

# KNOWING AND UNDERSTANDING WHISTLEBLOWER PROTECTIONS

32<sup>nd</sup> Annual Labor & Employment Conference

Reginald M. Turner  
(313) 965-8318  
rturner@clarkhill.com

Brian D. Shekell  
(313) 965-8803  
bshekell@clarkhill.com

clarkhill.com

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

---

# WHAT WE WILL COVER

- What is whistleblower retaliation and why should I care?
- The anatomy of a whistleblower retaliation claim
- Overview of the most common whistleblower claims
- New whistleblower protections that may affect your company
- Best practices for protecting your company against whistleblower claims

---

# WHAT IS WHISTLEBLOWER RETALIATION?

- Any adverse employment action motivated by an employee's exercise of protected rights
- The most common elements of a retaliation or whistleblower claim are:
  - The individual engaged in a **protected activity**
  - The employer had **knowledge** of the protected activity
  - The individual suffered an **adverse employment action**
  - There was a **causal connection** between the protected activity and the adverse action

# BE AWARE - RETALIATION CHARGES ARE ON THE RISE!

	2006	2007	2008	2009	2010	2011	2012	2013	2014
<b>Total Charges</b>	75,768	82,792	95,402	93,277	99,222	99,947	99,412	93,727	88,778
<b>Retaliation All Statutes</b>	22,555 29.5%	26,663 32.3%	32,690 34.3%	33,613 36.0%	36,258 36.3%	37,334 37.4%	37,836 38.1%	38,539 41.1%	37,955 42.8%
<b>Retaliation Title VII</b>	19,560 25.8%	23,371 28.3%	28,698 30.1%	28,948 31.0%	30,948 31.0%	31,429 31.4%	31,208 31.4%	31,478 33.6%	30,771 34.7%

---

# OVERVIEW OF STATUTES WITH RETALIATION PROVISIONS

- Numerous federal and state statutes protect employees from retaliation in certain circumstances:
  - Title VII
  - ADEA
  - ADA
  - FLSA
  - OSHA
  - FMLA
  - GINA
  - NLRA
  - Don't forget about state statutes that provide retaliation protection!
    - Whistleblowers' Protection Act (WPA), workers compensation, ELCRA, PDCRA, MIOSHA, etc.

---

# UNIQUE RETALIATION AND WHISTLEBLOWER STATUTES

- There are also several industry-specific retaliation/whistleblower statutes, regulations, and proposed regulations that employers should be aware of. These provisions include reporting requirements that may be different than traditional whistleblower statutes:
  - Federal Acquisition Regulation
  - Sarbanes-Oxley Act
  - Motor Vehicle Safety Whistleblower Act (FAST Act)

---

# WHY RETALIATION CLAIMS ARE ON THE RISE

- Easily identifiable
- Public popularity
- Employees becoming more aware of their rights
- Many different avenues to recovery-virtually all federal and state employment laws have anti-retaliation provisions
- Court decisions have made retaliation cases easier to prove
- Court decisions have expanded the pool of people who can sue for retaliation
- Jury Appeal – It is expected that a supervisor who learns that a subordinate has complained about the supervisor's behavior will have difficulty treating the subordinate as if no complaint was made. Juries know that it is human nature to want to strike back at people who accuse them of wrongdoing

---

## WHO MAY CLAIM RETALIATION?

- Those who **participate** in a protected activity
  - Employees who exercise protected rights
  - Employees who file a complaint or charge or participate as a witness
- Those who **oppose** an unlawful employment practice prohibited



---

# WHAT IS AN ADVERSE EMPLOYMENT ACTION?

- Hiring/discharge
- Demotion
- Loss or promise of benefits or wages
- Loss or promise of pay raise opportunities
- Loss or promise of promotional opportunities
- Undesirable reassignments

# STATE WHISTLEBLOWER PROTECTIONS

(Michigan Whistleblowers' Protection Act)

CLARK HILL

---

# PROTECTED ACTIVITY IN WHISTLEBLOWER CLAIMS

- An employee engages in protected activity under the Whistleblowers' Protection Act (WPA) when the employee:
  1. "Reports or is about to report, verbally or in writing"
  2. A violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States
  3. To a "public body"
- The WPA also applies if a person acting on behalf of the employee reports or threatens to report

---

# PROTECTED ACTIVITY IN WHISTLEBLOWER CLAIMS

- The WPA does **not** protect reports made by an employee:
  - That the employee knows are false
  - That are given because the employee is requested to participate in an investigation by a public body

---

# ABOUT TO REPORT

- To establish a claim under the “about to report” prong of the WPA, a plaintiff must show:
  - By clear and convincing evidence that s/he or a person acting on his/her behalf was about to report a violation or suspected violation of the law, and
  - That the person who terminated the plaintiff was aware that s/he was about to make a report before s/he was terminated. *Jennings v. County of Washtenaw*, 475 F. Supp. 2d 692 (E.D. Mich. 2007)

# FEDERAL WHISTLEBLOWER PROVISIONS

CLARK HILL

---

# PROHIBITED CONDUCT

1. Discharging or in any way discriminating against an employee;
2. With respect to the employee's compensation, terms, conditions, or privileges of employment;
3. Because the employee engaged in activity that constitutes "protected activity" under a whistleblower statute

---

# WHAT A WHISTLEBLOWER MUST PROVE

1. He/she engaged in protected activity
2. The employer knew about the protected activity
3. He/she suffered an adverse employment action
4. The protected activity was a contributing factor to the adverse employment action



---

# PROTECTED ACTIVITY

- Commencing or causing the commencement of proceedings for enforcement of a whistleblower statute
- Testifying or about to testify in any such proceeding
- Participating in or assisting in any such proceeding or any other conduct that implements the purpose of the whistleblower statutes
- Complaining about a violation of a statutory provision

# FEDERAL ACQUISITION REGULATION

CLARK HILL

---

# FEDERAL ACQUISITION REGULATION

- The proposed amendment would apply to commercial contracts with the government and contracts below the simplified acquisition threshold
- The proposed amendment to the Federal Acquisition Regulation **would forbid the government from spending money on business or nonprofits who require employees or subcontractors to sign “confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting (any) waste, fraud, or abuse”**
- Public response period closed on March 22, 2016
  - Final rule will be published sometime after that period closes

---

# POTENTIAL EFFECTS OF AMENDMENT

- The proposed FAR amendment could lead to:
  - Competitor bid protests
  - Extensive review of supply-chain agreements
  - Enforcement questions
  - Retaliation lawsuits from employees who feel that their reporting rights were chilled by the company
- Contractors would be required to notify their employees that any pre-existing confidentiality agreements not conforming to the rule are no longer in effect

# SARBANES-OXLEY ACT

CLARK HILL

---

# SARBANES-OXLEY ACT

- Section 806 of the Sarbanes-Oxley Act (“SOX”) prohibits publicly-traded companies from retaliating against employees who report various acts of wrongdoing to their employers
- SOX protects employees who:
  - “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, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders”

---

## SARBANES-OXLEY ACT (CONT.)

- The above provision only applies when the information or assistance is provided to or the investigation is conducted by:
  - A federal regulatory or law enforcement agency
  - Any member of Congress or any committee of Congress
  - 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)
- If an individual participates in conduct protected by SOX, it is unlawful for an employer to “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment”

---

## SARBANES-OXLEY ACT (CONT.)

- Enforcement of SOX may include:
  - Administrative claims
  - Federal civil action
- Employees who prevail in the civil enforcement of the Act are entitled to be made whole. This includes:
  - Reinstatement
  - Back pay



---

# SARBANES-OXLEY ACT – AUDIT COMMITTEE REQUIREMENTS

- The receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters
- The confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters

# MOTOR VEHICLE SAFETY WHISTLEBLOWER ACT (FAST ACT)

CLARK HILL

---

## FAST ACT – OVERVIEW

- President Obama recently signed into law the Fixing America's Surface Transportation Act (the "FAST Act"), the first comprehensive transportation bill in years
- The FAST Act was in part the federal government's response to a pattern of reporting delays and failures by vehicle manufacturers and several major vehicle recalls. It slightly modifies Motor Vehicle Safety Whistleblower Act (MVSWA)
- This Act will incentivize employees and automotive industry insiders to come forward with information regarding potential vehicle safety defects by offering the possibility of recovering sizeable whistleblower rewards

---

## FAST ACT – COVERED INFORMATION

- The scope of the FAST ACT is limited only to information that relates to any motor vehicle defect, noncompliance, violation or alleged violation of any notification or reporting obligation that “is likely to cause unreasonable risk of death or serious physical injury”
- Some have advocated for more comprehensive automotive whistleblower protections that apply more broadly to all vehicle defects or violations affecting public safety, public health or constitute fraud, particularly in light of Volkswagen’s emissions violations

---

## FAST ACT – WHAT DOES THIS MEAN?

- Although the reach of these new whistleblower provisions is not as broad as some have argued for in light of the VW emissions violations, there is no doubt that the MVSWA, together with several other vehicle safety-related provisions of the FAST Act, amounts to substantially increased risk for automotive suppliers
- Now that industry insiders have financial incentives and protections for sharing relevant information, suppliers can be sure that government action will become even more aggressive and frequent than in the past
- It is more critical than ever for suppliers to ensure that their internal protocols and business culture foster swift communication and investigation of potential issues

# BEST PRACTICES

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

---

# IMPLEMENT A POLICY PROHIBITING RETALIATION

- Could be a part of anti-discrimination and harassment policy:
  - Policy should encourage employees to come forward with complaint without fear of reprisal
  - Policy should include a complaint procedure for employees to report retaliatory conduct
  - Complaint procedure should include several supervisory levels

---

# TRAIN MANAGERS AND SUPERVISORS

- Provide training on the types of conduct that constitute retaliation
- Provide training on how to respond when a complaint is brought to their attention
- Document training efforts
- After a complaint is made, provide counsel concerning non-retaliation obligations
- Train managers and supervisors on best practices to avoid retaliation claims
  - Encourage employees to make complaints
  - Protect employees who make complaints
  - Listen to employees and solve problems
  - Document poor performance and counsel employees



---

# TRAIN EMPLOYEES

- Train employees on the complaint procedure
- Post the complaint procedure and any required governmental postings where employees will see them
- Periodically remind employees of the complaint procedure
- Actively seek complaints from employees who have raised problems or concerns, and solve the problems if possible and as soon as possible
- Involve human resources in employment decisions that could be considered adverse to ensure no retaliation is involved in the decision making process

---

# DO NOT IGNORE COMPLAINTS

- Proactively engage employee to determine complaint
- Provide employee with a copy of non-retaliation policy
- Offer to assist the employee if problems persist
- Document discussion
- Follow-up to ensure there have been no further incidents

---

# DISCIPLINING AN EMPLOYEE WHO HAS COMPLAINED

- Discipline is retaliatory only if it is taken because the employee complained
- You can and should enforce your policies and take disciplinary action for a violation of those policies
- If you must take adverse action, document the reasons and be prepared to show that those reasons are unrelated to the employee's complaint
- Hopefully, those reasons are supported by documentation which pre-dates the employee's complaint

---

# BEST PRACTICES THAT HELP AVOID RETALIATION CLAIMS

- Make certain work records and performance evaluations are conducted on time and contain current, factual information
- Be consistent in the application of policies and the imposition of discipline
- Encourage managers and supervisors to include human resources oversight whenever an adverse action or the imposition of discipline is undertaken
- Remember, sloppy administration negatively affects credibility
- Actively remind the subject of any complaint or investigation that any conduct of a retaliatory nature toward the complaining party is strictly prohibited

---

# BEST PRACTICES THAT HELP AVOID RETALIATION CLAIMS

- Remind supervisors that they serve as guardians of anti-retaliation compliance
- Observe group dynamics -- condoning abuse by co-workers of a complaining employee will not be excused and, if pervasive, will form the basis of a retaliation claim
- Watch for pranks, destruction of personal property, workspace indignities, and other mistreatment and take prompt action to stop them

---

# BEST PRACTICES THAT HELP AVOID RETALIATION CLAIMS

- Periodically monitor the treatment of employees that have engaged in protected activity
- Follow-up tends to neutralize allegations of retaliation
- Remember adherence and attention to your policy helps to defeat and reduce retaliation claims

---

## QUESTIONS?



**Reginald M. Turner**

(313) 965-8318

[rturner@clarkhill.com](mailto:rturner@clarkhill.com)



**Brian D. Shekell**

(313) 965-8803

[bshekell@clarkhill.com](mailto:bshekell@clarkhill.com)

# THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

CLARK HILL