BEST PRACTICE WHISTLEBLOWER LAW STANDARDS

The Office of the Whistleblower Ombuds advises House offices on whistleblower laws and policies and provides technical guidance on whistleblower legislation. As part of these services, the Office has compiled a list of U.S. and international best practice whistleblower law standards. Each standard includes a citation to at least one law, legal precedent, or directive that exemplifies it, though more may exist.

PROTECTED DISCLOSURES: RIGHTS ENCOMPASS THREATS TO THE PUBLIC INTEREST

In defining what constitutes a protected disclosure, best practice standards reflect a wide range of threats to the public interest. Standards also specify that certain pre-conditions do not disqualify whistleblowers from protection, such as their motive for making a disclosure.

Best Practice Standards for Establishing Scope of Protected Disclosures:

- ✓ Explicitly protects disclosures that the whistleblower reasonably believes evidence any violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.[1]
- ✓ Explicitly protects disclosures related to censorship of research, analysis, or technical information that the whistleblower reasonably believes is evidence of, or will cause, any of the misconduct or issues listed above.[2]
- ✓ Explicitly protects disclosures concerning policy decisions that lawfully exercise discretionary authority if the whistleblower reasonably believes that their disclosure evidences any of the misconduct or issues listed above.[3]
- ✓ Protects disclosures that were made as part of an employee's normal work duties—so-called "duty speech" — without heightened scrutiny.[4]
- ✓ Protects disclosures regardless of preconditions such as the whistleblower's motive; whether the information was previously disclosed; the amount of time that has passed since the alleged wrongdoing; and whether the disclosure was made orally or in writing, among other factors.[5]
- ✓ Protects disclosures that the whistleblower makes, is about to make, causes to be made, assists in making, or is perceived as making (even if that perception is incorrect).[6]

1 Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8).
2 Whistleblower Protection Enhancement Act of 2012, as amended, 5 U.SC. § 2302 note.
3 Whistleblower Protection Act, 5 U.SC. § 2302(a)(2)(D).
4 Federal court adopting Department of Labor interpretation of the Sarbanes Oxley Act (18 U.S.C. § 1514A). Yang v. Navigators Grp., Inc., 18F. Supp. 3d 519, 530 (S.D.N.Y. 2014). See also: Military Whistleblower Protection Act, 10 U.S.C. § 1034(c)(3)(f).
5 Whistleblower Protection Act, 5 U.S.C. § 2302(f)(1). See also: 2019 European Union Directive, Preamble clause 32.
6 Merit Systems Protection Board interpreting the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8); King v. Dep't of the Army, 116 M.S.P.R. 689 (Merit Systems Protection Board, 2011). See also: Consumer Financial Protection Act, 12 U.S.C. § 5567(a)(1).

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PROTECTED ACTS: CERTAIN CONDUCT IS EXPLICITLY PROTECTED

In addition to protecting disclosures of alleged misconduct, best practice standards also explicitly protect certain conduct that often goes hand in hand with making a protected disclosure such as assisting in a related investigation.

Best Practice Standards for Protecting Conduct:

- ✓ Protects the exercise of any appeal, complaint, or grievance right.[7]
- ✓ Protects the act of assisting someone who is exercising their own whistleblower rights.[8]
- ✓ Protects testifying.[9]
- ✓ Protects assisting in a lawful investigation.[10]
- ✓ Protects an individual for refusing to follow an order that would require them to violate a law, rule, or regulation.[11]

7 Whistleblower Protection Act, 5 U.S.C. § 2302(b)(9)(A). See also: Consumer Financial Protection Act, 12 U.S.C. § 5567(a)(3).
8 Whistleblower Protection Act, 5 U.S.C. § 2302(b)(9)(B).
9 Criminal Antitrust Anti-Retaliation Act, 15 U.S.C. § 7a-3(a)(1)(B). See also: Moving Ahead for Progress in the 21st Century Act (MAP-21), 49 U.S.C. § 30171(a)(3).
10 Criminal Antitrust Anti-Retaliation Act, 15 U.S.C. § 7a-3(a)(1)(B). See also: Whistleblower Protection Act, 5 U.S.C. § 2302(b)(9)(C).
11 Whistleblower Protection Act, 5 U.S.C. § 2302(b)(9)(D). See also: Federal Railroad Safety Act, 49 U.S.C. § 20109(a)(2).

KEY ACTORS ARE BROADLY DEFINED

When setting the boundaries of who qualifies as a "whistleblower," best practice standards do not limit protections to current employees of the entity under scrutiny. Rather, "whistleblower" is defined broadly to encompass all who are poised to expose evidence of wrongdoing. Likewise, retaliatory conduct is prohibited by anyone with authority—not just the whistleblower's immediate supervisor.

Best Practice Standards for Defining Key Actors:

- ✓ Extends protections to anyone who comes forward to make a disclosure under the law's scope including:
  - ✓ Current employees, former employees, and applicants for employment.[12]
  - ✓ All who work on behalf of an entity's mission, whether formally employed or not (e.g., volunteers).[13]
  - ✓ Any individual or entity that is impacted by the entity's actions[14] including shareholders and organizations.[15]
- ✓ Prohibits anyone with authority, and their agents, from retaliating against the whistleblower.[16]

12 Whistleblower Protection Act, 5 U.S.C. § 2302(a)(2)(A).
13 2019 European Union Directive, Article 4.1(c).
14 Federal Prison Oversight Act, 5 U.S.C. § 413(e)(7).
15 2019 European Union Directive, Article 4.1(c).
16 2019 European Union Directive, Article 4.4 (c).

PROTECTED AUDIENCES: PUBLIC, INTERNAL, AND EXTERNAL DISCLOSURES ARE PROTECTED

Best practice standards protect public disclosures when not otherwise restricted by law or executive order. Where disclosures cannot be public facing due to express legal limitations (e.g., classified disclosures), protected audiences are clearly identified.

Best Practice Standards for Defining a Protected Audience:

- ✓ Protects public disclosures where the information is not classified and not specifically prohibited by statute.[17]
- ✓ Protects internal disclosures made within the employee's chain of command, to those with authority, or to another employee.[18]
- ✓ Protects disclosures to clearly identified independent audiences such as Congress, inspectors general, the Office of Special Counsel, or another independent investigator.[19]

17 Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8)(A). See also: Department of Homeland Security v. MacLean, 574 US 383 (2015).
18 Sarbanes Oxley Act, 18 U.S.C. § 1514A(a)(1)(C). See also: Anti-Money Laundering Act, 31 U.S.C. § 5323(g)(1)(A)(4).
19 Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8)(B). See Also: American Recovery and Reinvestment Act of 2009, 41 U.S.C. § 4712(a)(2).

MISCONDUCT INVESTIGATIONS: INDEPENDENT, TIMELY, AND TRANSPARENT

Best practice standards provide a process for the timely, independent, and transparent review of the whistleblower's disclosure about the alleged misconduct.

Best Practice Standards for Investigations into the Alleged Misconduct:

- ✓ Ensures that any investigation into the alleged misconduct is overseen by an independent fact finder.[20]
- ✓ Provides deadlines for completion of the misconduct investigation.[21]
- ✓ Provides whistleblowers with a meaningful opportunity to review and comment on investigative reports.[22]
- ✓ Requires public reporting of investigative findings, with measures taken to maintain whistleblower confidentiality.[23]
- ✓ Requires a preliminary review, regardless of how long ago the alleged misconduct took place.[24]

20 Whistleblower Protection Act, 5 U.S.C. § 1213(b). See also: False Claims Act, 31 U.S.C. § 3730
21 Whistleblower Protection Act, 5 U.S.C. § 1213(c).
22 Whistleblower Protection Act, 5 U.S.C. § 1213(e)(1).
23 Whistleblower Protection Act, 5 U.S.C. § 1213(e)(3).
24 Whistleblower Protection Act, 5 U.S.C. § 2302(f)(1)(G).

WHISTLEBLOWER IDENTITIES: CONFIDENTIALITY IS OFFERED AND MAINTAINED

Best practice standards explicitly allow whistleblowers to make confidential or anonymous disclosures regarding alleged misconduct and confidential disclosures regarding unlawful retaliation.

Best Practice Standards for Offering and Maintaining Confidentiality and Anonymity:

- ✓ Prohibits the knowing release of a whistleblower's identity or personally identifying information without prior written consent by the whistleblower unless disclosure is required by law.[25]
- ✓ Provides timely, advance notice if the whistleblower's identity will be disclosed.[26]
- ✓ Provides a secure reporting channel for whistleblowers to submit disclosures and complaints. Requires that any related databases or information systems be designed, established, and operated to ensure confidentiality and limit access to authorized personnel.[27]

25 Whistleblower Protection Act, 5 U.S.C. § 1212(g). See also: Anti-Money Laundering Act, 31 U.S.C. § 5323(g)(4).
26 Rules of the House of Representatives, 118th Congress; Rule XXIII, Clause 21(d).
27 2019 European Union Directive, Chapter II, Article 9. See Also: Inspector General Act, as amended. 5 U.S.C. § 420(b)(2).

PROHIBITED REPRISAL: RETALIATORY CONDUCT IS FRAMED BROADLY

Best practice standards frame the scope of prohibited retaliation broadly. This is both to protect whistleblowers who come forward and to deter creative means of harassment that extend beyond the workplace such as retaliatory civil and criminal legal action.

Best Practice Standards for Framing the Scope of Prohibited Conduct:

- ✓ Prohibits unfavorable actions taken or threatened, as well as favorable actions not taken, because of protected whistleblowing or a perception of protected whistleblowing, even if the perception is mistaken.[28]
- ✓ Prohibits discharge, demotion, suspension, harassment, or any other manner of discrimination, in the terms and conditions of employment.[29]
- ✓ Extends immunity to criminal or civil liability with respect to protected disclosures.[30]
- ✓ Prohibits retaliatory investigations.[31]
- ✓ Prohibits access to medical records stemming from prohibited retaliation[32] or retaliatory referral for psychiatric or medical evaluation.[33]
- ✓ Requires accountability processes, including access to due process, for individuals found to have retaliated.[34]

28 Federal court interpretation of the Whistleblower Protection Act (5 U.S.C. § 2302(b)(8)). Mount v. U.S. Department of Homeland Security 937 F.3d 37, 44 (2019).
29 Taxpayer First Act, 26 U.S.C. § 7623(d). See also: Criminal Antitrust Anti-Retaliation Act, 15 U.S.C. § 7a-3(a)(1)
30 Defend Trade Secrets Act, 18 U.S.C. § 1833(b).
31 Military Whistleblower Protection Act, 10 U.S.C. § 1034(b)(2)(A)(v).
32 Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, 5 U.S.C. § 2302(b)(14).
33 Whistleblower Protection Act, 5 U.S.C. § 2302(a)(2)(A)(x).
34 VA Patient Protection Act of 2016, 38 U.S.C. § 731. See also: Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, 5 U.S.C. § 7515.

ENFORCEMENT OF RIGHTS: TIMELY DUE PROCESS; STANDARD BURDEN OF PROOF

Best practice standards include a clear and timely means for whistleblowers to seek enforcement of their rights, employing specific burden of proof standards.

Best Practice Standards for Due Process Enforcement of Rights:

- ✓ Provides at least a three-year statute of limitations in which to file a claim of unlawful reprisal.[35]
- ✓ Applies an objective "reasonable belief" standard for evaluating whether disclosures are protected.[36]
- ✓ Requires that the whistleblower demonstrate, by a preponderance of the evidence, that their whistleblowing was a contributing factor in the retaliation they faced.[37] Requires the respondent to demonstrate, by clear and convincing evidence, that they would have taken the same action for reasons independent of the whistleblowing activity.[38]
- ✓ Provides for timely due process enforcement of rights including an administrative hearing or remedy with the option of taking the case to federal court before a jury if there is not timely relief.[39]

35 Whistleblower Protection Act, 5 U.S.C. § 1214(a)(6)(A)(iii). See also: False Claims Act, 31 U.S.C. § 3730(h)(3).

36 Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8)(A). See also: Anti-Money Laundering Act, 31 U.S.C. § 5323(g)(1)(C).

37 Note that a contributing factor can be established with factors like knowledge by employers and timing of the personnel action.

38 Whistleblower Protection Act, 5 U.S.C. § 1221(e). See also: Anti-Money Laundering Act, 31 U.S.C. § 5323(g)(3)(A)(i).

39 Also note that the EU Whistleblowing Directive applies a more employee-friendly standard that does not require the whistleblower to demonstrate the nexus between their whistleblowing and the retaliation they face. Article 21.5 provides that retaliation is presumed when a covered individual has made a protected disclosure and subsequently faced a detriment. An employer can overcome a presumption of retaliation by proving that the detriment was based on "duly justified grounds." The Recital provides further guidance on how to interpret this. It states in clause 93 that after a whistleblower has proven a prima facie case, the "burden of proof should shift to the person who took the detrimental action, who should then demonstrate that the action was not linked in any way to the reporting or the public disclosure." See also: https://oversightproject.org/2019/10/01/a-comparative-analysis-of-u-s-v-e-u-whistleblower-law/.

RELIEF: INTERIM AND MAKE-WHOLE RELIEF ARE AVAILABLE TO WHISTLEBLOWERS

Best practice standards address the full scope of harm—past, present, and future—to make the whistleblower whole. This includes temporary relief or "stays," which pause the personnel action a whistleblower is facing.

Best Practice Standards for Relief from Unlawful Whistleblower Retaliation:

- ✓ Provides a clear means for whistleblowers to obtain interim relief or "stays" on the underlying personnel action following a preliminary determination in their favor.[40]
- ✓ Provides for an alternative dispute resolution option with an independent adjudicator selected or agreed to by both parties for the timely and affordable resolution of disputes.[41]
- ✓ Provides whistleblowers with compensatory damages including back pay.[42]
- ✓ Provides for reasonable attorney's fees and any special damages sustained because of the retaliation such as litigation costs and expert witness fees.[43]
- ✓ Provides other personal relief such as the option to transfer physical location for employment.[44]

40 Whistleblower Protection Act, 5 U.S.C. § 1214(b)(1). See also: Consumer Financial Protection Act, 12 U.S.C. § 5567(c)(2)(B).

41 Whistleblower Protection Act, 5 U.S.C. § 7121.

42 Dodd Frank Act, 15 U.S.C. § 78u-6(h)(1)(A). See also: Whistleblower Protection Act, 5 U.S.C. § 1221(g)

43 Criminal Antitrust Anti-Retaliation Act, 15 U.S.C. § 7a-3(c)(2)(C). See also: Whistleblower Protection Act, 5 U.S.C. § 1221(g).

44 Whistleblower Protection Act, 5 U.S.C. § 3352.

GAG-ORDERS: RIGHTS CANNOT BE WAIVED

Best practice standards make explicit that whistleblower protections cannot be waived through nondisclosure agreements or other prior restraints on the right to engage in protected whistleblowing.

Best Practice Standards for Preserving Whistleblower Rights:

- ✓ Dictates that whistleblower rights cannot be waived in any agreement, policy form, or condition of employment, including in a pre-dispute arbitration agreement.[45]
- ✓ Requires that any workplace policy or order restricting employee speech must also contain language making explicit that whistleblowing rights remain unaffected by the policy or order.[46]
- ✓ Dictates that covered individuals retain existing rights under federal and state laws, and under collective bargaining agreements.[47]

45 Anti-Money Laundering Act, 31 U.S.C. § 5323(j). See also: Taxpayer First Act, 26 U.S.C. § 7623(d)(5).
46 Whistleblower Protection Act, 5 U.S.C. § 2302(b)(13).
47 Taxpayer First Act, 26 U.S.C. § 7623(d)(4). See also: Criminal Antitrust Anti-Retaliation Act, 15 U.S.C. § 7a-3(d).

EMPLOYEE EDUCATION: MANDATORY, TIMELY, AND INDEPENDENTLY EVALUATED

Best practice standards require that individuals be informed of their rights and responsibilities under the law. Standards require independent evaluation to determine if education requirements are being met.

Best Practice Standards for Education:

- ✓ Makes available no-cost guidance for whistleblowers on their rights, options, and the procedures for making disclosures or reporting retaliation.[48]
- ✓ Requires that employers regularly train employees on their rights and remedies, with a separate training for managers on their responsibilities.[49]
- ✓ Requires regular assessment of the trainings through an independent evaluator.[50]

48 2019 European Union Directive, Article 20. See also: Inspector General Act, as amended. 5 U.S.C. § 403(d)(1)(C).
49 Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017; 5 U.S.C. § 2301 (Note).
50 Federal Contractor Whistleblower Protections under the National Defense Authorization Act; 41 U.S.C. § 4712(d).

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