USING FEDERAL AND STATE WHISTLEBLOWER LAWS TO PROTECT WORKERS FROM RETALIATION

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Whistleblower statutes, especially the Sarbanes-Oxley Act, offer attractive remedies for workers retaliated against by their employers for reporting or complaining about workplace violations of state and federal law and other possible misconduct by employers. Many of these anti-retaliation laws have remedies more effective than those traditionally available at the NLRB, including immediate reinstatement and substantial penalties. Although the Labor Board's recent focus on the adequacy of its own remedies available under the NLRB may change this perception, and efforts to enhance those NLRB enforcement provisions are now pending in Congress,[1] the wide-range of retaliation options under whistleblower laws give unions involved in organizing drives and bargaining tactical options that cannot be ignored. Depending on the specific employer and the industry involved, these laws provide additional arrows in the union's quiver to use when conditions warrant.

This paper presents an overview of these whistleblowing laws, both the federal array of statutory provisions and, for comparison purposes, those workplace-related retaliation protections in Illinois, which has long found that public policy warranted a common law exception to the employee-at-will doctrine, a separate tort for retaliatory discharges when an employee is terminated for reporting a state law violation to the appropriate law enforcement agency.[2]

I. Using Whistleblower Provision to Protect Workers and Enhance Organizing

Shortly after the passage of the Sarbanes-Oxley Act, there was a belief among union lawyers that these new causes of action and remedies to protect workers retaliated against by employers would be a boom to union organizing. Under some of these whistleblowing statutes, the union, as a separate party in interest, could invoke the retaliation provisions to not only protect the individual victims of the retaliation, but also to protect other workers as well. Especially in the early stages of any organizing campaign, encouraging workers to come forward to discuss possible workplace violations is always problematic since the most outspoken employees are usually the first people terminated by the employer. Whether it is FLSA violations, EEO issues or state prevailing wage compliance, these whistleblower laws provided unions with ready-made focus for its organizing drive and some non-NLRB protections for workers who come forward to cooperate with those efforts.

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[1] Workplace Action for a Growing Economy (WAGE) Act introduced in the U.S. House of Representatives, September 9, 2015. *See* www.washingtonpost.com/news/workblog/wp/2015/109/18.

[2] *See Kelsay v. Motorola*, 74 Ill. 2d 172, 384 N.E.2d 878 (1978).

The actual use of these whistleblower statutes, especially Sarbanes-Oxley, in a coordinated organizing campaign, however, have not always paid the dividends that many union advocates initially thought. The confidentiality and non-disclosure requirements of SOX make it less helpful in organizing and presents serious conflict of interest issues for the union attorneys such that most unions seeking to take advantage of these and other whistleblower provisions will almost always work with a separate plaintiff's counsel specializing in such claims to represent the individual whistleblower.

Often, the union's interest in publicizing their efforts that benefit the impacted workers collectively creates a tension with whistleblower's interests since the whistleblower may be entitled to specific relief, such as immediate reinstatement. This tension occurs because specific relief is typically only available to the employee terminated for reporting the illegal conduct and the union's interest in publicizing the employer's misconduct may not be in the whistleblower's interest since disclosures made to other workers or the public at large usually do not carry the same whistleblower protections. Also, because the technical and procedural requirements imposed on employees pursuing these whistleblower claims can result in dismissal of the claim on a procedural issue, such "losses" cannot easily be explained to the other coworkers who believed, perhaps incorrectly, that the whistleblower complaint would be the key to obtaining relief for the entire bargaining unit. In cases involving the *qui tam* provision of the federal and state false claims acts, the length of those investigations, done while the *qui tam* complaint is under seal, often complicate the union's organizing activities and usually extend far beyond the time the union can reasonably sustain its organizing efforts.

Even with these limitations, however, it is important for union lawyers with clients seeking to organize in industries or with employees impacted by SOX and the federal and state false claims acts, to have a working knowledge of these provisions and the procedural requirements needed to invoke their protections. The following is a summary of the various statutory provisions, recognizing that specific cases and circumstances will require the practitioner's attention to a more detailed analysis of the developments under the myriad of statutes that may be applicable to a particular case.[3]

II. Federal Laws Protecting Workers From Retaliation

The federal whistleblower or workplace-related retaliation laws fall into one of four categories: (1) federal false claims actions (and parallel state false claims provisions) that can be brought by a *qui tam* relator; (2) Sarbanes-Oxley complaints brought against publicly-traded companies for financial irregularities; (3) other federal whistleblower statutes administered by OSHA; and (4) other federal employment discrimination provisions that provide specific protections against retaliation for employees who report the discrimination.

[3] For example, the ABA Section of Labor and Employment Law Committee on Federal Labor Standards Legislation Subcommittee on the Sarbanes-Oxley Act of 2002 publishes an annual update to the Act.

A. Federal and State False Claims Act Protections

The Federal False Claims Act,[4] permits private individuals and corporations to sue on behalf of the federal government to recover funds illegally obtained or retained by federal contractors, subcontractors or providers of services under various federal programs, like Medicare, who have submitted false claims for those services. Whistleblower initiated lawsuits over the past thirty years have become one of the key sources of cases undertaken by government's civil and criminal prosecutors to identify, pursue and hopefully prevent government fraud. Recoveries for *qui tam* relators under these cases can be substantial, but the costs of pursuing such claims, absent intervention by the affected government agency and federal prosecutors, deter many relators. Furthermore, most if not all of these relator-only claims are eventually dismissed.

The 1986 False Claims Act amendments included anti-retaliation protections for employees. These amendments provided:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of his employer or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.[5]

Such relief to the employee included reinstatement with seniority status preserved; two times back pay; interest on the back pay, and compensation for any special damages; and litigation costs and attorneys' fees.[6] To prove a 31 U.S.C. § 3730(h) retaliatory discharge claim, the whistleblower must engage in conduct protected by the False Claims Act. Second, the defendant must have had some notice of the protected conduct that the whistleblower was either taking action in furtherance of a *qui tam* action or assisting in an investigation or actions brought by the Government. Finally, the plaintiff must show a connection between the protected activities and the retaliatory treatment. False Claims Act statutory protections against retaliation extend to whistleblowers whose allegation could legitimately support a False Claims Act Case, even if a case is not filed.[7]

The 2009 False Claims Act amendments passed as part of the Fraud and Enforcement and Recovery Act (FERA). These amendments significantly expanded the scope of liability for individuals and entities that received government funds. FERA amended the FCA anti-retaliation provision by permitting persons other than employees to sue for "lawful acts" done "in furtherance of other efforts to stop 1 or more violations of this subchapter."

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[4] 31 U.S.C. § 3729 *et seq.*

[5] False Claims Amendments Act of 1986, Pub. L. No. 99562, 100 Stat. 3153, Section 3730 codified at 31 U.S.C. § 3730(h) (1986).

[6] 31 U.S.C. § 3730(h) (2010).

[7] 31 U.S.C. § 3730(h).

State false claims statutes often have similar retaliation provisions, or provide a more generic state whistleblower statute which provides protection against retaliation, or permits under the state common law a claim for wrongful discharge as an exception to an employee's at-will status when termination is based on the employee reporting a violation of state law.[8]

B. Sarbanes-Oxley Whistleblower Protections (SOX)

Title VIII of Sarbanes-Oxley (SOX), the Corporate and Criminal Fraud Accountability Act of 2002,[9] was aimed at encouraging more corporate accountability and improving the reliability of fraud disclosures of publicly traded companies as a key component of the Act. The Act also included a provision to protect employees who reported financial irregularities. These provisions created a significant exception to the employment at-will doctrine. The SOX procedures provide powerful remedies, including immediate reinstatement upon a finding of merit in an administrative complaint.[10]

The whistleblower section of SOX applies to any company with a class of securities registered under § 12 of the Securities Exchange Act of 1934, or that is required to file reports under § 15(d) of the Securities Exchange Act of 1934.[11] In 2010, SOX was expanded to include "any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization."[12] No officer, employee, contractor, subcontractor or agent or nationally recognized statistical rating organization of such a company may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee of: (1) providing information or assisting in an investigation regarding conduct which the employee reasonably believes violates statutes on mail, wire, bank or securities fraud, any rule or regulation of the Securities and Exchange Commission, or any federal law relating to fraud against shareholders; or (2) filing or causing to be filed or participating in a proceeding relating to any such alleged violations.[13] The whistleblower is covered by the statute when providing information to a federal regulatory or law enforcement agency, a member or committee of Congress, or a person with supervisory authority over the employee.[14] Enforcement authority for SOX was given to the Department of Labor's Occupational Safety and Health Administration (OSHA).

C. Other Federal Whistleblower Laws Administered by OSHA

In addition to Sarbanes-Oxley, OSHA administers thirteen (13) other whistleblower laws which affect a number of different industries. Because these federal statutes impact both

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[8] *See e.g.*, 740 ILCS 175/1 *et seq.*
[9] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, Section 806 codified at 18 U.S.C. § 1514A (2002).
[10] 18 U.S.C. § 1514A(c) (2010).
[11] Sarbanes-Oxley Act of 2002, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public L. No. 111–203, codified at 18 U.S.C. § 1514A(c) (2010).
[12] 18 U.S.C. § 1514A(c) (2010).
[13] 18 U.S.C. § 1514A(a).
[14] 18 U.S.C. § 1514A(a).

publicly-traded and private companies, and are not specifically focused on financial irregularities, they are summarized below. The procedures OSHA follows and the limitations periods vary from statute to statute. [15]

1. Occupational Safety and Health Act of 1970 (OSHA)

The Occupational Safety and Health Act was designed "to assure as far as possible every working man and woman in the Nation safe and healthful working conditions ..." by reducing the number of occupational safety and health hazards.[16] It provided for the promulgation of occupational safety and health standards and for inspections and investigations.[17] Under the law, each employer is to furnish employees a place of employment free from recognized hazards that are likely to cause death or serious physical harm.[18]

The whistleblower section in this Act provides that no employee can be discharged or discriminated against in any manner for filing a complaint, for instituting a proceeding under the statute, for testifying or being about to testify, or for exercising any right afforded by the statute on behalf of himself or others.[19] An employee who believes he has been discharged or discriminated against may file a complaint with the Secretary of Labor within 30 days after the violation. The Secretary is supposed to notify the complainant of the determination within 90 days after receipt of the complaint. If the Secretary finds that the law was violated, the Secretary "shall bring an action in any appropriate United States district court …."[20]

2. The Surface Transportation Assistance Act of 1982 (STAA)

The purposes of the Surface Transportation Assistance Act are to promote the safe operation of commercial motor vehicles, to minimize dangers to the health of operators of such vehicles and other employees, and to ensure increased compliance with commercial motor vehicle safety and health regulations and standards.[21]

The whistleblower section in this Act provides that a person may not discharge, discipline or discriminate against an employee because the employee has filed a complaint or started a proceeding related to a violation of a commercial motor vehicle safety regulation, standard or

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[15] The whistleblower provisions of each statute, the filing period, and other details are summarized in the section of the DOL website entitled "The Whistleblower Program, Office of Investigative Assistance" which contains links to the specific statutes and regulations and procedures for filing complaints. *See* http://www.whistleblowers.gov/whistleblower_acts-desk_reference.pdf (last visited September 23, 2015).
See U.S. DEP'T OF LABOR, http://www.osha.gov/dep/oia/whistleblower/index.html (last visited Sept. 22, 2015). The section of the website for the Office of Administrative Law Judges contains links to the decisions and various summaries and newsletters. *See* U.S. DEP'T OF LABOR, http://www.oalj.dol.gov/libwhist.htm (last visited Sept. 22, 2015).

[16] 29 U.S.C. § 651(b) (1970).

[17] 29 U.S.C. § 655 (1970); 29 U.S.C. § 657 (1998).

[18] 29 U.S.C. § 654 (1970).

[19] 29 U.S.C. § 660(c) (1984).

[20] 29 U.S.C. § 660(c).

[21] 49 U.S.C. § 31131 (1994).

order.[22] The same actions are also prohibited if the employee refuses to operate a vehicle because the operation violates a regulation, standard or order related to commercial motor vehicle safety or health, or the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.[23] The Act has a "reasonable individual" standard concerning whether the unsafe condition establishes a real danger of accident, injury or serious impairment to health.[24] Furthermore, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.[25]

An employee may file a complaint with the Secretary of Labor within 180 days after the alleged violation occurred. Once the Secretary conducts an investigation, the Secretary must issue a finding within 60 days.[26] If the Secretary finds merit in the complaint, the Secretary can order the employee reinstated with compensatory damages, including back pay, as well as affirmative action to abate the violation.[27] Either party may file objections to the findings and preliminary order and request a hearing, but this will not stay a reinstatement order.[28]

3. The Asbestos Hazard Emergency Response Act of 1986 (AHERA)

The Asbestos Hazard Emergency Response Act calls for the establishment of federal regulations requiring inspection in school buildings for "friable asbestos-containing material."[29] Under AHERA, the Administrator of the Environmental Protection Agency (EPA Administrator) is required to promulgate regulations requiring response actions in school buildings when asbestos is present and is damaged or likely to become damaged.[30] The whistleblower provision forbids discrimination by a state or local educational agency against a person because the person provided information relating to a potential violation of the statute to any other person, including a state or the federal government.[31] Any public or private employee or representative of employees who believes he or she has been fired or discriminated against may apply within 90 days to the Secretary of Labor for a review of the alleged firing or discrimination.[32] The review is conducted in accordance with Section 11(c) of the Occupational Safety and Health Act.

4. The International Safe Container Act of 1977 (ISCA)

Under the International Safe Container Act, owners of shipping containers for international cargo must have each container initially approved and periodically inspected, in accordance with procedures established by the Secretary of Transportation.[33] The Secretary is responsible for establishing procedures for the testing, inspection and initial approval of existing

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[22] 49 U.S.C. § 31105(a)(1)(A) (2007).
[23] 49 U.S.C. § 31105(a)(1)(B) (2007).
[24] 49 U.S.C. § 31105(a)(1)(B).
[25] 49 U.S.C. § 31105(a)(1)(B).
[26] 49 U.S.C. § 31105(b)(2).
[27] 49 U.S.C. § 31105(b)(3).
[28] 49 U.S.C. § 31105(b)(2).
[29] 15 U.S.C. § 2641(b) (1986).
[30] 15 U.S.C. § 2643 (1990).
[31] 15 U.S.C. § 2651(a) (1986).
[32] 15 U.S.C. § 2651(b).
[33] 46 U.S.C. § 80507 (2006).

and new containers (including procedures relating to affixing and removing safety approval plates), establishing procedures for periodic inspections, and providing a method for collecting and disseminating data concerning container safety and international transport of containers.[34] The Secretary may require containers to be examined, may issue detention orders removing them from service, and may restrict their use if they are not in compliance.[35]

No person may discharge or in any manner discriminate against an employee because the employee has reported the existence of an unsafe container, or reported a violation to the Secretary or his agents.[36] An employee who believes he has been discharged or discriminated against may file a complaint with the Secretary of Labor within 60 days after the violation. The Secretary may investigate the complaint, and if it is determined that the law was violated, may bring an action in an appropriate United States district court.[37]

5. The Safe Drinking Water Act of 1974 (SDWA)

The Safe Drinking Water Act applies to public water systems.[38] It provides that drinking water may not be contaminated with lead, and requires any pipe, solder or flux used in plumbing or the repair of any public water system to be lead free.[39] Regulations under the Act specify maximum contaminant levels and quality control and testing procedures.

The whistleblower section provides that an employer may not discharge or discriminate against an employee with respect to his compensation, terms, conditions or privileges of employment because the employee has commenced or caused to be commenced a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a state.[40] The employee is also protected if he is "about to commence or cause to be commenced" a proceeding under that title.[41] Other protected actions include testifying or being about to testify in such a proceeding, or assisting or participating (or being about to assist or participate) in any manner in such a proceeding.[42]

An employee may file a complaint with the Secretary of Labor within 30 days after the violation occurred. The Secretary conducts an investigation, and within 30 days the Secretary is supposed to complete the investigation and notify the parties of the results of the investigation. Within 90 days of the receipt of the complaint, the Secretary is supposed to issue an order (made on the record and after notice and an opportunity for agency hearing) providing relief or denying the complaint. If the Secretary finds a violation has occurred, the Secretary can order the employee reinstated with back pay and compensatory and exemplary damages, as well as affirmative action to abate the violation.[43] Any person adversely affected by the order may

[34] 46 U.S.C. § 80506 (2006).
[35] 46 U.S.C. § 80505 (2006).
[36] 46 U.S.C. § 80507(a) (2006).
[37] 46 U.S.C. § 80507.
[38] 42 U.S.C. § 300f (1996).
[39] 42 U.S.C. § 300g-6 (2013).
[40] 42 U.S.C. § 300j-9(i)(1)(A) (1994).
[41] 42 U.S.C. § 300j-9(i)(1)(A).
[42] 42 U.S.C. §§ 300j-9(i)(l)(B),(C).
[43] 42 U.S.C. § 300j-9(i)(2)(B)(ii).

obtain review in the U.S. Court of Appeals in the circuit where the violation occurred, but this will not stay the Secretary's order.[44]

6. The Federal Water Pollution Control Act Amendments of 1972 (FWPCA)

Under the Federal Water Pollution Control Act, or as amended in 1977 the Clean Water Act, the discharge of any pollutant by any person is unlawful, except as in compliance with various sections of the statute.[45] Congress's objectives are to restore and maintain the chemical, physical and biological integrity of the nation's waters, eliminate the discharge of pollutants into navigable waters, attain an interim goal of water quality providing for the protection and propagation of fish, shellfish and wildlife, prohibit the discharge of toxic pollutants, provide federal financial assistance to construct publicly owned waste water treatment works, and develop adequate control of sources of pollution.[46] The Administrator of the Environmental Protection Agency administers the law.

The whistleblower portion of the statute provides that no person shall fire or in any other way discriminate against an employee or authorized representative of employees because the employee or representative has filed, instituted, or caused to be filed or instituted, any proceeding under the law, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the Act.[47] An employee may file a complaint with the Secretary of Labor within 30 days after the violation occurred. The Secretary investigates the complaint, and upon the request of any party must provide an opportunity for a public hearing to enable the parties to present information. On receiving the report of the investigation, the Secretary makes findings of fact.[48] If the Secretary finds a violation has occurred, the Secretary can require the party committing the violation to take affirmative action to abate the violation, including rehiring or reinstatement with compensation, costs and expenses.[49] Orders of the Secretary are subject to judicial review in the same manner as orders and decisions of the EPA Administrator.

7. The Toxic Substances Control Act of 1976 (TSCA)

The Toxic Substances Control Act declares that human beings and the environment are being exposed to a large number of chemical substances and mixtures, some of which present an unreasonable risk of injury, and that effective regulation of them in interstate commerce requires regulation of them in intrastate commerce.[50] The statute authorizes the EPA Administrator to order testing and regulation of hazardous chemical substances and mixtures.[51] Such regulations may prohibit the manufacturing, processing or distribution in commerce of such substances or mixtures, may limit their manufacture, may impose labeling requirements, or may regulate any manner or method of commercial use. No person may manufacture a new chemical substance or

[44] 42 U.S.C. § 300j-9(i)(3).
[45] 33 U.S.C. § 1311 (1995).
[46] 33 U.S.C. § 1251 (1987).
[47] 33 U.S.C. § 1367(a) (1972).
[48] 33 U.S.C. § 1367(b).
[49] 33 U.S.C. § 1367(b),(c).
[50] 15 U.S.C. § 2601 (1976).
[51] 15 U.S.C. § 2603 (1976); 15 U.S.C. § 2605 (2008).

process a substance for a significant new use without first submitting a notice to the Administrator of such person's intention to manufacture or process the substance, and without submitting required test data.[52] The statute contains a number of other provisions, including reporting and recordkeeping.

The whistleblower section of the statute provides that an employer may not discharge or discriminate against an employee with respect to compensation, terms, conditions or privileges of employment because the employee (or any person acting at the request of the employee) has commenced or caused to be commenced a proceeding under the statute.[53] The employee is also protected if he or she is "about to commence or cause to be commenced" a proceeding under the Act.[54] Other protected actions include testifying or being about to testify in such a proceeding, or assisting or participating (or being about to assist or participate) in any manner in such a proceeding or in any other action to carry out the purposes of the Act.

An employee may file a complaint with the Secretary of Labor within 30 days after the violation occurred. The Secretary conducts an investigation, and must complete the investigation and notify the parties of the results of the investigation within 30 days of the filing of the complaint. Within 90 days of the receipt of the complaint, the Secretary is supposed to issue an order (made on the record and after notice and an opportunity for agency hearing) providing relief or denying the complaint. If the Secretary finds a violation has occurred, the Secretary can order the employee reinstated with back pay and compensatory and exemplary damages, as well as affirmative action to abate the violation.[55] Any person adversely affected by the order may obtain review in the U.S. Court of Appeals in the circuit where the violation occurred.

8. The Solid Waste Disposal Act of 1976 (SWDA)

The Solid Waste Disposal Act includes open dumps and landfills, recycling, underground storage tanks, medical waste, and the treatment, storage and disposal of hazardous waste.[56]

The whistleblower portion of the statute provides that no person shall fire or in any other way discriminate against an employee or authorized representative of employees because the employee or representative has filed, instituted, or caused to be filed or instituted, any proceeding under the law, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the Act.[57] An employee or representative may apply to the Secretary of Labor for a review of the action within 30 days after the violation occurred. The Secretary investigates the complaint, and upon the request of any party must provide an opportunity for a public hearing to enable the parties to present information. On receiving the report of the investigation, the Secretary makes findings of fact. If the Secretary finds a violation has occurred, the Secretary can require the party committing the violation to take affirmative action to abate the violation, including rehiring or reinstatement with compensation, costs and

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[52] 15 U.S.C. § 2604 (1976).
[53] 15 U.S.C. § 2622(a) (1984).
[54] 15 U.S.C. § 2622(a).
[55] 15 U.S.C. § 2622(b).
[56] 42 U.S.C. § 6901 *et seq*.
[57] 42 U.S.C. § 6971 (1980).

expenses. Orders of the Secretary are subject to judicial review in the same manner as orders and decisions of the EPA Administrator.

9. The Clean Air Act of 1977 (CAA)

The purposes of the Clean Air Act are to protect and enhance the quality of the nation's air so as to promote public health, to initiate a national research and development program to achieve the prevention and control of air pollution, to provide technical and financial assistance to state and local governments to assist with their air pollution prevention and control programs, and to encourage the development of regional air pollution prevention and control programs.[58] The statute lists hazardous air pollutants, emission standards, and standards of performance for various sources of pollution.[59] There are related sections on acid deposition and stratospheric ozone protection.[60]

The whistleblower section of the statute provides that an employer may not discharge or discriminate against an employee with respect to compensation, terms, conditions or privileges of employment because the employee (or any person acting at the request of the employee) has commenced or caused to be commenced a proceeding under the statute.[61] The protections also apply to a proceeding for the enforcement of any requirement imposed under the Act or any applicable implementation plan. The employee is also protected if he or she is "about to commence or cause to be commenced" a proceeding under the Act.[62] Other protected actions include testifying or being about to testify in such a proceeding, or assisting or participating (or being about to assist or participate) in any manner in such a proceeding or in any other action to carry out the purposes of the Act.

An employee may file a complaint with the Secretary of Labor within 30 days after the violation occurred. The Secretary conducts an investigation, and within 30 days of the filing of the complaint, the Secretary must complete the investigation and notify the parties of the results of the investigation. Within 90 days of the receipt of the complaint, the Secretary is supposed to issue an order (made on the record and after notice and an opportunity for public hearing) providing relief or denying the complaint. If the Secretary finds a violation has occurred, the Secretary can order the employee reinstated with back pay and costs and expenses, including attorneys' fees and expert witness fees, as well as affirmative action to abate the violation.[63] Any person adversely affected by the order may obtain review in the U.S. Court of Appeals in the circuit where the violation occurred, but a petition for review does not stay the Secretary's order.[64]

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[58] 42 U.S.C. § 7401 (1999).
[59] 42 U.S.C. § 7412 (1990).
[60] 42 U.S.C. §§ 7651 *et seq.*, 7671 *et seq*.
[61] 42 U.S.C. § 7622(a) (1977).
[62] 42 U.S.C. § 7622(a).
[63] 42 U.S.C. § 7622(b).
[64] 42 U.S.C. § 7622(c).

10. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)

CERCLA is the Superfund legislation, and covers the release of hazardous substances, liability and procedures for payment of claims.[65] Under the statute, the EPA Administrator promulgates regulations designating substances as hazardous, and specifies what quantity of any substance, if released, triggers an obligation to report.[66] The statute also provides for investigations, inspections, monitoring and recordkeeping. Whenever a hazardous substance, pollutant or contaminant is released, or there is a substantial threat of release into the environment, the President can act, in accordance with a national contingency plan, to remove the substance and take remedial action or other response measures.[67] The statute also includes cleanup standards.

The whistleblower portion of the statute provides that no person shall fire or in any other way discriminate against an employee or authorized representative of employees because the employee or representative has filed, instituted, or caused to be filed or instituted, any proceeding under the law, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the Act.[68] The Act also prohibits discriminating against an employee or representative for providing information to a state or the federal government. An employee or representative may apply to the Secretary of Labor for a review of the action within 30 days of when the violation occurred. The Secretary investigates the complaint, and upon the request of any party must provide an opportunity for a public hearing to enable the parties to present information. On receiving the report of the investigation, the Secretary makes findings of fact. If the Secretary finds a violation has occurred, the Secretary can require the party committing the violation to take affirmative action to abate the violation, including rehiring or reinstatement with compensation, costs and expenses. Orders of the Secretary are subject to judicial review in the same manner as orders and decisions under the statute.

11. The Energy Reorganization Act of 1974 (ERA)

The Energy Reorganization Act of 1974 was designed to develop and increase the efficiency and reliability of all energy sources.[69] It establishes the Nuclear Regulatory Commission (NRC) and the Energy Research and Development Administration (ERDA).[70] The NRC has licensing and regulatory authority over demonstration breeder reactors, radioactive waste storage facilities, and fabricators of nuclear reactor fuel. It also licenses and regulates nuclear reactors, and develops nuclear safety standards. The ERDA plans and coordinates research and development programs on various energy sources, including fossil, nuclear, solar, geothermal and others, and encourages and conducts research and development in energy conservation.

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[65] 42 U.S.C. § 9601 *et seq*.
[66] 42 U.S.C. § 9602 (1977).
[67] 42 U.S.C. § 9604 (2005).
[68] 42 U.S.C. § 9610 (1980).
[69] 42 U.S.C. § 5801 (1974).
[70] 42 U.S.C. §§ 5841 *et seq*., 5811 *et seq*.

The whistleblower section provides that an employer may not discharge or discriminate against an employee with respect to compensation, terms, conditions or privileges of employment because the employee (or any person acting at the request of the employee): notified the employer of an alleged violation; refused to engage in an unlawful practice, if the employee identified the illegality to the employer; testified before Congress or at any federal or state proceeding concerning any provision of the Act; or has commenced or caused to be commenced a proceeding under the statute.[71] The protections also apply to a proceeding for the administration or enforcement of any requirement imposed under the Act. The employee is also protected if he or she is about to commence or cause to be commenced a proceeding under the Act. Other protected actions include testifying or being about to testify in such a proceeding, or assisting or participating (or being about to assist or participate) in any manner in such a proceeding or in any other action to carry out the purposes of the Act.

An employee may file a complaint with the Secretary of Labor within 180 days after the violation occurred. The Secretary conducts an investigation, and within 30 more days the Secretary is supposed to complete the investigation and notify the parties of the results of the investigation. The complainant must make a *prima facie* showing that protected activity was a contributing factor in the unfavorable personnel action, or the complaint will be dismissed. No investigation will be conducted if the employer demonstrates by clear and convincing evidence that it would have taken the same action absent protected activity. Within 90 days of the receipt of the complaint, the Secretary is supposed to issue an order (made on the record after notice and an opportunity for public hearing) providing relief or denying the complaint. If the Secretary finds after a hearing that the complaint has merit, the Secretary can order the employee reinstated with back pay and costs and expenses, including attorneys' fees and expert witness fees, as well as affirmative action to abate the violation, but may not order compensatory damages pending a final order. The Secretary may determine that a violation has occurred only if the protected activity was a contributing factor in the unfavorable personnel action. Relief may not be ordered if the employer demonstrates by clear and convincing evidence that it would have taken the same action absent protected activity. Any person adversely affected by the order may obtain review in the U.S. Court of Appeals in the circuit where the violation occurred, but a petition for review does not stay the Secretary's order.[72]

12. The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21)

The Wendell H. Ford Aviation Investment and Reform Act ("Ford Act," also known as "AIR 21") gives whistleblower protection to employees providing air safety information.[73] The statute calls for the Federal Aviation Administration to be notified of any complaints filed.

No air carrier or contractor or subcontractor may discharge or discriminate against an employee with respect to compensation, terms, conditions or privileges of employment because the employee (or any person acting at the request of the employee): (1) provided or caused to be provided to the employer or the federal government information relating to the violation of any FAA order, regulation or standard, or any law related to air carrier safety; (2) filed or caused to

[71] 42 U.S.C. § 5851(a) (2005).
[72] 42 U.S.C. § 5851(c).
[73] 49 U.S.C. § 42121 (2000).

be filed a proceeding related to any violation of any FAA order, regulation or standard, or any law related to air carrier safety; (3) testified in such a proceeding; or (4) assisted or participated in such a proceeding.[74] The employee is also protected if he or she is about to do any of the listed acts.

An employee may file a complaint with the Secretary of Labor within 90 days after the violation occurred. The Secretary is supposed to conduct an investigation within 60 days and determine if there is reasonable cause to believe that the complaint has merit.[75] The complainant must make a *prima facie* showing that protected activity was a contributing factor in the unfavorable personnel action, or the complaint will be dismissed. No investigation will be conducted if the employer demonstrates by clear and convincing evidence that it would have taken the same action absent protected activity. If the Secretary finds there is reasonable cause to believe that a violation occurred, the Secretary is to issue a preliminary order providing relief. The Secretary can order the employee reinstated with back pay and costs and expenses, including attorneys' fees and expert witness fees, compensatory damages, as well as affirmative action to abate the violation.[76] The Secretary may determine that a violation has occurred only if the protected activity was a contributing factor in the unfavorable personnel action. Relief may not be ordered if the employer demonstrates by clear and convincing evidence that it would have taken the same action absent protected activity.

Either party may file objections to the findings and order within 30 days, and request a hearing on the record. However, requesting a hearing does not stay any reinstatement remedy contained in the preliminary order. If a hearing is not requested, the preliminary order becomes a final order that is not subject to judicial review. If a hearing is requested, the Secretary issues a final order within 120 days after the conclusion of the hearing, providing relief or denying the complaint. Any person adversely affected by the order may obtain review in the U.S. Court of Appeals in the circuit where the violation occurred, but a petition for review does not stay the Secretary's order.[77]

13. The Pipeline Safety Improvement Act of 2002 (PSIA)

The Pipeline Safety Improvement Act of 2002 protects employees who provide pipeline safety information. No employer may discharge or discriminate against an employee with respect to compensation, terms, conditions or privileges of employment because the employee (or any person acting at the request of the employee): (1) provided or caused to be provided to the employer or the federal government information relating to the violation of any order, regulation, standard, or law related to pipeline safety; (2) refused to engage in any practice made unlawful by the statute or any other federal law related to pipeline safety, if the employee identified the illegality to the employer; (3) provided or caused to be provided testimony before Congress or in any federal or state proceeding regarding any federal law related to pipeline safety; (4) commenced or caused to be commenced a proceeding under any federal law related to

[74] 49 U.S.C. § 42121(a).
[75] 49 U.S.C. § 42121(b).
[76] 49 U.S.C. § 42121(b)(3)(B).
[77] 49 U.S.C. § 42121(b).

pipeline safety; (5) testified in such a proceeding; or (6) assisted or participated in such a proceeding.[78] The employee is also protected if he or she is about to do any of the listed acts.

An employee may file a complaint with the Secretary of Labor within 180 days after the violation occurred. The Secretary is supposed to conduct an investigation within 60 days and determine if there is reasonable cause to believe that the complaint has merit.[79] The complainant must make a *prima facie* showing that protected activity was a contributing factor in the unfavorable personnel action, or the complaint will be dismissed. No investigation will be conducted if the employer demonstrates by clear and convincing evidence that it would have taken the same action absent protected activity. If the Secretary finds there is reasonable cause to believe that a violation occurred, the Secretary is to issue a preliminary order providing relief. The Secretary can order the employee reinstated with back pay and costs and expenses, including attorneys' fees and expert witness fees, as well as affirmative action to abate the violation.[80] The Secretary may determine that a violation has occurred only if the protected activity was a contributing factor in the unfavorable personnel action. Relief may not be ordered if the employer demonstrates by clear and convincing evidence that it would have taken the same action absent protected activity.[81]

Either party may file objections to the findings and order within 30 days, and request a hearing on the record. However, requesting a hearing does not stay any reinstatement remedy contained in the preliminary order. If a hearing is not requested, the preliminary order becomes a final order that is not subject to judicial review. If a hearing is requested, the Secretary issues a final order within 120 days after the conclusion of the hearing, providing relief or denying the complaint. Any person adversely affected by the order may obtain review in the U.S. Court of Appeals in the circuit where the violation occurred, but a petition for review does not stay the Secretary's order.[82]

D. Other Federal Whistleblower Protections Not Administered by OSHA

Other federal statutes that provide protection against retaliation are summarized below:

1. Americans with Disabilities Act (ADA)

The ADA prohibits "retaliation and coercion"[83] and provides:

> (a) Retaliation. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a change, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

[78] 49 U.S.C. § 60129(a) (2002).
[79] 49 U.S.C. § 60129(b).
[80] 49 U.S.C. § 60129(b)(3)(B).
[81] 49 U.S.C. § 60129(b)(2)(B).
[82] 49 U.S.C. § 60129(b).
[83] 42 U.S.C.A. § 12203 (1990).

> (b) Interference, coercion, or intimidation. It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.
>
> (c) Remedies and procedures. The remedies and procedures available under sections 107, 203, and 308 of this Act [42 U.S.C. §§ 12117, 12133, 12188] shall be available to aggrieved persons for violations of subsections (a) and (b), with respect to title I, title II and title III [42 U.S.C. §§12111 *et seq.*, 12131 *et seq.*, 12181 *et seq.*], respectively. ADA claims of retaliation are analyzed like Title VII claims.

2. Civil Rights Act: Title VII Retaliation: Race, Sex, Ethnic Origin Discrimination

To establish a prima facie case of retaliation, in the absence of direct evidence, a plaintiff must show:

> 1) Protected employee activity;
>
> 2) Adverse action by the employer either after or contemporaneous with the employee's protected activity; and
>
> 3) A causal connection between the employee's protected activity and the employer's adverse action.[84]

The employer may rebut this presumption and ultimately the burden of proof is on the plaintiff, as in typical burden-shifting analysis.

3. Employee Polygraph Protection Act

The federal Employee Polygraph Act broadly prohibits an employer from requiring that an employee take a lie detector test and from retaliating against an employee who refuses to take the test.[85] The Employee Protection Polygraph Protection Act provides:

> It shall be unlawful for any employer engaged in or affecting commerce or in the production of goods for commerce –
>
> 1) Directly or indirectly, to require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test;

[84] Civil Rights Act of 1964, Section 704(a), as amended, 42 U.S.C.A. § 2000e–3(a) (1972).
[85] 29 U.S.C. § 2002 (1988).

***

3) To discharge, discipline, discriminate against in any manner, or deny employment or promotion to, or threaten to take any such action against–

(A) Any employee or prospective employee who refuses, declines, or fails to take or submit to any lie detector test

The protections extend to those who exercise their right during a test to terminate the test and to tape recordings of an employee's voice to be made as exemplars for polygraph purposes.[86]

Further, the Department of Labor's implementation of regulations restrict the manner in which a test can be conducted, and prohibit questions in a polygraph test inquiring about religious beliefs or affiliation, beliefs or opinions regarding racial matters, political beliefs or affiliations, sexual preferences or behavior; or "[b]eliefs, affiliations, opinions, or lawful activities concerning unions or labor organizations."[87]

4. Employment Retirement Income Security Act (ERISA)

ERISA prohibits against discrimination and retaliation in Section 510, 29 U.S.C. § 1140 as follows:

> It shall be unlawful for any person to discharge, fire, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan…or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.[88]

5. Fair Labor Standards Act (FLSA)

FLSA prohibits discrimination as follows:

> [I]t shall be unlawful for any person –
>
> …to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceedings under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.[89]

[86] 29 C.F.R. § 801.22 (2009).
[87] 29 C.F.R. § 801.22.
[88] 29 U.S.C. § 1140 (1974).
[89] 29 U.S.C.A. § 215(a)(3) (1950).

The Second Circuit interprets the FLSA more narrowly than Title VII retaliation and other similar statutory retaliation protection schemes. See Nicolaou v. Horizon Media, Inc., 402 F.3d 325 (2d Cir. 2005); Lambert v. Genesee Hosp., 10 F.3d 46 (2d Cir. 1993) overruled by Greathouse v. JHS Sec. Inc., 784 F.3d 105 (2d Cir. 2015) abrogated by Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (2011). Previously, there was a split in the circuits as to whether Section 15(a)(3) of FLSA applied to retaliation taken in response to adequate internal complaints, as opposed to retaliation occurring after an employee has cooperated with an investigation brought by a regulatory agency. See Lambert v. Genesee Hosp., 10 F.3d 46 (2d Cir. 1993) (internal wage and hour complaints not protected) overruled by Greathouse v. JHS Sec. Inc., 784 F.3d 105 (2d Cir. 2015); compare with Lambert v. Ackerley, 180 F.3d 997 (9th Cir. 2000) (other history omitted) (FLSA should be given liberal construction, FLSA intended to protect employees that complained of wage and hour violations even if complaints were only informally lodged with employer). Other cases also did not require a complaint to the federal government. See Valerio v. Putnam Assocs., Inc., 173 F.3d 35 (1st Cir. 1999); EEOC v. Romeo Cmty. Sch., 976 F.2d 985, 98990 (6th Cir. 1992); EEOC v. White & Son Enter., 881 F.2d 1006, 1011 (11th Cir. 1989); Love v. Re/Max of Am., Inc., 738 F.2d 383, 387 (10th Cir. 1984); Brennan v. Maxey's Yamaha, Inc. 513 F. 2d 179, 181 (8th Cir. 1975). However, a recent Second Circuit case held that section 215(a)(3) "does not restrict its protections to employees who file formal, written complaints with government agencies." Greathouse v. JHS Sec. Inc., 784 F.3d 105, 116 (2d Cir. 2015) abrogated by Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (2011). The court reasoned that "an employee may premise a section 215(a)(3) retaliation action on an oral complaint made to an employer, so long as—pursuant to Kasten—the complaint is sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." Id.

6. The Family and Medical Leave Act (FMLA)

Under the Family and Medical Leave Act, employers may not interfere with, restrain, or deny an employee's exercise of his rights under the Act. The FMLA provides:

> a) Interference with rights
>
> 1) Exercise of rights
>
> It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title [29 U.S.C.A. §§ 2611 *et seq.*].[90]
>
> 2) Discrimination
>
> It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for

[90] 29 U.S.C.A. § 2651(a)(1) (1993).

> opposing any practice made unlawful by this title [29 U.S.C.A. §§ 2611 *et seq.*].[91]

Interference can include refusing to authorize FMLA leave and discouraging employees from using leave.[92] To establish an interference claim, the plaintiff must show:

> 1) he was entitled to leave under the FMLA;
>
> 2) he gave notice of his intention to take FMLA leave; and
>
> 3) the employer denied FMLA leave and benefits to which the plaintiff was entitled. *See Cavin v. Honda of Am. Mfg, Inc.*, 346 F.3d 713 (6th Cir. 2003) *superseded by statute as stated in Srouder v. Dana Light Axle Mfg., LLC*, 725 F.3d 608, 614 (6th Cir. 2013); *Skrjanc v. Great Lakes Power Serv. Co.*, 272 F.3d 309, 314 (6th Cir. 2001); s*ee also Gibson v. City of Louisville*, 336 F.3d 511, 513–514 (6th Cir. 2003).

Most courts hold that when an employer interferes with the employee's right to leave, this violates the FMLA, regardless of the employer's intent. When an employee alleges a violation of this substantive right to FMLA leave, the employee must demonstrate by a preponderance of the evidence only entitlement to the disputed leave. The intent of the employer is not material.

7. Federal Railway Safety Act

The "employee protections" anti-retaliation provision of the Federal Railway Safety Act[93] provides:

> a) A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done because the employee, whether acting for the employee or as a representative, has –
>
> > 1) to refuse to violate or assist in the violation of any Federal law, rule or regulation relating to the railroad safety or security;

[91] 29 U.S.C.A. §§ 2611 *et seq.*; *see also Jarvis v. Gerstenslager Co.*, 2003-Ohio-3165 (2003).
[92] 29 U.S.C.A. § 2615 (1993).
[93] 49 U.S.C.A. § 20109 (2008).

2) to file a complaint or brought or caused to be brought a proceeding related to the enforcement of this part [49 USC §§20101 *et seq.*] or, as applicable to railroad safety, chapter 51 or 57 of this title [49 U.S.C. §§ 5101 *et seq.* or 5701 *et seq.*];

3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title [49 U.S.C.A. §§ 5101 *et seq.* or 5701 *et seq.*], or to testify in that proceeding;

4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

5) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board;

6) to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation; or

7) to accurately report hours on duty pursuant to chapter 211 [49 U.S.C.A. §§ 21101 *et seq.*].

b) Hazardous safety or security conditions.

1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for

A. reporting, in good faith, a hazardous safety or security condition;

B. refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (2) exist; or

C. refusing to authorize the use of any safety-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the conditions described in paragraph (2) exist.

2) A refusal is protected under paragraph (1)(B) and (C) if

A. the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

B. a reasonable individual in the circumstances then confronting the employee would conclude that

i. the hazardous condition presents an imminent danger of death or serious injury; and

ii. the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and

C. the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

An employee who alleges discharge, discipline or other discrimination in violation of these sections may seek relief with any petition or other request for relief by filing a complaint with the Secretary of Labor.[94]

8. Uniformed Services Employment and Reemployment Rights Act (USERRA)

The Uniformed Services Employment and Reemployment Rights Act "prohibits discrimination against military veterans on the basis of their military service and attempts to minimize the disadvantages to their civilian careers as a result of such service." It provides:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform services in a uniformed service shall not be denied

[94] 49 U.S.C.A. § 20109(d).

> initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.[95]

In construing a precursor to USERRA, the Supreme Court invented the "escalator" principle in stating that a returning service member "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war."96 The escalator principal applies to the employment position and rate of pay, as well as the seniority rights to which the returning service member is entitled. Thus, USERRA requires that the service member be reemployed in the escalator job position comparable to the position he would have held had he remained continuously in his civilian employment.97 Because USERRA was enacted to protect the rights of veterans and members of the uniformed services, it must be broadly construed in favor of its military beneficiaries. Violations of the USERRA require a written complaint to the Department of Labor. If unresolved administratively, a private cause of action can be pursued.[98]

The remedies include reinstatement, injunctive relief or that the employer "compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter."[99]

III. Illinois Laws Protecting Workers From Retaliation

A. Illinois Whistleblower Act

The Illinois Whistleblower Act was enacted in 2004 and was initially designed to provide employees who report an employer's violation of the law with a statutory cause of action for retaliatory discharge.[100] The Act prohibits employers from creating work rules which prevent employees from disclosing information to government or law enforcement agencies if the employee has reasonable cause to believe the information discloses a violation of state or federal law. The Act also prohibits employers from retaliating against employees for making disclosures regarding violations of state or federal laws and for refusing to participate in illegal activity.[101]

The Illinois Whistleblower Act was expanded in 2008 to protect additional disclosures and additional employees.[102] In 2009, it was further amended to add two new prohibitions on retaliation. First, Section 20.1 was added to prohibit any act or omission by an employer, whether within or outside of the workplace, if it would be materially adverse to a reasonable employee and is made because the employee disclosed or attempted to disclose public corruption

[95] 38 U.S.C.A. § 4311 (1996).
[96] *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 284–285 (1946).
[97] 38 U.S.C.A. § 4313 (1996).
[98] 38 U.S.C.A. §§ 4322, 4323 (2008).
[99] 38 U.S.C.A. § 4323.
[100] 740 ILCS 174/1 *et seq.*
[101] 740 ILCS 174/1 *et seq.*
[102] 740 ILCS 174/5, 15, 40.

or wrongdoing.[103] Second, Section 20.2 was added to prohibit an employer from threatening to retaliate if the act or omission threatened would constitute retaliation under the Act.[104] Moreover, in 2010, the Illinois Whistleblower Act supplemented the definition of an employee to include a licensed physician practicing in a medical facility funded by the state.[105]

B. Other Illinois Protections Against Retaliation

1. The Hospital Report Card Act

The Hospital Report Card Act requires all Illinois hospitals to report nurse staffing, infection prevention measures and hospital acquired infections data to the Illinois Department of Public Health (IDPH). Whistleblower protections under the Hospital Report Card Act provide that a hospital may not penalize, discriminate, or retaliate against an employee who discloses to a supervisor, collective bargaining agent, or regulatory agency any activity, policy, or practice of a hospital that violates the law or that the employee reasonably believes poses a risk to the health, safety, or welfare of a patient or the public.[106]

2. Workers' Compensation Act

The Illinois Workers' Compensation Act provides remedies for employees that are injured in the course of their work. Under the Workers' Compensation Act, an employee may not be discharged in retaliation for exercising rights and remedies granted to the employee under the Workers' Compensation Act.[107] Nothing in 820 ILCS 305/4(h) expressly provides a remedy for an employee in the event that the terms of the statute are violated, rather the remedy lies in a tort action, namely, the common law tort of retaliatory discharge.[108]

3. Field Sanitation Act

The Field Sanitation Act promotes the health and safety of agricultural workers by requiring that basic sanitary facilities be available to them. All farm operators who employ 10 or more agricultural workers must provide toilets, hand-washing facilities and safe drinking water within one-quarter mile of a work site. Under the Field Sanitation Act, it is unlawful for any person to discharge or in any other manner discriminate against any agricultural worker because such agricultural worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to the Field Sanitation Act, or has testified or is about to testify in

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[103] 740 ILCS 174/20.1.
[104] 740 ILCS 174/20.2.
[105] 740 ILCS 174/5.
[106] 210 ILCS 86/35.
[107] 820 ILCS 305/4(h); *see also Kelsay v. Motorola, Inc*., 74 Ill. 2d 172, 384 N.E.2d 876 (1978) (holding that a cause of action based on the tort of retaliatory discharge was necessary to ensure that the public policy behind the enactment of the Workmen's Compensation Act was not frustrated).
[108] *See Melton v. Central Illinois Public Service Co.,* 220 Ill. App. 3d 1052, 1055, 581 N.E.2d 423, 425 (1991).

any such proceeding, or has provided information to the Department or any other enforcement agency.[109]

4. The Prevailing Wage Act

The Prevailing Wage Act governs the wages that a contractor or subcontractor is required to pay to all laborers, workers and mechanics who perform work on public works projects. The Prevailing Wage Act also sets forth the record keeping requirements for a contractor or subcontractor and sets forth the obligations of municipalities and other public bodies to establish the prevailing wage as well as, to notify in writing all contractors and subcontractors regarding the Prevailing Wage Act when bidding and awarding contracts, as well as on work orders.[110]

The Prevailing Wage Act also prohibits the discharge, discipline or discrimination against any employee for reporting any proceeding resulting from the administration or enforcement of the Prevailing Wage Act, or offers any evidence of any violation of the Prevailing Wage Act.[111]

5. Illinois Wage Payment and Collection Act (IWPCA)

The Illinois Wage Payment and Collection Act provides standards for when, where and how often wages must be paid and prohibits deductions from wages or final compensation without the employee's consent and provides an administrative process for the reporting of employer violations.[112] The whistleblower section of the Act provides that any employer who discharges or discriminates in any other manner against any employee because that employee has made a complaint to his employer, to the Director of Labor or his authorized representative, in a public hearing, or to a community organization that he or she has not been paid in accordance with the provisions of this Act, or because the employee has testified or is about to testify in an investigation, is guilty, upon conviction of a Class C misdemeanor. An employee who has been unlawfully retaliated against shall be entitled to recover through a claim filed with the Department of Labor or in a civil action, but not both, all legal and equitable relief as may be appropriate. In a civil action, such employee shall also recover costs and all reasonable attorneys' fees.[113]

6. Illinois Migrant Labor Camp Law

The Illinois Migrant Labor Camp Law provides standards for licensing migrant labor camps. Under the Migrant Labor Camp Law, it is unlawful for any person to evict, discharge or in any other manner discriminate against any migrant worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to the Migrant Labor Camp Law, or has testified or is about to testify in any such proceeding, or has provided information to the Department or any other enforcement agency.[114]

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[109] 210 ILCS 105/13.
[110] 820 ILCS 130/1 *et seq.*
[111] 820 ILCS 130/11b(a).
[112] 820 ILCS 115/1–16.
[113] 820 ILCS 115/14(c).
[114] 210 ILCS 110/17.

7. The Nursing Home Care Act

The Nursing Home Care Act (Act) is an Illinois law which protects the rights of residents of long-term care facilities. Under the Nursing Home Care Act, a facility shall not take any retaliatory action against an employee of the facility, including a nursing home administrator, because the employee does any of the following: (1) discloses or threatens to disclose to a supervisor or to a public body an activity, inaction, policy, or practice implemented by a facility that the employee reasonably believes is in violation of a law, rule, or regulation; (2) provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of a law, rule, or regulation by a nursing home administrator; or (3) assists or participates in a proceeding to enforce the provisions of the Nursing Home Care Act.[115]

Remedies imposed by the court may include, but are not limited to, all of the following: (1) reinstatement of the employee to either the same position held before the retaliatory action or to an equivalent position; (2) two times the amount of back pay; (3) interest on the back pay; (4) reinstatement of full fringe benefits and seniority rights; and (5) payment of reasonable costs and attorneys' fees.[116]

8. Illinois Minimum Wage Law

The Illinois Minimum Wage Law is intended to establish a minimum wage standard for workers at a level consistent with their health, efficiency and general well-being; to safeguard such minimum wage against the unfair competition of wage and hour standards which do not provide such adequate standards of living; and to sustain purchasing power and increase employment opportunities.[117] Under the Minimum Wage Law, it is unlawful for any employer or his agent, or the officer or agent of any private employer, to discharge or in any other manner discriminate against any employee because that employee made a complaint that he had not been paid wages in accordance with the provisions of this Minimum Wage Law, or because that employee caused to be instituted or is about to cause to be instituted any proceeding under or related to this Minimum Wage Law, or because that employee testified or is about to testify in an investigation or proceeding under this Minimum Wage Law.[118]

It is the duty of the Department of Labor to inquire for any violations of this Act, institute the action for penalties, and enforce the retaliation provisions of this Act.[119] Any employer found guilty of violating the retaliation provisions is guilty of a Class B misdemeanor.[120]

9. Illinois Equal Pay Act of 2003

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[115] 210 ILCS 45/3-810(b).
[116] 210 ILCS 45/3-810(d).
[117] 820 ILCS 105/1 *et seq.*
[118] 820 ILCS 105/11(c).
[119] 820 ILCS 105/11(d).
[120] 820 ILCS 105/11(c).

The Illinois Equal Pay Act of 2003 prohibits employers from discriminating based on gender in the amount and payment of wages. Under the Illinois Equal Pay Act of 2003, it is unlawful for any person to discharge or in any other manner discriminate against any individual because the individual: (1) filed any charge or instituted or caused to be instituted any proceeding under or related to this Act; (2) gave, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this Act; or (3) testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this Act.[121]

A private right of action is available to a person or can be filed on behalf of the employee by the Illinois Department of Labor. A person whose rights have been violated under the anti-retaliation provisions may recover in a civil action: (1) the entire amount of any underpayment, plus interest, and (2) costs and reasonable attorneys' fees.[122]

10. Illinois Employee Classification Act

The Illinois Employee Classification Act is intended to address the practice of misclassifying employees as independent contractors.[123] The Act prohibits employers from retaliating through discharge or in any other manner against any person for actions taken with reference to the Act.[124] If an employer retaliates against an employee under this Act, the employer will be subject to civil penalties or a private cause of action, or both.[125] Civil penalties can include significant back taxes and penalties from the IRS, the Illinois Department of Revenue and the Illinois Department of Employment Security to back-wage determinations from the Illinois Department of Labor.[126]

A private right of action is available to a person or can be filed by an organization and has been used by local building trade unions to target non-union contractors who pay employees or independent contractors on behalf of persons similarly situated. A person whose rights have been violated under this Act by an employer or entity is entitled to collect: (1) the amount of any wages, salary, employment benefits, or other compensation denied or lost to the person by reason of the violation, plus an equal amount in liquidated damages; (2) compensatory damages and an amount up to $500 for each violation of the Act; (3) in the case of unlawful retaliation, all legal or equitable relief as may be appropriate; and (4) attorneys' fees and costs.[127]

[121] 820 ILCS 112/10(c).
[122] 820 ILCS 112/30(a).
[123] 820 ILCS 185/3.
[124] 820 ILCS 185/55.
[125] 820 ILCS 185/55; 820 ILCS 185/60.
[126] 820 ILCS 185/40.
[127] 820 ILCS 185/60.

11. Illinois Occupational Safety and Health Act

The Illinois Occupational Safety and Health Act protects the lives, health and safety of public employers and its employees by enacting standards to educate employees and employers about safe working conditions and occupational hazards. Under the Occupational Safety and Health Act, a person may not discharge or in any way discriminate against an employee because the employee has: (1) filed a complaint or instituted or caused to be instituted any proceeding under the Occupational Safety and Health Act; (2) testified or is about to testify in any such proceeding; or (3) exercised, on his or her own behalf or on behalf of another person, any right afforded by the Occupational Safety and Health Act.[128] There is no private right of action under this Act. An employee who believes that he or she has been discharged or otherwise discriminated against by an employer in violation of this Act may file a complaint with the Director of Labor.[129]

IV. Conclusion

Taken as a whole, these whistleblower and retaliation statutes, adopted and expanded over the last twenty years, have significantly modified the employee-at-will doctrine and provided workers with additional remedies, including immediate reinstatement, when the retaliation can be established. Collectively, these provisions offer unions alternatives to the traditional protections provided by the NLRB.

[128] 820 ILCS 219/110.
[129] 820 ILCS 219/110(b).