

## New Developments in Whistleblower Protection Law

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## Agenda

- Section 1553 of the American Recovery and Reinvestment Act (ARRA)
- Amendments to the False Claims Act
- Consumer Product Safety Improvement Act of 2008 (CPSIA)
- Section 1558 of the Patient Protection and Affordable Care Act
- Adler tort claims
- Tips and practical advice



## Key Provisions of Section 1553

- Broad scope of protected conduct
- Broad range of actionable adverse actions
- Low burden to establish causation
- Right to a Jury Trial
- No "duty speech" defense
- No statute of limitations



## Section 1553 Coverage

- Applies to employees of contractors, grantees and recipients of stimulus funds
- Applies to employees of state and local governments receiving stimulus funds
- Broad definition of "covered funds"



## Section 1553 Protected Conduct

- Protected conduct includes a disclosure about information that an employee reasonably believes evidences:
  - Gross mismanagement of an agency contract relating to stimulus funds;
  - Gross waste of stimulus funds;
  - Substantial and specific danger to public health or safety;
  - Abuse of authority related to the implementation or use of stimulus funds; or
  - A violation of a law, rule, or regulation that governs an agency contract or grant related to stimulus funds.



## Section 1553 Protected Conduct

- Protects disclosures to the following:
  - Person with supervisory authority over the employee
  - State or federal regulatory or law enforcement agency
  - Member of Congress
  - IG of an agency that expends stimulus funds
  - Comptroller General
  - Recovery Accountability and Transparency Board



## **"Duty Speech" Doctrine Does Not Apply**

- Section 1553 specifically protects "duty speech" whistleblowing, i.e., disclosures made by employees in the ordinary course of performing their job duties

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## **Objective Reasonableness**

- Courts will likely apply a standard of objective reasonableness from analogous whistleblower protection laws, such as Section 806 of Sarbanes-Oxley Act
- DOL ARB and two Circuit Courts have imposed a high standard of "objective reasonableness" in SOX claims
  - Allen v. Admin. Review Bd., 514 F.3d 468 (5th Cir. 2008)
  - Livingston v. Wyeth, Inc., 520 F.3d 344 (4th Cir. 2008)
  - Welch v. Cardinal Bankshares Corp., ARB No. 05-064, ALJ No. 2003-SOX-15 (ARB May 31, 2007)

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## **Burden of Proof**

- "Contributing factor" standard
- Temporal proximity suffices to establish causation
- Employer can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same action absent the employee's protected conduct

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## **Section 1553 Procedure**

- No statute of limitations
- Inspector General investigates
- If an agency head does not issue a final decision within 210 days of the employee filing the complaint, employee can remove the claim to federal court and is entitled to a trial by jury.

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## **Section 1553 Remedies**

- Reinstatement
- Back Pay
- Compensatory Damages
- Attorney's Fees

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## **False Claims Act**

- FCA prohibits direct and indirect submission of false claims
- Unique qui tam provisions gives qui tam relators incentive to report fraud
  - relator award ranges from 15% to 30%
- Filed under seal and DOJ decides whether to intervene
- Treble damages and penalty up to \$11,000 per violation
- Prohibits retaliation

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## False Claims Act Amendments

- On May 20, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act (FERA), which amends the FCA's qui tam and retaliation provisions
- On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act of 2009, H.R. 3590, 111th Cong., which amends the definition of an "original source," narrows public disclosure bar.

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## 2010 Amendments to the Qui Tam Provision of the FCA

- Expands the definition of an "original source" by replacing 31 U.S.C. 3730(e)(4).
- The "original source" requirement is no longer jurisdictional.
- Narrows public disclosure bar to Federal proceedings and documents.

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## 2009 Amendments to Retaliation Provision of False Claims Act

- FCA retaliation provision now covers contractors and agents
  - Provides whistleblower protection to any person outside the government working on a government contract
- Protected conduct includes any efforts to stop one or more violations of the FCA
- Plaintiff need not demonstrate that she raised concerns about an actual violation of the FCA

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## Broadening the Scope of Protected Conduct

- Protected conduct now includes any act in "furtherance of other efforts to stop 1 or more violations of this subchapter."
- Efforts to stop a violation of the FCA likely include any acts "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."
- Need not demonstrate an actual violation of the FCA.

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## Elements of FCA Retaliation Claim

- Protected Conduct
- Knowledge of Protected Conduct
- Adverse Action
- Inference of causation between the protected activity and the adverse action, i.e., the retaliation was motivated, at least in part, by the employee's engaging in protected activity.

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## Statute of Limitations

- Statute of limitations for retaliation claim is "the most closely analogous state limitations period." *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409 (2005)
- Statute of Limitations can range from 90 days to 2 years

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## Damages

- Double Back Pay
- Emotional Distress
- Reinstatement or front pay
- Attorney Fees

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## Consumer Product Safety Improvement Act, 15 U.S.C. § 2087

- Applies to manufacturers, private labelers, distributors, and retailers
- Prohibits retaliation against an employee who discloses information to the employer, Federal Government, or state Attorney General, information that the employee reasonably believes evidences a violation of any act enforced by the Consumer Product Safety Commission
- Protects objectors and participants

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## Elements of a CPSIA Claim

- Complainant engaged in protected conduct
- Employer knew of protected conduct
- The protected conduct was a contributing factor in the employer's decision to take the take an unfavorable personnel action

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## Burden of Proof for CPISA Claims

- Employee must show by a preponderance of the evidence that her protected conduct was a contributing factor in the employer's decision to take an unfavorable personnel action
- Employer may avoid liability only by showing by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected conduct

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## Procedures for CPISA Claims

- 180 day statute of limitations
- Complaint to be initially filed with OSHA who will investigate the complaint and may order reinstatement
- Right to a hearing before the OALJ

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## Right to a Jury Trial

- If the Secretary does not issue a final decision within 210 days of filing of the complaint or within 90 days of receiving OSHA's written determination, the plaintiff can remove the claim to federal district court and seek a jury trial

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## Remedies for CPISA Claims

- Reinstatement
- Back pay with interest
- Special damages
- Litigation costs

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## Patient Protection and Affordable Care Act of 2009

- New whistleblower protection law contained in section 1558
- Prohibits retaliation against employees who disclose information that they reasonably believe evidences a violation of Title I of the Act.
- Protects those who participate in proceedings or refuse to participate in suspected violations

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## Procedures for Section 1558 Claims

- Utilizes same burden of proof, procedures as the Consumer Product Safety Improvement Act, 15 U.S.C. § 2087.

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## Adler Abusive Discharge

- In Maryland, the common law tort for wrongful or abusive discharge is known as an Adler claim.
  - Adler v. Am. Standard Corp., 432 A.2d 464 (Md. 1981).

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## Elements of an Adler Claim

1. The employee was discharged
  - This may be satisfied by showing the employee was constructively discharged
2. The basis for the discharge violated a clear mandate of public policy
3. There is a nexus between the employee's conduct and the employer's decision to fire the employee

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## Protected Conduct Under Adler

- Refusing to engage in illegal activity
- Exercising a statutory right or privilege
- Fulfilling a statutory obligation

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## Example Adler Claims Cont.

- Refusing to commit health care benefit fraud
  - Magee v. DanSources Technical Servs., Inc., 137 Md. App. 527 (2001).
- Filing a worker's compensation claim.
  - Ewing v. Koppers Co., 312 Md. 45 (1998).
- Reporting suspected child abuse and neglect as required by state law.
  - Bleich v. Florence Crittenton Servs. of Balt., Inc., 632 A.2d 463 (Md. Ct. Spec. App. 1993).

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## Key Limitation on Adler Claims

- The source of public policy must lack its own enforcement mechanism.
- "[W]e limit the availability of the abusive discharge cause of action to cases where an employee's termination contravened a clear mandate of public policy and not to allow the cause of action would leave the employee without a remedy." Newell v. Runnels, 967 A.2d 729, 769 (Md. 2009).

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## The Source of Public Policy Must Lack Its Own Enforcement Mechanism

- Employee alleging retaliation for cooperating in a state and federal prosecution of the employer for dumping toxic waste, could not maintain an Adler claim because CERCLA provides its own remedy for retaliation.
  - Miller v. Fairchild Indus., Inc., 97 Md. App. 324 (D. Md. 1987).

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## Adler Claims Generally Preempted Where:

- 1.) the conduct is regulated by labor and relations laws, i.e., the National Labor Relations Act;
- 2.) resolution of the claims requires interpretation of collective bargaining agreements;
- 3.) the conduct is regulated by federal law governing a specific term or condition of employment, i.e. ERISA;
- 4.) or the employment is in a field regulated by federal anti-discrimination, safety, environmental, or banking laws.

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## Remedies

- Back pay, front pay, emotional distress, reputational harm, and punitive damages
- An award of punitive damages requires showing malice.
  - Malice can be inferred from circumstantial evidence. Kessler v. Equity Mgmt., Inc., 82 Md. App. 577, 591 (1990).

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## Elements/Factors of Malice

- Malice "may be characterized as the performance of an unlawful act, intentionally or wantonly, without legal justification or excuse but with an evil or malicious motive influenced by hate; the purpose being to deliberately and willfully injure the plaintiff."
  - Hanna v. Emergency Med. Assocs., P.A., 551 A.2d 492, 500 (Md. Ct. Spec. App. 1989) (Internal quotation, citation omitted).

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## Basis of Public Policy

- Title VII
  - Title VII provides a clear public policy but does not contain a remedy if the employer has less than 15 employees.
- Anti-prostitution laws
  - Quid pro quo harassment violates Title VII, state laws, and can be a solicitation for prostitution.

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## Basis of Public Policy Cont.

- 18 U.S.C. § 1513(e): criminalizes retaliation against witnesses
- Md. Code. Ann., Crim Law § 9-303: criminalizes retaliation “against a victim or witness for: (1) giving testimony in an official proceeding; or (2) reporting a crime or delinquent act.”

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## Interaction with Other Laws

- Adler claims are subject to a 3 year statute of limitation.
- Consider using an Adler claim where the employee has missed the filing deadline of another statute.
- Use an Adler claim to aver punitive damages.

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## Example Adler Claim

- Plaintiffs asserted an Adler claim based on alleged violation of Md. Code Ann., Lab. & Empl. § 3-415 which criminalizes retaliation for asserting a violation of Maryland wage law.
  - Randolph v. ADT Sec. Servs., Inc., No. DKC 2009-1790, 2010 WL 1233989 (D. Md. Mar. 24, 2010).

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## Tips and Practical Advice

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## Case Selection – Things to Look For

- Long term employees with a solid performance record and expertise in the subject matter
- Timely disclosures following the chain of command
- A whistleblower that is not complicit in the wrong doing
- Issues of public concern
- Close temporal proximity between disclosure and retaliation

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## Forum Selection

- Employees generally obtain higher verdicts in state court and are more likely to survive summary judgment in a state court
- The Fourth Circuit has construed Adler more narrowly than Maryland courts

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## Naming an Individual as a Defendant

- Adler claims can be asserted against an individual supervisor who plays a “dominant role in the affairs of the corporate employer and who primarily formulates the corporation’s decision to fire a particular employee...”
  - Bleich v. Florence Crittenton Servs. of Balt., Inc., 632 A.2d 463 (Md. Ct. Spec. App. 1993) (Internal quotation omitted).

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## Naming an Individual as a Defendant Cont.

- Consider the impact an individual defendant has diversity jurisdiction
- Juries tend to be more sympathetic to individuals

## Issues to Develop in Discovery

- Direct evidence of retaliatory motive
  - Was the decision maker angry at the employee?
  - What does the employer stand to gain from engaging in wrongful conduct?

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## Issues to Develop in Discovery Cont.

- Temporal proximity between protected conduct and decision to terminate the employee
- Deviation from company policy or practice
  - Did a senior manager step outside their role and evaluate an employee far below them?

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## Issues to Develop in Discovery Cont.

- Comparator evidence showing disparate treatment
- Information showing that the alleged legitimate business reason for the adverse employment action is false and pretextual

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## Maximizing Damages

- Job search journal
  - There is a duty to mitigate damages – document efforts of the client to find a new job
  - The inability to find a comparable position justifies front pay

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## Punitive Damages

- Consider adding an Adler claim in addition to a federal cause of action.
  - Under Maryland law, punitive damages can only be awarded upon showing of malice.
- What does the employer stand to gain from their wrongful activity? What will it take to discourage future infractions?
  - Be detailed in describing the expected gains

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## Illustrating Loss

- Clearly illustrate the plaintiff's damages.
- Have friends, family, and others testify about the impact on the plaintiff.
  - A juror may perceive a plaintiff talking about their emotional suffering as whining or complaining.
  - A spouse testifying about the impact on the plaintiff can be more effective.

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