

A LITTLER PRESENTATION

Whistleblowing Doesn't Have to Stop the Game:

Strategies for Reducing the Risk of Whistleblower
and Retaliation Claims

Little®



Presented By



BETHANY INGLE

Shareholder
Tysons Corner
GIngle@littler.com
703.286.3135



ALEX BERG

Shareholder
Tysons Corner
ABerg@littler.com
703.286.3138

Agenda

- Opening Ceremony
- The “Parade of Nations”
 - Federal laws
 - Virginia state laws
- Lessons in Teamwork





Opening Ceremony

(or, Common Elements
and Key Themes)

General Principles



- MANY laws prohibit retaliation against employees (and contractors) for raising a **good faith belief** of alleged unlawful or unethical conduct, including:
 - Anti-discrimination and wage-and-hour laws;
 - Laws specific to certain industries, such as banks and airlines, or to practices such as occupational safety.
- Employers should **encourage** employees to raise any complaints or concerns.
- Once an employee engages in protected activity, they are protected against retaliation; however, they are **not immune from normal discipline**.



The Concept of “Whistleblowing”



- Subject to various statutory differences, “whistleblowing” is generally defined as:
 - The reporting of information or concerns,
 - By one or more individuals or entities,
 - That is reasonably believed by such individual(s) or entity(ies) to constitute illegality, fraud, unfair, or unethical conduct, mismanagement, abuse of power, unsafe or dangerous activities, or other wrongful conduct,
 - Including but not limited to, any conduct that may affect the safety, soundness, or reputation of the institution.



Who is a “Whistleblower”?

Littler®

- Any person who has an opportunity to observe what the person believes is improper conduct.
 - Current employee
 - Former employee
 - Agent
 - Consultant
 - Vendor
 - Shareholder



Typical Whistleblower Claim Elements



1. The individual engaged in protected activity;

- The individual reported conduct that they reasonably believe (or had a good faith belief) constitutes a violation.
- Includes both subjective and objective components.
- The individual need not ultimately be correct or prove underlying claim of wrongdoing.

2. Whistleblower suffered some adverse employment action; and

- Not just termination, demotion, pay cut, or reduction in hours.
- Typically, an action that well might dissuade a reasonable employee from engaging in protected activity.

3. “Reasonable cause” to believe the protected activity was a contributing factor in the adverse action.

- *E.g.*, timing, where adverse action occurs within a relatively brief time period (typically 2-3 months or less) after the whistleblower reported their complaint.
- Causation is critical: did the relevant decision-maker know?

Key Themes



1. No complaint is too small.
2. Beware of serial complainers.
3. Federal and Virginia laws encourage reporting.
4. Liability differs from damages.
5. No one person's reputation is more important than the reputation of the business.
6. Merely raising a complaint does not mean you cannot proceed with previously planned disciplinary action.



Parade of Nations

(Federal and Virginia Whistleblower Laws)



Federal Laws

Commonly Used Federal Whistleblower Retaliation Laws



- False Claims Act
- Sarbanes-Oxley Act
- Dodd-Frank Act
- Other Federal Considerations



The False Claims Act (FCA)

FCA



- Enacted in 1863 to curb wasteful billing practices by government contractors during the Civil War.
- The FCA creates liability for knowingly submitting a false or fraudulent claim to the government for payment or approval, including a person's failure to return known overpayments, or conspiring to do the same.
- To “knowingly” submit a false or fraudulent claim is to do so with actual knowledge or to act in deliberate ignorance of, or reckless disregard for, the truth or falsity of the information. 31 U.S.C. § 3279(b)(1)(A).



Recent FCA Case Law



- In 2023, the Supreme Court held that when assessing FCA liability, courts should evaluate what the company thought **when submitting** the false claim, rather than what the company thought **after** submitting it. Honest mistakes are not enough. *See U.S. ex rel. Schutte v. Supervalu Inc.*, 598 U.S. 739 (2023).
- Regardless of whether the company has, in fact, submitted a false claim, however, it may be liable if it retaliates against a whistleblower.

FCA Whistleblower Protection



- Unlawful for “[a]ny employee, contractor, or agent” to be “discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done... in furtherance of an action under this section or other efforts to stop one or more violations of this subchapter.” 31 U.S.C. § 3730(h).
- Relief:
 - Double back pay
 - Interest
 - Special damages
 - Attorneys’ fees and costs

What is FCA-Protected Activity?



- Lawful acts in furtherance of a qui tam action
 - Filing the lawsuit as the relator.
 - Investigating or gathering information in advance of filing the lawsuit.
- Efforts to stop “one or more violations” of the FCA
 - Actual violation of the FCA is not required.
 - Employee’s belief that they are trying to stop a violation must be both objectively and subjectively reasonable.



Sarbanes-Oxley Act of 2002 (SOX)

SOX Overview



- Enacted in 2002 in reaction to corporate and accounting scandals, including Enron, Tyco, and WorldCom.
- Originally applied exclusively to publicly traded companies.
- Also applies to employees of a public company's private contractors and subcontractors. *See Lawson v. FMR, LLC, 571 U.S. 429 (2014).*
- Retaliatory intent is **not** required. *See Murray v. UBS Secs., LLC, 601 U.S. 23 (2024).*

SOX Whistleblower Protection



- May not retaliate against an employee who reports what they “reasonably believe” to be criminal fraud, or violation of SEC rules/regs or other laws relating to fraud against shareholders.
- Relief:
 - Reinstatement
 - Back pay
 - Special damages
 - Attorneys’ fees and costs
- “Bounty” provision

SOX-Protected Activity



- Providing information (or causing information to be provided) regarding any of the topics identified on the previous slide to:
 - Company supervisor;
 - SEC or law enforcement agency; or
 - Member or Committee of Congress.
- Filing a complaint, causing to be filed, testifying, participating in, or otherwise assisting in a proceeding filed or about to be filed relating to the topics identified on the previous slide.

Dodd-Frank Act



Dodd-Frank Act Overview



- Enacted in 2010 in response to financial industry behavior that led to the “Great Recession” of 2007-08.
- Expands upon SOX whistleblower protections and creates incentives for individuals to blow the whistle.
- Note: The Dodd-Frank Act requires the SEC to protect the identity of whistleblowers, so employers may not be aware of who has blown the whistle.

Dodd-Frank Act Whistleblower Protection



- Prohibits employers from taking adverse action against a “whistleblower” for:
 - Providing information to the SEC relating to a violation of securities laws;
 - Initiating, testifying in, or assisting in any investigation, judicial action, or administrative action of the SEC based on or related to such information; or
 - Making disclosures that are required or protected under SOX, or any other SEC law, rule, or regulation.
- Relief:
 - Double back pay
 - Reinstatement
 - Attorneys’ fees and costs
- “Bounty” provision

Dodd-Frank Act Protected Activity



- A complaint made to the SEC regarding a violation of the securities laws.
 - However, a whistleblower is not entitled to any award if they knowingly and willfully make any false or fraudulent statement or use any false writing or document.
- An individual who has not reported such information to the SEC – *e.g.*, an individual who goes instead to the DEA or a different federal agency – is not a covered *Dodd-Frank* whistleblower. See *Digital Realty Trust, Inc. v. Somers*, 583 U.S. 149 (2018).





Other Federal Statutes

SEC Rule 21F-17



- Obama-era regulation under the Securities Act of 1934
- Companies may not take “any action to impede an individual from communicating directly with [SEC] staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement...with respect to such communications.” 17 C.F.R. § 240.21F-17(a).
- Best practice: Include carve-out to confidentiality clauses in severance and settlement agreements.

Defend Trade Secrets Act of 2016 (DTSA)



- Under the DTSA, individuals may disclose trade secrets under certain narrow and precise circumstances:
 - In confidence to a government official (or in a sealed complaint) solely for the purpose of reporting or investigating a suspected violation of law.
 - To their attorneys for use in a court proceeding where filed under seal.
- *Employers must provide notice of this immunity in any employment agreement (or by cross-reference to their reporting policy).



Virginia Laws

Virginia Whistleblower Laws



- Virginia Whistleblower Protection Law (VWPL)
- Virginia Occupational Safety and Health Act (VOSH Act)
- Virginia Fraud and Abuse Whistleblower Protection Act (FAWBPA)

Virginia Whistleblower Protection Law (VWPL) Overview



- Effective as of July 1, 2020.
- Enacted for the purposes of strengthening whistleblower protection laws for employees in Virginia (including persons acting on their behalf).

VWPL Whistleblower Protection



- Employers shall not “discharge, discipline, threaten, discriminate against, or penalize an employee, or take other retaliatory action regarding an employee’s compensation, terms, conditions, location or privileges of employment, because the employee or a person acting on behalf of the employee” reports a violation of any federal or state law or regulation to a supervisor or to any governmental body or law enforcement official.

VWPL Protected Activity



1. Reporting a violation of any federal or state law or regulation to a supervisor or to any governmental body or law-enforcement official;
2. Being requested by a governmental body or law-enforcement official to participate in an investigation, hearing, or inquiry;
3. Refusing to engage in a criminal act that would subject the employee to criminal liability;
4. Refusing an employer's order to perform an action that violates any federal or state law or regulation and the employee informs the employer that the order is being refused for that reason; or
5. Providing information to or testifies before any governmental body or law-enforcement official conducting an investigation, hearing, or inquiry into any alleged violation by the employer of federal or state law or regulation.

VWPL Enforcement and Remedies



- Remedies:
 - Injunctive relief
 - Reinstatement
 - Actual compensatory damages (*e.g.*, lost wages)
 - Attorneys' fees and costs

VWPL – Failed 2024 Amendment



- HB 770 (2024) would have made two important changes, but was vetoed by Gov. Youngkin on April 8:
 1. Extended statute of limitations from 1 year to 1 year from “the employer’s *final* prohibited retaliatory action”
 2. Provided for double damages in cases of willful violations
- It is possible that this or similar legislation will be introduced again during the 2025 General Assembly session.

Virginia Occupational Safety and Health Act (VOSH) – Whistleblower Protection



- Under Section 40.1-51.2:1 of the Virginia Code, “[n]o person shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or otherwise acted to exercise rights under the safety and health provisions of this title for themselves or others.”
 - A plaintiff proceeding under this statute must demonstrate that the adverse action would not have taken place “but-for” their engagement in protected activity.
- Remedies: injunctive relief, reinstatement, and back pay plus interest. *See* Va. Code § 40.1-51.2:2.

VOSH Act – Protected Activity



- Participating in safety and health activities
- Complaining to OSHA/VOSH or seeking an OSHA/VOSH inspection
- Participating in an OSHA/VOSH inspection
- Participating or testifying in any proceeding related to an OSHA/VOSH inspection
- Reporting a work-related injury, illness, or fatality
- Reviewing records of work-related injuries and illnesses
- Receiving information and training about hazards, methods to prevent harms, and the OSHA/VOSH standards that apply to the employee's workplace

Virginia Fraud & Abuse Whistleblower Protection Act (FAWBPA) – Overview



- Protects employees from retaliation for reporting wrongdoing or abuse committed by state government executive branch agencies, institutions, and independent contractors of governmental agencies
- Requires state government executive branch agencies and independent contractors of government agencies to post the Virginia Whistleblower Hotline Poster informing employees of their rights

FAWBPA Whistleblower Protection



- Covered government agency employers and independent contractors may not discharge, threaten, or otherwise discriminate or retaliate against a whistleblower for engaging in a protected activity or conduct.
- Remedies:
 - Reinstatement
 - Back pay
 - Attorneys' fees and costs

FAWBPA Protected Activity



- Disclosing information about suspected wrongdoing or abuse
- Participating in an investigation, hearing, or inquiry by an appropriate authority or in a court action
- Wrongdoing is defined as a violation “not of a merely technical or minimal nature, of a federal or state law regulation, local ordinance, or a formally adopted code of conduct or ethics of a professional organization designed to protect the interests of the public or employee.” Va. Code § 2.2-3010



Lessons in Teamwork

“Bronze Medal” Tip: Maintain a Written Anti-Retaliation Policy



- Most policies, and the law, require prompt investigation and corrective action after finding wrongful conduct.
- You should require that all employees, including the whistleblower, must participate in the investigation in good faith.
- Advise interviewees at the start of each conversation that they will not be retaliated against for participating.

“Silver Medal” Tip: Listen Carefully



- Welcome the complaint (with words and body language).
- Take the time to listen, actively.
- Be professional and respectful.
- Listen and partner ASAP with other departments, (e.g., Legal, HR, or Compliance). Do not investigate a whistleblower complaint alone!



“Gold Medal” Tip: Train Your Managers!



- Train and implement practices that require managers to vigorously enforce company’s anti-retaliation policies and procedures.
- Understand the manager’s role and be open to answering questions.
- Create an atmosphere and workplace culture where no objective takes priority over compliance and behaving ethically.



Littler®

Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.

**Fueled by ingenuity.
Inspired by you.®**

Thank You



BETHANY INGLE

Shareholder
Tysons Corner
Gingle@littler.com
703.286.3135

ALEX BERG

Shareholder
Tysons Corner
ABerg@littler.com
703.286.3138

Littler[®]

Fueled by ingenuity.
Inspired by you.[®]