

Who Is A “whistleblower?” Legal Protections Can Apply (or Not) In Unexpected Ways

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The word “whistleblower” is often used casually to describe anyone who raises an issue that may imply unethical or unfair conduct, usually by a company or government entity. However, not everyone who believes he or she is a whistleblower is legally protected from retaliation such as termination or lower pay. The complaints or reports made by individuals that are actually protected by the law are generally much more limited than people believe. Various laws exist to protect individuals who step forward to report certain types of unlawful conduct, but the extent of their protection and whether someone can bring a legal claim often requires an attorney to analyze the facts.

LAWS PROTECTING EMPLOYEES’ WORKPLACE RIGHTS – RETALIATION IS PROHIBITED

Most federal, state and local laws that protect employees from discrimination, harassment and wage-hour violations (such as failure to pay overtime) also prohibit retaliation against employees for complaining about such conduct. For example, federal laws such as [Title VII](#) (prohibits discrimination based upon race, sex, religion, color and national origin), the [Americans with Disabilities Act](#) (prohibits discrimination based upon, and requires reasonable accommodation of, employee disabilities) and the [Age Discrimination in Employment Act](#) (prohibits age discrimination against individuals 40 years of age and over), as well as state and local laws such as the [New York State](#) and [New York City Human Rights Laws](#) (which cover these categories and others, such as sexual orientation) all contain anti-retaliation provisions. Therefore, if an employee has “blown the whistle” regarding conduct he or she believes violates a legal prohibition of discrimination or harassment or a wage-hour requirement, an employer would violate the law by retaliating against that employee. Retaliatory acts against an employee may include termination, demotion or unfavorable transfer, loss of pay, or even negative treatment such as exclusion or micromanaging.

LAWS PROTECTING EMPLOYEES REPORTING CONDUCT THEY BELIEVE IS UNLAWFUL – WHAT WAS REPORTED, HOW AND TO WHOM?

State laws prohibiting retaliation against whistleblowers vary widely in what and who they cover. For example, New York’s whistleblower laws primarily focus on fraud against the state, threats to public health and unsafe conditions at health care facilities, whereas [New Jersey’s Conscientious Employee Protection Act](#) is more general in scope. Some states protect whistleblowers through court-recognized exceptions to the employee-at-will doctrine for employees terminated for whistleblowing. Many state whistleblower laws only cover public (i.e., government) employees, and not private sector employees.

There are various federal whistleblower laws which focus on specific areas of the law or regulations, such as the [Sarbanes-Oxley Act \(SOX\)](#), [Dodd-Frank](#), [Clean Air Act](#), the [Federal Deposit Corporation Improvement Act](#), the [Occupational Safety and Mental Health Act](#) and many others. SOX has become one of the best-known whistleblower laws as it was passed in the wake of the Enron scandal in 2002 and because it is aimed at protecting individuals who report suspected fraud and securities violations (which

became particularly relevant following the financial crisis of 2008-2009).

Depending upon the reported legal violation and type of complaint (e.g., to a government agency or within the company), a whistleblower may be able to bring a retaliation lawsuit on her own behalf, or it may be up to the government to do so on behalf of the individual.

FALSE CLAIMS ACT AND QUI TAM ACTIONS: INDIVIDUALS ALSO CAN BE PROTECTED AGAINST RETALIATION BASED UPON REPORTING FRAUD AGAINST THE GOVERNMENT – AND MAY GET A SHARE OF FUNDS RECOVERED

Under the federal [False Claims Act](#) (FCA), which also has equivalents under state law (including in New York), an individual may bring a lawsuit on behalf of the government against a business that has defrauded the government. The government has the option of joining the lawsuit or allowing the individual to pursue it on her own. This is known as a “qui tam” action. If successful, a whistleblower under the FCA can receive a substantial share of the funds recovered on behalf of the government. FCA whistleblowers also are protected against retaliation based upon a qui tam action.

GET ADVICE ON YOUR POTENTIAL RIGHTS

In general, employees who have made reports of suspected unlawful conduct either within or outside their company should be aware that they may be entitled to protection from retaliation. However, determining whether the complaint or report is covered and which law may provide relief from retaliation may not be easy to determination. Therefore, employees should consult an attorney if caught in a situation where an employer may be taking action against them because of a good faith report of known or suspected wrongdoing.

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