6 Ways Whistleblowers Can Protect Themselves

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For government agencies and regulators seeking to deter and punish instances of fraud, corruption and other wrongdoing that threaten the public interest, cases are often proven thanks to essential information provided by employees on the “inside.” Those who report this pertinent information are known as “whistleblowers” and, by disclosing this information, may place themselves at much personal risk.

If you are considering becoming a whistleblower, you will want to understand your rights under the various laws that afford protections to employees who call out employer wrongdoing. This article provides six steps you can take to protect yourself before and after blowing the whistle.

1. Understand What Conduct Is “Protected” from Retaliation

A great many laws protect whistleblowers from retaliation for legitimate whistleblowing activities. To assess whether you have a viable retaliation lawsuit, you must first determine whether you engaged in “protected activity” under these various whistleblower statutes. For an easy reference, check out the “Whistleblower Law” section of our website, which identifies several of the most prominent statutes broken down by industry and topic area.

“Protected activity” generally refers to the act of reporting, opposing or refusing to engage in violations of laws, rules or regulations. Many whistleblower laws protect not only complaints to a government agency but also internal complaints to supervisors and participation in internal or external investigations. In many cases, a refusal to work in unsafe conditions is also considered protected activity.

Note that not all complaints and objections are protected activity. You must have a “reasonable belief” that the practice complained of is a violation of a law. For example, a court is unlikely to find you engaged in protected activity if your complaint is only about your employer violating its own internal company handbook or about a practice that is “bad for business.” On the other hand, you need not ultimately be correct about the illegality of the company practice that is the subject of the complaint. So long as your belief in that illegality is reasonable, you are protected against retaliation.

2. Know Your Statute of Limitations

If you’ve been retaliated against because of your whistleblowing activities, you only have a certain period of time within which you can file a complaint against your employer. This time period, which is measured from the day your employer retaliates against you (or, in some cases, the date you learn of the retaliatory act), is called the “statute of limitations.” Note that the deadline varies depending on the particular whistleblower statute from which you seek protection.

For example, suppose your employer has fired you after you reported to the Environmental Protection Agency that the company was contaminating the local drinking water. The Safe Drinking Water Act
protects whistleblowers like you against just this sort of retaliation, but you must file your complaint against your employer within 30 days from the date you are fired. In contrast, complaints regarding retaliation for the reporting of securities violations under the Sarbanes-Oxley Act (SOX) provide for a 180-day statute of limitations. The shorter the limitations period, the quicker you must gather all of your facts and evidence and put together your retaliation complaint.

Many whistleblower complaints must be filed initially with the Occupational Safety and Health Administration (OSHA), even for matters that do not have much at all to do with occupational safety, including retaliation claims under SOX. OSHA provides a helpful reference guide that lists the deadlines of the various whistleblower statutes overseen by OSHA.

However, OSHA does not administer all industry whistleblower complaints, and some statutes allow you to take your retaliation complaints directly to court. For example, the False Claims Act prohibits retaliation against individuals who report the submission of fraudulent claims to the government. Whistleblowers protected under this law can file their claims in federal court and must do so within three years from the date of the retaliation.

3. You Can Blow the Whistle Without Your Employer’s Knowledge

Of course, retaliation can only happen if the employer knows or suspects that you are the whistleblower. For several whistleblower programs, including those operated by the Securities and Exchange Commission (SEC), Commodity Futures Trading Commission (CFTC), and Internal Revenue Service (IRS), the government agencies will accept your whistleblower tips and then take important measures to keep your identity concealed from your employer. If these tips lead to agency collection efforts resulting in certain threshold amounts being recovered ($1 million for the SEC and CFTC, $2 million for the IRS program), the agencies may award you 10% to 30% of that recovery. The government agencies will fiercely protect your identity, even after the granting of your whistleblower award.

4. Take Notes

Your whistleblower incentive program submissions and complaints against retaliation will be strongest if supported by hard evidence. One of the best sources of evidence can be recordings among individuals discussing their illegal activities or retaliating against you for objecting to those activities. This advice, however, comes with an important caveat. There are some states, including Maryland, where secretly recording a conversation without the other person’s consent is illegal. You should never record conversations in one of these jurisdictions. The majority of states, however, have “one-party consent” laws, meaning that so long as you are in the conversation you may record it without asking permission from the other participants.

At a minimum, keep detailed notes for yourself of meetings, conversations and actions that relate to your employer’s illegal activities and retaliation against you. Do not store these notes on your employer’s computer or in your workplace email account, as your employer may review these or cut off your access to them at any time. If you can, make sure to identify important documents that will corroborate your claims so that you can later notify the applicable government agency or court as to their existence. Note that the actual copying and disclosure of these documents raises some complex issues touching on confidentiality and privilege concerns, among others. We highly recommend you seek advice from an attorney before gathering such records.

5. Don’t Give Your Employer an Excuse to Fire You

Disputes over retaliation almost always boil down to questions about the employer’s actual
motivations—did they fire you because of your whistleblowing activity or for some alternative legitimate reason? You do not want to undermine your potential whistleblower claim by providing your employer legitimate excuses for terminating your employment. Be calm and polite when voicing your complaints. Screams and profanities can provide an employer with reason for retaliating against you that may be difficult to challenge later as pretext.

Similarly, you should comply with employer requests to participate in investigations, especially those investigations triggered by your complaints. Employers often claim “insubordination” as a defense to their retaliation against whistleblowers, and they will look for any behavior on your part to support this charge. And, of course, continue to perform all other duties and responsibilities to the best of your abilities.

In short, when you think your employer wants to get rid of you because you’ve blown the whistle, don’t hand over any “good” reasons for them to fire you!

6. Consider Quitting Only as the Last Option

Let’s say you suspect that your employer has learned that you’ve blown the whistle. You feel like you’re being retaliated against or unfairly set up for termination. Or perhaps the employer doesn’t know about your whistleblower status yet, but you just don’t feel right working for the company any longer. Should you quit?

This is a personal decision, of course, and extracting yourself from a toxic situation may be the best move for you, regardless of the impact on your potential legal claims or future job prospects. That said, the act of resigning can make it more difficult for you to successfully pursue legal relief made available to whistleblowers.

First, government agencies operating whistleblower incentive programs prefer that whistleblowers maintain their employment if they can. Having a “source on the ground” is attractive to the government agencies. They appreciate having someone who they can communicate with about employers’ continuing illegal activities as well as to provide direction regarding where evidence is located or being moved to.

Second, quitting your job makes it harder to prevail in a retaliation case against your employer. To win any retaliation case, you must prove that your employer took an “adverse action” against you, which is often something along the lines of termination, demotion or failure to promote. Courts will recognize forced resignation as an actionable adverse action under the theory of “constructive discharge,” but such cases impose a high burden for whistleblowers. Essentially, you must prove that conditions were so intolerable that you had no other choice but to quit.

While quitting because of the effects of your whistleblowing activities is sometimes the only appropriate action, it is best done after consulting with an attorney about all of your options and the best manner in which to communicate your resignation.