

PRESENTED AT

27th Annual Labor & Employment Law Conference

May 7-8, 2020

Whistleblowers

Drew L. Harris

Austin Kaplan

Whistleblowers

By Drew L. Harris and Austin Kaplan

I. Introduction

This paper discusses federal and Texas state whistleblower protection laws. To say whistleblowers are a hot topic lately is an understatement. Some recent newsworthy examples include:

1. The impeachment trial;¹
2. The Boeing 737 Max;²
3. Chelsea Manning;³
4. The Veterans Administration;⁴
5. Cambridge Analytica;⁵ and, of course
6. Theranos.⁶

The paper presents various important whistleblower statutes for litigation in Texas.⁷ The paper covers the exhaustion requirements and elements needed to prove retaliation claims under these statutes, and concludes with a discussion of the ethical issues related to attorneys as whistleblowers.

II. Federal Whistleblower Statutes

Federal law contains a patchwork of whistleblower statutes that apply to employees of public and private entities.

Some of the most commonly applicable federal whistleblower statutes that cover employees of non-governmental entities are the National Defense Authorization Act (“NDAA”)—which applies to private employees who work for federal contractors—and the False Claims Act (“FCA”), which applies to any employer which makes claims for payment to the federal government.

Additionally, many other federal regulatory statutes contain very specific anti-retaliation provisions dealing with certain industries that penalize retaliation against employees who report violations of those statutes. For example, the Federal Mine Safety and Health Act of 1977 prohibits mining employers from retaliating against miners who report any violations of that statute, providing reinstatement, backpay, costs and attorney’s fees.⁸

A. National Defense Authorization Act

A National Defense Authorization Act is enacted each fiscal year to specify the annual budget and expenditures of the U.S. Department of Defense. The NDAA for Fiscal Year 2013, however, also expanded the whistleblower

¹<https://www.usatoday.com/story/news/politics/2020/01/30/trump-impeachment-arrestandpaul-trends-after-whistleblower-snit/2860281001/>.

²<https://www.nytimes.com/2019/12/09/business/boeing-737-max-whistleblower.html>.

³ <https://www.theguardian.com/us-news/2018/oct/07/chelsea-manning-wikileaks-whistleblowing-interview-carole-cadwalladr>.

⁴<https://www.nytimes.com/2019/10/24/us/politics/va-whistleblowers.html>.

⁵<https://www.nytimes.com/2019/10/09/books/review-christopher-wylie-targeted-brittany-kaiser-cambridge-analytica.html>.

[analytica.html](https://www.nytimes.com/2019/10/09/books/review-christopher-wylie-targeted-brittany-kaiser-cambridge-analytica.html).

⁶<https://www.cnn.com/2019/04/02/tech/theranos-whistleblowers-ethics-in-entrepreneurship/index.html>.

⁷ Because they have been discussed extensively already elsewhere, this paper does not separately cover the Corporate and Criminal Fraud Accountability Act of 2002, better known as the Sarbanes-Oxley Act, or the Dodd-Frank Act, Pub. L. No. 111-203 (“Dodd-Frank Act”), which significantly expanded employee rights under Sarbanes-Oxley and other federal securities laws.

⁸ 30 U.S.C. § 815(c).

protection that federal employees enjoyed to employees of federal contractors and grantees.

In general, the NDAA provides protection from retaliation to employees of federal contractors or grantees who disclose information they reasonably believe is evidence of fraud relating to federal funds.

1. Exhaustion Requirements

The NDAA does require administrative exhaustion. To bring a claim, the whistleblower must file with the Office of Inspector General of the agency that awarded the contract, grant, or federal funds in question.⁹ The OIG has 180 days to investigate and submit a report to the relevant agency head and parties, and the agency head must then issue an order within 30 days granting or denying relief.¹⁰ If the OIG denies relief or the whistleblower has not received relief within 210 days of filing, then the whistleblower may file in federal district court.¹¹ However, the whistleblower must file the *de novo* lawsuit within two years of administrative exhaustion.¹² Finally, the statute of limitations is three years after the date of the reprisal.¹³

2. Required Elements

To prevail on a whistleblower retaliation claim under the NDAA, the employee must prove the following elements by a preponderance of the evidence:

1. the employee engaged in protected activity as described in the Act;

2. the contractor's decisionmaker knew the employee engaged in protected activity;
3. an adverse action against the employee; and
4. the employee's protected activity was a contributing factor in the adverse action taken against him or her.¹⁴

The NDAA covers all individuals who perform work on a government contract or grant, including employees of federal contractors and subcontractors, employees of entities that receive federal funds, and personal service contractors working on defense or civilian grant programs.¹⁵ Employees of contractors and subcontractors of the Department of Defense and National Aeronautics and Space Administration are notably included, while disclosures that relate to activities of the intelligence community are notably excluded.¹⁶

A protected disclosure under the NDAA is one the employee reasonably believes constitutes gross mismanagement of federal contract or grant, gross waste of federal funds, abuse of authority, violation of law, rule, regulation related to federal contract or grant, or a substantial specific danger to public health and safety.

The disclosure must be made to a member of Congress, the OIG, the GAO, a federal employee for oversight, a court, a DOJ official, or management or an employee of the contractor with the responsibility to investigate. In other words, reporting to a supervisor can often qualify as a disclosure under the Act.

⁹ 10 U.S.C. § 2409(b)(1); 41 U.S.C. § 4712(b)(1).

¹⁰ 10 U.S.C. § 2409(b)(2); 41 U.S.C. § 4712(b)(2); 10 U.S.C. § 2409(c)(1); 41 U.S.C. § 2409(c)(1).

¹¹ 10 U.S.C. § 2409(c)(2); 41 U.S.C. § 4712 (c)(2).

¹² *Id.*

¹³ 10 U.S.C. § 2409(b)(4); 41 U.S.C. § 4712(b)(4).

¹⁴ See *Wilczynski v. Loyal Source Gov't Servs., LLC*,

No. 18-cv-2973-WJM-KMT, 2020 U.S. Dist. LEXIS 39124, at *8 (D. Colo. 2020) (citing *Cejka v. Vectrus Systems Corp.*, 292 F. Supp. 3d 1175, 1192 (D. Colo. 2018)).

¹⁵ 41 U.S.C. § 4712(a)(1).

¹⁶ 10 U.S.C. § 2409(e); 41 U.S.C. § 4712(f); 50 U.S.C. § 3003(4).

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Whistleblowers

Also available as part of the eCourse

[Whistleblowers](#)

First appeared as part of the conference materials for the
27th Annual Labor and Employment Law Conference session
"Whistleblowers"