

# Whistleblowers

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## I. Introduction

This paper discusses federal and Texas state whistleblower protection laws. Whistleblowers continue to be a hot topic in 2023. Some recent newsworthy examples include:

1. Boeing 737 Max;<sup>1</sup>
2. Chelsea Manning;<sup>2</sup>
3. The Veterans Administration;<sup>3</sup>
4. Tesla;<sup>4</sup>
5. Credit Suisse;<sup>5</sup>
6. Cambridge Analytica;<sup>6</sup> and, of course
7. Theranos.<sup>7</sup>

In late 2020 and early 2021, the new whistleblower protections in the Anti-Money Laundering Act (“AMLA”) <sup>8</sup> and the Criminal Antitrust Anti-Retaliation Act (“CAARA”) <sup>9</sup> became effective. In March 2021, the Fifth Circuit issued a published opinion interpreting the whistleblower protections in the National Defense Authorization Act (“NDAA”). <sup>10</sup> In January 2021, the Fifth Circuit clarified that Sarbanes Oxley whistleblower protection extends only to an employee of the retaliating entity<sup>11</sup>

<sup>1</sup><https://www.nytimes.com/2019/12/09/business/boeing-737-max-whistleblower.html>.

<sup>2</sup> <https://www.theguardian.com/us-news/2018/oct/07/chelsea-manning-wikileaks-whistleblowing-interview-carole-cadwalladr>.

<sup>3</sup><https://www.nytimes.com/2019/10/24/us/politics/va-whistleblowers.html>.

<sup>4</sup><https://www.cnbc.com/2021/03/22/tesla-whistleblower-on-solar-fires-interviewed-in-cpsc-probe.html>

<sup>5</sup> <https://www.nytimes.com/2021/03/13/business/whistle-blower-credit-suisse-taxes.html>

<sup>6</sup><https://www.nytimes.com/2019/10/09/books/review->

The paper presents various important whistleblower statutes for litigation in Texas. 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 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

[christopher-wylie-targeted-brittany-kaiser-cambridge-analytica.html](https://www.nytimes.com/live/2022/01/03/technology/elizabeth-holmes-trial-verdict).

<sup>7</sup><https://www.nytimes.com/live/2022/01/03/technology/elizabeth-holmes-trial-verdict>.

<sup>8</sup> 31 U.S.C. § 5323 (“Whistleblower incentives and protections”).

<sup>9</sup> 15 U.S.C. § 7a-3 (“Anti-retaliation protection for whistleblowers”).

<sup>10</sup> *Texas Educ. Agency v. United States Dep’t of Educ.*, 992 F.3d 350 (5th Cir. 2021).

<sup>11</sup> *Moody v. American National Insurance Co.*, No. 20-cv-40462 (5th Cir. Jan. 29, 2021).

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.<sup>12</sup> The newly enacted AMLA prohibits employers from retaliating against individuals who report money laundering violations (and also incentivizes whistleblowers by making it possible for them to recover up to 30% of government sanctions against the employer).<sup>13</sup> The newly enacted CAARA prohibits retaliation against individuals reporting criminal antitrust violations.<sup>14</sup>

### 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 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.

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<sup>12</sup> 30 U.S.C. § 815(c).

<sup>13</sup> 31 U.S.C. § 5323(g). AMLA protected activity includes internal and external reporting of money laundering or other violations of the Bank Secrecy Act. The reward system for tips was previously subject to a \$150,000 cap, but is now expanded to 30% of penalties on any action that exceeds \$1 million in penalties. AMLA uses the contributing factor causation standard, and remedies include double backpay, reinstatement, uncapped special (compensatory) damages, and attorneys' fees and costs. Pursuant to 31 U.S.C. § 5323(j), AMLA claims are not subject to arbitration.

<sup>14</sup> 15 U.S.C. § 7a-3. CAARA prohibits employers from taking adverse action against employees, contractors, subcontractors, and agents who cause to be provided a report of any reasonable belief of a violation of antitrust

### 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> However, the whistleblower must file the *de novo* lawsuit within two years of administrative exhaustion.<sup>18</sup> Finally, the statute of limitations is three years after the date of the reprisal.<sup>19</sup>

### 1. 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;

laws to: (1) the federal government or (2) a person with supervisory authority over them at the employer or (3) an individual at the employer with the authority to investigate, discover, or terminate misconduct. CAARA uses the contributing factor causation standard, and remedies include backpay, reinstatement, uncapped special (compensatory) damages, and attorneys' fees and costs.

<sup>15</sup> 10 U.S.C. § 2409(b)(1); 41 U.S.C. § 4712(b)(1).

<sup>16</sup> 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).

<sup>17</sup> 10 U.S.C. § 2409(c)(2); 41 U.S.C. § 4712(c)(2).

<sup>18</sup> *Id.*

<sup>19</sup> 10 U.S.C. § 2409(b)(4); 41 U.S.C. § 4712(b)(4).

- and
4. the employee's protected activity was a "contributing factor" in the adverse action taken against him or her.<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup>

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.

Regarding adverse action, the NDAA

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<sup>20</sup> 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)).

<sup>21</sup> 41 U.S.C. § 4712(a)(1).

<sup>22</sup> 10 U.S.C. § 2409(e); 41 U.S.C. § 4712(f); 50 U.S.C. § 3003(4).

<sup>23</sup> *Casias v. Raytheon Co.*, Civil Action No. 17-CV-

"protects employees who are 'discharged, demoted or otherwise discriminated against' as a result of engaging in protected activity." <sup>23</sup> Although there is little authority interpreting this passage, the *Casias* court held the standard is the familiar *White* standard: "a reasonable employee would have found the challenged action materially adverse."<sup>24</sup>

The NDAA uses contributing factor causation. "Contributing factor" means any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. To determine whether a protected disclosure was a contributing factor in a decision to take or fail to take, or threaten to take or fail to take, any action, the analysis ordinarily weighs the following factors: knowledge of the protected disclosures on the part of the officer or employee involved in the decision and the decision's proximity in time to the protected disclosure. In many instances, these two factors together suffice to establish that a protected disclosure was a contributing factor. <sup>25</sup> However, if knowledge and timing alone fail to establish that a disclosure was a contributing factor, other circumstantial evidence may also be considered, such as the strength or weakness of the responsible management official's stated reasons for the action, whether the protected disclosure was personally directed at the responsible management official, or whether the responsible management official had a desire or motive to retaliate against the complainant.

2635-MSK-SKC, 2019 U.S. Dist. LEXIS 40531, at \*6 (D. Colo. 2019).

<sup>24</sup> *Id.*

<sup>25</sup> See Jan. 3, 2018 DoD OIG REPORT NO. DODIG-2018-044 (Whistleblower Reprisal Investigation regarding Leidos, Inc), available at [https://media.defense.gov/2018/Jan/08/2001863576/-1/-1/1/DODIG-2018-044-REDACTED\\_508.PDF](https://media.defense.gov/2018/Jan/08/2001863576/-1/-1/1/DODIG-2018-044-REDACTED_508.PDF).

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