

PREFACE

This Third Edition is current through December 2014, with additional discussion of key regulatory developments through the Department of Labor Final Rule of March 5, 2015, governing procedures for handling retaliation complaints under Section 806 of the Sarbanes-Oxley Act.

This third edition of *Whistleblowing: The Law of Retaliatory Discharge* is perhaps overdue. In the decade since the second edition, numerous federal laws have been enacted that contain whistleblower protections. These statutes prohibit retaliation against employees who disclose violations of the respective statutes. While there is still not a federal law protecting whistleblowers in all situations, the number of federal statutes that contain whistleblower protections has been increasing at such a rapid pace that in many whistleblowing contexts, a federal statute may provide protection. Violations of banking and financial services laws, consumer product safety laws, food safety laws, and transportation safety laws are all areas where federal statutory protection has been enacted for whistleblowers in the past decade.

As a result of these new protections, as well as other changes in the landscape of whistleblower protection law, this edition has been significantly reorganized. It contains a new chapter—Chapter 3, Overview of Federal Statutory Protections for Whistleblowers in the Private Sector. The organization has also been changed to reflect the increasing focus on protecting whistleblowers in the private sector by placing chapters that address private sector employees before the chapters discussing public sector employees. These organizational changes have resulted in renumbering all chapters from the second edition except for Chapters 1 and 2.

The third edition is structured as follows:

- Chapter 1, The Evolution of Whistleblower Protections, remains an introductory chapter to whistleblowing in the United States.
- Following Chapter 1 is Part I of the book, Key Issues for Advocates and Advisors, which is composed of Chapter 2, Analytical Framework: Balancing Workplace Responsibilities and Conscience.
- Part II, Federal Law Protections in the Private Sector, contains Chapter 3, the new chapter providing an overview of federal protections; Chapter 4, which focuses on the protections provided to whistleblowers by the Sarbanes-Oxley and Dodd-Frank Acts; and Chapter 5, which addresses retaliation claims brought under the federal antidiscrimination statutes.

- Part III, State Law Protections in the Private Sector, is divided into Chapter 6, which analyzes state statutory protections for whistleblowers; and Chapter 7, which discusses common law protections that may be available.
- Part IV, Federal, State, and Local Law Protections in the Public Sector, contains Chapter 8, which assesses the federal constitutional and state statutory protections available to public sector whistleblowers.
- Finally, Part V, Strategies for Litigation and Avoiding Litigation, is composed of three chapters. Chapter 9 analyzes the problems that arise from the multiple and overlapping sources of whistleblower protection, focusing on preemption issues in particular; Chapter 10 provides insights into litigation strategies in whistleblower cases; and Chapter 11 suggests ways that litigation might be avoided.

In addition to this restructuring, the text has been updated to incorporate relevant revisions to statutes and regulations, along with court decisions interpreting these laws and the common law. Significant changes have been made to the substance of nearly every chapter. The most significant of these are outlined below.

Chapter 1, The Evolution of Whistleblower Protections, adds a discussion of the case history of Edward Snowden, which highlighted the shortcomings of whistleblowing protections in the intelligence community and among independent contractors. Chapter 1 was also revised to include an analysis of the U.S. Supreme Court doctrine in the past decade that has been a mixed response to whistleblowers.

Chapter 2, Analytical Framework: Balancing Workplace Responsibilities and Conscience, was updated to assess the changing perceptions of the duties of employees, including as reflected in the Restatement (Third) of Agency.

Chapter 3, Overview of Federal Statutory Protections for Whistleblowers in the Private Sector, is new. It analyzes the patchwork quilt of federal statutory protections for whistleblowers and provides a framework for understanding the structure and commonalities among these statutes. It also contains an overview of the administrative process that is applicable to many of the federal statutory whistleblower protections.

Chapter 4, entitled The Sarbanes-Oxley and Dodd-Frank Whistleblower Provisions, has been significantly restructured and expanded in light of the body of Sarbanes-Oxley case law that has developed since publication of the second edition and the enactment of Dodd-Frank in 2010. Chapter 4 analyzes the provisions of Dodd-Frank that amended the Sarbanes-Oxley whistleblower retaliation provisions, as well as the new federal whistleblower retaliation remedies available to employees under Dodd-Frank. Chapter 4 also discusses the often lucrative “bounties” awarded to whistleblowers by the Securities and Exchange Commission (SEC) under Dodd-Frank.

Chapter 5, Retaliation Claims Under the Federal Antidiscrimination Statutes, was revised to address the explosion in the number of retaliation claims brought under the federal employment discrimination statutes. The increasing number of retaliation claims has sparked numerous federal court decisions, including a number from the Supreme Court. These cases are analyzed, and

their impact on whistleblowing claims brought under other federal statutes as well as state statutes is also discussed.

Along with an increase in federal statutes has come an increase in state statutes that protect private sector whistleblowers, which are discussed in Chapter 6: Statutory Protections. Nearly half of the states now protect whistleblowers in the private sector. Statutes of general application to whistleblowers, that is, statutes that protect whistleblowers regardless of the subject on which they disclose corporate wrongdoing, are discussed in the first part of the chapter. A new section, which explains the increase in state statutes protecting whistleblowers who disclose wrongdoing in a particular, topic-specific area, has been added to Chapter 6.

Chapter 7, Common Law Protection: The Public Policy Doctrine, has been reorganized to better reflect the current analysis of these claims. The chapter also adds significant cases addressing the common law claims that have been decided since the second edition.

Chapter 8, Whistleblower Protections in the Public Sector, has been reorganized to reflect the increasing importance of statutory protections as contrasted with constitutional protections for federal employees. It has also been updated to reflect the addition of statutory protections enacted in the last, holdout states since the second edition.

Chapter 9, Preemption and Related Issues, has been updated to include the increasing number of cases where state courts have either deferred to statutory authority by declining to recognize a common law claim in the presence of a statutory claim or have found that the claim is preempted by federal law.

Chapter 10, Litigating Whistleblower Cases, provides insights into litigation strategies in whistleblower cases, including changes to the landscape effected by the enactment of the Dodd-Frank Act. This chapter also discusses efforts by the SEC and the Financial Industry Regulatory Authority, Inc. (FINRA) to rein in the use of confidentiality provisions in settlement agreements

Chapter 11, Avoiding Whistleblower Litigation, suggests ways that litigation might be avoided through the adoption of effective company policies, creation of a culture of compliance, and implementation of effective avenues that will encourage internal reporting of perceived violations of law.

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March 2015

