

All-too-common story ...



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Whistleblower Retaliation



Adverse employment action motivated by an employee's exercise of protected whistleblowing rights.



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Typical elements of an employment whistleblower claim:



- Employee engaged in a protected whistleblowing activity.
- Employer knew of the protected activity.
- Employee suffered adverse employment action.
- Causal connection between the protected activity and the adverse action.



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Retaliation Charges ... Cha-Ching!



- From 1997 to 2015, the number of retaliation-based charges filed with the EEOC increased from 18,000 per year to nearly 40,000.
- During that same time, the amount of "benefits" recovered increased from \$41 million to \$173 million per year.



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But ...



- That \$173 million amount does NOT include the amount of "benefits" recovered through litigation.



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And ...



- That \$173 million dollars does not include the amount paid to attorneys to prosecute and defend those retaliation-based claims.



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And ...



- That \$173 million dollars does not factor in the amount of time employers spent to defend against whistleblower claims.



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Let's Look at Some Statutes with Whistleblower-Type Retaliation Provisions



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Selected Federal Statutes with Whistleblower Protections



- Title VII: Illegal to discriminate against someone on the basis of race, color, religion, national origin, or sex.
- ADEA: Protects people who are 40 or older from discrimination because of age.



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Selected Federal Statutes with Whistleblower Protections



- ADA: Illegal to discriminate against a qualified person with a disability in the private sector and in state and local governments.
- FLSA: Regulates workplace practices related to minimum wage, overtime pay, and child labor.



13

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Selected Federal Statutes with Whistleblower Protections



- NLRA: Protects workers who wish to form, join or support unions or who are already represented by unions, and workers who join together as a group (two or more employees) without a union seeking to modify their wages or working conditions.



14

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Commonality among these laws?



- Whistleblower-Related Anti-Retaliation Protections
- Typical language: It is unlawful for any person to "discharge or **in any other manner** discriminate against any employee because such employee has" complained about a workplace practice that the law is intended protect against.



15

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Why is whistleblowing protected?



- It is a matter of public policy.
- These types of federal employment laws want to support and protect bona fide whistleblowers.
- Such whistleblowing activity is considered to benefit society.



Take the National Labor Relations Act (NLRA), for example ...



- Employees have the right to engage in "concerted activities" for collective bargaining "or other mutual aid or protection."
- Protected activities can include discussing wages, benefits, and other work-related terms and conditions.
- Employers are prohibited from interfering with those rights.



Non-Disparagement Clauses & the NLRA



Employment policies and handbook provisions that prohibit or limit employees from discussing their employment (such as complaining about wages and hours on social media) may draw the scrutiny of the National Labor Relations Board (which enforces the NLRA).



Non-Disparagement Clauses & Employees



- Example: NLRB ruled that a Quicken Loan's employment agreement (that admonished employees, stating they were not permitted to publicly "criticize, ridicule, disparage, or defame" the employer) violated the Act.
- The Board noted, "Within certain limits, employees are allowed to criticize their employer and its products as part of their [NLRA] rights * * * *"

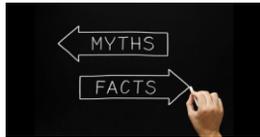


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Your company is not unionized, so who cares about the NLRA and whistleblowing?



- Some non-union employers believe that the NLRA does not govern any aspect of non-union businesses.
 - That can be a costly misconception.
- The NLRA applies to private union and non-union facilities and other workplaces.



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What if the employee's gripe-fest-filled rant doesn't even mention "unions"?



- The NLRA does not only protect "union" talk.
- The Act also protects activity to discuss or protest "wages, hours, and working conditions."



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What about employees who discuss "confidential" wage information? Could that be a type of whistleblowing?



- Yes.
- Generally, the NLRB's position is that if a social media posting pertains to wages, hours, or working conditions, the employee's right to discuss such issues outweighs your right and interest in keeping that information private.



22

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NLRA: What about employees whose complaint also discloses "confidential" information?



- Employees cannot disclose your trade secrets and proprietary information (not related to wages, hours, or working conditions).
- Disclosing the "secret sauce" can result in lawful discipline?



23

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NLRA: Must facilities tolerate employees who flaunt their disloyalty? Is such conduct even whistleblowing?



- The NLRB grants employees substantial latitude to criticize (blow the whistle on) their employers, especially related to wages, hours, and working conditions.
- However, NLRB also recognizes that at some point an employee's "complaint" or "report" can move beyond comments that are merely prejudicial to the employer, so that the comments lose protections of the Act.



24

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NLRA: When is a whistleblowing comment not really a whistleblowing comment?



- Complaints / reports that are maliciously false are not protected.
- But just because a comment is not 100% true does not mean it is not protected by the Act.
- Assume that innocent or negligent mistakes are protected.
- Employers have the burden to prove malicious falsehood, and not just a mistake.



35

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NLRA: What about workplace complaints that contain profanity?



- The Act protects a certain amount of vulgarity/profanity.
- If the complaint was an impulsive/knee-jerk act, the NLRB is likely to give the employee the benefit of the doubt that it was a heat-of-the-moment act (and protected).



36

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NLRA: More on Profanity-Laced Whistleblowing



- If it appears the employee's profane complaint was in response to employer provocation, that complaint is more likely to be protected too.
- If similar vulgarity is generally tolerated in the workplace, that complaint is also more likely to be protected.



37

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Employer Tips regarding NLRA and Whistleblowing



Employers should:

- Analyze their social rules and policies to make sure they could not have a "chilling effect" on concerted activities protected by the Act.
- Review other work-related documents, too (such as employee evaluation forms, employment applications, and employment agreements).



28

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Another NLRA Whistleblowing Compliance Tip



- Train your supervisors and employees to comply with your NLRA-Compliance Policy (including the right of employees to complain about terms and conditions of work).
- Document your company's compliance.



29

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Bottom Line on the NLRA and Whistleblowing



- Employers probably need to tolerate a disappointing amount of bad behavior from employees to comply with the NLRA.



30

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Bottom Line on the NLRA and Whistleblowing



- Before taking action with respect to employee conduct, carefully consider whether the conduct is a complaint that concerns terms and conditions of employment, and if the conduct is so egregious that the Act's protections do not apply (and that's a steep hill to climb).
- Unfair labor charges are not fun.



There Are Many, Many, Many More Federal Statutes (and Other Laws) that Contain Whistleblower Protections



- Title IX
- ERISA,
- FMLA
- False Claims Act,
- RICO
- Equal Pay Act
- First Amendment retaliation claims...
- You get the idea.



Oregon Whistleblower Protections



- **ORS 659A.199:** Employer acts unlawfully if it takes adverse action against an employee "for the reason that the employee has in good faith reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation."



Oregon Whistleblower Protections



- **ORS 659A.230:** Employer acts unlawfully if takes adverse action against an employee, among other reasons, "for the reason that the employee has in good faith reported criminal activity by any person."



34

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Oregon Whistleblower Protections



- **659A.233 Discrimination for reporting certain violations or testifying at unemployment compensation hearing prohibited.**
- "It is an unlawful employment practice for an employer to discharge, demote, suspend or in any manner discriminate or retaliate against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment for the reason that the employee has in good faith reported possible violations of ORS chapter 441 or of ORS 443.400 to 443.455 or has testified in good faith at an unemployment compensation hearing"



35

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There are more Oregon Whistleblowing Laws too.



- ▶ Oregon anti-discrimination statutes, common law tort of wrongful discharge...
- ▶ But, again, you get the idea.



36

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So Why Are Retaliation Claims Continuing to Increase?



Employees are becoming more aware of their rights.

- > Internet sites
- > Newspaper reports
- > Coworker "success"



37

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Why Else Are Retaliation Claims Continuing to Increase?



Creative plaintiffs' attorneys.

- > There are many different avenues to recovery.
- > Virtually all federal and state employment laws have anti-retaliation provisions.
- > Some court decisions have made retaliation cases easier to prove.
- > Jury appeal / compelling stories / public popularity: Some believe 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.
- > Defending complaints is expensive.



38

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Who In Your Workforce Gets to Sue For Whistleblower Retaliation?



- Employees who participate in a whistleblowing-related "protected activity," such as:
 - > filing a complaint or charge/report unlawful act
 - > participate as a witness
 - > oppose an unlawful employment practice prohibited



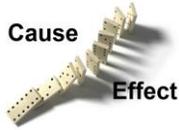
39

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Who In Your Workforce Gets to Sue For Whistleblower Retaliation?



And the employee who suffers an adverse employment action because of the protected whistleblowing activity.



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What's an Adverse Employment Action?



- Not hired
- Fired
- Demoted
- Reduced wages
- Reduced benefits
- Reduced workplace opportunities
- Cruddy reassignments



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Do Self-Professed Whistleblowers Have Immunity from Discipline?



Not necessarily ...

- Similar to NLRA protections ("concerted activities" related to terms and conditions of employment), other statutory and common law whistleblowing protections have limits and must be analyzed on a case-by-case basis.
- Whistleblowing protections apply to legitimate, proper, good faith reports of abuse, neglect, unsafe conditions, and rule violations.
- Whistleblowing protections do not apply to conveniently invented reports that are made to avoid termination or discipline for unrelated/unprotected workplace conduct.



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To Recap ... What Must a Whistleblower Plaintiff Prove?



- Employee engaged in bona fide protected activity.
- Employer knew about the protected activity.
- Employee suffered an adverse employment action.
- Protected activity was a contributing factor to the adverse employment action.

LET'S RECAP...

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Best Whistleblowing-Related Policies



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Adopt a Policy that Encourages Employees to Make Suggestions, Report Unsafe/Unlawful Conduct



- ▶ How to report
- ▶ Who to report
- ▶ Protections against retaliation
- ▶ It takes a village ...



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Implement a Policy on Response to Whistleblower Complaints



- Adopt clear procedures.
 - Follow them.
 - Follow them consistently.
 - Every time.



46



Train Managers and Supervisors



- Train on how to respond to a whistleblower's complaint.
 - Analyze initial facts and circumstances.
 - Investigate.
 - Confer with legal.
 - Protect evidence.
 - Protect witnesses.
 - Respond appropriately.



47



Train Managers and Supervisors



- Train on the types of conduct that constitute retaliation.
- Make sure EVERYONE knows about it.



48



Implement a Policy Prohibiting Retaliation Against Whistleblowers



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



Train employees About Your Whistleblower Culture



- Train employees that reporting dangerous or unlawful is not a bad thing.
 - It's their duty.
- Train employees on the complaint procedure.
 - Post the complaint procedure.
 - Post any required governmental postings in common areas.
 - Remember, it's your culture.



Your Culture of Encouraging Whistleblowers



- Periodically remind employees of the complaint procedure.
- Reward "best" safety ideas.
- Actively seek complaints from employees who have raised problems or concerns.
- Involve HR (early and often) in employment decisions that might be related to whistleblowing.
- Make sure no retaliation is involved in the decision making process.



Respond Promptly (Reinforce Your Culture)



- Proactively engage employee to nail down allegations of whistleblower's complaint/report.
- Provide employee with a copy of non-retaliation policy.
- Offer to assist the employee if problems persist.
- Follow-up to ensure there have been no further incidents.



13

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Document Your Policy, Training, Response ... Culture



You work hard to comply with whistleblower protection laws.

- Make sure to document those efforts.
- Do it contemporaneously.
- Implement a document retention policy.



14

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Disciplining an Employee who has Complained/Reported



- Discipline is retaliatory if it is taken because the employee complained/reported.
- You can still enforce your (lawful) policies and take disciplinary action for a violation of those (lawful) policies.
- If you must take adverse action, document the reasons.
 - Be prepared to prove reasons are unrelated to the employee's complaint.



15

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Tips to Avoid Whistleblower Retaliation Claims



- Perform timely evaluations.
 - conducted on time
 - contain facts
- Consistently apply policies.
- Consistently impose discipline.
- Encourage management to seek HR input (and legal advice, when appropriate).



Tips to Avoid Whistleblower Retaliation Claims



- Remind employees to report retaliation (and how to report).
 - Establish employee tip line.
 - Establish internal reporting process.
 - Deal with all reports promptly.
- Remind subject of complaint/report that retaliation is prohibited.
- Follow-up.
- Document!



More Whistleblower Policy and Practice Tips



- Remind supervisors that they serve as guardians of anti-retaliation compliance (and your culture).
- Be vigilant for "good natured" pranks, comments, and workspace indignities.



Periodically Check The Pulse of Your Workplace's Whistleblower Culture



- Check in periodically.
- Confidential survey?
- Tweak your policies, when appropriate.
- Document.



18

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And now a little information on ... Whistleblowing and "SLAPP" Litigation



19

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What is "SLAPP"?



SLAPP stands for "strategic lawsuit against public participation," generally defined as meritless lawsuits brought to deter people from (or punish people for) exercising speech rights (including whistleblowing).



20

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Anti-SLAPP Laws



- Anti-SLAPP statutes (including Oregon's) provide a procedure to dismiss a SLAPP lawsuit at an early stage.
- The Oregon Court of Appeals has explained: "The purpose of the special motion to strike procedure *** is to expeditiously terminate unfounded claims that threaten constitutional free speech rights."



SLAPP: Employer Litigation Options / Issues



- Can employer sue employee for defamation?
- Not for engaging in protecting whistleblowing activities.
- And otherwise, it still, generally, depends ...



SLAPP: Employer Litigation Options / Issues



With respect to US Constitution, First Amendment, Oregon courts:

- First consider whether the statement involves a matter of public concern.
- If it does, then courts consider if the statement implies an assertion of objective fact (which requires analysis of the "totality of the relevant circumstances," including the context in which particular statements were made and the verifiability of those statements).



Another SLAPP Consideration



Before filing a lawsuit against an employee who has made defamatory statements about employer, the employer should also consider:

- How might the lawsuit negatively impact business, co-workers, management?
- Might the lawsuit draw even more unwanted attention?
- Might the lawsuit be perceived as the employee's attempt to "hide something" and/or retaliate against a whistleblower?

Please Notice This



And Another SLAPP Consideration



If you file a lawsuit in response to defamatory statements about your company, and if the defendant files an anti-SLAPP motion and the motion against your complaint is granted:

- The court, in addition to dismissing your lawsuit, is required to award the defendant its attorney fees and costs.
- But if your company (as plaintiff) prevails against the anti-SLAPP motion, it does not get a fee and cost award.



And finally ... Whistleblowing and Employee Social Media Use



Darn Twittersverse!



Sometimes employees report unlawful workplace activity via social media (instead of through internal channels).



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How to Diffuse Social Media Whistleblowers



- (Carefully) Adopt a social media policy.
- Encourage **internal** reporting of workplace problems / issues.
- Take social media postings seriously.
- Investigate (but be sure to analyze mandatory reporting issues and requirements).
- Avoid anything that resembles retaliation for whistleblowing (carefully consider related discipline for violations of privacy or disloyal conduct).
- Document, document, document.
- Follow up with complaining party.



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A Related Whistleblower Issue ...



Oregon's law regarding employer access to employee social media?



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Oregon law prohibits employers from:



- Requiring employees to disclose the username and password to their personal social media accounts.



70



Oregon law prohibits employers from:



- Forcing employees to allow the employer to view the employee's (non-public) accounts.



71



Oregon law prohibits employers from:



- Forcing employees to "friend" the employer.



72



And as of January 1, 2016:



Oregon employers have been prohibited from requiring an employee to:

- Establish or maintain a personal social media account, or
- Allow the employer to advertise on his or her personal social media account.



73

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Oregon law prohibits employers from:



- Taking negative employment action against employees who refuse to comply with any of the preceding requirements.



74

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Narrow Exceptions:

- Employer may require employee to disclose password and other account access information if account was provided by, or on behalf of, the employer, or to be used on behalf of the employer.
- Employer may use or require employee to share content from social media account to comply with state and federal laws or to conduct an employment investigation.
- Employers may access information and content posted by or about an employee that is publicly available.



75

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But be careful ...



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Increasing Scrutiny



- Labor and employment law enforcement agencies (like the EEOC and BOLI) are focusing more and more on employer's social media-related employment practices.
- Employer use of social media as tool to discover misconduct makes them vulnerable to agency action and private whistleblowing lawsuits.



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Potential Claims and Liability



- Even a passing glance at an employee's social media could disclose protected whistleblowing activities.
- If disciplined employees can show they were disciplined because the employer learned of a protected whistleblowing activity by viewing the employees social media posting(s), the employer may be found liable.



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Safest bet? Don't use social media to "monitor" your employees.



- Train your management team on these whistleblowing issues.
- Document your company's compliance with the policy.
- If you take "adverse action" because of employee's social media use, make sure it is lawful to do so.



79

So ... when you draft (or revise) your social media policy:



- ▶ DO **NOT** discourage employee participation in social media by threatening sanctions and policies against those that post disparaging remarks regarding your company (such remarks could include protected whistleblowing).
- ▶ DO **NOT** over-broadly define confidential information.
- ▶ DO **NOT** require employees to report on co-worker's social media activities.



80

Your social media policy should instead ...



- Encourage employees to resolve workplace concerns internally.
- State that discriminatory remarks, harassment, bullying, threats of violence and similar inappropriate behavior not tolerated in the workplace is not acceptable in social media.
- Forbid employees from impersonating your company or making statements on behalf of the company without authorization.



81

Nearly Final Thoughts ... Potential Benefits of Encouraging a "Whistleblower Culture"



- Reduces adverse stigma of reporting problems.
- Reduces instances of misconduct.
- Reduces retaliation.
- Strengthens workforce cohesion.
- Increases likelihood that employees will report misconduct *internally* first ...
- Which leads to huge benefits to a company.

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Final Thoughts ...



- Complying with the law related to whistleblowing is a challenging and ever-moving target.
- Develop, implement, and regularly update your whistleblower related protections and other policies.
- Adopt a policy that encourages employees to properly report unsafe and unlawful conduct.
- Train your supervisors and employees to comply with those policies.
- Document your compliance. Do it now.

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