

Government Accountability Project's Twenty-Three Point Checklist for Effective Whistleblower Protection

SCOPE OF COVERAGE

1. Full Free Speech Rights. Protected whistleblowing should cover “any” disclosure that would be accepted in a legal forum as evidence of significant misconduct or would assist in carrying out legitimate law enforcement functions. There can be no loopholes for form, context or audience, unless release of the information is specifically prohibited by statute. In that circumstance, disclosures should still be protected if made to representatives of institutional leadership, or to designated law enforcement or legislative offices.

2. Permitting All Disclosures of Illegality and Misconduct. Whistleblower laws should cover disclosures of any illegality, gross waste, mismanagement, abuse of authority, substantial and specific danger to public health or safety, as well as any other information that assists in implementing or enforcing the law or achieving its purpose.

3. Duty to Disclose Illegality. This provision helps switch the whistleblowing context from a personal initiative for conflict, to a public service duty to bear witness.

4. Right to Obey the Law. This provision is fundamental to stop *faits accomplis* and in some cases prevent the need for whistleblowing. As a practical reality however, in many institutions, an employee who refuses to obey an order on the grounds that it is illegal must proceed at his or her own risk, assuming vulnerability to discipline if a court or other authority subsequently determines the order would not have required illegality. Thus what is needed is a fair and expeditious means of reaching such a determination while protecting the employee who reasonably believes that she or he is being asked to violate the law from having to proceed with the action or from suffering retaliation while a determination is sought.

5. Stopping Harassment Intended to Prevent Disclosures. The law should cover all common scenarios that could have a chilling effect on responsible exercise of free speech rights. Representative scenarios include employees who are perceived as whistleblowers, even if mistaken (to guard against guilt by association), and employees who are “about to” make a disclosure (to preclude preemptive strikes to circumvent statutory protection). These indirect contexts often can have the most significant potential to lock in secrecy by keeping employees silent, and isolating those who do speak out. The most fundamental is reprisal for exercise of anti-retaliation rights.

6. Covering Staff and Project-Affected Communities. Coverage should extend to all relevant applicants or personnel who challenge betrayals of the institutional mission or public trust, regardless of formal status. It should not matter whether they

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are full time, part time, temporary, permanent, expert consultants, contractors or employees seconded from another organization. If harassment could create a chilling effect that undermines the bank's public service mission, the reprisal victim should have rights. This means the mandate also must cover those who apply for jobs, contracts or other funding, since blacklisting is such a common tactic.

7. Protecting Anonymity. To maximize the flow of information necessary for accountability, protected channels must be available for those who choose to make anonymous disclosures.

8. Safety From Harassment After Blowing the Whistle. The forms of harassment are limited only by the imagination. As a result, it is necessary to ban any discrimination taken because of protected activity, whether active such as termination, or passive such as refusal to promote or provide training. The prohibition must cover recommendations as well as the official act of discrimination, to guard against managers who "don't want to know" why subordinates have targeted employees for an action.

9. Unrestricted Free Speech Rights. Any whistleblower law must include a ban on "gag orders" through an employer's rules, policies, or nondisclosure agreements that would otherwise override free speech rights and impose prior restraint.

10. Effectively Communicating Obligations and Rights to Disclose Illegality and Policy Violations. Whistleblowers are not protected by any law, if they do not know it exists. Whistleblower rights, along with the duty to disclose illegality, must be posted prominently in any workplace.

FORUM

The setting to adjudicate a whistleblower's rights must be free from institutionalized conflict of interest. The records of administrative boards and grievances have been so unfavorable that as a rule, laws adjudicated in these settings are Trojan horses. Two settings have a track record of giving whistleblowers a fair day in court.

11. Right to Fair and Independent Complaint Mechanisms. This rule institutionalizes normal judicial due process rights, the same rights available for citizens generally who are aggrieved by illegality or abuse of power. The elements include timely decisions, a day in court on non-proprietary or legally confidential matters, the right to confront the accusers and witnesses, objective and balanced rules of procedure and reasonable deadlines.

12. Option for Mediation with an Independent Party of Mutual Consent. Arbitration can be an expedited, less costly forum for whistleblowers, if compensation is shared by the parties who select the decision maker by mutual consent through a "strike" process. It can provide an independent, fair resolution of whistleblower

disputes. It is contemplated as a normal option to resolve retaliation cases in the model whistleblower law to implement the Organization of American States Inter American Convention Against Corruption.

RULES TO PREVAIL

13. Realistic Requirements of Proof. In the United States, the federal Whistleblower Protection Act of 1989 overhauled antiquated, unreasonable burdens of proof that had made it hopelessly unrealistic for whistleblowers to prevail when defending their rights.

The current standard, which since 1989 has been adopted consistently in federal laws, is that a whistleblower established a *prima facie* case of violation by establishing through a preponderance of the evidence that protected conduct was a "contributing factor" in challenged discrimination. The discrimination does not have to involve retaliation, which could require personal hostility, but only need occur "because of" the whistleblowing. Once a *prima facie* case has been made, the burden of proof shifts to the employer to demonstrate by clear and convincing evidence that it would have taken the same action for independent, legitimate reasons in the absence of protected activity.

Since the federal government switched the burden of proof in whistleblower laws, the rate to prevail on the merits has increased from 1-5% annually, which institutionalizes a chilling effect, to 25-33%, which gives whistleblowers a fighting chance to successfully defend themselves.

14. Adequate Time Frame for Accepting Disclosures. Although some laws require employees to act within 30-60 days or waive their rights, most whistleblowers are not even aware of their rights within that time frame. Three months is the minimum functional statute of limitations. One-year statute of limitations are consistent with common law rights and are preferable.

RELIEF FOR WHISTLEBLOWERS WHO WIN

15. Compensating Whistleblowers. If a whistleblower prevails, the relief must be comprehensive to cover all the direct, indirect, and future consequences of the reprisal. In some instances this means relocation or payment of medical bills for consequences of physical and mental harassment.

16. Immediate Relief. Anti-reprisal systems that appear streamlined on paper commonly drag out for years in practice. Ultimate victory may be merely an academic vindication, for unemployed, blacklisted whistleblowers who go bankrupt while they are waiting to win. Injunctive, or interim relief must occur after a preliminary determination. Even after winning a hearing or trial, an unemployed whistleblower could go bankrupt waiting for completion of an appeals process that frequently drags out for years. Relief should be awarded during the interim for employees who prevail.

17. Coverage for Attorney Fees. Attorney fees and associated litigation costs should be available for all who substantially prevail. Whistleblowers otherwise couldn't afford to assert their rights. The fees should be awarded if the whistleblower obtains the relief sought, regardless of whether it is directly from the legal order issued in the litigation. Otherwise, employers can and have unilaterally surrendered outside the scope of the forum and avoided fees by declaring that the whistleblower's lawsuit was irrelevant to the result. Employees can be ruined by that type victory, since attorney fees not uncommonly reach five to six figures.

18. Transfer Option. It is unrealistic to expect a whistleblower to go back to work for a boss whom he or she has just defeated in a lawsuit. In order to prevent repetitive reprisals that cancel the law's impact, those who prevail must have a strong transfer preference for any realistic chance at a fresh start after winning.

19. Accountability for Misconduct and Retaliation. To deter repetitive violations, it is indispensable to hold accountable those responsible for whistleblower reprisal. Otherwise, managers have nothing to lose by doing the dirty work of harassment. The worst that will happen is that they won't get away with it, and they may well be rewarded informally for trying. The most effective option to prevent retaliation is personal liability for punitive damages by those found responsible for violating whistleblower laws. Another option is to allow whistleblowers to counterclaim for disciplinary action, including termination. The most superficial is to make compliance with the whistleblower law a critical element in every manager's performance appraisal, and for decision makers in reprisal cases to refer responsible officials for investigation to determine if sanctions are appropriate for violating this element.

20. Taking Corrective Action. Whether through hotlines, ombudsmen, compliance officers, or other mechanisms, the point of whistleblowing through an internal system is to give the employer an opportunity to clean house, before matters deteriorate into a public scandal or law enforcement action. The track records of these systems will determine whether institutions have that opportunity or are blindsided due to the absence of early warnings from employees. Studies repeatedly have confirmed that the primary reason would-be whistleblowers remain silent is the fear that their actions won't make a difference and not the concern of retaliation.

MAKING A DIFFERENCE

21. Public Audits and Records for Whistleblower Hearings and Conclusions. Like secret free speech rights, secret reforms are a contradiction in terms. By definition, that would be an institutional honor system for resolution of alleged institutional misconduct. As a result, it is insufficient for government agencies secretly to correct betrayals of the public trust, without transparency through a public record on the nature of alleged misconduct, its causes, and the evidence and corrective action to prevent recurrence. Exceptions must occur to preserve proprietary information or honor preexisting legal confidentiality commitments. However, there is no basis for

trust without some ultimate public record, and timely initial notice to government regulatory or law enforcement officials to permit oversight of how the institution handles the dispute.

22. Prosecuting Criminal Misconduct in National Judicial Systems. Even more significant is enfranchising whistleblowers and citizens to file suit in court against illegality exposed by their disclosures. These types of suits are known as private attorney general, or "qui tam" actions in a reference to the Latin phrase for "he who sues on behalf of himself as well as the king." These statutes can provide both litigation costs (including attorney and expert witness fees) and a portion of money recovered for the government to the citizen whistleblowers who file them, a premise that merges "doing well" with "doing good," a rare marriage of the public interest and self interest. In the U.S., this approach has been tested in the False Claims Act for whistleblower suits challenging fraud in government contracts. It is the nation's most effective whistleblower law in history for making a difference, increasing civil fraud recoveries in government contracts from \$27 million annually in 1985, to over a billion dollars in 2002 for the third year in a row. Another tool that is vital in cases where there are continuing violations is the power to obtain from a court or objective body an order that will halt the violations or require specific corrective actions.

23. Committed Leadership. The intangible element of leadership's commitment to announced reforms normally is key to determining how seriously institutional staff take it, and how much is accomplished. Unless a leader demonstrates that commitment through highly visible public actions, would-be whistleblowers may dismiss the changes as public relations gestures or empty rhetoric, and the changes may not disrupt ingrained patterns of management secrecy enforced by retaliation.