

A LITTLER PRESENTATION

A Whistleblower's Game: The New and Increased Risks for In House Counsel

September 29, 2023

Littler[®]



Presented By



SHERRIL COLOMBO

Shareholder

Miami

scolombo@littler.com

305.400.7559



**ROCIO BLANCO
GARCIA**

Shareholder

Miami

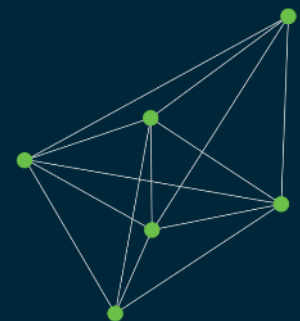
rblancogarcia@littler.com

305.400.7530

Agenda

- An Introduction to Whistleblowing
- Florida's Whistleblower Protections (Public and Private)
- The Basics
- A Deeper Dive
- What are the Courts Saying?
- Practical Considerations
- Closing Remarks and Questions

Introduction



Whistleblower Objectives – Exception to *At Will*

- Whistleblower laws are designed to protect private and public employees who report, object to, or refuse to participate in certain conduct that violates law or policy.
- Exception to Florida's at-will employment doctrine.
- Whistleblower laws are liberally construed so as not to frustrate legislative intent.



Whistleblower Laws

- Employees who blow the whistle may also be protected under multiple federal laws:
 - **Sarbanes Oxley Act:** SOX prevents a publicly traded company or independent contractors of publicly traded companies from retaliating against an employee who reports various types of fraud.
 - **Section 11(c) of the Occupational and Safety Health Act:** The OSHA Act prevents workplace retaliation against an employee of a private employer who opposes workplace safety violations or otherwise asserts their rights under the Act.
 - **Federal Whistleblower Protection Act:** The Federal WPA protects covered federal workers who report waste, fraud and abuse by their governmental employer.
 - **Taxpayer First Act:** The TFA provides a cause of action to employees who report their employer's suspected violations of the tax code to the IRS or other appropriate government agency.

Whistleblower Laws

- **Consumer Product Safety Improvement Act:** The CPSIA prevents a covered employer from retaliating or otherwise discriminating against an employee who reports a suspected violation of consumer protection laws.
- **Consumer Financial Protection Act:** Prevents covered employers from retaliating against employees who report reasonably perceived violations of the Consumer Financial Protection Bureau's regulations or other consumer financial laws.
- **Dodd-Frank Act:** Dodd-Frank prohibits covered employers from retaliating against an employee who reports a violation of securities laws to the Security Exchange Commission (SEC).
- **False Claims Act:** The FCA allows private citizens to report and initiate lawsuits against other persons and companies (usually federal contractors) suspected of defrauding the federal government. The FCA also protects employees who report such fraudulent practices

The Florida Whistleblower Act

Public Employer:

112.3187: An agency or independent contractor shall not dismiss, discipline, or take any other adverse personnel action against an employee for disclosing ...

(a) Any violation or suspected violation of any federal, state, or local law, rule, or regulation committed by an employee or agent of an agency or independent contractor which creates and presents a substantial and specific danger to the public's health, safety, or welfare.

(b) Any act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty committed by an employee or agent of an agency or independent contractor.

The Florida Whistleblower Act

Private Employer:

448.102: An employer may not take any retaliatory personnel action against an employee because the employee has:

- (1) Disclosed, or threatened to disclose, to any appropriate governmental agency, under oath, in writing, an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation. However, this subsection does not apply unless the employee has, in writing, brought the activity, policy, or practice to the attention of a supervisor or the employer and has afforded the employer a reasonable opportunity to correct the activity, policy, or practice.
- (2) Provided information to, or testified before, any appropriate governmental agency, person, or entity conducting an investigation, hearing, or inquiry into an alleged violation of a law, rule, or regulation by the employer.
- (3) Objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation.

A Deeper Dive Into Florida Law



Prima Facie Case for Private FWA Protection

- Employee's burden to prove:
 - Employee engaged in statutorily protected activity;
 - Suffered an adverse employment action – demotion, pay decreases, loss of benefits, termination – and
 - The statutorily protected activity caused the adverse employment action.



Law, Rule, or Regulation

- The FWA defines as “any statute or ordinance or any rule or regulation adopted pursuant to any federal, state, or local statute or ordinance applicable to the employer and pertaining to its business.” Fla. Stat. 448.101(4)



Employment Laws at Play in FWA Claims

- Overlap between whistleblowing claims and those directed at violations of equal employment opportunity laws.
- Florida's whistleblower statute is patterned after federal enactments, like Title VII.
 - Due to similarities among the statutes (*i.e.* Title VII retaliation claims), they are often analyzed under the same legal framework.
- Employees may file lawsuits to seek remedy for acts of retaliation concerning state anti-discrimination, wage and labor laws.

Private Sector Protected Activity – What is it?

- Disclosure claims - An employer may not take retaliatory personnel action against an employee because the employee has disclosed the employer's activity, practice or policy that violates a law, rule or regulation.
- Participation claims – Prohibits retaliation against an employee who participates in an investigation, hearing or inquiry into an alleged violation of a rule, law, or regulation.
- Opposition claims – Prohibits retaliation against an employee who objected to, or refused to participate in any activity, policy or practice of the employer that is in violation of a law, rule or regulation.

Flat. Stat. § 448.102

Florida Split – the “Violation of” element

- Is an actual violation of a law, rule or regulation required to maintain an FWA “opposition” claim? Florida District Courts of Appeal disagree.
 - *Aery v. Wallace Lincoln Mercury, LLC*, 118 So. 3d 904 (Fla. 4th DCA 2013)(employee was engaged in statutorily protected activity when he opposed acts - based on a good faith objective belief – that appeared illegal).
 - (*Kearns v. Farmer Acquisition Co.*, 157 So. 3d 458 (Fla. 2d DCA 2015) (employee is required to prove an actual violation of a law, rule or regulation).
- Unlike the FWA’s participation clause, the opposition clause does not include an “alleged” violation.

Public Sector Protected Activity

- Disclosure of information via a written and signed complaint.
- Asked to participate in an investigation, hearing, or inquiry.
- Declined to take part in a prohibited, adverse action.
- Filed a written complaint with their supervisor(s).
- Filed a complaint with the Florida Commission on Human Relations, the Office of the Chief Inspector General, the Agency Inspector General, or the Whistleblower's Hotline.

Flat. Stat. §112.3187

What is Not in the Cards to Show Protected Activity?

- Objecting to conduct that is not illegal
- Reporting of legal violations is a requirement of the employee's position
- Common-place workplace grievances
- Disagreements over discretionary decisions, policy choices, interpersonal dynamics or other nonactionable issues in the workplace.
- Malicious, frivolous or bad faith claims

Causation – Must Show Your Cards

- Retaliatory discharge under the private FWA – must show the decision-makers were aware of the protected conduct and
- The protected activity and adverse actions are not wholly unrelated (*i.e.* temporal proximity)
- Similar to Title VII retaliation claims, under the FWA, “but for” and not “motivating factor” causation is the standard.
 - The unlawful retaliation would not have occurred in the absence of the alleged wrongful action of the employer.

Defenses

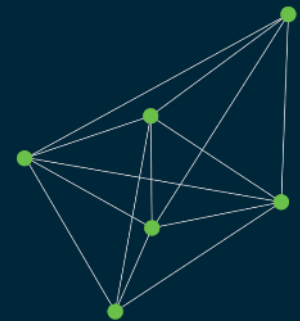
- Lack of specificity as to the “law, rule or regulation” allegedly violated
- Legitimate reason(s) for the adverse action
- Statute of limitations
- Less than 10 employees
- After-acquired evidence
- Failure to mitigate damages



Remedies

- Reinstatement to the same or an equivalent job position
- Reinstatement of benefits and seniority rights
- Compensation for back pay, front pay, lost bonuses and benefits;
- Compensatory damages (emotional pain and suffering and reputational harm)
- Liquidated damages
- Attorneys' fees and costs
- Punitive damages are not recoverable.

What Are The Courts Saying?



What Makes A Whistleblower?



HOW to Spot a Whistleblower

- Is there a “Typical” Whistleblower Personality?



How to Spot a Whistleblower and Prevent Retaliation: Top 10 Tips

1. Look for Characteristics Unique to “Typical” Whistleblowers
 - Personality Often Sees Only “Black and White”
 - Hard Time Accepting Other Points of View
 - May Relish Being Contrarian (e.g. “Devil’s Advocate”)
2. Understand What Can Trigger False Whistleblower Claims
 - Upset by Changes, New Initiatives, or New Managers
 - Poor Performers Seeking to Avoid Termination
3. Publish a Policy Offering Multiple “Open Doors” for Complaints
 - Easy Access Via Employee Handbook or Standalone Document
 - Wide Distribution
 - Obtain Individual Employee Acknowledgment

How to Spot a Whistleblower and Prevent Retaliation: Top 10 Tips

4. Allow Employees to Complain Anonymously
 - Do NOT Attempt to Identify Complainants!
5. Make Sure Complaints Are Funneled to a Central Location
 - Prevents Complaints from Being “Lost in the Shuffle”
6. Investigate and Document!
 - Show Your Work!
 - Crucial to Emphasize Anti-Retaliation Policy
7. Cure Any Unlawful Practice (or Confirm a Complained-Of Practice is Actually Lawful)
 - Remedy Improper Practice OR Confirm Meritless

How to Spot a Whistleblower and Prevent Retaliation: Top 10 Tips (Part III of III)

8. Understand Even Meritless Complaints May Qualify as “Protected Activity”
 - “Reasonable Belief” May Be Good Enough
9. Avoid Not Only Actual Retaliation, But Even Perceived Retaliation
 - “Clear and Convincing” Evidence of Non-Retaliatory Reasons
10. For Severance Agreements, Don’t Attempt to Prevent Whistleblowers from Talking to the Government or Receiving a Bounty
 - More on This Below

Practical Advice: What to Do When a Whistleblower Steals Company Documents?



What to Do When Someone Takes Company Documents

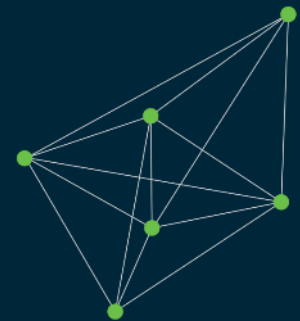
- How to respond when someone takes company documents depends on several factors:
 1. How the employee took the documents. For example, was a crime committed when the employees took the documents?
 2. Why the employee took the documents. For example, were the documents taken to support a whistleblower complaint?
 3. The types of documents that were taken. For example, were trade secrets taken?
 4. To whom the documents were given. For example, were they sent to the employee's attorney or the SEC?

Options for What to Do When Someone Takes Company Documents

- Ask for the documents back
- Terminate the employee if it is a current employee subject to a confidentiality agreement
- Contact the authorities
- Add a counterclaim if the matter is in litigation
- Seek litigation sanctions
- Talk to IT; forensic image



Settlement Agreements and Confidentiality Policies



Drafting Considerations

- Make clear that nothing in Agreement prohibits employee from filing a complaint or charge with a government agency
- Make clear that nothing in Agreement prohibits employee from providing documents or information to government agency
- OK (for now) to state that employee waives any right to further individual relief **from the company**
- But, carve out right to receive payment – a/k/a bounty – from government agency for information provided to the agency
- The impact of McLaren Macomb, 372 NLRB No. 58

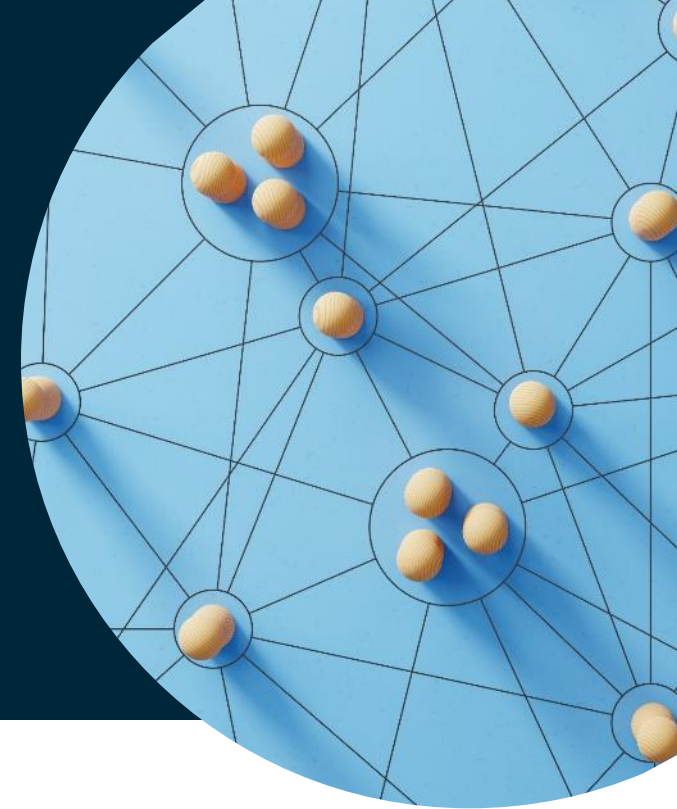


Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.

Fueled by ingenuity.
Inspired by you.®





Thank You

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.

Fueled by ingenuity.
Inspired by you.®