

# White Paper on the Law of Whistleblowing

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## Introduction

Whistleblowers can play an important role in fighting corruption, protecting the public and the environment from harm, and ensuring accountability for the violation of legal norms. A well-known example of whistleblowing involved a Morton Thiokol engineer who was concerned that cold weather at the space shuttle launch site would cause the shuttle's O-rings to fail and an explosion to occur. He pleaded with his colleagues to prevent NASA from launching the space shuttle, but his internal whistleblowing was unsuccessful. The launch did occur, resulting in a catastrophic explosion. A less well-known example of whistleblowing involved a medical device company lawyer who blew the whistle internally when he learned that the company planned to sell faulty dialysis equipment that could cause illness and death to kidney disease patients. When he learned that the company was going ahead with these sales, he engaged in external whistleblowing, disclosing the information to the Food and Drug Administration, which seized the shipment and prevented the sale.

When an individual blows the whistle on alleged wrongdoing, she may suffer severe financial consequences. Whistleblowers who disclose information about their employers' misconduct are sometimes fired or demoted. Some employers "blacklist" whistleblowers among other employers in the industry, making it difficult or impossible for a whistleblower to find another job in her chosen field. While whistleblowers can play a critical role in protecting the public, they often pay an enormous personal price. For example, a former Justice Department lawyer who disclosed to a journalist internal government e-mails that she believed were evidence of government misconduct was fired from her job at a private law firm, was investigated by the Justice Department and by bar disciplinary authorities, and was unable to find work as a lawyer for several years.

The law recognizes the social good that can come from whistleblowing. It provides protection to whistleblowers and encourages whistleblowing in a variety of ways. This paper provides a definition of whistleblowing, describes five distinct ways that the law encourages it, acknowledges that some confidentiality mandates conflict with whistleblowing norms, and identifies key legal concepts and distinctions found in the law of whistleblowing.

## Definition of "Whistleblower"

A "whistleblower" is someone who discloses alleged wrongdoing or a danger to someone else in an effort to rectify or address the wrongdoing. In some cases, the wrongdoing is continuing or in the future, and the whistleblower is attempting to end or prevent the wrongdoing. In other cases, the wrongdoing has already occurred, and the whistleblower is attempting to rectify it or hold the wrongdoer accountable.

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The wrongdoing may be an activity that is criminal in nature, or it may violate a less serious legal norm. The information being disclosed is generally closely held, and a key issue is whether a legal obligation of confidentiality prohibits such disclosures. The recipient of the information may be someone who directly or indirectly can take action to end the misconduct or to hold accountable the wrongdoer. The recipient of information may be “internal” (such as a supervisor or other official within the organization) or “external” (i.e., someone outside the organization, such as the government or the press).

### **Five Ways that the Law Encourages Whistleblowing**

When most people think about whistleblower laws, they tend to focus on laws that provide compensation to whistleblowers who have experienced retaliation. But this is just one of five different ways that the law encourages whistleblowing. These are:

- (1) requiring individuals to report certain types of wrongdoing or other dangers;
- (2) prohibiting retaliation against whistleblowers and punishing those who engage in retaliation;
- (3) providing compensation to whistleblowers who have suffered retaliation;
- (4) requiring or encouraging institutions to create mechanisms (such as anonymous tip lines) to facilitate whistleblowing; and
- (5) providing financial incentives for those who blow the whistle on certain types of misconduct.

The first technique – imposing a legal mandate to disclose wrongdoing – can be found in statutes, rules and even common law decisions involving particularly vulnerable populations or situations where there is concern that legal authorities may never learn of the wrongdoing with such a reporting requirement. A prominent example involves the mandate that teachers, social workers and health professionals report suspected child abuse or neglect. Another example is the requirement that lawyers report to bar disciplinary authorities serious misconduct by other lawyers.

The second technique – prohibiting retaliation against whistleblowers – can be found in a variety of statutes. A federal statute prohibits killing or injuring someone in retaliation for testifying at an official proceeding. Congress significantly expanded the reach of this statute when it enacted the Sarbanes Oxley Act of 2002, adding criminal penalties for interfering with the lawful employment or livelihood of someone in retaliation for providing truthful information about the violation of federal criminal law to law enforcement. While this kind of enactment may have significant symbolic significance, its weakness is that a whistleblower must rely on government prosecutors to enforce the criminal prohibition.

The third technique – providing compensation to whistleblowers who have suffered retaliation – can be found in both the common law and in many statutes. In the United States, the common law in most states allows an employer to fire an employee for no reason at all or for almost any reason (except a few prohibited reasons). This legal regime (called “employment-at-will”) gives employers wide freedom to fire their employees. But courts in many states have created an exception to employment-at-will for whistleblowers. If an employee can show that she was fired in retaliation for disclosing her employer’s wrongdoing, she may be able to recover damages for lost

wages.<sup>2</sup> (Courts generally do not have the power to order employers to re-hire fired employees.)

In addition to this protection under common law, state legislatures and the Congress have enacted statutes that promise compensation for employees who have been fired or demoted for whistleblowing. While these statutes are many in number, they tend to be narrow in scope. In the United States, whistleblower protection statutes tend to protect relatively narrow slices of the workforce for a narrowly defined set of disclosures.

Under both the common law and most of these statutes, the compensation provided – back wages – is quite modest. Even so, administrative agencies and courts have often construed these statutes narrowly, undermining the limited protection they provide. The promise of compensation for whistleblowers found in the common law and statutes creates the appearance -- but not always the reality -- of protection for whistleblowers.

A fourth way that the law encourages whistleblowing is by requiring organizations to facilitate whistleblowing through the creation of new mechanisms or institutions. Sarbanes Oxley, for example, requires publicly traded companies to create procedures for the submission of confidential, anonymous reports of questionable accounting or auditing practices.<sup>3</sup> Military contractors are required to display posters listing the Defense Department's fraud hotline, thus increasing the chances that contractor employees will know to whom they can report fraud that they observe. Scores of federal agencies and many state and local governments have offices of Inspector General to receive and investigate allegations of wrongdoing. Some institutions have created procedures not just for channeling or investigating whistleblowers' concerns, but also for resolving them. After years of contentious whistleblower litigation at the Hanford nuclear site, for example, the parties established a non-adversarial system for addressing and resolving the safety and concerns that whistleblowers raise.<sup>4</sup>

The fifth way that the law encourages whistleblowing is by providing financial incentives to whistleblowers themselves. The False Claims Act enables whistleblowers with information about fraud against the government to file a lawsuit in the name of the government and receive up to 30% of the proceeds if the lawsuit is successful. This statute was originally enacted in 1863 in response to fraud committed by contractors selling the government supplies for the Civil War, but it was only after Congress broadened the statute in 1986 that whistleblowers began to use it in significant numbers. This statute has proven to be a very powerful tool. Since 1986, the government has recovered over \$21 billion with the assistance of these whistleblower lawsuits.

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<sup>2</sup> Courts have used this same doctrine, “retaliatory discharge,” to provide compensation to employees who were fired for refusing to engage in wrongdoing. A person who refuses to engage in wrongdoing is sometimes referred to as a “passive” whistleblower, while a person discloses wrongdoing is an “active” whistleblower.

<sup>3</sup> These mandates have created an entire cottage industry in the outsourcing of tip hotlines. But they have also created particular challenges for companies operating internationally because European Union and foreign restrictions on the use of personal informational limit the types of allegations that companies can collect.

<sup>4</sup> See Jonathan Brock, *Filling the Holes in Whistleblower Protection Systems: Lessons from the Hanford Council Experience*, 11 SEATTLE J. FOR SOC. JUST. 573 (2013).

Whistleblowers -- and the lawyers who represent them -- have received over \$3 billion for coming forward with these claims.

The United States has recently expanded the availability of financial incentives for those who blow the whistle on securities and tax fraud. The Dodd-Frank Wall Street Reform and Consumer Protection Act provides financial incentives to individuals who report securities law violations to the Securities and Exchange Commission (SEC) or the Commodities Futures Trading Commission (CFTC). If that information leads to agency sanctions greater than \$1 million, the whistleblower receives between 10 and 30% of those sanctions. In its first year of operation, the SEC's Office of the Whistleblower received more than 3000 tips. The Internal Revenue Service has a similar program providing financial incentives to whistleblowers who provide information about large-scale tax fraud.

While many statutes prohibit retaliation against whistleblowers and seem to provide compensation to those who experience retaliation, these laws have proven to be largely ineffective. Whistleblowing can be a career-ending device, so the financial consequences of whistleblowing can be enormous. If the financial incentives for whistleblowing are large enough, they can effectively compensate a whistleblower for the loss of her career.

### **Whistleblowing in the Face of a Confidentiality Obligation**

While many laws encourages or facilitate whistleblowing, there are also legal standards that mandate confidentiality or nondisclosure, conflicting with whistleblowing norms. Confidentiality mandates can be found in contracts (e.g., non-disclosure agreements), professional rules (e.g., lawyers' obligation of confidentiality), statutes (e.g., the Health Insurance Portability and Accountability Act of 1996 or HIPAA), regulations (e.g., restrictions on government employees' use of nonpublic information), executive orders (e.g., those establishing the security classification system) and the common law (e.g., court decisions recognizing the fiduciary nature of certain relationships).

When a potential whistleblower is subject to a confidentiality mandate, which legal norm prevails: whistleblowing or confidentiality? There is no single answer to this question. Courts generally won't enforce contracts mandating confidentiality about wrongdoing or dangerous conditions. Professional confidentiality rules often have exceptions allowing disclosures to prevent crimes or serious bodily harm. The federal Whistleblower Protection Act allows government employees to violate confidentiality norms stemming from regulations, but not those stemming from statutes or executive orders. To determine whether someone who is subject to a confidentiality mandate may nonetheless engage in whistleblowing, one must carefully examine the specific legal and factual context.

### **Key Legal Issues**

There are dozens of different legal issues and distinctions that arise in the law of whistleblowing and that would be relevant to any jurisdiction considering whether to

adopt such laws. This section does not comprehensively review all of those issues, but it does identify the most important issues that must be considered. They include:

- scope of coverage:
  - types of wrongdoing covered:
    - violations of criminal law
    - violations of regulations
    - actions that can result in physical harm
    - actions that can result in financial harm
    - only violations of significant magnitude
  - recipients of the disclosure:
    - internally within the organization:
      - a supervisor
      - co-workers
      - a designated recipient, such as an ombudsperson
    - external to the organization:
      - law enforcement authorities
      - journalists
      - non-governmental organizations
  - sector of the economy to cover:
    - public sector
    - private sector
    - a particular industry
  - types of whistleblowers protected:
    - employees
    - contractors
    - subcontractors
  - types of retaliation that are prohibited:
    - firing
    - change in job responsibilities
    - change in contractual or business relationship
- whether:
  - the motivation of the whistleblower is relevant
  - the whistleblower is protected even if her information turns out to be inaccurate
  - to permit or facilitate anonymous or confidential reporting
  - to require that certain individuals blow the whistle on misconduct
  - to protect whistleblowers who are required to make disclosures as part of their jobs
  - to grant protection or financial incentives to whistleblowers who call attention to information even where other outsiders already know about it
- procedures:
  - private cause of action for individual whistleblower or
  - administrative action under the control of government agency.

## Conclusion

While this paper has focused on the law of whistleblowing in the United States, one can find aspects of whistleblowing law in many other countries (both common law and civil law) and in international treaties.<sup>5</sup> The law – here and abroad -- encourages whistleblowing in a variety of ways. Even so, whistleblowers continue to occupy a fundamentally ambivalent position in society. Some whistleblowers are celebrated for their courage and self-sacrifice in protecting society from harm. But at the same time, many whistleblowers experience financial and social retaliation. This ambivalence is reflected in the law of whistleblowing: both its limited scope and how it actually operates. The law offers whistleblowers some legal protections, but government officials who are responsible for administering those laws often find ways to narrow that protection. And even the most robust legal protections cannot protect whistleblowers from the social consequences of their actions.

In deciding whether or how to encourage whistleblowing, it is important to consider the social and historical context. Whistleblowing -- the reporting of allegations against others -- resonates quite differently in a country that has recently experienced an authoritarian regime and widespread use of informants than in a country without such experience. Legal mandates that are seen as relatively uncontroversial in the United States, such as the creation of anonymous tip lines for reporting a wide range of misconduct, are viewed as inappropriate and actually illegal in continental Europe, which experienced a different recent history and has adopted robust limits on the collection of derogatory information about individuals.

The law of whistleblowing raises complex questions about the role of individuals in protecting the public at large. The many distinctions described in the “Key Legal Issues” section above thus reflect broader policy choices about how far the law will go in embracing the role of whistleblowing in protecting the public and vindicating legal norms.

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<sup>5</sup> The U.N. Convention Against Corruption, for example, requires national governments to protect testifying witnesses from retaliation or intimidation (Article 32) and to consider establishing protections against “unjustified treatment” for some whistleblowers (those who “in good faith and on reasonable grounds” report alleged corruption “to competent authorities”). (Article 33).