

## Weather the Whistleblowing Tempest With Confidence

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### Today's Objectives:

- Who is a “Whistleblower”?
- The Costs of Whistleblowing
- Example Whistleblower Laws
- Tools to Minimize Whistleblower Risks

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### When is a Person Entitled to Whistleblower Protections & Remedies?

- Employee Engagement in “Protected Activity”
  - ✓ only certain activities are protected
- Employer Knowledge
  - ✓ The Defensive “Silver Bullet”
- Adverse Employment Action
  - ✓ Not always obvious
- Causation: The Protected Activity Prompted the Adverse Action
  - ✓ Sometimes there really isn't any connection

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### Is the Activity Protected?

- Employee has Reasonable Belief Illegal Activity/Violation Public Policy
  - ✓ Safety
  - ✓ Government Benefit
  - ✓ Protected Right
- Opposition
  - ✓ Report
  - ✓ - not required by job
- Participation
  - ✓ Investigation
  - ✓ Testimony

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### The Costs of Whistleblowing

- The Expense of Investigating & Defending
- Loss of Labor Capital
- Impact on Morale & Risk of “Copy Cat” Activities
- Harm to Goodwill
- Governmental Scrutiny

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### Potential Whistleblower Remedies

- Reinstatement
  - ✓ Front Wages
- Economic Damages
  - ✓ Back Wages
- Compensatory Damages
  - ✓ Pain & Suffering
- Punitive Damages
- Attorney Fees
- Civil Monetary Penalties

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### Representative Federal Whistleblower Laws

- American Recovery and Reinvestment Act of 2009
- Commercial Motor Vehicle Safety Act
- Fair Labor Standards Act
- False Claims Act
- Family Medical Leave Act
- FDA Food Safety Modernization Act
- National Transit Systems Security Act
- Occupational Safety Health Act
- Patient Protection And Affordable Care Act
- Sarbanes-Oxley Act of 2002
- Uniformed Services Employment and Reemployment Rights Act

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### Representative Ohio Whistleblower Laws

- Revised Code § 4113.52 – Ohio's Whistleblower Statute
- Revised Code § 4111.17(D) – Opposition or Participation Protected Activity for Wage Discrimination
- Revised Code § 3721.24 – The "Nursing Home Bill of Rights"
- Public Policy Wrongful Discharge Civil Action

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### A "Sunshine" Culture Minimizes Whistleblower Risks

- Publicized Top-Down Commitment
  - ✓ Business Practices: Legal/Public Policy-Compliant
  - ✓ Reports of Misconduct Addressed Seriously
  - ✓ Retaliation Strictly Prohibited
- Trustworthy & Easy-to-Use Process for Employees to Report Potential Misconduct
- Protocol to Prevent, Detect and Remediate Issues, & Evaluate Program Effectiveness

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## Promote Policy Compliance

- Employee Education
  - ✓ Ongoing process that starts with orientation
  - ✓ Handbook Guidance/Easily Understandable Rules
  - ✓ Open Door
  - ✓ Emphasis that everyone is responsible
- Supervisor Accountability
  - ✓ Must understand the practices & procedures
  - ✓ Evaluate Regularly: reward compliance enforcement & punish those who ignore requirements or enforce inconsistently

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## Encourage Employees to Report Potential Misconduct

- Make Communication Easy & Publicize Methods
  - ✓ Anonymous Hotline
  - ✓ Confidential Surveys
- Investigate Reported Misconduct
- Strictly Enforce Anti-Retaliation Policy
- Take Action When Merited
  - ✓ Reward Reporters Who Disclose Their Identities
- Document Findings & Action Taken

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## Maintain an Effective Internal Compliance Program

- Obtain Top-Down Commitment
- Assign Accountable Leadership
- Identify & Evaluate Risks
- Prepare Plans
- Balance Competing Goals of Prompt Response and Adequate Information
- Routinely Re-Evaluate Objectives, Strategies & Outcomes

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### Competently Conducted Investigations Minimize Whistleblower Risks

- Maintain a protocol to process Complaints
- Conduct an investigation designed to manage risk & maximize potential for effective resolution
- Evaluate information to make rational findings & conclusions
- Determine appropriate disclosure of findings & conclusions

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### Complaint Protocol Best Practices

- Treat Whistleblower & All Witnesses with Dignity
- Protect Confidentiality
- Prevent Retaliation
- Respond Objectively & Promptly
- Follow Reasonable Deadlines; Re-Set if Circumstances Necessitate

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### Investigation Best Practices

- Conduct Initial Evaluation of Complaint
  - ✓ Magnitude
  - ✓ Legal Ramifications
  - ✓ Potential Consequences
- Assign Investigator/Investigation Team
  - ✓ Internal: HR Director? In-house Counsel?
  - ✓ External: Legal Counsel? Criminal Counsel?
  - ✓ Report Chain

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## Investigation Best Practices

- Collect Information
  - ✓ Whistleblower
  - ✓ Managerial Witnesses
  - ✓ Non-Managerial Witnesses
- Maintain Confidentiality/Anti-Retaliation
- Document
- Adjust to Developments

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## Findings & Conclusions That Resolve Complaints & Minimize Risk

- What is the Appropriate Standard of Proof?
  - ✓ It isn't Beyond a Reasonable Doubt or Clear and Convincing
  - ✓ Conclusions must be rational; not arbitrary
- Does the Employer's Action Specific to the Complaint "Fit" the Determined Facts?
  - ✓ Take a look at "Comparables"
- Do the Circumstances Merit Additional Action?
  - ✓ Re-education
  - ✓ Other remediation

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## Disclosure of Findings and Conclusions

- What Type of Written Report is Merited?
  - ✓ It didn't happen if it isn't recorded
  - ✓ You're stuck with what you wrote\*
- What Internal Disclosures Should be Made?
  - ✓ Whistleblower
  - ✓ Supervisory Staff
  - ✓ Others; e.g., Board of Directors
- Do the Circumstances Merit External Disclosure?
  - ✓ Is there a duty to Self-Report?
  - ✓ Is there a 'race' to the Government?

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QUESTIONS?

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