

# Whistleblower Protections and Retaliation Risks

---

## Related Professionals

David E. Dubberly  
803.253.8281  
ddubberly@nexsenpruet.com

## Practices

Employment & Labor Law

10.09.2019

Whistleblower issues are in the news, mainly because a U.S. intelligence officer recently filed a complaint against President Trump under the Intelligence Community Whistleblower Protection Act (ICWPA). The complaint, which asserts that the president engaged in improper conduct in interacting with the government of Ukraine, has led to an impeachment inquiry. The ICWPA was enacted to provide intelligence community employees a safe process to report alleged wrongdoing.

## Whistleblower Protections in Private Sector

In the private employment context, 22 laws have whistleblower protection provisions that are enforced by the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor (DOL). These provisions prohibit employers from taking “adverse action” against employees who engage in “protected activity.”

Adverse action includes termination, demotion, or other discipline, and denial of promotion or benefits. Protected activity includes reporting alleged violations of a broad range of statutes, including safety and health and environmental laws and laws regulating the aviation, trucking, railroad, healthcare, nuclear, consumer product, and financial services industries. Protected activity also includes reporting workplace hazards, injuries, or illnesses, and refusing to violate a law.

Employees who believe they have been retaliated against for protected activity can complain to OSHA, which investigates and decides if there is reasonable cause to believe the complaint has merit. As legal counsel for employers, Nexsen Pruet usually defends whistleblower cases by showing that the adverse action was taken for legitimate, non-retaliatory reasons, such as poor performance or misconduct, and by asserting other defenses.

Under most of the statutes with whistleblower provisions enforced by OSHA, if the agency believes a complaint has merit, it can order that the employee be reinstated to his or her former position and that the employer pay back wages, money damages, and the employee’s attorney’s fees.

Losing parties can appeal to the DOL's Administrative Review Board and from there to federal court.

## Best Practices to Minimize Risk of Whistleblower Claims

There is good reason for employers to adopt policies and provide training focused on the need for ethical and lawful conduct. These policies and training typically encourage employees to report perceived violations of applicable laws, and provide that complaints will be acknowledged promptly and investigated thoroughly.

When it is necessary to take adverse action against an employee who has made a complaint, employers should be prepared to show that the action was taken for reasons unrelated to protected activity. A well-managed evaluation and termination process with supporting documentation is essential to winning a whistleblower case.

These practices will help private sector employers address whistleblower complaints proactively, avoid or successfully defend them, and stay out of the news—regardless of political developments.

---

*Our Insights are published as a service to clients and friends. They are intended to be informational and do not constitute legal advice regarding any specific situation.*