GAPS AND DISPARITIES IN WHISTLEBLOWER LAW

OFFICE OF THE
WHISTLEBLOWER OMBUDS
COACHING THE HOUSE ON BEST PRACTICES

WHISTLEBLOWER.HOUSE.GOV WHISTLEBLOWEROFFICE@MAIL.HOUSE.GOV 202-226-6638

OVERVIEW

Federal whistleblower laws vary significantly between sectors. Disparities are often apparent when comparing older laws to newer ones. This document explores common gaps and disparities in federal whistleblower laws. Individuals considering blowing the whistle should do so under advisement of a whistleblower attorney.

GAPS IN PROTECTIONS

Public Sector Employees

Most career civil service employees in the executive branch are covered under the **Whistleblower Protection Act** or a sector-specific law. However, some executive branch employees are **excluded from protections** including political appointees such as inspectors general, and those working in a position that involves significant policy-determining, advocating, or advisory duties. This includes employees designated as **Schedule Policy/Career** by their agency. Employees of the **judicial branch** are not covered under whistleblower statutes, and employees of the **legislative branch** have limited anti-retaliation protections.

A Note on the First Amendment

While public employees are empowered by the First Amendment to speak out on matters of public concern, in most instances they must do so in their private capacity. If the employee faces retaliation, courts may not rule in the employee's favor unless the public's interest in learning about the alleged wrongdoing outweighs the government's interest in keeping it restricted.

Private Sector Employees

Most **private sector workers** are covered under one or more sector-specific whistleblower laws. However, not all sectors benefit from unique protections. Employees in the **tech industry**, for example, do not have a dedicated whistleblowing statute. These employees may be able to blow the whistle under separate private sector laws such as the Occupational Safety and Health Act and the Sarbanes-Oxley Act where appropriate.

Whistleblowing-Adjacent Individuals and Organizations

Most federal laws do not extend rights beyond the employment context, yet some individuals are vulnerable to retaliation due to their relationships with a whistleblower. For example, family members of whistleblowers may also face difficulty in their career field due to their spouse or parent's whistleblowing.

Further, organizations may be poised to expose the illegal acts of another organization but may fear reprisal from industry leaders, the government, or other actors that could affect the organization's own future and the wellbeing of its employees.

Evolving Tactics Expose Gaps

While modern whistleblower protection laws cover a wide range of prohibited retaliatory actions, laws may not account for the broad spectrum of whistleblower retaliation — particularly as new tactics emerge.

Retaliatory Investigations: Apart from the **Military Whistleblower Protection Act**, laws generally do not protect against a retaliatory investigation that an employer opens against a whistleblower. Under the Whistleblower Protection Act, employees may only challenge these investigations if they result in a prohibited retaliatory action such as termination. As such, these investigations may persist for years in an attempt to discredit the messenger and distract from their disclosures.

Criminal and Civil Liability: Protections against retaliation are generally limited to the employment context — such as rights against demotion. However, employers may engage in other forms of retaliation such as referring the whistleblower for criminal investigation using false pretexts. Private sector whistleblowers are also susceptible to retaliatory civil lawsuits like a defamation claim, for example. These tactics may undermine their credibility or ability to defend themselves due to costly legal battles.

Security Clearance Retaliation: Security clearances and the eligibility to access classified information are generally a requirement of working in the intelligence

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community. As such, retaliating against a whistleblower by limiting or removing their access can prevent that individual from working in their career field. There are **limited rights** against retaliatory clearance suspensions. However, a whistleblower can only challenge a suspension if it lasts for at least one year.

Doxing: Doxing occurs when someone intentionally and publicly exposes another's personal information, commonly through the internet. It may threaten a whistleblower's emotional, physical, and financial wellbeing, and it generally is not covered under whistleblower laws.

DISPARITIES BETWEEN LAWS

Scope

Who is protected? While laws typically protect whistleblowers in the employment context, including current and former employees, some laws also protect applicants, interns, and volunteers. Others limit protections for probationary employees.

What is protected?

- Statutes generally require that the whistleblower's disclosure pertains to an identified category of misconduct, such as an abuse of authority or gross waste of funds. However, laws may categorize relevant misconduct differently. **Federal contractor protections**, for example, explicitly protect disclosures related to contract fraud.
- Some laws limit protected audiences, such as to Congress or an inspector general, while others protect public disclosures. For some laws, like the Whistleblower Protection Act, it depends on the nature of the information being disclosed.
- Laws also generally protect conduct such as testimony, cooperation with an investigation, and exercising one's rights.

What retaliation is prohibited? Employers are prohibited from retaliating against their employees for protected disclosures or conduct. However, laws vary in how they define a prohibited action for the purposes of establishing retaliation. Laws will typically prohibit retaliatory termination, for example, but may only cover suspensions that last a certain amount of time.

Enforcement

Processes for Enforcement: Due process rights vary significantly between laws. For example, the Intelligence Community Whistleblower Protection Act prohibits retaliation, but it does not provide whistleblowers with a means to seek relief. Conversely, some laws only offer an administrative hearing, whereas other laws provide access to a jury trial to challenge retaliation.

Statute of Limitations: The amount of time an individual has to file a retaliation claim can range from 30 days (e.g., Occupational Safety and Health Act) to three years (e.g., Whistleblower Protection Act). The clock generally starts when the retaliatory action takes place, or when the whistleblower becomes aware of it.

Burden of Proof: The amount of evidence that is required to prove retaliation may vary between laws. Under the Whistleblower Protection Act, individuals must demonstrate by a preponderance of the evidence that their whistleblowing was a contributing factor in the reprisal action, whereas some laws place a heavier burden on the whistleblower.

Remedies: If a whistleblower is successful in proving retaliation, they may be eligible for legal remedies such as reinstatement, legal and other fees, and back pay. However, not all whistleblower laws provide the same relief.

ADDITIONAL RESOURCES

- Congressional Research Service Report: **Compilation of Federal Whistleblower Protection Statutes**
- Congressional Research Service Report: **Intelligence Community Whistleblower Provisions: A Legislative History**
- **Occupational Safety and Health Administration: OSHA-Administered Whistleblower Statutes**