



## Preventing Whistleblower Claims in the Automotive Industry

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## Whistleblower Claims on the Rise

- OSHA: 58% increase in whistleblower claims between 2005 and 2014

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## Retaliation Claims on the Rise



- Retaliation claims generally are on the rise
- Retaliation claims under the statutes governed by the EEOC have increased 70% since 2005.

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## High Cost of Retaliation Claims



- Median jury awards for retaliation: highest of all employment claims – \$225,000
- Median settlements for retaliation: tied with discrimination claims as highest employment settlements

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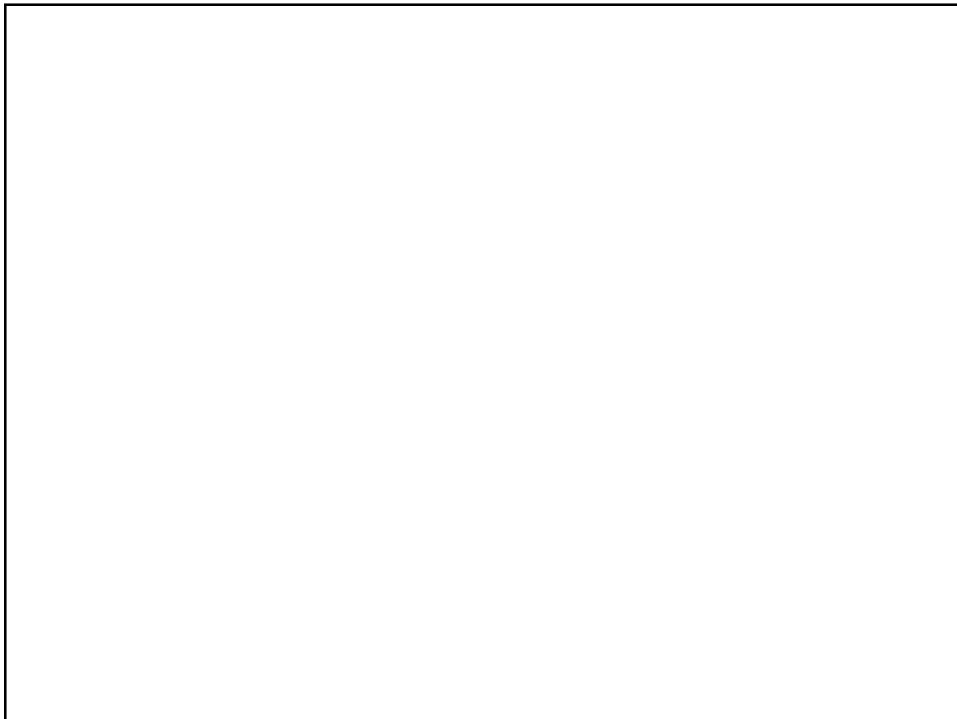
## High Cost of Whistleblower Claims



### ■ Recent example of high award:

- » Zulfer v. Playboy Enterprises Inc., No. 12-cv-08263 (C.D. Cal. 2014).
- » Plaintiff alleged she was discharged in violation of Sarbanes Oxley after refusing the CFO's demands to set aside \$1 million in executive bonuses that had not been approved by the board of directors
- » Jury awarded approximately \$6 million

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## What is a Retaliation Claim



- Protected Activity
- Adverse Employment Action
- Causation

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## What is an Adverse Employment Action?



- According to the U.S. Department of Labor, examples include:
  - » denial of promotion;
  - » non-selection/refusal to hire;
  - » denial of job benefits;
  - » demotion;
  - » suspension;
  - » discharge;
  - » threats;
  - » reprimands;
  - » negative evaluations;
  - » harassment; or
  - » other adverse treatment that is likely to deter reasonable people from pursuing their rights

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## What is Protected Activity?



- A complaint to employer, or state or federal agency that the employer is engaged in activity that violates a law or public policy.

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## Protected Activity - EEOC



- For discrimination claims governed by the EEOC, protected activity includes:
  - » Opposition to a practice believed to be unlawful discrimination
  - » Complaining to anyone about alleged discrimination against oneself or others
  - » Threatening to file a charge of discrimination
  - » Picketing in opposition to discrimination
  - » Refusing to obey an order reasonably believed to be discriminatory

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## Protected Activity - EEOC



- Requesting a reasonable accommodation based on religion or disability
- Participation in an employment discrimination proceeding
- Examples:
  - » Filing a charge of employment discrimination
  - » Cooperating with an internal investigation of alleged discriminatory practices
  - » Serving as a witness in an EEO investigation or litigation

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## Protected Activity - EEOC



- According to the EEOC, examples of activities that are NOT protected activity include:
  - » Actions that interfere with job performance which render the employee ineffective
  - » Unlawful activities such as acts or threats of violence

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## Protected Activity - OSHA



- The OSH Act protects workers who complain to their employer, OSHA or other governmental agencies about unsafe or unhealthful working conditions in the workplace or environmental problems
- OSHA administers the employee protection or “whistleblower” provisions of many statutes

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## Protected Activity - OSHA



- Occupational Safety and Health Act (OSH Act),
- Surface Transportation Assistance Act (STAA),
- Asbestos Hazard Emergency Response Act (AHERA),
- International Safe Container Act (ISCA),
- Energy Reorganization Act (ERA),
- Clean Air Act (CAA),
- Safe Drinking Water Act (SDWA),
- Federal Water Pollution Control Act (FWPCA),
- Toxic Substances Control Act (TSCA),
- Solid Waste Disposal Act (SWDA),
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),
- Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21),
- Corporate and Criminal Fraud Accountability Act, Title VIII of the Sarbanes-Oxley Act (SOX),
- Pipeline Safety Improvement Act (PSIA),
- Federal Rail Safety Act (FRSA),
- National Transit Systems Security Act (NTSSA), and
- Consumer Product Safety Improvement Act (CPSIA).

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## Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21)



### ■ Background:

- » Chapter 301 of Title 49 – gives the National Highway Traffic Safety Administration (NHTSA) the authority to:
  - Issue vehicle safety standards
  - Require manufacturers to recall vehicles that have a safety related defect or do not meet requirements for motor vehicle manufacturers and part suppliers
- » MAP-21 is a comprehensive federal transportation program funding and authorization law which includes some whistleblower protections.
- » MAP-21 signed into law in 2012.

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## MAP-21 Whistleblower Protection



- Section 30171 prohibits motor vehicle manufacturers, part suppliers, and dealerships from retaliating against employees for engaging in certain protected activities

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## Protected Activity Under MAP-21



- Providing info relating to any motor vehicle defect or violation of NHTSA vehicle safety standards and the federal reporting requirements for auto manufacturers to
  - » Employer
  - » The U.S. Department of Transportation

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## Protected Activity Under MAP-21



- Filing, testifying, assisting or participating in a proceeding concerning any motor vehicle defect or alleged violation of chapter 301 including vehicle safety standards and federal reporting requirements for auto manufacturers
- Objecting to or refusing to participate in any activity that he or she reasonably believed to be in violation of chapter 301 or any order, rule, regulation, standard or ban under Chapter 301

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## MAP-21 Retaliation Claims



- Complaints alleging retaliation in violation of MAP-21 are filed with OSHA
- MAP-21 complaints must be filed within 180 days after the alleged retaliatory action

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## Consumer Products Safety Improvement Act of 2008



- Landmark consumer product safety law provided the Consumer Product Safety Commission with significant new regulatory and enforcement tools as part of amending and enhancing several consumer protection statutes, including the Consumer Product Safety Act

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## Consumer Products Safety Improvement Act of 2008



- Includes whistleblower protections
- Under the Act, an employer cannot retaliate against an employee who
  - » Provided, or is about to provide to the employer, or the state or federal government information regarding a violation of the act
  - » Testified, is about to testify, or assisted or participated (or about to assist or participate) in a proceeding concerning such violation; or
  - » Objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of the Act

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## Consumer Products Safety Improvement Act of 2008



- Complaints of retaliation are filed with OSHA
- Complaints must be filed within 180 days after the alleged retaliatory action

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## Michigan Whistleblowers' Protection Act (WPA)



- Private right of action for employees
- An employer may not discharge, threaten or otherwise discriminate against an employee because the employee reports or is about to report a violation or suspected violation of a federal or state statute or regulation to a public body
- Employees are also protected if a public body requests that the employee participate in a court action, investigation or hearing

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## Protected Activity Under the Michigan WPA



- Employee reports or is about to report
- A violation or suspected violation
- To a public body
- Employer must have notice of the report or threat to report

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## Michigan WPA



- Action must be brought within 90 days of the alleged violation of the WPA
- Court can order reinstatement of the employee, back pay, full reinstatement of benefits and seniority rights, and damages

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## Sarbanes Oxley Act of 2002



- Introduced major changes to the regulation of financial practice and corporate governance
- Includes protections for whistleblowers from retaliation for reporting alleged:
  - » mail, wire, bank, or securities fraud;
  - » violations of SEC rules and regulations; or
  - » violations of Federal law relating to fraud against shareholders

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## Protected Activity Under Sarbanes Oxley



- Under the Act, and Employer cannot retaliate against an employee who:
  - » Provided information (or caused information to be provided to), or assisted in an investigation by,
    - A federal regulatory or law enforcement agency
    - A Member or Committee of Congress
    - An internal investigation by the company relating to alleged mail/wire/bank fraud, violations of SEC rules and regulations, or violation of Federal law relating to fraud against shareholders

OR

  - » Filed a Charge relating to, or participated or assisted in a proceeding relating to alleged mail/wire/bank fraud, violations of SEC rules and regulations, or violation of Federal law relating to fraud against shareholders

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## Sarbanes Oxley Act of 2002



- » Complaints of retaliation are filed with OSHA
- Complaints must be filed within 180 days after the alleged retaliation

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## Example and Analysis of Retaliation Claim



- Collins v. Beazer Homes USA, Inc., - Georgia 2004
- Collins was hired as Director of Marketing
- Soon after starting employment, Collins complained internally to several people including Human Resources, the VP of Sales, and the company CEO about a variety of alleged financial and other wrongdoing
- She alleged:
  - » an advertiser was being overpaid because of a personal relationship with the President of the Division
  - » marketing expenses were being miscategorized
  - » a cover-up/corruption existed with respect to her complaints

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## Example and Analysis of Retaliation Claim



- Collins met with several executives, but was not satisfied with the results of her internal complaints
- At the time, Collins was still within an initial 90 day review period in which her employer could terminate her employment without giving a reason
- About two weeks after she complained, the company terminated her employment allegedly because she could not get along with her fellow employees (including the employees she accused of wrongdoing)
- She filed a Sarbanes Oxley complaint with OSHA
- Then she filed a lawsuit against the company asserting claims under Sarbanes Oxley and the Florida Whistleblower's Act.

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## Example and Analysis of Retaliation Claim



- The Court held that there was sufficient evidence of retaliation for her case to move forward to trial because:
  - » She engaged in protected activity by reporting the alleged financial wrongdoing internally
  - » The employer was aware of her protected activity
  - » She suffered an adverse employment action when she was terminated
  - » The temporal proximity, 14 days, between her complaints and her termination was sufficient to suggest that protected activity was a contributing factor
  - » The employer could not show as a matter of law that it would have terminated her in the absence of her protected activity

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## Example and Analysis of Retaliation Claim



- What could the employer have done differently?

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## COMING SOON?



- Automotive Industry whistleblower incentive law under consideration by Congress

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## Motor Vehicle Safety Whistleblower Act



- Provides whistleblower incentives and protections for employees of :
  - » motor vehicle manufacturers,
  - » part suppliers,
  - » dealerships, or
  - » their contractorswho voluntarily provide the Secretary of Transportation (DOT) information relating to:
  - any motor vehicle defect,
  - noncompliance, or any violation of any notification or reporting requirement which is likely to cause unreasonable risk of death or serious physical injury

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## Motor Vehicle Safety Whistleblower Act



- Whistleblowers can receive up to 30% of total monetary sanctions collected pursuant to an administrative or judicial action resulting in monetary sanctions exceeding \$1 million

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## Motor Vehicle Safety Whistleblower Act



- Prohibits an award to any whistleblower who knowingly and willfully makes false representations and subjects them to criminal penalties
- Passed the U.S. Senate on April 28, 2015
- Now heading to the House of Representatives

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## How to Avoid Whistleblower Retaliation Claims



### ■ Policies and Procedures

- » Develop clear and well publicized anti-retaliation policies
- » Develop and emphasize internal reporting procedures, for all whistleblower claims: discrimination, product issues, financial and other activities protected under Sarbanes Oxley, etc.
- » Ensure that the people who are the subject of the complaint are not investigating or taking action against the reporting employee
- » Create a culture that supports reporting

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## How to Avoid Whistleblower Retaliation Claims



### ■ TRAIN and RE-TRAIN:

- » Human Resources and managers regarding retaliation
- » All employees regarding the reporting procedures and anti-retaliation policy
- » All personnel involved in receiving reports and conducting investigations

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## How to Avoid Whistleblower Retaliation Claims



### ■ Investigate and Respond

- » Conduct prompt and thorough investigations of any complaints including retaliation complaints
- » Where appropriate, take remedial action
- » Follow up with the reporting employee at the end of the investigation

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## How to Avoid Whistleblower Retaliation Claims



### ■ Document, Document, Document!

- » In avoiding and defending claims, documentation is essential.
- » Document your investigation of the complaint
- » Document performance problems of all employees consistently and thoroughly

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**Thank You**



**Questions?**

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