeking enforcement of the order in the US district court for the district in which the violation occurred.[92]

Appeal

Within 60 days after the final order of the ARB has been issued, any person adversely affected or aggrieved by the order may file a petition for review of the order in the US court of appeals for the circuit in which the violation allegedly occurred or the circuit that the employee resided in on the day of the violation.[93]

Summary Decision

A party may file for a summary decision 20 or more days before the date of a hearing. The ALJ may set the matter for argument or ask the parties to submit briefs. A summary decision will be issued when the ALJ has determined that there is no genuine issue as to any material fact, so the case can be decided without a hearing on legal grounds alone.[94]

Settlement Judge Program

At any time the parties may ask to defer the hearing for a reasonable time to permit negotiation of a settlement. The parties may use a settlement judge to mediate.[95] There is no charge for the services of the settlement judge.[96] Settlement discussions are confidential, and no evidence of statements or conduct in the proceedings is admissible in the proceedings or subsequent administrative proceedings before the Department of Labor, unless agreed to by the parties. Any documents disclosed in the settlement process may not be used in litigation unless obtained through discovery. The settlement judge will not discuss the case with the ALJ or be called as a witness in the proceeding or subsequent proceedings before the DOL.[97]

Settlement negotiations shall not exceed 30 days from the appointment of the settlement judge. Nevertheless the settlement judge may request an extension of time from the ALJ. Upon a communication from either party that the party no longer wishes to participate, the negotiations will end.[98]

At any time after the filing of objections to OSHA's findings or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the ALJ if the case is before the ALJ. An approved settlement is a final order and may be enforced as such.[99]

Administrative Review Board

Review

Either party may seek judicial review. To seek judicial review of a decision of the ALJ or in the case of a respondent's alleging that the complaint was frivolous or in bad faith, a written petition for review with the ARB must be made. The petition should specifically identify the findings, conclusions, or orders to which exception is taken. Any exception not raised will be deemed to have been waived. Either party has 10 business days from the date of the ALJ's decision in which to file a petition. A party seeking review must serve a petition on all parties in the litigation, the chief ALJ, the assistant secretary of OSHA, and the assistant secretary of the Division of Fair Labor Standards. The date of the postmark is considered to be the date of filing.[100] If the parties fail to do so, the ALJ's decision becomes final and is not reviewable.

Stays

Parties may request a stay of an order pending an appeal. One should be mindful, however, that the burden to receive a stay is rather high. To receive a stay, a party must show that: he is likely to prevail on appeal; irreparable injury will result if the stay is not granted; the stay will not cause substantial harm to the other litigants; and the stay will not interfere with the public interest. If the request for stay is denied, the party may appeal with the US court of appeals for the circuit in which the violation occurred.

Withdrawal

Anytime before the findings or order becomes final, a party may withdraw the objections to the findings or order by filing a written withdrawal with the Administrative Review Board. The ARB will decide whether to approve the withdrawal.[101]

Settlement

At any time after the filing of objections to OSHA's findings or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the ARB if the case is before the ARB. An approved settlement is a final order and may be enforced as such.[102]

Appeal

An ARB decision may be appealed by any person adversely affected or by an aggrieved party within 60 days of a final decision to the US court of appeals for the circuit in which the violation occurred. Final orders of the ARB are not subject to judicial review in any criminal or other civil proceeding.[103]

Federal Court

If the secretary of labor has not issued a final decision within 180 days of the filing of the complaint and the delay has not been caused by the employee, the employee may wait for the decision of the secretary of labor or he may file suit in the US district court with jurisdiction over the matter. (The amount in controversy is not an issue in such cases as it is with traditional civil suits in federal courts.[104]) To do so the employee must file a notice of his intention to file such a complaint 15 days in advance of filing the complaint in federal court. The assistant secretary for OSHA and the associate solicitor of the Division of Fair Labor Standards should also be served with a copy of the notice.[105]

Frequently Asked Questions

When should I file my complaint?

A complaint now must be filed within 180 days, doubled from 90 before recent changes.

Where should I file my complaint?

A complaint can be filed at the OSHA area office. In states that do not have area offices, you should contact the OSHA regional office.

Can I keep my identity confidential?

No, the identity of the complainant will be revealed to the respondent (your employer). Under some circumstances, however, witnesses may keep their identities confidential.

Do I need an attorney to file a complaint?

No, you can represent yourself in all proceedings, or you may choose to have a personal representative who is not an attorney represent you. Although an attorney is not required, you should be mindful that without an attorney you may be at a disadvantage in more-complex proceedings.

If I change my mind, can I withdraw my complaint?

Yes, anytime before the findings or an order becomes final, a complaint may be withdrawn.

Is there a fee for the use of a settlement judge?

There is no fee for the settlement judge.

Can I return to work once I have a reinstatement order?

Reinstatement orders are applicable immediately upon receipt of the order. To enforce the order, however, additional steps may need to be taken.

How is front pay determined?

Numerous factors are considered when making a determination of a front-pay award. These factors include the discharged employee's duty to mitigate the damages, the availability of employment opportunities, the period within which the employee by reasonable efforts may be re-employed, the employee's work and life expectancy, and the utilization of discount tables to determine the current value of future damages.

What if my case does not meet the minimum amount required in federal court?

SOX cases may proceed to federal court regardless of the amount in controversy.

Appendix A: 18 U.S.C. § 1514 A

§ 1514 A. Civil action to protect against retaliation in fraud cases.

(a) Whistleblower protection for employees of publicly traded companies. No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), or any officer, employee, contractor, subcontractor, or agent of such company, or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348 [18 USCS § 1341, 1343, 1344,

or 1348], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348 [18 USCS § 1341, 1343, 1344, or 1348], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

(b) Enforcement action.

(1) In general. A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by—

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(2) Procedure.

(A) In general. An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

(B) Exception. Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) Burdens of proof. An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

(D) Statute of limitations. An action under paragraph (1) shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.

(E) Jury trial. A party to an action brought under paragraph (1)(B) shall be entitled to trial by jury.

(c) Remedies.

(1) In general. An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) Compensatory damages. Relief for any action under paragraph (1) shall include—

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(d) Rights retained by employee. Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

(e) Nonenforceability of certain provisions waiving rights and remedies or requiring arbitration of disputes.

(1) Waiver of rights and remedies. The rights and remedies provided for in this section may not be waived by any agreement,

policy form, or condition of employment, including by a predispute abitration agreement.

(2) Predispute arbitration agreements. No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

Appendix B: Investigative Materials and Confidentiality

Investigative materials (such as notes, memos, work papers, records, and recordings received or prepared by the investigator) are included in the case file to support the findings of the investigation. Information and statements obtained from investigations are confidential except for those that may be released under the Freedom of Information Act or the Privacy Act and those that must be released for the purpose of due process. The region's document custodian will process any request for release of information in compliance with requisite laws and agency policy.[106]

After a case has been closed, much of the information in the file is available upon receipt of a FOIA request, a request from a federal agency or the ALJ, or through discovery procedures. A SOX case is closed once OSHA has completed its investigation and issued its determination letter, unless OSHA is participating in the proceeding before the ALJ or has recommended that OSHA participate as a party in the proceeding.[107]

Upon a FOIA request, the entire narrative report minus analysis and recommendation is generally disclosed. Included may be interviews of officials representing the employer as well as interviews of the employee and others who have not requested confidentiality after the redaction of passages that might be considered an invasion of privacy to a third party.[108]

Confidentiality

During the investigation the employer may identify materials it deems trade secrets or confidential or financial information. If the investigator finds no reason to question such identification and the disclosure officer agrees, the information will be labeled "confidential" and will not be released except in accordance with OSHA or similar statutory requirements.[109]

TOOL B

Sample FOIA Request Letter

Your address
Contact information
Date

Freedom of Information Office
Agency
Address [separate for each agency subunit where records may be located]

FOIA Request

Dear FOIA Officer,

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to the following records, as defined by the act: *[Here clearly describe what you want. Include the format the records may take (e-mails, audio files, documents) and identifying material, such as names, places, and the period of time about which you are inquiring. If you think it will help to explain what you are looking for, attach news clippings, reports, and other documents describing the subject of your research.]*

As a noncommercial requester of information, I am entitled to two hours of search time and copies of 100 pages for free. Provided they are reasonable, I agree to pay any additional processing fees for this request in an amount not to exceed $*[state dollar amount]*. Please notify me prior to your incurring any expenses in excess of that amount.

[Optional public interest fee waiver request] Please waive my applicable fees because release of the information is in the public interest. *[Argue why the request satisfies the six criteria laid out in chapter 3.]*

If my request is denied in whole or in part, I ask that you justify all deletions by reference to specific exemptions of the FOIA. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

I look forward to your reply within 20 business days, as the statute requires, and *[option to expedite the process]* would appreciate your communicating with me by telephone or e-mail, rather than by mail, if you have questions regarding this request.

Thank you for your assistance.

Very truly yours,

Your signature

TOOL C

Public Interest Organizations

In addition to the Government Accountability Project, the following public interest organizations may be of assistance to corporate whistleblowers.

Electronic Frontier Foundation (EFF)
454 Shotwell St.
San Francisco, CA 94110-1914
http://www.eff.org
information@eff.org
Tel: (415) 436-9333
Fax: (415) 436-9993

Founded in 1990, EFF confronts cutting-edge issues in free speech, privacy, and consumer rights by blending the expertise of lawyers, policy analysts, activists, and technologists.

Electronic Privacy Information Center (EPIC)
1718 Connecticut Ave. NW, Suite 200
Washington, DC 20009
http://epic.org
Tel: (202) 483-1140
Fax: (202) 483-1248

EPIC is a public interest research center in Washington, DC. It was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values.

Make It Safe Coalition
c/o Government Accountability Project
http://www.makeitsafecampaign.org
info@whistleblower.org
Tel: (202) 418-0034

This nonpartisan, transideological coalition of good government, taxpayer watchdog, transparency, consumer, professional, libertarian, and labor organizations is the umbrella for nearly all organized whistleblower rights advocacy in the United States. From 2007 to 2010, it has sponsored an annual May whistleblower conference in Washington, DC.

National Whistleblower Center (NWC)
3238 P St. NW
PO Box 3768
Washington, DC 20027
http://www.whistleblowers.org
contact@whistleblowers.org
Tel: (202) 342-1903
Fax: (202) 342-1904

The NWC has a small staff, but it actively participates in whistleblower rights coalitions and has an impressive website with excellent research. It is connected with the highly successful law firm of Kohn, Kohn & Colapinto, LLP, which has been particularly active with FBI whistleblowers.

Project on Government Oversight (POGO)
1100 G St. NW, Suite 900
Washington DC, 20005-3806
http://www.pogo.org
info@pogo.org
Tel: (202) 347-1122
Fax: (202) 347-1116

POGO conducts in-depth investigations of whistleblower disclosures and effectively airs the results in reports taken seriously by Congress and national media outlets. It helps find legal, political, and media champions to protect those with whom it works, and it has been an active leader in whistleblower rights campaigns for government employees and contractors.

Public Citizen
1600 20th St. NW
Washington, DC 20009
http://www.citizen.org
member@citizen.org
Tel: (202) 588-1000

Founded in 1971, Public Citizen is a national nonprofit consumer advocacy organization that fights for safer drugs and medical devices, cleaner and safer energy sources, a cleaner environment, fair trade, and a more open and democratic government. It also has been a cutting-edge leader in whistleblower rights legislative campaigns.

Taxpayers Against Fraud (TAF)
1220 19th St. NW, Suite 501
Washington, DC 20036
http://www.taf.org
Tel: (202) 296-4826 or (800) US-FALSE [800-873-2573]
Fax: (202) 296-4838

TAF is a nonprofit, public interest organization dedicated to combating fraud against the federal government through the promotion and the use of the *qui tam* provisions of the False Claims Act. Established in 1986, TAF serves to collect and evaluate evidence of fraud against the federal government and facilitate the filing of meritorious False Claims *qui tam* suits. TAF also works to advance public, legislative, and government support for *qui tam* measures.

Union of Concerned Scientists (UCS)
National Headquarters
2 Brattle Sq.
Cambridge, MA 02138-3780
http://www.ucsusa.org
Tel: (617) 547-5552
Fax: (617) 864-9405

UCS is the leading science-based nonprofit organization working for a healthy environment and a safer world. It combines independent scientific research and citizen action to develop innovative, practical solutions and to secure responsible changes in government policy, corporate practices, and consumer choices.

Although the following organizations deal primarily with public employees and government misconduct, they may be useful if the corporate wrongdoer is in a contract or regulatory relationship with a particular government agency.

American Civil Liberties Union (ACLU)
125 Broad St., 18th Floor
New York, NY 10004
http://www.aclu.org/contact-us
Tel: (212) 549-2500

Better Government Association (BGA)
11 E Adams St., Suite 608
Chicago, IL 60603
http://www.bettergov.org
info@bettergov.org
Tel: (312) 427-8330
Fax (312) 821-9038

Citizens against Government Waste (CAGW)
1301 Pennsylvania Ave. NW, Suite 1075
Washington, DC 20004
http://www.cagw.org
membership@cagw.org
Tel: (202) 467-5300
Fax: (202) 467-4253

OMB Watch
1742 Connecticut Ave. NW
Washington, DC 20009
http://www.ombwatch.org
Tel: (202) 234-8494
Fax: (202) 234-8584

OpenTheGovernment.org
1742 Connecticut Ave. NW, 3rd Floor
Washington, DC 20009
http://www.openthegovernment.org
info@openthegovernment.org
Tel: (202) 332-OPEN [6736]

Public Employees for Environmental Responsibility (PEER)
2000 P St. NW, Suite 240
Washington, DC 20036
http://www.peer.org
info@peer.org
Tel: (202) 265-7337
Fax: (202) 265-4192

The following whistleblower organizations operate outside the United States.

Canadians for Accountability
532 Montreal Rd., Suite 221
Ottawa, ON, Canada K1K 4R4
http://www.canadians4accountability.org
info@canadians4accountability.org
Tel: (613) 304-8049
Fax: (613) 747-9317

Federal Accountability Initiative for Reform (FAIR)
82 Strathcona Ave.
Ottawa, ON, Canada K1S 1X6
http://fairwhistleblower.ca
david@fairwhistleblower.ca
Tel: (613) 567-1511

Integrity Line
Englischviertelstrasse 18
CH-8032 Zürich, Switzerland
www.integrityline.org
zora.ledergerber@integrityline.org
Tel: 041 76 339 41 18
Tel: 041 325 123 553

International Freedom of Expression eXchange (IFEX)
555 Richmond Street W, Suite 1101
PO Box 407
Toronto, ON, Canada M5V 3B1
http://www.ifex.org
ifex@ifex.org
Tel: (416) 515-9622
Fax: (416) 515-7879

Open Democracy Advice Centre (ODAC)
6 Spin Street
PO Box 1739
Cape Town, 8001, South Africa
http://www.opendemocracy.org.za
Tel: 027 21 4613096
Fax: 027 21 4613021

Public Concern at Work
3rd Floor, Bank Chambers
6–10 Borough High Street
London SE1 9QQ, United Kingdom
http://www.pcaw.co.uk
whistle@pcaw.co.uk
Tel: 020 7404 6609
Fax: 020 74038823

Whistleblower-Netzwerk e.V.
Allerseelenstrasse 1n
D-51105 Köln, Germany
http://www.whistleblower-net.de
Tel: 0221 1692194

TOOL D

Online Resources

The following is a brief list of sites on the World Wide Web that may be of assistance or interest to corporate whistleblowers.

A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records

http://www.fas.org/sgp/foia/citizen.html

Cryptome: a secured online anonymous document disclosure forum

http://www.cryptome.org

Electronic Privacy Information Center's Online Guide to Practical Privacy Tools

http://epic.org/privacy/tools.html

POGO's Federal Contractor Misconduct Database

http://www.contractormisconduct.org

IBM Investor Relations: a guide to reading financial statements in annual reports

http://www.ibm.com/investor/help/guide/introduction.wss

Jobs with Justice: a US coalition for the rights of working people

http://www.jwj.org

LawMall: self-help publications for dealing with legal problems

http://www.lawmall.com/lm_pamph.html

The Motley Fool's guide to reading SEC filings and financial statements

http://www.fool.com/dripport/2000/dripport000106.htm

National Security Archive of government and contractor documents

http://www.gwu.edu/~nsarchiv

National Employment Lawyers Association

http://www.nela.org

New Grady Coalition

http://www.newgradycoalition.com

Qui Tam Information Center

http://www.quitam.com

US Department of Energy Hearings and Appeals: administrative whistleblower decisions

http://www.oha.doe.gov

US Department of Labor: administrative whistleblower decisions

http://www.oalj.dol.gov

US General Services Administration Office of Inspector General FraudNet Hotline

http://www.gsa.gov/fraudnet

US Office of Special Counsel

http://www.osc.gov

US Securities and Exchange Commission: Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system of corporate filings

http://www.sec.gov/edgar.shtml

US Environmental Protection Agency: information sources

http://www.epa.gov/epahome/resource.htm

US federal government online resource for recalls

http://www.recalls.gov

US Merit Systems Protection Board

http://www.mspb.gov

US Food and Drug Administration

http://www.fda.gov

WhistleblowerLaws.com: Whistleblower employee protection

http://www.whistleblowerlaws.com

WikiLeaks: a secured online anonymous document disclosure forum

http://wikileaks.org

Workplace Fairness: information about workplace rights and employment issues

http://www.workplacefairness.org

WorldwideWhistleblowers.com

http://worldwidewhistleblowers.com

TOOL E

Federal Statutes with Corporate Whistleblower Provisions

★ *Denotes laws restricted to government employees. Out of the 57 federal whistleblower statutes, 44 protect corporate employees, 7 are solely for government workers, 3 cover government corporations, and 3 are limited to government contractors.*

▶ *Denotes law enforced by the US Department of Labor.*

Age Discrimination in Employment Act, 29 U.S.C. § 623(d)

American Recovery and Reinvestment Act of 2009 (stimulus bill), Pub. L. 111-5 § 1553

Americans with Disabilities Act, 42 U.S.C. § 12203

★ Armed Forces, 10 U.S.C. § 1587 (civilian employee protection)

▶ Asbestos Hazard Emergency Response Act, 15 U.S.C. § 2651

Asbestos School Hazard Abatement, 20 U.S.C. § 4018

Asbestos School Hazard Detection and Control, 20 U.S.C. § 3608

★ Banking, 31 U.S.C. § 5328 (employee protection)

Banking, 12 U.S.C. § 1790(b) (credit unions)

Banking, 12 U.S.C. § 1831(j) (FDIC)

- ★ Civil Rights Act of 1871, 42 U.S.C. § 1983 (protection for constitutional rights of state and municipal government employees)

  Civil Rights Act of 1871, 42 U.S.C. § 1985 (protection against conspiracy to obstruct justice or intimidate witnesses)

  Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997(d)

- ★ Civil Service Reform Act/Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8)

- ▶ Clean Air Act, 42 U.S.C. § 7622

- ★ Coast Guard, 46 U.S.C. § 2114 (whistleblower protection)

- ▶ Commercial Motor Vehicle Safety Act/Surface Transportation Assistance Act, 49 U.S.C. § 31105

- ▶ Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. § 9610

- ▶ Consumer Product Safety Improvement Act, 15 U.S.C. § 2087

  Defense Contractors, 10 U.S.C. § 2409

  Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 §§ 748, 922 (bounties and associated anti-retaliation rights)

- ▶ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 § 1558 (anti-retaliation)

- ▶ Employment Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1132(a), 1140

- ▶ Energy Reorganization Act/Energy Policy Act, 42 U.S.C. § 5851

  Fair Labor Standards Act, 29 U.S.C. § 215(a)(3)

  False Claims Act, 31 U.S.C. § 3730(h)

  Family and Medical Leave Act, 29 U.S.C. § 2615(a), (b)

  FBI whistleblower protection, 5 U.S.C. § 2303

- ▶ Federal Rail Safety Act, 49 U.S.C. § 20109

FDA Food Safety Modernization Act, Pub. L. 111-353 § 402 (employee protection)

★ Foreign Service Act of 1980, 22 U.S.C. § 3905

Government Contractors, 41 U.S.C. § 265

▶ International Safe Containers Act, 42 U.S.C. § 8057

▶ Job Training and Partnership Act/Workforce Investment Act, 29 U.S.C. § 2934(f)

★ Lloyd-LaFollette Act, 5 U.S.C. § 7211 (federal employees' right to petition Congress)

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 948(a)

Major Fraud Act, 18 U.S.C. § 1031(h)

Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. §§ 1854–1855

★ Military Whistleblower Protection Act, 10 U.S.C. § 1034

Mine Health and Safety Act, 30 U.S.C. § 815(c)

National Labor Relations Act, 29 U.S.C. § 158(a)(4)

▶ National Transit Systems Security Act, 6 U.S.C. § 1142

▶ Occupational Safety and Health Act, 29 U.S.C. § 660(c)

▶ Patient Protection and Affordable Care Act, 29 U.S.C. § 218(c) and 42 U.S.C. § 300(gg-5)

▶ Pipeline Safety Act/Pipeline Safety Improvement Act, 49 U.S.C. § 60129

Racketeering Influenced and Corrupt Organizations Act (RICO), 38 U.S.C. §§ 1961–1968

▶ Safe Drinking Water Act, 42 U.S.C. § 300(j)-9(I)

▶ Sarbanes-Oxley Act, 18 U.S.C. § 1514(a)

Seaman's Protection Act, 46 U.S.C. § 2114

- Solid Waste Disposal Act, 42 U.S.C. § 6971

  Surface Mining Act, 30 U.S.C. § 1293 (employee protection)

  Title VII, 42 U.S.C. § 2000e-3(a) (anti-retaliation)

- Toxic Substances Control Act, 15 U.S.C. § 2622

- ★ Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4311(b)

- Water Pollution Control Act, 33 U.S.C. § 1367

  Welfare and Pensions Disclosure Act, 29 U.S.C. § 1140

- Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121

TOOL F

International Ombudsman Association Standards of Practice

Reprinted from http://www.ombudsassociation.org/standards/IOA_Standards_of_Practice_Oct09.pdf

Preamble

The IOA Standards of Practice are based upon and derived from the ethical principles stated in the IOA Code of Ethics.

Each Ombudsman office should have an organizational Charter or Terms of Reference, approved by senior management, articulating the principles of the Ombudsman function in that organization and their consistency with the IOA Standards of Practice.

Standards of Practice

Independence

1.1 The Ombudsman Office and the Ombudsman are independent from other organizational entities.

1.2 The Ombudsman holds no other position within the organization which might compromise independence.

1.3 The Ombudsman exercises sole discretion over whether or how to act regarding an individual's concern, a trend, or concerns of multiple

individuals over time. The Ombudsman may also initiate action on a concern identified through the Ombudsman's direct observation.

1.4 The Ombudsman has access to all information and all individuals in the organization, as permitted by law.

1.5 The Ombudsman has authority to select Ombudsman Office staff and manage Ombudsman Office budget and operations.

Neutrality and Impartiality

2.1 The Ombudsman is neutral, impartial, and unaligned.

2.2 The Ombudsman strives for impartiality, fairness, and objectivity in the treatment of people and the consideration of issues. The Ombudsman advocates for fair and equitably administered processes and does not advocate on behalf of any individual within the organization.

2.3 The Ombudsman is a designated neutral, reporting to the highest possible level of the organization and operating independently of ordinary line and staff structures. The Ombudsman should not report to nor be structurally affiliated with any compliance function of the organization.

2.4 The Ombudsman serves in no additional role within the organization which would compromise the Ombudsman's neutrality. The Ombudsman should not be aligned with any formal or informal associations within the organization in a way that might create actual or perceived conflicts of interest for the Ombudsman. The Ombudsman should have no personal interest or stake in, and incur no gain or loss from, the outcome of an issue.

2.5 The Ombudsman has a responsibility to consider the legitimate concerns and interests of all individuals affected by the matter under consideration.

2.6 The Ombudsman helps develop a range of responsible options to resolve problems and facilitate discussion to identify the best options.

Confidentiality

3.1 The Ombudsman holds all communications with those seeking assistance in strict confidence and takes all reasonable steps to safeguard confidentiality, including the following: The Ombudsman does not reveal, and must not be required to reveal, the identity of any individual contacting the Ombudsman Office, nor does the Ombudsman reveal information provided in confidence that could lead to the identification of any individual contacting the Ombudsman Office, without that individual's express permission, given in the course of informal discussions with the Ombudsman; the Ombudsman takes specific action related to an individual's issue only with the individual's express permission and only to the extent permitted, and even then at the sole discretion of the Ombudsman, unless such action can be taken in a way that safeguards the identity of the individual contacting the Ombudsman Office. The only exception to this privilege of confidentiality is where there appears to be imminent risk of serious harm, and where there is no other reasonable option. Whether this risk exists is a determination to be made by the Ombudsman.

3.2 Communications between the Ombudsman and others (made while the Ombudsman is serving in that capacity) are considered privileged. The privilege belongs to the Ombudsman and the Ombudsman Office, rather than to any party to an issue. Others cannot waive this privilege.

3.3 The Ombudsman does not testify in any formal process inside the organization and resists testifying in any formal process outside of the organization regarding a visitor's contact with the Ombudsman or confidential information communicated to the Ombudsman, even if given permission or requested to do so. The Ombudsman may, however, provide general, nonconfidential information about the Ombudsman Office or the Ombudsman profession.

3.4 If the Ombudsman pursues an issue systemically (e.g., provides feedback on trends, issues, policies, and practices) the Ombudsman does so in a way that safeguards the identity of individuals.

3.5 The Ombudsman keeps no records containing identifying information on behalf of the organization.

3.6 The Ombudsman maintains information (e.g., notes, phone messages, appointment calendars) in a secure location and manner, protected from inspection by others (including management), and has a consistent and standard practice for the destruction of such information.

3.7 The Ombudsman prepares any data and/or reports in a manner that protects confidentiality.

3.8 Communications made to the Ombudsman are not notice to the organization. The Ombudsman neither acts as agent for, nor accepts notice on behalf of, the organization and shall not serve in a position or role that is designated by the organization as a place to receive notice on behalf of the organization. However, the Ombudsman may refer individuals to the appropriate place where formal notice can be made.

Informality and Other Standards

4.1 The Ombudsman functions on an informal basis by such means as: listening, providing and receiving information, identifying and reframing issues, developing a range of responsible options, and—with permission and at Ombudsman discretion—engaging in informal third-party intervention. When possible, the Ombudsman helps people develop new ways to solve problems themselves.

4.2 The Ombudsman as an informal and off-the-record resource pursues resolution of concerns and looks into procedural irregularities and/or broader systemic problems when appropriate.

4.3 The Ombudsman does not make binding decisions, mandate policies, or formally adjudicate issues for the organization.

4.4 The Ombudsman supplements, but does not replace, any formal channels. Use of the Ombudsman Office is voluntary and is not a required step in any grievance process or organizational policy.

4.5 The Ombudsman does not participate in any formal investigative or adjudicative procedures. Formal investigations should be conducted by others. When a formal investigation is requested, the Ombudsman refers individuals to the appropriate offices or individual.

4.6 The Ombudsman identifies trends, issues, and concerns about policies and procedures, including potential future issues and concerns, without breaching confidentiality or anonymity, and provides recommendations for responsibly addressing them.

4.7 The Ombudsman acts in accordance with the IOA Code of Ethics and Standards of Practice, keeps professionally current by pursuing continuing education, and provides opportunities for staff to pursue professional training.

4.8 The Ombudsman endeavors to be worthy of the trust placed in the Ombudsman Office.

Source: www.ombudsassociation.org Rev. 10/2009

TOOL G

International Best Practices for Whistleblower Policies

While whistleblower protection laws are increasingly popular, in many cases the rights have been largely symbolic and therefore counterproductive. Employees have risked retaliation, thinking they had genuine protection when in reality there was no realistic chance that they could maintain their careers. In those instances acting on rights contained in whistleblower laws has meant the near certainty that a legal forum would formally endorse the retaliation, leaving the careers of reprisal victims far more prejudiced than if no whistleblower protection law had been in place at all. The Government Accountability Project's review of the track records for these and prior laws over the past three decades has revealed numerous lessons learned, which have steadily been solved on the federal level through amendments to correct mistakes and close loopholes.

GAP labels such token laws as "cardboard shields" because anyone relying on them is sure to die professionally. We view genuine whistleblower laws as "metal shields," behind which an employee's career has a fighting chance. The following checklist of 20 requirements reflects GAP's 32 years of lessons learned. All the minimum concepts exist in various employee protection statutes currently on the books. This best-practice standard is based on a compilation of all national laws and intergovernmental organization policies such as those of the United Nations and the World Bank. It does not reference state or regional policies.

Scope of Coverage

The first cornerstone for any reform is that it is available. Loopholes that deny coverage when it is needed most, either for the public or the harassment victim, compromise whistleblower protection rules. Seamless coverage is essential so that accessible free-expression rights extend to any relevant witness, regardless of audience, misconduct, or context, to protect them against any harassment that could have a chilling effect.

Context for free-expression rights with no loopholes Protected whistleblowing should cover *any* disclosure that would be accepted in a legal forum as evidence of significant misconduct or would assist in carrying out legitimate compliance functions. There can be no loopholes for form, context, or audience, unless release of the information is specifically prohibited by statute or would incur organizational liability for breach of legally enforceable confidentiality commitments. In that circumstance disclosures should still be protected if made to representatives of organizational leadership or to designated law enforcement or legislative offices. It is necessary to specify that disclosures in the course of job duties are protected because most retaliation is in response to "duty speech" by those whose institutional role is blowing the whistle as part of organizational checks and balances.

> United Nations whistleblower policy (U.N. policy), § 4; OAS Model Law (approved November 2000) to implement Inter-American Convention against Corruption (OAS Model Law), §§ 2(d)–(f); Asian Development Bank Audit Manual, § 810.200; Public Interest Disclosure Act of 1998 (PIDA), c. 23 (U.K.), amending the Employment Rights Act of 1996, c.18, § 43(G); Protected Disclosures Act of 2000 (PDA); Act No. 26, GG21453 of Aug. 7, 2000 (S. Afr.), § 7–8; Anti-Corruption Act of 2001 (ACA) (Korea; statute has no requirement for internal reporting); Ghana Whistleblower Act of 2005 (Ghana WPA), § 4; Japan Whistleblower Protection Act, Article 3; Whistleblower Protection Act of 1989 (WPA) (U.S. federal government), 5 U.S.C. § 2302(b)(8); Consumer Product Safety Improvement Act (CPSIA) (U.S. corporate retail products), 15 U.S.C. § 2087(a); Federal Rail Safety Act (FRSA) (U.S. rail workers) 49 U.S.C. § 20109(a); National Transportation Security Systems Act (NTSSA) (U.S. public transportation), 6 U.S.C. § 1142(a); Sarbanes-Oxley Act of 2002 (SOX) (U.S. publicly traded corporations), 18 U.S.C. § 1514(a); Surface Transportation Assistance Act

(STAA) (U.S. corporate trucking industry), 49 U.S.C. § 31105(a); American Recovery and Reinvestment Act of 2009 (ARRA), (U.S. Stimulus Law), P.L. 111-5 § 1553(a)

Subject matter for free-speech rights with no loopholes Whistleblower rights should cover disclosures of any illegality, gross waste, mismanagement, abuse of authority, substantial and specific danger to public health or safety, and any other activity that undermines the institution's mission to its stakeholders as well as any other information that assists in honoring those duties.

U.N. policy, § 2.1(a); OAS Model Law, Article 2(c); Inter-American Development Bank (IDB) Staff Rule 328 § 104; PIDA (U.K.); PDA, § 1(i) (S. Afr.); ACA (Korea), Article 2; Public Service Act (PSA), Antigua and Barbuda Freedom of Information Act, § 47; R.S.O., ch. 47, § 28.13 (1990) (Can.); Ghana WPA, § 1; Uganda Whistleblower Protection Act of 2010 (Uganda 2010 WPA), § 1; WPA (U.S. federal government), 5 U.S.C. § 2302(b)(8); FRSA (U.S. rail workers), 49 U.S.C. § 20109(a)(1); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(a); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(a)(1); ARRA (U.S. Stimulus Law); P.L. 111-5 § 1553(A)(1)-(5)

Right to refuse to violate the law This provision is fundamental to stop faits accomplis and in some cases to prevent the need for whistleblowing. As a practical reality, however, in many organizations an individual who refuses to obey an order on the grounds that it is illegal must proceed at his or her own risk, assuming vulnerability to discipline if a court or other authority subsequently determines that the order would *not* have required illegality. Thus what is needed is a fair and expeditious means of reaching such a determination while protecting the individual who reasonably believes that she or he is being asked to violate the law from having to proceed with the action or from suffering retaliation while a determination is sought.

OAS Model Law, Articles 2(c), (5); Inter-American Development Whistleblower Policy, § 28; WPA (U.S. federal government), 5 U.S.C. § 2302(b)(9); FRSA (U.S. rail workers), 49 U.S.C. § 20109(a)(2); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(a)(2); CPSIA (U.S. corporate retail products), 15 U.S.C. § 2087(a)(4); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(a)(1)(B)

Protection against spillover retaliation The law should cover all common scenarios that could have a chilling effect on the responsible exercise of free-expression rights. Representative scenarios include individuals who are perceived as whistleblowers (even if mistakenly) or as "assisting whistleblowers" (to guard against guilt by association) as well as individuals who are "about to" make a disclosure (to preclude preemptive strikes to circumvent statutory protection and to cover the essential preliminary steps to have a "reasonable belief" and qualify for protection as a responsible whistleblowing disclosure). These indirect contexts often can have the most significant potential for a chilling effect that locks in secrecy by keeping people silent and isolating those who do speak out. The most fundamental illustration is reprisal for exercising anti-retaliation rights.

> OAS Model Law, Articles 2(g), 5; World Bank Group Policy on Eradicating Harassment, Guidelines for Implementation (World Bank Harassment Guidelines), § 9.0 (Mar. 1, 2000); European Bank for Reconstruction and Development (EBRD), Grievance and Appeals Procedure (Employee Grievance Procedures), § 10.02 (2002); Asian Development Bank (ADB) Administrative Order No. 2.06: Administrative Review and Appeal (Administrative Review), § 10.1 (July 9, 1998), ADB Personnel Policy § 2.12; ACA (Korea), Article 31; Uganda 2010 WPA, § 1(d); WPA (U.S. federal government), 5 U.S.C. § 2302(b)(8) (case law) and § 2302(b)(9); Energy Policy Act of 2005 (U.S. Nuclear Regulatory Commission, Department of Energy and regulated corporations), 42 U.S.C. § 5851(a); FRSA (U.S. rail workers), 49 U.S.C. § 20109(a); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(a); CPSIA (U.S. corporate retail products), 15 U.S.C. § 2087(a); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(a)

No loopholes protection for all citizens with disclosures relevant to the public service mission Coverage for employment-related discrimination should extend to all relevant applicants and personnel who challenge betrayals of the organizational mission or public trust, regardless of formal status. In addition to conventional salaried employees, whistleblower policies should protect all who carry out activities relevant to the organization's mission. It should not matter whether they are full-time, part-time, temporary, permanent, expert consultants, contractors, employees seconded from another organization, or even volunteers. What matters is the contribution they can make by bearing witness. If harassment could create a chilling effect that undermines the organization's mission, the

reprisal victim should have rights. This means the mandate must also cover those who apply for jobs, contracts, or other funding because blacklisting is a common tactic.

Most significantly, whistleblower protection should extend to those who participate in or are affected by the organization's activities. Overarching US whistleblower laws, particularly criminal statutes, protect all witnesses from harassment because it obstructs government proceedings.

> U.N. policy, § 8; OAS Model Law, § 2(b); Anti-Corruption Initiative for Asia-Pacific (Organization for Economic Cooperation and Development [OECD]), Pillar 3; Asian Development Bank Audit Manual, § 810.750; PIDA (U.K.), § 43 (K)(1)(b-d); ACA (Korea), Article 25; Whistleblower Protection Act of 2004 (Japan WPA), § 2; Ghana WPA, § 2; Uganda 2010 WPA, § 1(d); Foreign Operations Appropriations Act of 2005 (Foreign Operations Act) (U.S. MDB policy), § 1505(a)(11) (signed Nov. 14, 2005); False Claims Act (U.S. government contractors), 31 U.S.C. §§ 3730(h), 8-9; STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(j); ARRA (U.S. Stimulus Law) P.L. 111-5 § 1553(g)(2)-(4)

Reliable anonymity protection To maximize the flow of information necessary for accountability, reliable protected channels must be available for those who choose to make confidential disclosures. As sponsors of whistleblower rights laws have recognized repeatedly, denying this option creates a severe chilling effect.

> U.N. policy, § 5.2; OAS Model Law, Articles 10(5), 20-22; Asian Development Bank Audit Manual, §§ 810.175, 820.915, 830.400, 830.500, 830.530; 2003 Office of Auditor General Anticorruption (OAGA) Annual Report, at 3, explained in letter from Peter Pedersen, ADB Auditor General to GAP (Nov. 12, 2003) (Pedersen letter) (available at GAP); PSA (Can.), §§ 28.17(1-3), 28.20(4), 28.24(2), 28.24(4); ACA (Korea), Articles 15 and 33(1); Uganda 2010 WPA, § 14; WPA (U.S. federal government), 5 U.S.C. §§ 1212(g), 1213(h); FRSA (U.S. rail workers), 49 U.S.C. § 20109(i); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(h); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(h)

Protection against unconventional harassment The forms of harassment are limited only by the imagination. As a result, it is necessary to ban any discrimination taken because of protected activity whether active, such as termination, or passive, such as refusal to promote or

provide training. Recommended, threatened, and attempted actions can have the same chilling effect as actual retaliation. The prohibition must cover recommendations as well as the official act of discrimination, to guard against managers who "don't want to know" why subordinates have targeted employees for an action. In nonemployment contexts it could include protection against harassment ranging from discipline to litigation.

> OAS Model Law, Article 2(g); World Bank Harassment Guidelines, § 1; ADB Audit Manual, §§ 810.750, 830.530; Pedersen letter; EBRD Employee Grievance Procedures, §§ 4.01, 6.01(a); IDB Staff Rule 323 §§ 102, 301, 2101-02; IDB Staff Rule 328 § 105; ACA (Korea), Article 33; Uganda 2010 WPA, §§ 1(d), 10, 11; WPA (U.S. federal government), 5 U.S.C. § 2302(b)(8) and associated case law precedents; FRSA (U.S. rail workers), 49 U.S.C. § 20109(a); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(a); CPSIA (U.S. corporate retail products), 15 U.S.C. § 2087(a); SOX (U.S. publicly traded corporations), 18 U.S.C. § 1514(a); ARRA (U.S. Stimulus Law), P.L. 111-5 § 1553(a)

Shielding whistleblower rights from gag orders Any whistleblower law or policy must include a ban on gag orders through an organization's rules, policies, or nondisclosure agreements that would otherwise override free-expression rights and impose prior restraint on speech.

> OAS Model Law, Article 6; PIDA (U.K.), § 43(J); PDA (S. Afr.), § 2(3)(a, b); Ghana WPA, § 31; Uganda 2010 WPA, § 13; WPA (U.S. federal government), 5 U.S.C. § 2302(b)(8); Transportation, Treasury, Omnibus Appropriations Act of 2009 (U.S.), § 716 (anti-gag statute) (passed annually since 1988); FRSA (U.S. rail workers), 49 U.S.C. § 20109(h); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(g); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(g); ARRA (U.S. Stimulus Law) P.L. 111-5 § 1553(d)(1)

Providing essential support services for paper rights Whistleblowers are not protected by any law if they do not know it exists. Whistleblower rights, along with the duty to disclose illegality, must be posted prominently in any workplace. Similarly, legal indigence can leave a whistleblower's rights beyond reach. Access to legal assistance or services and to legal defense funding can make free-expression rights meaningful for those who are unemployed and blacklisted. An ombudsman with sufficient access to documents and institutional officials can neutralize

resource handicaps and cut through draining conflicts to provide expeditious corrective action. The US Whistleblower Protection Act includes an Office of Special Counsel, which investigates retaliation complaints and may seek relief on the whistleblower's behalf. Informal resources should be risk-free for the whistleblower, without any discretion by relevant staff to act against the interests of individuals seeking help.

OAS Model Law, Articles 9(11), 10(1)(5-8), 13, 29–30; World Bank Harassment Guidelines, § 3.0; Korean Independent Commission Against Corruption (Korea), First Annual Report (2002), at 139; WPA (U.S. federal government), 5 U.S.C. § 1212; Inspector General Act (U.S.), 5 U.S.C. app.; ARRA (U.S. Stimulus Law) P.L. 111-5 § 1553(b)

Forum

The setting to adjudicate a whistleblower's rights must be free from institutionalized conflict of interest and operate under due process rules that provide a fair day in court. The histories of administrative boards have been so unfavorable that so-called hearings in these settings have often been traps, both in perception and in reality.

Right to a genuine day in court This criterion requires normal judicial due process rights—the same rights enjoyed by citizens generally who are aggrieved by illegality or abuse of power. The elements include timely decisions, a day in court with witnesses and the right to confront the accusers, objective and balanced rules of procedure, and reasonable deadlines. At a minimum, internal systems must be structured to provide autonomy and freedom from institutional conflicts of interest. This is particularly significant for the preliminary stages of informal or internal review, which are inherently compromised by conflict of interest, such as Office of Human Resources Management reviews of actions. Otherwise, instead of being remedial, those activities are vulnerable to becoming investigations of the whistleblower and the evidentiary base to attack the individual's case for any eventual day in a due process forum.

U.N. policy, § 6.3; OAS Model Law, Articles 11, 14; Foreign Operations Act (U.S. MDB policy), § 1505(11); PIDA (U.K.), Articles 3, 5; PDA (S. Afr.), § 4(1); ACA (Korea), Article 33; Uganda 2010 WPA, §§ 9(3), (4); WPA (U.S. federal government), 5 U.S.C. §§ 1221, 7701-02; Defense Authorization

Act (U.S.) (defense contractors), 10 U.S.C. § 2409(c)(2); Energy Policy Act (U.S. government and corporate nuclear workers), 42 U.S.C. §§ 5851(b)(4), (c)-(f); FRSA (U.S. rail workers), 49 U.S.C. § 20109(c)(2)-(4); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(c)(4)-(7); CPSIA (U.S. corporate retail products), 15 U.S.C. § 2087(b)(4)-(7); SOX (U.S. publicly traded corporations), 18 U.S.C. § 1514(b); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105 (c)-(e); ARRA (U.S. Stimulus Law) P.L. 111-5 § 1553(c)(3)-(5)

Option for alternative dispute resolution with an independent party of mutual consent Third-party dispute resolution can be an expedited, less costly forum for whistleblowers. For example, labor/management arbitrations have been highly effective when the parties share costs and select the decision-maker by mutual consent through a "strike" process. It can provide an independent, fair resolution of whistleblower disputes while circumventing the issue of whether intergovernmental organizations waive their immunity from national legal systems. It is contemplated as a normal option to resolve retaliation cases in the model whistleblower law to implement the OAS Inter-American Convention against Corruption, as well as the US Whistleblower Protection Act.

OAS Model Law, Article 10(14); Foreign Operations Act (U.S. MDB policy), § 1505(a)(11); WPA (U.S. federal government), 5 U.S.C. § 7121

Rules to Prevail

The rules to prevail control the bottom line. They are the tests a whistleblower must pass to prove that illegal retaliation violated his or her rights—and win.

Realistic standards to prove a violation of rights The US Whistleblower Protection Act of 1989 overhauled antiquated, unreasonable burdens of proof that had made it hopelessly unrealistic for whistleblowers to prevail when defending their rights. The test has been adopted within international law, within generic professional standards such as the OAS model law, and by individual organizations such as the World Bank.

This emerging global standard is that a whistleblower establishes a prima facie case of violation by establishing through a preponderance

of the evidence that the protected conduct was a "contributing factor" in the challenged discrimination. The discrimination need not involve retaliation but occur only "because of" the whistleblowing. Once a prima facie case is made, the burden of proof shifts to the organization to demonstrate by clear and convincing evidence that it would have taken the same action for independent, legitimate reasons in the absence of protected activity.

Since the US government changed the burden of proof in its whistleblower laws, the rate of success on the merits has increased from 1 to 5 percent annually to 25 to 33 percent, which gives whistleblowers a fighting chance to successfully defend themselves. Many nations that adjudicate whistleblower disputes under labor laws have analogous presumptions and track records. There is no alternative, however, for the intergovernmental organization to commit to one of these proven formulas to determine the bottom line—tests the whistleblower must pass to win a ruling that his or her rights were violated.

> OAS Model Law, Articles 2(h), 7; World Bank, Department of Institutional Integrity Investigations Manual, § 7.4; Foreign Operations Act (U.S. MDB policy), § 1505(11); WPA (U.S. federal government), 5 U.S.C. §§ 1214(b)(2)(4), 1221(e); Energy Policy Act (U.S. government and corporate nuclear workers), 42 U.S.C. § 5851(b)(3); FRSA (U.S. rail workers), 49 U.S.C. 20109(c)(2)(A)(i); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(c)(2)(B); CPSIA (U.S. corporate retail products), 15 U.S.C. § 2087 (b)(2)(B), (b)(4); SOX (U.S. publicly traded corporations), 18 U.S.C. § 1514(b)(2)(c); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(b)(1); ARRA (U.S. Stimulus Law) P.L. 111-5 § 1553(c)(1)

Realistic time frame to act on rights Although some laws require employees to act within 30 to 60 days or waive their rights, most whistleblowers are not even aware of their rights within that time frame. Six months is the minimum functional statute of limitations. One-year statutes of limitations are consistent with common-law rights and are preferable.

> World Bank, Appeals Committee Procedures, § 5, Administrative Tribunal Statute, Article II.2; EBRD Employee Grievance Procedures, §§ 2.03, 5.02; PIDA (U.K.), § 48.3; PDA (S. Afr.), § 4(1); WPA (U.S. federal government), 5 U.S.C. § 1214; False Claims Act (U.S. government contractors), 42 U.S.C.

§ 3730(h) and associated case law precedents; Energy Policy Act (U.S. government and corporate nuclear workers), 42 U.S.C. § 5851(b)(1); FRSA (U.S. railroad workers), 49 U.S.C. § 20109(d)(2)(A)(ii); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(c)(1); CPSIA (U.S. corporate retail products), 15 U.S.C. § 2087(b)(1); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(b)(1); ARRA (U.S. Stimulus Law) P.L. 111-5 § 1553(b)(1)

Relief for Whistleblowers Who Win

The twin bottom lines for a remedial statute's effectiveness are whether it achieves justice not only by adequately helping the victim obtain a net benefit but also by holding the wrongdoer accountable.

Compensation with "no loopholes" If a whistleblower prevails, the relief must be comprehensive to cover all the direct, indirect, and future consequences of the reprisal. In some instances this means relocation or payment of medical bills for consequences of physical and mental harassment. In nonemployment contexts, it could require relocation, identity protection, or withdrawal of litigation against the individual.

OAS Model Law, Articles 10(10), 16-17; Foreign Operations Act (U.S. MDB policy), § 1505(11); ACA (Korea), Article 33; PIDA (U.K.), § 4; WPA (U.S. federal government), 5 U.S.C. § 1221(g)(1); False Claims Act (U.S. government contractors), 31 U.S.C. § 3730(h); Defense Authorization Act (U.S.) (defense contractors), 10 U.S.C. § 2409(c)(2); Energy Policy Act (U.S. government and corporate nuclear workers), 42 U.S.C. § 5851(b)(2)(B); FRSA (U.S. rail workers), 49 U.S.C. § 20109(e); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(c)(3)(B), (d); CPSIA (U.S. corporate retail products), 15 U.S.C. § 2087(b)(3)(B), (b)(4); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(b)(3)(B); ARRA (U.S. Stimulus Law) P.L. 111-5 § 1553(b)(2)(A), (B), (b)(3)

Interim relief Relief should be awarded during the interim for employees who prevail. Anti-reprisal systems that appear streamlined on paper commonly drag out for years in practice. Ultimate victory may merely be an academic vindication for unemployed, blacklisted whistleblowers who go bankrupt while waiting to win. Injunctive or interim relief must occur after a preliminary determination. Even after winning a hearing or

trial, an unemployed whistleblower could go bankrupt while waiting for the completion of an appeals process that frequently takes years.

U.N. policy, § 5.6; OAS Model Law, Articles 9(12), 10(1), 24; PIDA (U.K.), § 9; WPA (U.S. federal government), 5 U.S.C. §§ 1214(b)(1), 1221(c); CPSIA (U.S. corporate retail products), 15 U.S.C. § 2087(b)(1); SOX (U.S. publicly traded corporations), 5 U.S.C. § 1214(b)(1)

Coverage for attorney's fees Attorney's fees and associated litigation costs should be available for all who substantially prevail. Whistleblowers otherwise couldn't afford to assert their rights. The fees should be awarded if the whistleblower obtains the relief sought, regardless of whether it is directly from the legal order issued in the litigation. Otherwise, organizations can and have unilaterally surrendered outside the scope of the forum and avoided fees by declaring that the whistleblower's lawsuit was irrelevant to the result. Affected individuals can be ruined by that type of victory because attorney's fees often reach sums that exceed the whistleblower's annual salary.

OAS Model Law, Article 16; EBRD Employee Grievance Procedures, § 9.06; WPA (U.S. federal government), 5 U.S.C. § 1221(g)(2-3); False Claims Act (U.S. government contractors), 31 U.S.C § 3730(h); Energy Policy Act (U.S. government and corporate nuclear workers), 42 U.S.C. § 5851(b)(2)(B)(ii); FRSA (U.S. rail workers), 49 U.S.C. § 20109(e); NTSSA (U.S. public transportation) 6 U.S.C. § 1142(d)(2)(C); CPSIA (U.S. corporate retail products), 15 U.S.C. §§ 2087(b)(3)(B), (b)(4)(C); SOX (U.S. publicly traded corporations), 18 U.S.C. § 1514(c)(2)(C); STAA (U.S. corporate trucking industry), 49 U.S.C. §§ 31105(b)(3)(A)(iii), (B); ARRA (U.S. Stimulus Law), P.L. 111-5 §§ 1553(b)(2)(C), (b)(3)

Transfer option It is unrealistic to expect a whistleblower to go back to work for a boss whom he or she has just defeated in a lawsuit. For any realistic chance at a fresh start, whistleblowers who prevail must have the ability to transfer. This option prevents repetitive reprisals that cancel the impact of newly created institutional rights.

U.N. policy, § 6.1; OAS Model Law, Article 10(7); EBRD Employee Grievance Procedures, § 9.04; ADB Audit Manual, § 810.750; PDA (S. Afr.), § 4(3); ACA (Korea), Article 33; WPA (U.S. federal government), 5 U.S.C. § 3352

Personal accountability for reprisals To deter repetitive violations, those responsible for whistleblower reprisal must be held accountable. Otherwise, managers have nothing to lose by doing the dirty work of harassment. The worst that will happen is they won't get away with it, and they may well be rewarded for trying. The most effective option to prevent retaliation is personal liability for punitive damages by those found responsible for violations. Another option is to allow whistleblowers to counterclaim for disciplinary action, including termination. In selective scenarios such as obstruction of justice, some nations, including Hungary and the United States, impose potential criminal liability for whistleblower retaliation.

> U.N. policy, § 7; OAS Model Law, § 18; EBRD, Procedures for Reporting and Investigating Suspect Misconduct, § 6.01(a); Staff Handbook, ch. 8.5.6; ACA (Korea), Article 32(8); Hungary, Criminal Code Article 257, "Persecution of a Conveyor of an Announcement of Public Concern"; Public Interest Disclosure Act, No. 108, § 32; Uganda 2010 WPA, § 16; WPA (U.S. federal government), 5 U.S.C. § 1215; FRSA (U.S. rail workers), 49 U.S.C. § 20109(e)(3); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(d)(3); CPSIA (U.S. corporate retail products), 15 U.S.C. §§ 2087(b)(3)(B), (b)(4)(C); SOX (U.S. publicly traded corporations), 18 U.S.C. § 1513(e); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(b)(3)(C)

Making a Difference

Whistleblowers risk retaliation if they think that challenging abuse of power or any other misconduct that betrays the public trust will make a difference. Numerous studies have confirmed this motivation. This is also the bottom line for affected institutions and the public: positive results. Otherwise, the point of a reprisal dispute is limited to whether injustice occurred on a personal level. Legislatures unanimously pass whistleblower laws to make a difference for society.

Credible corrective action process Whether through hotlines, ombudsmen, compliance officers, or other mechanisms, the point of whistleblowing through an internal system is to give managers an opportunity to clean house, before matters deteriorate into a public scandal or

law enforcement action. In addition to a good-faith investigation, two additional elements are necessary for legitimacy.

First, the whistleblower who raised the issues should be enfranchised to review and comment on the charges that merited an investigation and to report whether there has been a good-faith resolution. As a rule the whistleblower, rather than investigators or finders of fact, is the most knowledgeable, concerned witness in the process. Whistleblowers' evaluation comments have in fact led to significant improvements and changed conclusions in the US Whistleblower Protection Act. Whistleblowers should not be silenced in the final stage of official resolution of the alleged misconduct they risked their careers to challenge.

Second, transparency should be mandatory. Secret reforms are an oxymoron. As a result, unless the whistleblower elects to maintain anonymity, both the final report and the whistleblower's comments should be a matter of public record, posted on the organization's website. The most significant reform is to enfranchise whistleblowers and citizens to "walk the talk" by filing formal actions against illegality exposed by their disclosures. In government statutes, these types of suits are known as private attorney general, or *qui tam,* actions (see the following section).

> OAS Model Law, Articles 10(13), 27-28; ACA (Korea), Articles 30, 36; PSA (Can.), § 28.14(1) (1990); Japan WPA, § 9 (2004); Uganda 2010 WPA, § 18; WPA (U.S. federal government), 5 U.S.C. § 1213; Inspector General Act of 1978 (U.S. federal government), 5 U.S.C. app.; False Claims Act, 31 U.S.C. § 3729 (government contractors); FRSA (U.S. rail workers), 49 U.S.C. § 20109(j); NTSSA (U.S. public transportation), 6 U.S.C. § 1142(i); STAA (U.S. corporate trucking industry), 49 U.S.C. § 31105(i)

Private attorney general option: Citizen Enforcement Act Even more significant is enfranchising whistleblowers and citizens to file suit in court against illegality exposed by their disclosures. These types of suits are known as private attorney general, or *qui tam,* actions, in reference to the Latin phrase for "he who sues on behalf of himself as well as the king." These statutes can provide both litigation costs (including attorney's and expert witness fees) and a portion of money recovered for the government to the citizen whistleblowers who file them, a premise that merges "doing well" with "doing good"—a rare marriage of the public interest and self-interest.

In the United States, this approach has been tested in the Federal False Claims Act for whistleblower suits challenging fraud in government contracts. It is the nation's most-effective whistleblower law in history for making a difference, increasing civil fraud recoveries in government contracts from $27 million annually in 1985 to more than $20 billion since, including more than $1 billion annually since 2000.

Another tool that is vital in cases of continuing violations is the power to obtain from a court or an objective body an order that will halt the violations or require specific corrective actions. The obvious analogy for intergovernmental organizations is the ability to file for proceedings at independent review mechanisms or inspection panels—the same as for an outside citizen personally aggrieved by institutional misconduct.

False Claims Act, 31 U.S.C. § 3730 (U.S. government contractors)

TOOL H

Model Whistleblower Hotline Policy

Since the 2002 passage of the Sarbanes-Oxley Act for corporate accountability, all corporations that are publicly traded in the United States must have whistleblower "hotlines" to the audit committee for each board of directors. This requirement has institutionalized a common practice for decades at government agencies and companies. It has also created a dynamic, growing cottage industry in the United States for what traditionally was a scattered phenomenon with widely varying standards of quality.

Historically, there has been little credible evidence that hotlines are an effective vehicle through which whistleblowers could challenge corruption or other abuses of power sustained by secrecy. This model policy is drawn from the accumulated best practices of the past seven years since SOX reform created a growth market.

Hotline Requirements

Individuals are invited to make disclosures of information that evidence illegality, gross waste, mismanagement, abuse of authority, substantial and specific danger to public health or safety, and any other action that could create significant liability or other risks to the health of the corporation.

The hotline shall be operated 24 hours a day, seven days a week.

Operators designated to receive calls for the hotline shall be certified, based on possession of academic credentials and completion of additional training that represents best practices for this purpose.

The hotline shall be accredited by a recognized national accrediting organization.

The hotline shall be operated in a manner consistent with the following best practices.

Independence from conflicts of interest The hotline shall report directly to the agency head, the board of directors of a corporation, or the chief executive officer if no board exists, and may be subjected to discipline only by the board or the CEO if no board exists.

Access through multiple communication sources Access shall include confidential telephone reporting, e-mail, personal interview, and confidential mail deposit or similar mechanism.

Protection from retaliation The hotline shall be subject to all federal statutory and agency protections for citizens and employees, prohibiting retaliation for reporting illegal or unethical conduct or behavior.

Confidentiality The hotline shall comply with federal and agency or department rules providing for the confidentiality of disclosures made to hotline officials and employees. The hotline shall adopt procedures, including secure firewalls and the encryption of e-mail, and employ technology and equipment that reasonably ensure the confidentiality of disclosures that are received or maintained by the hotline.

Enfranchisement The hotline shall be operated in a manner that encourages employee and citizen participation. This includes the opportunity to supplement and comment on responses to the disclosures. It also includes an on-the-record assessment that evaluates the effectiveness of hotline resolution for the employee's concerns and that supports the contribution of additional information promoting evaluation of the initial employee disclosures.

Transparency The hotline shall issue an annual report on its effectiveness in terms of overall numbers of complaints or reports received and their disposition, including moneys recovered in a manner consistent

with the protection of confidentiality of the covered employee. The annual report shall include findings and resolution for each case, along with the employee's evaluation comments, which shall be maintained in a publicly available file also posted on the Internet, with necessary deletions for properly classified information or information whose disclosure is specifically prohibited by statute.

TOOL

Model Citizen Enforcement Act

Whereas:

Citizens have been frustrated that they have not been empowered with meaningful control of their lives through expensive, cumbersome government regulatory agencies; and

Whereas:

The public interest requires that it be illegal to discriminate against government or private employees who make disclosures responsibly challenging violations of law because they are invaluable to law enforcement, to the public's right to know, and to prevent or minimize the consequences of institutional misconduct.

Therefore Be It Resolved:

Section 1: Jurisdiction and procedure Any citizen may challenge violations of law through a jury trial under the procedures available in the False Claims Act (31 U.S.C. § 3729 *et seq.*) unless the parties mutually consent to alternative dispute resolution procedures such as mediation or arbitration.

Section 2: Relief A jury may award injunctive relief to stop ongoing illegality, as well as actual or exemplary damages, as it deems appropriate.

Section 3: Employee Protection

(A) ***In general*** No employee or other person may be harassed, prosecuted, held liable, or discriminated against in any way because that person (1) has made or is about to make disclosures not prohibited by law or executive order; commenced, caused to be commenced, or is about to commence a proceeding; testified or is about to testify at a proceeding; assisted or participated in or is about to assist or participate in, in any manner, such a proceeding or in any other action to carry out the purposes, functions, or responsibilities of this Act; or (2) is refusing to violate or assist in the violation of this Act.

(B) ***Procedures*** Cases of alleged discrimination shall be governed by the procedures of the Federal False Claims Act (31 U.S.C. § 3730(h)), unless the parties mutually consent to alternative dispute resolution procedures such as mediation or arbitration.

(C) ***Burdens of proof*** The legal burdens of proof with respect to prohibited discrimination under subsection (A) shall be governed by the applicable provisions of the Whistleblower Protection Act of 1989 (5 U.S.C. §§ 1214, 1221).

Section 4: Conflicts No funds may be spent to implement or enforce any nondisclosure policy, form, or agreement without explicit provision that, in the event of a conflict, any restrictions on protected activity are superseded by this Act.