

# Whistleblower Reporting: Training Presentation

A Lexis Practice Advisor® Practice Note by  
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This is a presentation to provide training on handling whistleblower reports to management employees and other key stakeholders in an organization. The presentation

provides an overview of the key statutes with whistleblower protection provisions, tips for conducting effective internal investigations after receiving a report of potential wrongdoing from a whistleblower, and best practices to ensure compliance and avoid retaliation claims by whistleblowers. You can adapt this presentation to address relevant state law and other whistleblower issues applicable for the target audience. This training is intended for private employers. It includes speaker notes to facilitate your presentation.

For additional information on federal and state whistleblower laws and protections, see [Whistleblowing State and Federal Practice Notes Chart](#). For additional practice notes, annotated forms, and checklists concerning whistleblower policies, programs, and investigations, see the Whistleblowing subtask.

## Whistleblower Reporting: Training Presentation

Slide	Contents	Notes
1.	<p><b>Whistleblower Reporting:</b></p> <p><b>Training Presentation</b></p> <p>for [AUDIENCE NAME]</p> <p>by [PRESENTER]</p> <p>[COMPANY NAME]</p> <p>[DATE]</p>	<p>The presenter’s style is often as important as the substance of the presentation. This is especially true for topics like this that are highly technical. Personalize this presentation in a way that engages your audience. Break up the material (even if that means using more slides) in a way that makes sense for your audience. To further assist attendees in retaining key concepts, consider including work-appropriate analogies, references from popular culture, and pictures to keep your audience engaged.</p> <p>Keep a copy of this presentation and record the names of attendees.</p>

2.	<p><b>Overview</b></p> <ul style="list-style-type: none"> <li>• Key statutes with whistleblower protection provisions</li> <li>• Conducting effective internal investigations of whistleblower complaints</li> <li>• Best practices to ensure compliance and avoid whistleblower retaliation claims</li> </ul>	<p>When presenting, it is important to understand that each topic could be its own presentation. Make sure you convey to your audience that this presentation is a general overview of the topic and that the appropriate steps or strategies to be taken for handling whistleblower reporting depends on the particular facts and circumstances. Emphasize the importance of reasonably relying on external legal counsel and subject matter experts.</p>
3.	<p><b>Federal Whistleblower Protection Provisions Enforced by the DOL</b></p> <ul style="list-style-type: none"> <li>• Sarbanes-Oxley Act (SOX)</li> <li>• Consumer Product Safety Improvement Act</li> <li>• Energy Reorganization Act</li> <li>• Federal Railroad Safety Act</li> <li>• International Safe Container Act</li> <li>• National Transit System Security Act</li> <li>• Pipeline Safety Improvement Act</li> <li>• Surface Transportation Assistance Act</li> <li>• Occupational Safety and Health Act</li> <li>• Asbestos Hazard Emergency Response Act</li> <li>• Affordable Care Act (ACA)</li> <li>• Consumer Financial Protection Act of 2010</li> <li>• FDA Food Safety Modernization Act</li> <li>• Moving Ahead for Progress in the 21st Century Act</li> <li>• Seaman's Protection Act</li> <li>• Taxpayer First Act</li> <li>• Clean Air Act</li> <li>• Comprehensive Environmental Response, Compensation, and Liability Act</li> <li>• Federal Water Pollution Control Act</li> <li>• Safe Drinking Water Act</li> <li>• Solid Waste Disposal Act</li> <li>• Toxic Substances Control Act</li> <li>• Wendell H. Ford Aviation Investment and Reform Act</li> </ul>	<p>The Occupational Safety and Health Administration (OSHA), an agency of the U.S. Department of Labor (DOL), investigates alleged violations of whistleblower provisions in a number of different federal statutory schemes. See <a href="#">DOL, Occupational Safety and Health Administration, Whistleblower Statutes</a>.</p>

4.	<p><b>SOX Whistleblower – Coverage</b></p> <ul style="list-style-type: none"> <li>• Applies to publicly traded companies and their subsidiaries</li> <li>• Also covers “any officer, employee, contractor, subcontractor or agent” of a covered company</li> <li>• <i>Lawson v. FMR LLC</i>, 134 S. Ct. 1158 (2014)—the Supreme Court held that SOX’s whistleblower protections extend to employees of a publicly traded company’s contractors and subcontractors</li> </ul>	<p>Explain that the most commonly invoked whistleblower provision is Section 806 of the Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514.</p> <p>Section 806 of SOX applies to publicly traded companies, defined as all companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (SEA) and to all companies that are required to file reports under Section 15(d) of the SEA. 18 U.S.C. § 1514A(a).</p> <p>The Dodd-Frank Act amended the SOX anti-retaliation provision by extending its application to subsidiaries and affiliates of publicly traded companies whose financial information is included in the publicly traded company’s financial statements. <i>Id.</i>; <i>Lawson</i>, 134 S. Ct. at 1174.</p> <p>For more information on whistleblowing protections under SOX, see <a href="#">Whistleblower Protections under Dodd-Frank and Sarbanes-Oxley (SOX)</a>, <a href="#">Private Companies Regulation under Sarbanes-Oxley</a>, and Corporate Governance: Law and Practice § 13.02[2][b].</p>
5.	<p><b>SOX Whistleblower – Protected Activity</b></p> <ul style="list-style-type: none"> <li>• Employee engages in lawful whistleblowing activities when he or she: <ul style="list-style-type: none"> <li>o Provides information or investigative assistance regarding any conduct which the employee “reasonably believes” to be a violation of Sections 1341, 1343, 1344, or 1348 of the U.S. Code (which address mail fraud; wire, radio, and television fraud; and bank and securities fraud); the rules or regulations of the SEC; or any federal law provisions relating to fraud against shareholders –or–</li> <li>o Files, causes to be filed, testifies, participates in, or otherwise assists in a proceeding filed or about to be filed regarding an alleged violation of these laws and regulations</li> </ul> </li> </ul>	<p>The requirements discussed in this slide are set forth in 18 U.S.C. § 1514A(a)(1), (a)(2).</p>

6.	<p><b>SOX Whistleblower – Procedure</b></p> <ul style="list-style-type: none"> <li>• Aggrieved party must file complaint with OSHA within 180 days of adverse action.</li> <li>• Employee can pursue claim through DOL's adjudicative regime and then proceed in federal court of appeals:</li> <li>• OSHA → ALJ → ARB → Federal Appellate Court</li> <li>• Employee can “kick out” claim to federal district court (de novo) if DOL does not issue a final order within 180 days—even where an ALJ already adjudicated the claim.</li> </ul>	<p>Walk the audience through the process of SOX whistleblower claims.</p> <p>An employee cannot file a SOX whistleblower claim in court before exhausting administrative remedies. The employee must first file a complaint with OSHA. OSHA will then conduct an investigation. If the evidence supports an employee's claim of retaliation, OSHA will issue an order requiring the employer to put the employee back to work, pay lost wages, restore benefits, and provide other relief, as appropriate. The exact requirements depend on the facts of the case. If the evidence does not support the employee's claim, OSHA will dismiss the complaint.</p> <p>After OSHA issues a decision, the employer and/or the employee may request a full hearing before an administrative law judge (ALJ). A final decision by an ALJ may be appealed to the DOL's Administrative Review Board (ARB). A decision by the ARB can then be appealed to a federal appellate court.</p> <p>The procedures discussed in this slide are set forth in 29 C.F.R. § 1980.</p>
7.	<p><b>SOX Whistleblower – Employee's Burden of Proof</b></p> <ul style="list-style-type: none"> <li>• Whistleblowing was a contributing factor to the adverse action.</li> <li>• Employee must show: <ul style="list-style-type: none"> <li>○ He/she engaged in protected activity/conduct</li> <li>○ The named person knew or suspected, actually or constructively, of the employee's protected activity</li> <li>○ The employee suffered an unfavorable personnel action –and–</li> <li>○ There are circumstances sufficient to raise an inference that the protected activity was a contributing factor in the unfavorable personnel action</li> </ul> </li> </ul>	<p>Consider giving some background on the standards for SOX whistleblower claims.</p> <p>Specifically, in <i>Platone v. FLYi Inc.</i>, ARB Case No. 04-154, 2006 DOL Ad. Rev. Bd. LEXIS 89 (Sept. 29, 2006), the Bush-era ARB introduced an employer-friendly standard for a SOX whistleblower complaint, requiring the whistleblower to describe conduct that “definitively and specifically” relates to one of the six categories of unlawful acts set forth in the statute. That standard was adopted by the First, Second, Fourth, Fifth, and Ninth Circuits.</p> <p>But, in 2011, the Obama-era ARB abrogated <i>Platone</i> in <i>Sylvester v. Parexel International LLC</i>, ARB Case No. 07-123, 2011 DOL Ad. Rev. Bd. LEXIS 47 (May 25, 2011) and dramatically lowered the bar for what constitutes “protected activity” under SOX, holding that an employee's complaint need not “definitively and specifically” relate to an enumerated legal violation, and that complainants only had to show that they reasonably believed the conduct complained about violated one of the laws enumerated in SOX. Federal courts, including the Second, Third, Sixth, and Tenth Circuits, subsequently adopted the ARB's more liberal <i>Sylvester</i> standard.</p>

8.	<p><b>SOX Whistleblower – Rebutting Employer’s Showing</b></p> <p>Employers can avoid liability even if the employee meets the burden of proof by producing:</p> <ul style="list-style-type: none"> <li>• “Clear and convincing” evidence that employer would have acted the same absent the whistleblowing</li> </ul>	<p>If the employee meets his/her burden, the employer can still avoid liability if it demonstrates by “clear and convincing” evidence that it “would have taken the same unfavorable personnel action in the absence of that behavior.” 49 U.S.C. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1980.104(c).</p>
9.	<p><b>SOX Whistleblower – Remedies and Relief</b></p> <ul style="list-style-type: none"> <li>• In both the administrative hearing and court action, a prevailing employee is entitled to “all relief necessary to make the employee whole,” which can include: <ul style="list-style-type: none"> <li>o Reinstatement</li> <li>o Back pay with interest –and–</li> <li>o Compensation for “special damages” incurred, such as litigation costs, reasonable attorney’s fees, and expert witness fees</li> </ul> </li> <li>• Criminal penalties. Any person who knowingly and intentionally retaliates against an individual for providing law enforcement with truthful information relating to the commission or possible commission of a federal offense is subject to fines up to \$250,000 (\$500,000 for organizations), up to 10 years of imprisonment, or both.</li> </ul>	<p>SOX does not provide for punitive damages but note to the audience that financial costs and penalties can be significant. See 18 U.S.C. §§ 1513(e), 1514A(c).</p>
10.	<p><b>Dodd-Frank Whistleblower Provisions</b></p> <ul style="list-style-type: none"> <li>• Private rights of action for whistleblowers under the Securities and Exchange Act and the Commodity Exchange Act of 1936</li> <li>• New private right of action for whistleblowers in the financial services industry relating to consumer financial products or services</li> <li>• “Bounty” program to incentivize whistleblowers</li> </ul>	<p>Provide some context for this law. On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act.</p> <p>The Dodd-Frank Act includes significant new whistleblower incentives and protections, including the creation of SEC and Commodities Futures Trading Commission (CFTC) bounty programs for whistleblowers and the creation of a new whistleblower cause of action.</p> <p>For more information on whistleblowing protections under Dodd-Frank, see <a href="#">Whistleblower Protections under Dodd-Frank and Sarbanes-Oxley (SOX)</a>, <a href="#">Dodd-Frank Whistleblower Award Provisions</a>, and <a href="#">Registered Investment Adviser Handbook Chapter 8: Substantive Requirements (Other Securities Laws)</a> and Corporate Governance: Law and Practice § 13.02[2][b].</p>

11.	<p><b>Dodd-Frank Whistleblower Anti-retaliation Provision (Section 922)</b></p> <ul style="list-style-type: none"> <li>Employers are prohibited from retaliating against a whistleblower who: <ul style="list-style-type: none"> <li>Provided information to the SEC regarding laws it enforces</li> <li>Provided assistance in any SEC investigation or action –or–</li> <li>Made required or protected disclosures under the Sarbanes-Oxley Act of 2002; the Securities Exchange Act of 1934; or any other law, rule, or regulation subject to the jurisdiction of the SEC</li> </ul> </li> </ul>	<p>Section 922 of the Dodd-Frank Act amends the Securities Exchange Act of 1934 to add a new Section 21F.</p>
12.	<p><b>Differences between Dodd-Frank and SOX Anti-retaliation Provisions</b></p> <ul style="list-style-type: none"> <li>An employee alleging retaliation under Dodd-Frank can file suit directly in federal district court.</li> <li>The statute of limitations for Dodd-Frank claims is up to 10 years.</li> <li>Dodd-Frank allows for double back pay.</li> <li>Dodd-Frank whistleblowers must provide information to the SEC; internal reports are not covered.</li> </ul>	<p>Inform the audience that unlike under SOX, an employee alleging retaliation under Dodd-Frank need not first file a complaint with an agency and exhaust administrative remedies.</p> <p>Additionally, Dodd-Frank has a substantially longer statute of limitations than the 180-day statute provided in SOX: six years after the alleged retaliation occurs or three years after an employee knows or reasonably should have known of facts material to the violation as long as the complaint is filed within 10 years of the violation.</p> <p>Dodd-Frank also allows for greater monetary damages than SOX because of its double back pay provision.</p> <p>In contrast to Dodd-Frank, which only protects whistleblowers who report their concerns directly to the SEC, SOX also covers whistleblowers who raise their concerns internally within the company without going to the SEC. See <i>Digital Realty Tr., Inc. v. Somers</i>, 138 S. Ct. 767 (2018).</p>
13.	<p><b>SEC Enforcement of Dodd-Frank Anti-retaliation Provision</b></p> <ul style="list-style-type: none"> <li><i>Paradigm Capital Management and Candace King Weir (2014)</i> <ul style="list-style-type: none"> <li>This was the first time SEC sought to enforce the anti-retaliation provisions of Dodd-Frank.</li> <li>SEC asserted that employer retaliated against employee who had made reports of improper trades to the SEC.</li> </ul> </li> </ul>	<p>The SEC has taken the position that it has the authority to enforce Dodd-Frank's anti-retaliation provisions. See <i>Paradigm Capital Management and Candace King Weir</i>, Exchange Act Release No. 3857, 2014 SEC LEXIS 2104 (June 16, 2014).</p>

	<ul style="list-style-type: none"> <li>o Without admitting or denying wrongdoing, Paradigm and its principal agreed to pay disgorgement of \$1.7 million, prejudgment interest of \$181,771, and a civil penalty of \$300,000.</li> <li>o Whistleblower received over \$600,000 as a bounty.</li> </ul>	
14.	<p><b>SEC Enforcement of Dodd-Frank Anti-retaliation Provision (continued)</b></p> <ul style="list-style-type: none"> <li>• <i>International Game Technology (2016)</i> <ul style="list-style-type: none"> <li>o SEC announced its settlement of a whistleblower retaliation claim under Dodd-Frank for \$500,000.</li> <li>o This was a stand-alone whistleblower retaliation action—the SEC did not allege a violation of securities laws.</li> <li>o Whistleblower complained of problems with company’s cost accounting model, claiming it caused financial statements to be distorted.</li> <li>o Company conducted an investigation which refuted the complaint.</li> <li>o During the investigation, the whistleblower was removed from two opportunities and the company later terminated his employment.</li> </ul> </li> </ul>	For more information, see <i>International Game Technology</i> , Exchange Act Release No. 78991, 2016 SEC LEXIS 3688 (Sept. 29, 2016).
15.	<p><b>Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767 (2018)</b></p> <ul style="list-style-type: none"> <li>• U.S. Supreme Court unanimously ruled that individuals are not covered by the anti-retaliation provision of the Dodd-Frank Act unless they have provided information regarding a violation of law to the SEC.</li> <li>• Supreme Court declined to accord Chevron deference to the SEC’s broad interpretation of the definition of “whistleblower” because the statutory definition is “clear and conclusive” and consistent with Dodd-Frank’s core objective.</li> </ul>	If you wish to provide more background, you can note that the Court’s decision settled a circuit split on the issue. The Second and Ninth Circuits had held that a Dodd-Frank whistleblower need not report a securities law violation to the SEC and internal reports were covered, while the Fifth Circuit held that employees must provide information to the SEC to avail themselves of the anti-retaliation safeguard.

16.	<p><b>Confidentiality Agreements</b></p> <ul style="list-style-type: none"> <li>SEC Regulation 21F-17(a): <ul style="list-style-type: none"> <li>“No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . .”</li> </ul> </li> </ul>	<p>The SEC prohibits employers from using confidentiality agreements to impede employees from communicating directly with the SEC about potential securities law violations. Emphasize this point regarding the employer's risk of exposure. The SEC has issued multiple penalties based on severance or separation agreements that limited an employee's ability to communicate with the SEC or participate in an investigation.</p>
17.	<p><b>First SEC Enforcement Action – KBR Inc.</b></p> <ul style="list-style-type: none"> <li>In 2015, the SEC announced its first enforcement action against a company for including improperly restrictive language in confidentiality agreements, charging Houston-based global engineering firm KBR.</li> <li>KBR agreed to pay a \$130,000 penalty to settle charges and agreed to amend its confidentiality statement by adding language making clear that employees were free to report possible violations to the SEC and other federal agencies without KBR approval or fear of retaliation.</li> <li>Notably, the SEC was not aware of any instances of a KBR employee being prevented from communicating with the SEC about potential securities law violations nor that KBR attempted to enforce the provision.</li> </ul>	<p><i>KBR Inc.</i> required witnesses in certain internal investigation interviews to sign confidentiality statements with language warning that they could face discipline and even be fired if they discussed the matters with outside parties without the prior approval of KBR's legal department. See <i>KBR, Inc.</i>, Exchange Act Release No. 74619, 2015 SEC LEXIS 1207 (Apr. 1, 2015). Caution the management in attendance to avoid repeating this mistake.</p>
18.	<p><b>SEC Approved Language</b></p> <ul style="list-style-type: none"> <li>“Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures.”</li> </ul>	<p>The SEC's order in the <i>KBR Inc.</i> enforcement action required KBR to use this language for employees who were interviewed in the course of internal investigations.</p>



19.	<p><b>Dodd-Frank Whistleblower Bounty</b></p> <ul style="list-style-type: none"> <li>• Individuals are eligible for an award for voluntarily providing original information regarding a violation of the federal securities or commodities laws that leads to monetary sanctions exceeding \$1 million.</li> <li>• Award = 10% to 30% of the total monetary sanctions collected.</li> <li>• Since issuing the first award in 2012, the SEC has awarded approximately \$387 million to 67 whistleblowers (as of November 2019).</li> </ul>	<p>All bounty payments are made from an investor protection fund established by Congress that is financed entirely through monetary sanctions paid to the SEC.</p> <p>Note that the SEC has issued multiple penalties based on severance or separation agreements that precluded recovery of a whistleblower bounty award.</p> <p>Section 924 of Dodd-Frank required the SEC to establish a separate office to administer and enforce the SEC's whistleblower program, which is called <a href="#">The Office of the Whistleblower</a>.</p>
20.	<p><b>Dodd-Frank Whistleblower Bounty - Original Information</b></p> <ul style="list-style-type: none"> <li>• Original information must: <ul style="list-style-type: none"> <li>◦ Be derived from the independent knowledge or analysis of the whistleblower</li> <li>◦ Not be known to the SEC or Commodities Futures Trading Commission (CFTC) from any other source –and–</li> <li>◦ Not be exclusively derived from an allegation made in a judicial or administrative hearing; in a governmental report, hearing, audit, or investigation; or from the news media, unless the whistleblower is a source of the information</li> </ul> </li> </ul>	<p>The definition discussed in this slide is set forth in 17 C.F.R. § 240.21F-4(b)(1).</p>
21.	<p><b>Dodd-Frank Whistleblower Bounty - Exceptions</b></p> <ul style="list-style-type: none"> <li>• Subject to several significant exceptions (see following slide), limitations on the ability to make whistleblower submissions apply to individuals who: <ul style="list-style-type: none"> <li>◦ Are officers, directors, trustees, or partners who learn of allegations of misconduct from another or from the entity's processes for identifying, reporting, and addressing possible violations of the law</li> <li>◦ Have principal duties involving compliance or internal audit</li> </ul> </li> </ul>	<p>The exceptions discussed in this slide are set forth in 17 C.F.R. § 240.21F-4(b)(4).</p>

	<ul style="list-style-type: none"> <li>o Conduct internal investigations of possible violations –or–</li> <li>o Are employed by or associated with a public accounting firm if the information was obtained through an engagement other than an audit and relates to a violation by the client or its directors, officers, or employees</li> </ul>	
22.	<p><b>Dodd-Frank: Whistleblower Bounty – Exceptions (continued)</b></p> <ul style="list-style-type: none"> <li>• However, these individuals can be whistleblowers when: <ul style="list-style-type: none"> <li>o The individual has a reasonable basis to believe that both: <ul style="list-style-type: none"> <li>– Disclosure is required to prevent substantial injury to the financial interest or property of the entity or its investors –and–</li> <li>– The entity is engaging in conduct that will impede an investigation –and–</li> </ul> </li> <li>o At least 120 days have elapsed since the individual either: <ul style="list-style-type: none"> <li>– Provided the information to the entity's audit committee, chief legal officer (CLO), chief compliance officer (CCO), or to his or her supervisor –or–</li> <li>– Received the information, if it was received under circumstances indicating that the entity's audit committee, CLO, CCO, or the individual's supervisor was already aware of the information</li> </ul> </li> </ul> </li> </ul>	<p>The exceptions discussed in this slide are set forth in 17 C.F.R. § 240.21F-4(b)(4).</p>
23.	<p><b>Consumer Financial Services Anti-retaliation (Section 1057)</b></p> <ul style="list-style-type: none"> <li>• Protects any “covered employee” <ul style="list-style-type: none"> <li>o Any individual performing tasks related to the offering or provision of a consumer financial product or service</li> </ul> </li> <li>• Prohibits retaliation by any “covered person or service provider” <ul style="list-style-type: none"> <li>o Any firm that offers or provides a consumer financial product or service</li> </ul> </li> </ul>	<p>Section 1057 of the Dodd-Frank Act, codified at 12 U.S.C. § 5567, created a new whistleblower retaliation cause of action for employees performing tasks related to the offering or provision of consumer financial products or services.</p>

24.	<p><b>Consumer Financial Services Anti-retaliation – Coverage</b></p> <ul style="list-style-type: none"> <li>Covers employees involved in offering a “financial product or service,” which includes: <ul style="list-style-type: none"> <li>Extending credit or services</li> <li>Brokering loans or leases</li> <li>Engaging in deposit-taking activities</li> <li>Acting as a custodian of funds</li> <li>Providing check cashing, collection, or guaranty services</li> <li>Providing certain financial advisory services</li> <li>Collecting, analyzing, maintaining, or providing consumer report information</li> <li>Collecting debt</li> </ul> </li> </ul>	<p>The requirements discussed in this slide are set forth in 29 C.F.R. § 1985.101, which incorporates the definition of “financial product or service” found in 12 U.S.C. § 5481(15).</p>
25.	<p><b>Consumer Financial Services Anti-retaliation – Protected Activity</b></p> <ul style="list-style-type: none"> <li>Prohibits retaliation against employees who have: <ul style="list-style-type: none"> <li>Provided or are about to provide information to the employer, the CFPB, or any government/law enforcement agency about a violation of Dodd-Frank or any CFPB rule, order, or standard</li> <li>Testified (or will testify) in a proceeding relating to Dodd-Frank’s consumer protection provisions</li> <li>Filed any proceeding under federal consumer financial law</li> <li>Objected to or refused to participate in any activity that the employee reasonably believes to be a violation of any law, rule, standard, or prohibition enforceable by CFPB</li> </ul> </li> </ul>	<p>The requirements discussed in this slide are set forth in 12 U.S.C. § 5567(a).</p>
26.	<p><b>Consumer Financial Services Anti-retaliation – Procedure</b></p> <ul style="list-style-type: none"> <li>Accelerated administrative process: <ul style="list-style-type: none"> <li>Employee first must file a complaint with DOL within 180 days.</li> <li>DOL must conduct investigation and issue order within 60 days.</li> </ul> </li> </ul>	<p>The requirements discussed in this slide are set forth in 12 U.S.C. § 5567(c).</p>

	<ul style="list-style-type: none"> <li>o Employee can file de novo federal court lawsuit if no final order is issued within 210 days of the filing of the complaint or within 90 days of a written determination.</li> <li>o Either party may appeal a final DOL order to a federal appellate court.</li> </ul>	
27.	<p><b>Commodity Exchange Act Anti-retaliation (Section 748)</b></p> <ul style="list-style-type: none"> <li>• Protects individuals who provide information to the CFTC relating to a violation of the Commodity Exchange Act</li> <li>• Does not require employee to first exhaust administrative remedies <ul style="list-style-type: none"> <li>o Whistleblower can file claim directly in federal court within two years after the alleged retaliation occurs.</li> </ul> </li> </ul>	Section 748 of the Dodd-Frank Act, codified at 7 U.S.C. § 26, amended the Commodity Exchange Act to create a new whistleblower retaliation cause of action.
28.	<p><b>False Claims Act</b></p> <ul style="list-style-type: none"> <li>• Allows persons and entities with evidence of fraud against federal programs or contracts to sue the wrongdoer on behalf of the U.S. government</li> <li>• Gives the government the right to intervene and join the action</li> <li>• Allows the private plaintiff (called the “relator”) to proceed on his or her own if the government declines</li> <li>• Referred to as a qui tam action</li> </ul>	For more information on whistleblower protections under the False Claims Act, see <a href="#">Whistleblower Protection Provisions under the False Claims Act</a> .
29.	<p><b>False Claims Act – Remedies</b></p> <ul style="list-style-type: none"> <li>• A qui tam plaintiff can receive between 15% to 30% of the total recovery from the defendant, whether through a favorable judgment or settlement.</li> <li>• In a retaliation lawsuit, the relator can recover: <ul style="list-style-type: none"> <li>o Reinstatement</li> <li>o Double back pay</li> <li>o Compensation for any special damages, including litigation costs and reasonable attorney’s fees</li> </ul> </li> </ul>	The requirements discussed in this slide are set forth in 31 U.S.C. § 3730.

30.	<p><b>Affordable Care Act</b></p> <ul style="list-style-type: none"> <li>• Protects employees from retaliation for reporting violations of the various reforms found in the ACA, such as the prohibition on denying health coverage because of a person's preexisting medical conditions or the cap on out-of-pocket expenses</li> <li>• Also protects employees from retaliation for merely receiving benefits under the ACA even if they have not complained about perceived violations of the law</li> <li>• Must file complaint with OSHA within 180 days of adverse action and exhaust administrative remedies before filing suit in U.S. District Court, which hears the case de novo</li> </ul>	<p>The requirements discussed in this slide are set forth in 29 U.S.C. § 218c.</p> <p>Explain that the whistleblower provisions of the ACA are unique in that an employee need not "blow the whistle" (i.e., engage in protected activity) to receive protection from retaliation under the statute.</p> <p>For more information on whistleblower provisions under the ACA, see <a href="#">ACA Whistleblower Protections</a>.</p>
31.	<p><b>State Whistleblower Laws</b></p> <ul style="list-style-type: none"> <li>• <b>California:</b> California Labor Code § 1102.5</li> <li>• <b>New York:</b> New York Labor Law §§ 740, 741</li> <li>• <b>New Jersey:</b> New Jersey Conscientious Employee Protection Act (CEPA), N.J.S.A. §§ 34:19-1 to 34:19-8</li> </ul>	<p>Provide additional detail on these statutes if time allows. Cal. Lab. Code § 1102.5 is California's general whistleblower statute. The law protects whistleblowers who either (1) disclose information to a governmental or law enforcement agency based on a reasonable belief that the employer is violating a statute, rule, or regulation; (2) refuse to participate in an employer activity that would result in a violation of a statute, rule, or regulation; (3) report suspected illegal behavior internally; or (4) report suspected illegal behavior externally to any "public body conducting an investigation, hearing, or inquiry." California also recognizes a common law cause of action for retaliation in violation of a California public policy, sounding in tort.</p> <p>New York Labor Law (N.Y.L.L.) § 740 protects employees who report a violation of the law that either "creates and presents a substantial and specific danger to the public health or safety, or . . . constitutes health care fraud." N.Y.L.L. § 741 is a parallel whistleblower statute enacted to provide healthcare employees with additional protections.</p> <p>CEPA makes it illegal to retaliate against whistleblowers who disclose or threaten to disclose an employer's activity where the employee reasonably believes that the activity is a violation of a law or regulation. N.J. Stat. §§ 34:19-1 to 34:19-14.</p>

		<p>Inform the audience that many other states have whistleblower laws as well and consider amending this slide to discuss the laws in the jurisdiction where the employer operates. For more information on state whistleblower laws, see <a href="#">Whistleblowing State and Federal Practice Notes Chart</a>.</p>
32.	<p><b>Conducting Internal Investigations - Why Investigate?</b></p> <ul style="list-style-type: none"> <li>• Comply with duty to investigate.</li> <li>• Determine whether company violated law or policy.</li> <li>• Ensure employees feel comfortable that complaints are taken seriously.</li> </ul>	<p>SOX requires companies to establish procedures for receiving and addressing complaints of potential misconduct.</p> <p>Once the company becomes aware of potential misconduct, failure to adequately investigate can itself constitute a violation of SOX.</p> <p>For additional guidance on conducting whistleblower investigations, see <a href="#">Whistleblower Policies, Programs, and Investigations</a>, <a href="#">Whistleblower Internal Investigations: Special Considerations</a>, and <a href="#">Workplace Investigations: Step-by-Step Guidance</a>.</p>
33.	<p><b>Before You Investigate, Ask These Key Questions</b></p> <ul style="list-style-type: none"> <li>• Why is the company conducting the investigation?</li> <li>• What laws and policies, if any, govern the investigation?</li> <li>• Who should conduct the investigation?</li> <li>• Who should have access to the evidence and results?</li> <li>• Will the evidence regarding the investigation potentially be offered as evidence?</li> </ul>	<p>Explain that companies should ensure that investigations are properly scoped and conducted by qualified personnel.</p> <p>State further that reporting and investigating mechanisms should be sufficiently funded.</p>
34.	<p><b>Develop an Investigation Plan</b></p> <ul style="list-style-type: none"> <li>• Collect and preserve all documents relating to the alleged violation.</li> <li>• Determine the appropriate investigator (e.g., legal counsel or outside consultant). <ul style="list-style-type: none"> <li>◦ Consider privilege implications.</li> <li>◦ Consider issue of trial witnesses.</li> </ul> </li> <li>• Identify who is responsible for each task.</li> <li>• Determine the scope and goals of the investigation.</li> </ul>	<p>Explain that every investigation should be tailored to address the specific risks implicated by the report.</p>

	<ul style="list-style-type: none"> <li>• Outline the steps of the investigation.</li> <li>• Identify the managers who have a “need to know.”</li> <li>• Determine interviewees and order.</li> <li>• Determine whether a report will be provided.</li> <li>• Schedule interviews.</li> </ul>	
35.	<b>Conducting an Effective Investigation</b> <ul style="list-style-type: none"> <li>• Interview accused and witnesses.</li> <li>• Review pertinent documents.</li> <li>• Prepare chronology of relevant events.</li> <li>• Determine, based on the investigation, whether a violation occurred.</li> <li>• Determine appropriate remedial steps.</li> </ul>	<p>State that in forming conclusions, the company and its counsel should consider the observations and statements of witnesses and documentary evidence and try to determine the motivations and credibility of the complainant and witnesses.</p>
36.	<b>Basic Interview Techniques</b> <ul style="list-style-type: none"> <li>• Advise the interviewee of the general purpose of interview and your role as investigator.</li> <li>• Advise the interviewee that the company will not tolerate retaliation (refer to company policy or code of conduct).</li> <li>• Do not promise absolute confidentiality.</li> <li>• Use open-ended, nonleading questions and neutral terms.</li> <li>• Follow up with more directed questions.</li> </ul>	<p>Explain that it is important to keep one's own opinions and feelings private when conducting the interview as the only purpose of the interview is to gather information.</p> <p>The investigator should make sure to review the complainant's specific allegations and explore all contradictions, unclear answers, biases, etc.</p>
37.	<b>Documenting the Investigation</b> <ul style="list-style-type: none"> <li>• Take interview notes, including: <ul style="list-style-type: none"> <li>◦ Date</li> <li>◦ Time</li> <li>◦ Location</li> <li>◦ Parties present</li> <li>◦ Identity of notetaker</li> <li>◦ Length of interview</li> </ul> </li> <li>• Bring a witness responsible for taking notes.</li> <li>• Ensure completion and accuracy.</li> <li>• Preserve documents and electronically stored information (ESI).</li> </ul>	<p>For more information on documenting investigations, see <a href="#">Documenting Key Events in Workplace Investigations</a>.</p>

38.	<p><b>The Noncooperative Witness and Witness Right to Representation</b></p> <ul style="list-style-type: none"> <li>• Employees have a duty to cooperate with the investigation and may be disciplined for failing to cooperate.</li> <li>• An employee's request to leave the interview should be granted.</li> <li>• Document noncooperation (e.g., refusal to talk, refusal to provide names of witnesses, hostility, etc.)</li> </ul>	
39.	<p><b>Interviewing the Accused</b></p> <ul style="list-style-type: none"> <li>• Anticipate that the accused will be hostile and defensive.</li> <li>• Explain the company's anti-retaliation policy. <ul style="list-style-type: none"> <li>◦ Note, however, that it is not a "shield" against the consequences of improper conduct.</li> </ul> </li> <li>• Discuss confidentiality—it can't be guaranteed but will be maintained to the extent practicable.</li> <li>• Maintain impartiality and objectivity.</li> <li>• Keep channel of communication open.</li> </ul>	<p>For more information on interviewing witnesses in workplace investigations, see <a href="#">Interviewing Employees in Workplace Investigations</a>.</p> <p>For more information on confidentiality in workplace investigations, see <a href="#">Confidentiality in Workplace Investigations</a>.</p>
40.	<p><b>Who Should Conduct the Investigation? Attorney-Client Privilege Issues</b></p> <ul style="list-style-type: none"> <li>• Think about how your investigator would fare as a witness?</li> <li>• HR representative as investigator: <ul style="list-style-type: none"> <li>◦ Attorney-client privilege attaches if investigation is conducted at direction of counsel in anticipation of litigation.</li> </ul> </li> <li>• Could it "hit too close to home" for HR representative to remain impartial in some instances?</li> </ul>	<p>For more information on attorney-client privilege in workplace investigations, see <a href="#">Attorney-Client Privilege and Work Product Protection in Workplace Investigations</a>.</p>
41.	<p><b>Attorney-Client Privilege Issues</b> (continued)</p> <ul style="list-style-type: none"> <li>• Outside counsel as investigator <ul style="list-style-type: none"> <li>◦ Attorney-client privilege</li> <li>◦ Privilege waived if employer uses investigation as part of its defense</li> <li>◦ Retain independent counsel for this purpose?</li> </ul> </li> </ul>	<p>Make the point that if an employer anticipates that the complainant will file a whistleblower claim, it is generally recommended that the investigation be conducted by different attorneys than those who will defend the company against the claim to avoid the appearance that the investigation was not independent.</p>



42.	<p><b>Final Report</b></p> <ul style="list-style-type: none"> <li>• Determine upfront if a final report is appropriate</li> <li>• Report features: <ul style="list-style-type: none"> <li>o Statement of purpose</li> <li>o Privileged</li> <li>o Scope of investigation</li> <li>o Investigative process</li> <li>o Factual findings</li> <li>o Conclusions</li> <li>o Recommendations, if appropriate</li> </ul> </li> </ul>	<p>Note that the company should discuss all of this with the investigator before preparing any report.</p>
43.	<p><b>Top 10 Mistakes in Conducting Investigations</b></p> <ol style="list-style-type: none"> <li>1. Delay, delay, delay . . . and then failing to follow up with the complainant</li> <li>2. Entering the investigation with a pre-conceived notion as to what happened and who is credible</li> <li>3. Giving witnesses strict assurances of confidentiality</li> <li>4. Intimidating witnesses</li> <li>5. Honoring a request that you do not conduct an investigation, taking certain steps in the investigation, or reprimanding the subject</li> </ol>	
44.	<p><b>Top 10 Mistakes in Conducting Investigations</b> (continued)</p> <ol style="list-style-type: none"> <li>6. Waiving privilege by forwarding communications outside of the control group</li> <li>7. Not retaining an expert through counsel and not documenting that he or she is being retained so that counsel can provide legal advice</li> <li>8. Mixing business and legal communications in outside counsel's communications with in-house counsel</li> <li>9. Recording or making verbatim transcripts of interviews</li> <li>10. Interviewing employees without a witness present</li> </ol>	

45.	<p><b>Best Practices to Ensure Compliance</b></p> <ul style="list-style-type: none"> <li>• Policies <ul style="list-style-type: none"> <li>o Maintain a code of conduct and other policies that reflect and address the spectrum of risks the company faces and create a “culture of compliance.”</li> <li>o Consult business units prior to rolling out new or revised policies to ensure that policies are designed to address issues that actually arise in the company.</li> <li>o Reinforce policies and procedures through the company’s internal controls systems.</li> </ul> </li> </ul>	<p>Explain that companies can foster a “culture of compliance” through messaging from leaders regarding core values and ensuring that the workforce is aware of how ethical conduct is valued and that employees will be held accountable for misconduct.</p> <p>State further that companies should continuously review and evolve their policies and procedures to ensure that they keep pace with developments in the business, legal, and regulatory landscape.</p>
46.	<p><b>Best Practices to Ensure Compliance</b> (continued)</p> <ul style="list-style-type: none"> <li>• Training <ul style="list-style-type: none"> <li>o Conduct appropriately tailored training to ensure that the culture of compliance is integrated at all levels of the company.</li> <li>o Tailored training is especially important for high-risk employees.</li> <li>o Supervisory employees should receive different or supplementary training tailored to risks in the areas for which they are responsible.</li> </ul> </li> </ul>	<p>Explain that training should be tailored to address lessons learned from prior compliance incidents.</p> <p>Companies should consider testing employees on what they have learned in training and addressing employees who fail all or a portion of the training.</p> <p>Assess whether employees know when to seek advice and whether they would be willing to do so.</p>
47.	<p><b>Best Practices to Ensure Compliance</b> (continued)</p> <ul style="list-style-type: none"> <li>• Confidential reporting structure <ul style="list-style-type: none"> <li>o Implement a mechanism by which employees can anonymously or confidentially report allegations of a breach of the company’s code of conduct, company policies, or suspected or actual misconduct.</li> <li>o Ensure investigations of any reports are independent, objective, appropriately conducted, and properly documented.</li> <li>o Implement a process for monitoring the outcome of investigations and ensuring accountability for the response to any findings or recommendations.</li> </ul> </li> </ul>	<p>You may consider mentioning that many companies utilize an anonymous hotline managed by a third party as a mechanism for the submission of complaints. See <a href="#">Whistleblowing Hotline Creation and Administration Checklist</a>.</p> <p>State that companies should periodically analyze the reports or investigation findings for patterns of misconduct or other red flags for compliance weaknesses.</p>

48.	<p><b>Best Practices to Ensure Compliance</b> (continued)</p> <ul style="list-style-type: none"> <li>• Disciplinary measures and incentives <ul style="list-style-type: none"> <li>o Maintain clear, consistent, and fair disciplinary procedures while providing positive incentives for demonstrating leadership in ethics and compliance, such as promotions and bonuses.</li> <li>o Communications to employees should make clear that unethical conduct is not tolerated and will bring swift consequences, regardless of the position or title of the employee who engages in the conduct.</li> </ul> </li> </ul>	<p>Some companies have also made compliance a significant metric for management bonuses and/or have made working on compliance a means of career advancement.</p> <p>For additional guidance on whistleblower programs and policies, see <a href="#">Whistleblower Policies, Programs, and Investigations</a>.</p>
49.	<p><b>Best Practices to Avoid Whistleblower Retaliation Claims</b></p> <ul style="list-style-type: none"> <li>• Use objective, job-related criteria for decision-making.</li> <li>• Continue to treat the whistleblower the same as before and as other employees.</li> <li>• Be discrete! Only share information with necessary parties (do not gossip).</li> <li>• Consult Human Resources and employment counsel before taking any adverse employment action with respect to the employee.</li> <li>• Ensure any employment action is not only fair in fact, but also fair in appearance.</li> </ul>	<p>For additional guidance on avoiding retaliation claims, see <a href="#">Retaliation Claim Avoidance</a>.</p>
50.	<p><b>Questions?</b></p> <p>[PRESENTER CONTACT INFORMATION]</p>	

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### **Harris Mufson, Partner, Proskauer Rose LLP**

Harris M. Mufson is a partner in Proskauer's Labor & Employment Law Department, where he serves as co-head of the Firm's Whistleblowing & Retaliation Practice Group and the Disability, Accommodation & Leave Management Practice Group. He is highly regarded as a trusted advisor to clients in a wide range of industries regarding significant employment issues. Harris has vast expertise in employment matters, representing employers in disputes regarding discrimination and retaliation, whistleblowing, sexual harassment, wrongful discharge, defamation, breach of contract, wage and hour, and restrictive covenants. In addition to litigating, Harris counsels clients on compliance with employment-related laws, as well as the development, implementation and enforcement of personnel policies and procedures. Additionally, he has conducted numerous internal investigations regarding sensitive employment matters.

Clients have praised Harris' ability to craft practical legal solutions to complex problems. Recognized as a thought leader in the industry, Harris has delivered numerous seminars before the American Bar Association on key developments in employment laws. He is a co-editor of Proskauer's Whistleblower Defense blog, which reports on key developments in federal and state whistleblower laws. Harris is also a frequent contributor on "The Proskauer Brief", a podcast in which he provides his perspective on cutting-edge labor and employment issues. As a result of Harris' extraordinary talents, he has been recognized as a "Rising Star" by *New York Super Lawyers – Metro Edition* every year since 2014.

### **Pinny Goldberg, Associate, Proskauer Rose LLP**

Pinny Goldberg is an associate in the Labor & Employment Law Department. Pinny represents employers in a broad array of matters before federal and state courts, FINRA and other arbitration panels, and administrative agencies, including the EEOC and its state equivalents, and in pre-litigation negotiations. Matters he works on include discrimination and harassment, wage and hour, wrongful discharge, whistleblowing and retaliation, covenants not to compete, breaches of fiduciary duty, unjust enrichment, and tort and contract claims.

In addition to handling litigation and dispute resolution, Pinny regularly advises clients on a wide variety of employment issues, including drafting, reviewing and revising handbooks and workplace policies. He also addresses questions and concerns related to hiring, wage and hour issues, employee leave, performance problems, terminations of employment, and separation agreements and releases.

Prior to joining Proskauer, Pinny was a Labor and Employment associate at Seyfarth Shaw LLP. While in law school, he served as an editor for the *Cardozo Law Review*.

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