INTRODUCTION

Whistleblowers—those who make disclosures to reveal abuses, wrongdoing, or dangers that threaten the public interest—are increasingly visible in today's workplace and society. Names such as Daniel Ellsberg, Karen Silkwood, Sherron Watkins, Bradley Manning, and Edward Snowden are widely known, and engender strong emotions. Indeed, sharp disagreements exist as to whether whistleblowers are heroes or villains, or some combination of the two. But not all whistleblowers end up on the cover of a newspaper, or become the subject of a Hollywood movie. Everyday employees who report concerns have historically been and continue to be an effective means of identifying illegality, corruption and threats to public health, safety and the environment because of their insider knowledge and experience. And yet, it is undeniable that disclosing confidential information can have very serious and negative effects on industry, privacy, and even national security. Thus, controversies abound, particularly in the government sector, about whether a particular whistleblower is a hero or a traitor, a conscientious employee or a disloyal troublemaker. Either way, it seems clear that state and federal legislative efforts of the past decade or two to incentivize and protect whistleblowers reflect a view that whistleblowers are often the best source of information about waste, fraud and abuse in the public sector, and can help promote institutional accountability, compliance and safety in the private sector.

While the term "whistleblower" is relatively new—some claim that consumer advocate Ralph Nader coined the term during the 1970s[1]—the concept goes back over a century in the United States. In 1863, Congress passed the False Claims Act ("FCA"),[2] also known as the "Lincoln Law," during the Civil War to deter fraudulent procurement activities by government contractors.[3] The FCA prohibits any person from presenting a "false or fraudulent claim for payment or approval" to the United States,

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[1] See Whistle Blowing: The Report of the Conference on Professional Responsibility (Ralph Nader et al. eds., 1972).

[2] See generally Chapter 1 *infra*.

[3] See Act of March 2, 1863, ch. 67, § 1, 12 Stat. 696-697, codified at 31 U.S.C. §§ 3729-3733.

and allows the federal government to obtain reimbursement for false or fraudulent claims for payment.[4] As part of the FCA, Congress included a *qui tam* provision, which allowed individuals to sue companies and individuals who were defrauding the government on the government's behalf.[5] The phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*" translates roughly to "he who brings an action for the king as well as for himself." As originally drafted in 1863, the FCA provided for double damages and a $2,000 fine for each false claim submitted. Those who filed *qui tam* actions, called "relators," were entitled to receive fifty percent of the amount the government recovered as a result of the action.[6] Thus, as it was drafted, the FCA provided incentives to those who would expose fraud on the government.

The whistleblower incentives of the FCA remained largely unchanged until 1943, when, in response to perceived "parasitic lawsuits" by relators during wartime, and in deference to the Department of Justice's claim to sole authority to prosecute fraud cases, Congress amended the statute and reduced the relator's share of the recovery significantly.[7] Congress also added a provision that prevented a whistleblower from filing a *qui tam* action if the information regarding fraud was already in the possession of a government official, even if the government was not taking any action to address the wrongdoing. After these amendments, *qui tam* actions under the FCA were effectively eliminated for the next several decades.[8] The FCA reemerged in the 1980s, as defense spending associated with the Cold War and other conflicts skyrocketed, and with it, reports of fraud, waste and abuse by government contractors.[9] In response, Congress amended the FCA in a number of important respects: an increased relator's share; recovery of treble damages; increased penalties for each false claim; recovery of attorneys' fees and expenses for the relator; and protection for relators from retaliation for "blowing the whistle."[10] As a result of these amendments, there was a rapid expansion of *qui tam* suits to enforce the FCA.[11]

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[4] 31 U.S.C. § 3729(a).

[5] 31 U.S.C. § 3730(b)(1).

[6] See Act of March 2, 1863, ch. 67 §§ 1, 3, 4, 6, 12 Stat. 696-698.

[7] Pub. L. No. 213, ch. 377, 57 Stat. 608 (Dec. 23, 1943); 31 U.S.C. § 232(c).

[8] United States *ex rel.* Springfield Terminal Railway Co. v. Quinn, 14 F.3d 645, 650 (1994) (noting that the 1943 amendments "substantially decreased the use of *qui tam* provisions to enforce the FCA . . . an courts greeted those *qui tam* suits that did arise with considerable caution").

[9] Doyle, "Qui Tam: The False Claims Act and Related Federal Statutes," p. 7, Congressional Research Service, R40785, (2009), available at https://www.fas.org/sgp/crs/misc/R40785.pdf (last visited Nov. 30, 2015).

[10] Pub. L. No. 99-562, 100 Stat. 3153 (Oct. 27, 1986).

[11] Department of Justice, Fraud Statistics—Overview October 1, 1987 - September 30, 2014 (Nov. 20, 2014), available at http://www.justice.gov/sites/default/files/civil/legacy/2013/12/26/C-FRAUDS_FCA_Statistics.pdf (last visited Nov. 30, 2015).

In addition to the financial incentives offered by the FCA, the anti-retaliation provisions added to the statute in 1986 reflected a growing awareness of and attention to the role of whistleblowers in identifying illegal conduct, and a desire to afford such individuals protection from reprisal for their actions. The most rapid development of whistleblower protections has generally occurred over the last thirty to forty years. The 1970s and 1980s, for example, saw the passage of a number of statutes that reflected an increasing emphasis on the role of public and private whistleblowers, arising in the context of some of the specific concerns of the time: environmental protection, nuclear power, transportation developments, increased military spending, and banking irregularities.

By the time President Richard Nixon signed an executive order creating the Environmental Protection Agency ("EPA") in 1970, the environmental movement had firmly taken hold. Over the next decade and a half, Congress enacted or revised numerous statutes concerning natural resources and public health and safety—each of which contain an anti-retaliation provision.[12] The Clean Air Act, originally passed in 1963, was amended twice during the 1970s to address emerging pollution concerns.[13] In 1970, Congress amended the Solid Waste Disposal Act, which regulated municipal waste-disposal technology.[14] The Occupational Safety and Health Act of 1970 contained protections for employees who report unsafe or unhealthy working conditions.[15] The Federal Water Pollution Control Act was amended significantly in 1972, and along with the Clean Water Act of 1977 and the Water Quality Act of 1987, it created a structure for regulating the discharge of pollution into navigable or surface waters.[16] The Energy Reorganization Act of 1974, which established the Nuclear Regulatory Commission, responded to the growing use of nuclear energy for civilian and military purposes.[17] The Safe Drinking Water Act of 1974 allowed the federal government to set quality standards for the nation's public drinking water systems.[18] The Toxic Substances Control Act, enacted in 1976, granted the EPA the power to regulate and monitor the production, importation, use, and disposal of chemicals and substances that could adversely

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[12] See generally, Chapter 5 *infra*.

[13] Pub. L. No. 91-604, 84 Stat. 1676 (Dec. 31, 1970); Pub. L. No. 90-148, 81 Stat. 485 (Nov. 21, 1967); Pub. L. No. 95-95, 91 Stat. 685 (Aug. 7, 1977); Pub. L. No. 101-549, 104 Stat. 2399 (Nov. 15, 1990); 42 U.S.C. § 7401 note.

[14] Pub. L. No. 91-512, 84 Stat. 1227 (Oct. 26, 1970).

[15] Pub. L. No. 91-596, 84 Stat. 1590 (Dec. 29, 1970).

[16] Pub. L. No. 92-500, 86 Stat. 816 (Oct. 18, 1972), 33 U.S.C. §§ 1251 *et seq.*; Pub. L. No. 95-217, 91 Stat. 1566 (Dec. 22, 1977); Pub. L. No. 100-4, 101 Stat. 7 (Feb. 4, 1987), 33 U.S.C. § 1251 note.

[17] Pub. L. No. 93-438, 88 Stat. 1233 (Oct. 11, 1974); 42 U.S.C. §§ 5801 *et seq.*

[18] Pub. L. No. 93-523, 88 Stat. 1660 (Dec. 16, 1974); 42 U.S.C. § 201 note.

impact human health and the environment.[19] The Comprehensive Environmental Response, Compensation and Liability Act of 1980, passed in the wake of discoveries in the 1970s of uncontrolled toxic-waste dumps, established regulations for hazardous waste sites.[20] The Asbestos Hazard Emergency Response Act of 1986 required local educational agencies to take steps to protect students and staff from harmful asbestos exposure.[21]

Similarly, Congress passed a number of statutes during this time that applied to whistleblowers in the transportation industry.[22] The Federal Railroad Safety Act of 1970 was amended in 1980 to add anti-retaliation protections for employees.[23] The International Safe Container Act of 1977 imposed safety regulations on the design of cargo containers moving in international trade.[24] The Surface Transportation Assistance Act of 1982 responded to concerns regarding safety in the trucking industry.[25] The Seaman's Protection Act, enacted in 1984, prohibited discharge or demotion of a seaman for reporting violations of maritime regulations to the Coast Guard.[26]

Other federal whistleblower statutes passed during the 1970s and 1980s reflected the dramatic increase in military and defense spending and the growing concern about fraud by government contractors.[27] The Defense Contractor Whistleblower Protection Act, which was passed in 1986, created anti-retaliation protections for Department of Defense contractors who report illegal activity and misconduct by their employers.[28] The Major Fraud Act of 1988 ("MFA") criminalizes fraud on the government and protects individuals from retaliation for lawful acts done in furtherance of criminal prosecution under the statute.[29] The Military Whistleblower Protection Act of 1988 ("MWPA") protects members of the armed forces from retaliation for reporting any of a number of enumerated acts of misconduct.[30] The Whistleblower Protection Act of 1989 ("WPA"), which amended the Civil Service Reform Act of 1978, provides public employees with

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[19] Pub. L. No. 94-469, 90 Stat. 2003 (Oct. 11, 1976); 15 U.S.C. §§ 2601 *et seq.*

[20] Pub. L. No. 96-510, 94 Stat. 2767 (Dec. 11, 1980); 42 U.S.C. § 9601 note.

[21] Pub. L. No. 99-519, 100 Stat. 2970 (Oct. 22, 1986); 15 U.S.C. §§ 2651 *et seq.*

[22] See generally, Chapter 6 *infra*.

[23] Pub. L. No. 91-458, Title II, 84 Stat. 971 (Oct. 16, 1970), as amended by Pub. L. No. 96-423, § 10, 94 Stat. 1811, 1815 (Oct. 10, 1980); 49 U.S.C. § 20101.

[24] Pub. L. No. 95-208, 91 Stat. 1475 (Dec. 13, 1977).

[25] Pub. L. No. 97-424, 96 Stat. 2097 (Jan. 6, 1983); 29 C.F.R. pt. 1978.

[26] Coast Guard Authorization Act of 1984, Pub. L. No. 98-557, § 13(a), 98 Stat. 2860, 2863 (Oct. 30, 1984), 46 U.S.C. § 2114, as amended by Pub. L. No. 111-281, Title VI, § 611(a), 124 Stat. 2905, 2969 (Oct. 15, 2010).

[27] See generally, Chapter 7 *infra*.

[28] Pub. L. No. 99-500, § 942, 100 Stat. 1783 (Oct. 18, 1986); 10 U.S.C. § 2409.

[29] Pub. L. No. 100-700, 102 Stat. 4631 (Nov. 19, 1988); 18 U.S.C. § 1031(h).

[30] 10 U.S.C. § 1034.

protection from retaliation for blowing the whistle on fraud, waste and abuse.[31]

As a corollary to these federal statutes, many states in the U.S. have passed their own laws to protect whistleblowers.[32] These statutes augment federal protections, or create state analogues of their federal counterparts. In addition, most states recognize a common law cause of action for employees terminated in violation of the public policy of that jurisdiction. These tort claims serve as a narrow exception to the general doctrine of at-will employment, however, and are often unavailable where a statutory remedy already exists. Nevertheless, by the 1980s and into the 1990s, employees in public and private spheres, across industries, could often find protection against retaliation for raising concerns about issues of illegality, corruption or fraud, and threats to public health, safety and the environment. Because these protections are applicable only to certain industries, however, or to certain locations, coverage was uncertain, and often absent in the case of a general corporate whistleblower.

The patchwork nature of protection for whistleblowers provided in federal and state law became apparent in the wake of the Enron scandal in 2001. Congressional testimony revealed that when an internal Enron accountant complained of financial improprieties to the energy company's CEO, the company sought and received advice from its counsel that no law prevented the discharge of the accountant.[33] The company's counsel was correct that no federal or state law protected the employee from retaliation for raising concerns—a fact seized upon by a bipartisan Congress to enact expansive whistleblower protections in the Sarbanes Oxley Act of 2002 ("SOX") and provide a cause of action to employees of publicly traded companies who suffered retaliation because they reported fraud.[34] Not only did SOX implement reforms over the financial and banking industries after the Enron and WorldCom scandals, it also provided the broadest protections then available for private-sector whistleblowers. The Act was generally seen as a watershed moment for whistleblowers.

SOX also served as a model for subsequent whistleblower legislation, and what followed was an array of new federal statutes that contained similar whistleblower-friendly provisions related to burden of proof, remedies, reporting mechanism, and district court review. These statutes include the FDA Food Safety Modernization Act ("FSMA"),[35]

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[31] Pub. L. No. 101-12, 103 Stat. 16 (April 10, 1989); Pub. L. No. 103-424, 108 Stat. 4361 (Oct. 29, 1984); Pub. L. No. 112-199, 126 Stat. 1465 (Nov. 27, 2012) (codified, as amended, in various sections of Title 5 U.S.C.).

[32] See generally, Chapter 8 *infra*.

[33] S. Rep. No. 107-146, 107th Cong, 2nd Sess. 5, 107 S. Rpt. 146 (LEXIS) (May 6, 2002).

[34] 18 U.S.C. § 1514A (2006).

[35] Pub. L. No. 111-353, 124 Stat. 3885 (Jan. 4, 2011); 21 U.S.C. § 2201 note.

the Patient Protection and Affordable Care Act ("ACA"),[36] the American Recovery and Reinvestment Act of 2009 ("ARRA"),[37] the Consumer Product Safety Improvement Act of 2008 ("CPSIA"),[38] the National Transit System Security Act of 2007 ("NTSSA"),[39] and the Pipeline Safety Improvement Act of 2002 ("PSIA").[40] During the past decade alone, Congress has also amended several statutes to broaden their reach, including the Coast Guard Authorization Act of 2010,[41] the Energy Policy Act of 2005,[42] the Fraud Enforcement and Recovery Act of 2009,[43] and the Rail Safety Improvements Act of 2008.[44] SOX also appeared to spur a number of states to create or strengthen whistleblower protections for private and public employees.[45] In addition, SOX required publicly-traded corporations to adopt a code of ethics, and was effective in influencing corporations to institute other measures to better ensure compliance and encourage employees to report issues that arise.

The trend toward greater protection for whistleblowers has continued in recent years. Among other things, administrative judges appointed to the U.S. Department of Labor Administrative Review Board ("ARB") by President Barack Obama have issued decisions reflecting a more expansive interpretation of SOX, and Congress enacted additional whistleblower protections in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd Frank").[46]

Dodd-Frank was passed in response to the subprime mortgage debacle and financial crisis of 2008/2009, and was yet another effort by Congress to improve accountability and transparency in the financial system, protect consumers from abusive practices, and empower whistleblowers, among other purposes. Dodd Frank contains its own anti-retaliation provision and amends SOX to provide for, among other things, a longer statute of limitations, the right to a jury trial, expanded coverage, and a "kick out" provision to allow for filing in federal court.[47] In an attempt to further encourage whistleblowers, Congress also imported the incentive model of the FCA and the Internal Revenue Service ("IRS") whistleblower program to Dodd Frank, and created whistleblower programs related to the Securities

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[36] Pub. L. No. 111-148, 124 Stat. 119 (March 23, 2010); 42 U.S.C. § 18001 note.
[37] Pub. L. No. 111-5, § 1553, 123 Stat. 115 (Feb. 17, 2009).
[38] Pub. L. No. 110-314, 122 Stat. 3016 (Aug. 14, 2008); 15 U.S.C. § 2051 note.
[39] Pub. L. No. 110-53, Title XIV, 121 Stat. 400 (Aug. 3, 2007); 29 C.F.R. pt. 1982.
[40] Pub. L. No. 107-355, 116 Stat. 2985 (Dec. 17, 2002); 29 C.F.R. pt. 1981.
[41] Pub. L. No. 111-281, Title VI, § 611(a), 124 Stat. 2905 (Oct. 15, 2010).
[42] Pub. L. No. 109-58, 119 Stat. 594 (Aug. 8, 2005); 42 U.S.C. § 15801 note.
[43] Pub. L. No. 111-21, § 4(d), 123 Stat. 1617 (May 20, 2009).
[44] Pub. L. No. 110-432, 122 Stat. 4848, 4892 (Oct. 16, 2008).
[45] See generally, Chapter 8 *infra*.
[46] Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010); 12 U.S.C. § 5301 note.
[47] See generally, Chapter 3 *infra*.

and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC"), both of which provide a financial reward to employees whose information resulted in a successful enforcement action by the government.[48] These programs have not been without controversy, however, as the business community has expressed concerns that such programs encourage individuals not to report internally (which would provide a company the opportunity to address a problem), but rather encourage employees to collect information and then report perceived wrongdoing externally, in order to seek a financial reward.[49]

While the general trend in the law has been toward increased incentives and protections for would-be whistleblowers, debate over the effectiveness of whistleblowers and the consequences of the proliferation of whistleblower laws continues. There is no doubt that insiders are the best source of information about waste, fraud and abuse in the public sector, and are critical to promoting institutional accountability, compliance and safety in the private sector. It is also true that individuals may cause serious harm by raising unfounded allegations or by recklessly disseminating information, and that over-regulation of employment decisions makes it difficult to efficiently manage a business. It is undeniable that some employees experience retaliation for complaining about fraud or safety violations, while others are appropriately disciplined for unrelated failings. And perhaps clearest of all is the fact that no statutory or common law whistleblower scheme will consistently strike the right balance of prohibitions, protections, and incentives. This treatise does not take a stance on the virtues of whistleblowing in general, or on whether any particular whistleblower law or program is good or bad. Rather, the book presents the various whistleblower laws that have developed over time and in various industries, in an attempt to provide a balanced overview of the current landscape of the law and a helpful guide for practitioners.

The book begins by covering the most impactful whistleblower statutes, including the False Claims Act in Chapter 1, SOX in Chapter 2, and Dodd-Frank in Chapter 3. The next three chapters address the many statutes (other than SOX) enforced by OSHA, which are grouped into three categories: Consumer and Investor (Chapter 4); Nuclear and Environmental (Chapter 5); and Transportation (Chapter 6). Chapter 7

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[48] See generally, Chapters 9-11 *infra*.

[49] See, e.g.: Letter from U.S. Chamber of Commerce to U.S. Securities and Exchange Commission (Dec. 17, 2010), available at http://www.sec.gov/comments/s7-33-10/s73310-194.pdf (last visited Nov. 30, 2015); Letter from The Financial Services Roundtable and the American Bankers Association to the U.S. Securities and Exchange Commission (Dec. 17, 2010), available at http://www.sec.gov/comments/s7-33-10/s73310-191.pdf (last visited Nov. 30, 2015).

covers many of the various other federal whistleblower statutes that have evolved in the last thirty or forty years, and are not enforced by OSHA. Chapter 8 provides a survey of the state statutory and common law claims available to whistleblowers in all fifty states and the District of Columbia. The three primary whistleblower incentive programs are covered in Chapters 9 (SEC), 10 (IRS), and 11 (CFTC). Chapter 12 addresses the issues related to corporate documents that frequently arise in whistleblower cases, and Chapter 13 addresses the unique issues related to attorneys and compliance officers who blow the whistle. Finally, Chapter 14 addresses the challenges faced by corporations and employers in addressing whistleblower reports and defending against whistleblower actions.