

## INTERNATIONAL BEST PRACTICES FOR WHISTLEBLOWER POLICIES

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by Tom Devine, Legal Director,

The Government Accountability Project (GAP) is a non-profit, nonpartisan public interest law firm that specializes in protection for genuine whistleblowers -- employees who exercise free speech rights to challenge institutional illegality, abuse of power or other betrayals of the public trust they learn of or witness on the job. GAP has been a leader in the public campaigns to enact or defend nearly all United States national whistleblower laws; and played partnership roles in drafting and obtaining approval for the original Organization of American States (OAS) model law to implement its Inter-American Convention Against Corruption and whistleblower protection policies for staff and contractors at the African Development Bank, the Asian Development Bank, the OAS, and the United Nations.

While whistleblower protection laws are increasingly popular, in many cases the rights have been largely symbolic and therefore counterproductive. Employees have risked retaliation thinking they had genuine protection, when in reality there was no realistic chance they could maintain their careers. In those instances, acting on rights contained in whistleblower laws has meant the near-certainty that a legal forum would formally endorse the retaliation, leaving the careers of reprisal victims far more prejudiced than if no whistleblower protection law had been in place at all. Review of the track records for these and prior laws over the last three decades has revealed numerous lessons learned, which have steadily been solved on the U.S. federal level through amendments to correct mistakes and close loopholes.

GAP labels token laws as “cardboard shields,” because anyone relying on them is sure to die professionally. We view genuine whistleblower laws as “metal shields,” behind which an employee’s career has a fighting chance to survive. The checklist of 20 requirements below reflects GAP’s 35 years of lessons learned on the difference. All the minimum concepts exist in various employee protection statutes currently on the books. These “best practices” standards are based on a compilation of national laws from the 32 nations with minimally credible dedicated whistleblower laws, as well as Intergovernmental Organization policies, including those at the United Nations, World Bank, African Development Bank, Asian Development Bank, and Inter-American Development Bank. Nations covered by this study are identified in Attachment 1. Nations with whistleblower laws whose coverage is broader than the employment context are listed in Attachment 2. Attachment 3 lists laws with significant national security or law enforcement loopholes in their free speech protections. Copies of the laws can be downloaded from GAP’s website, at: <http://whistleblower.org/blog/112316-i-whistle-you-whistle-%E2%80%93-looking-best-practices-around-world>.

## I. SCOPE OF COVERAGE

The first cornerstone for any reform is that it is available. Loopholes that deny coverage when it is needed most, either for the public or the harassment victim, compromise whistleblower protection rules. Seamless coverage is essential so that accessible free expression rights extend to any relevant witness, regardless of audience, misconduct or context to protect them against any harassment that could have a chilling effect.

**1. Context for Free Expression Rights with “No Loopholes”.** Protected whistleblowing should cover “any” disclosure that would be accepted as evidence of significant misconduct or would assist in carrying out legitimate compliance functions. The consistent standard is for the whistleblower to reasonably believe the information is evidence of misconduct. Motives should not be a relevant factor, if the whistleblower believes the information is true. There can be no loopholes for form, context or audience, unless release of the information is specifically prohibited by statute. In that circumstance, disclosures should still be protected if made to representatives of organizational leadership or to designated law enforcement or legislative offices. The key criterion is that public freedom of expression be protected if necessary as the only way to prevent or address serious misconduct. It also is necessary to specify that disclosures in the course of job duties are protected, because most retaliation is in response to “duty speech” by those whose institutional role is blowing the whistle as part of organizational checks and balances.

Best Practices: United Nations Secretariat whistleblower policy (UN), section 4; World Bank Staff Rule 8.02 (WB), section 4.02; Australian Public Interest disclosure Act, (“Aus. PIDA”), Part 2, Div. 2; Irish Public Disclosure Act (“Irish PDA”), Sec. 10; United Kingdom (UK) Public Interest Disclosure Act of 1998 (“PIDA”), c. 23, amending the Employment Rights Act of 1996, c.18), section 43(G); Protected Disclosures Act of 2000 (“PDA”); Act No. 26, GG21453 of 7 Aug. 2000 (S. Afr.), section 7-8; Anti-Corruption Act of 2001 (“ACA”) (Korea – statute has no requirement for internal reporting); Ghana Whistleblower Act of 2005 (“Ghana WPA”), section 4; Japan Whistleblower Protection Act, Article 3; Romanian Whistleblower’s Law (“Romania WPA”), Article 6; Whistleblower Protection Act of 1989 (“WPA”) (U.S. federal government), 5 USC 2302(b)(8); Consumer Products Safety Improvement Act (“CPSIA”) (U.S. corporate retail products), 15 USC 2087(a); Federal Rail Safety Act (“FRSA”) (U.S. rail workers) 49 USC 20109(a); National Transportation Security Systems Act (“NTSSA”) (U.S. public transportation) 6 USC 1142(a); Sarbanes Oxley Reform Act (“SOX”) (U.S. publicly-traded corporations) 18 USC 1514(a); Surface Transportation Assistance Act (“STAA”) (U.S. corporate trucking industry) 49 USC 31105(a); American Recovery and Reinvestment Act of 2009 (“ARRA”), (U.S. Stimulus Law), P.L.111-5, Section 1553(a)(2)-(4); Patient Protection and Affordable Care Act (“ACA”), (U.S. health care), sec. 1558, in provision creating section 18C of Fair Labor Standards Act, sec. 18B(a)(2)(4); Food Safety Modernization Act (“FSMA”) (U.S. food industry), 21 USC 1012(a)(1)-(3); Dodd Frank Wall Street Reform and Consumer Protection Act (“Dodd Frank”)(U.S. financial services industry), sec. 1057(a)(1)-(3); Bosnia WPA, Art. 2(d); Irish Public Disclosures Act (Irish PDA), secs. 7, 10; Japan

Whistleblower Protection Act (WPA), Art. 1; Serbian Law for the Protection of Whistleblowers (Serbian WPA”), Art. 2,2, 2.5, 19, Liberia Executive Order 62, Protection of Whistleblowers (“Liberia EO”), Sec. 4(1)(a-j), 11; Slovakia WPA, sec. 2(2); OAS Staff Rule 101.11 Procedures for Whistleblowers and Protections Against Retaliation (OAS Staff Rule), sec. (c)(vi).

**2. Subject Matter for Free Speech Rights with “No Loopholes”.** Whistleblower rights should cover disclosures of any illegality, gross waste, mismanagement, abuse of authority, substantial and specific danger to public health or safety and any other activity which undermines the institutional mission to its stakeholders, as well as any other information that assists in honoring those duties.

Best Practices: UN ST/SGB/2005/21, section 2.1(a); World Food Programme (WFP) Executive Circular ED2008/003, section 5; World Bank Staff Rule 8.02, section 1.03; African Development Bank (AfDB) “Whistleblowing and Complaints Handling Policy, section 4; The Whistleblowers Protection Act , 2010 (“Uganda WPA”), section II.2; PIDA, (U.K.); PDA, section 1(i)(S. Afr.); Irish PDA, Sec. 5; New Zealand Protected Disclosures Act (“NZ PDA”), 2000, section 3(1), 6(1); ACA (Korea), Article 2; Public Service Act (“PSA”), Antigua and Barbuda Freedom of Information Act, section 47; R.S.O., ch. 47, section 28.13 (1990) (Can.); Ghana WPA, section 1; WPA(U.S. federal government), 5 USC 2302(b)(8); FRSA (U.S. rail workers) 49 USC 20109(a)(1); NTSSA (U.S. public transportation) 6 USC 1142(a); STAA (U.S. corporate trucking industry) 49 USC 31105(a)(1); ACCR (U.S. Stimulus Law) P.L.111-5, Section 1553(A)(1)-(5); ACA(U.S. health care) *id.*; FMSA (U.S. food industry) *id.*; Dodd Frank (U.S. financial services industry) *id.*; Aus. PIDA, sec. 2; Belgium WPA, Art. 2; Bosnia WPA, Art. 2(b); WPA, Art. 2; Irish PDA, sec. 7; Serbian WPA, Art. 2.1, 13; Liberia EO, sec. 1(f), 4(1)(a-j); Zambia PIDA, sec 2. 2, 11; Malta Protection of the Whistleblower Act 2013 (Malta PWA), Art. 1(2); OAS Staff Rule, sec. (b)(v)

**3. Right to Refuse Violating the Law.** This provision is fundamental to stop *faits accomplis* and in some cases prevent the need for whistleblowing. As a practical reality, however, in many organizations an individual who refuses to obey an order on the grounds that it is illegal must proceed at his or her own risk, assuming vulnerability to discipline if a court or other authority subsequently determines the order would not have required illegality. Thus what is needed is a fair and expeditious means of reaching such a determination while protecting the individual who reasonably believes that she or he is being asked to violate the law from having to proceed with the action or from suffering retaliation while a determination is sought.

Best Practices: Asian Development Bank (ADB) Administrative Order No. 2.10, section 3.5 (see AO 2.04, section 2.1 (f) for corresponding definition of misconduct); World Bank Staff Rule 8.02, section 2.07(see Staff Rule 8.01, section 2.01 for definition of misconduct); WPA (U.S. federal government) 5 USC 2302(b)(9); FRSA (U.S. rail workers) 49 USC 20109(a)(2); NTSSA (U.S. public transportation) 6 USC 1142(a)(2); CPSIA (U.S corporate retail products) 15 USC 2087(a)(4); STAA (U.S. corporate trucking industry) 49 USC 31105(a)(1)(B); ACA (U.S. health care) sec.18C(a)(5); FSMA

(U.S. food industry) 21 USC 1012(a)(4); Dodd Frank (U.S. financial services industry) sec. 1057(a)(4); Liberia EO, sec. 13(b); OAS Staff Rule, sec. (a)(iii).

**4. Protection Against Spillover Retaliation.** The law should cover all common scenarios that could have a chilling effect on responsible exercise of free expression rights. Representative scenarios include individuals who are perceived as whistleblowers (even if mistaken), or as “assisting whistleblowers,” (to guard against guilt by association), and individuals who are “about to” make a disclosure (to preclude preemptive strikes to circumvent statutory protection, and to cover the essential preliminary steps to have a “reasonable belief” and qualify for protection as a responsible whistleblowing disclosure). These indirect contexts often can have the most significant potential for a chilling effect that locks in secrecy by keeping people silent and isolating those who do speak out. The most fundamental illustration is reprisal for exercise of anti-retaliation rights.

Best Practices: World Bank Staff Rule 8.02, section 2.04; AfDB Whistleblowing and Complaints Handling Policy, section 6; Organization of American States, “Draft Model Law to Encourage and Facilitate the Reporting of Acts of Corruption and to Protect Whistleblowers and Witnesses” (“OAS Model Law”), Article 28; Aus. PIDA, Provisions (“Prov.”) 13, 57; ACA (Korea), Art. 31; NZ PDA, section 4(3); WPA (U.S.), 5 USC sections 2302(b)(8) (case law) and 2302(b)(9); Energy Policy Act of 2005 (U.S. Nuclear Regular Commission, Department of Energy and regulated corporations), 42 USC 5851(a); FRSA (U.S. rail workers) 49 USC 20109(a); NTSSA (U.S. public transportation) 6 USC 1142(a); CPSIA (U.S. corporate retail products) 15 USC 2087(a); STAA (U.S. corporate trucking industry) 49 USC 31105(a); ACA (U.S. health care) sec. 18C(a); FSMA (U.S. food industry) 21 USC 1012(a); Dodd Frank (U.S. financial services industry) Sec. 1057; Irish PDA, sec.12; Japan WPA, Art. 3; Serbian WPA, Art. 6-9; OAS Staff Rule, secs. (a)(ii), (b)(vi).

**5. “No Loopholes” Protection for All Citizens With Disclosures Relevant to the Public Service Mission.** Coverage for employment-related discrimination should extend to all relevant applicants or personnel who challenge betrayals of the organizational mission or public trust, regardless of formal status. In addition to conventional salaried employees, whistleblower policies should protect all who carry out activities relevant to the organization’s mission. It should not matter whether they are full time, part-time, temporary, permanent, expert consultants, contractors, employees seconded from another organization, or even volunteers. What matters is the contribution they can make by bearing witness. If harassment could create a chilling effect that undermines an organization’s mission, the reprisal victim should have rights. This means the mandate also must cover those who apply for jobs, contracts or other funding, since blacklisting is a common tactic.

Most significant, whistleblower protection should extend to those who participate in or are affected by the organization’s activities. Overarching U.S. whistleblower laws, particularly criminal statutes, protect all witnesses from harassment, because it obstructs government proceedings. Any increasing number of global statutes do not limit

protection to employees, but rather protect “any person” who discloses misconduct. As previewed, a list of nations with significant loopholes for whistleblowers in law enforcement or national security positions is enclosed as Attachment 3.

Best Practices: AfDB Whistleblowing and Complaints Handling policy, sections 5.1 & 6.2; ADB Administrative Order No. 2.10, section 8; Inter-American Development Bank (IDB) Staff Rule No. PE-328, section 2.1 & 2.2; Anti-Corruption Initiative for Asia-Pacific (Organization for Economic Cooperation and Development [OECD]); Aus. PIDA, Prov. 13; NZPDA, section 19A; PIDA (U.K.), sections 43 (K)(1)(b-d); ACA (Korea), Art. 25; Whistleblower Protection Act of 2004 (Japan WPA), section 2; Ghana WPA, sec. 2; Slovenia Integrity and Prevention of Corruption Act (Slovenia Anti-Corruption Act), Article 26; Uganda WPA, section II.3; Foreign Operations Appropriations Act of 2005 (“Foreign Operations Act”)(U.S. MDB policy) section 1505(a)(11)(signed November 14, 2005); False Claims Act (U.S. government contractors), 31 USC 3730(h); sections 8-9.; STAA (U.S. corporate trucking industry) 49 USC 31105(j); ACCR of 2009 (U.S. Stimulus Law) P.L.111-5, Section 1553(g)(2)-(4); Dodd Frank, Sec. 922(h)(1); Jam PDA, Part 1.2; Kosovo Law No. 04/L-043 on Protection of Informants (Kosovo LPI), Art.2, Sec. 1.1; Serbian WPA, Art. 2.2, 2.3; Liberia EO, sec. 1(a), (e); Uganda WPA, secs. 2, 3; Zambia PIDA, secs. 1, 2(1), 3(1); OAS Staff Rule, sec. (e)(i).

**6. Reliable Confidentiality Protection.** To maximize the flow of information necessary for accountability, reliable protected channels must be available for those who choose to make confidential disclosures. As sponsors of whistleblower rights laws have recognized repeatedly, denying this option creates a severe chilling effect. Confidentiality goes beyond just promising not to reveal a name. It also extends to restrictions on disclosure of “identifying information,” because often when facts are known only to a few that information easily can be traced back to the source and are the equivalent of a signature. Further, almost no whistleblower can guarantee absolute confidentiality, because testimony may be required for a criminal conviction or other essential purpose. Under those circumstances, a best practice confidentiality policy provides for as much advance notice as possible to the whistleblower that his or her identity must be revealed.

Best Practices: ADB Administrative Order No. 2.10, sections 3.2, 5.1 & 5.4 and Administrative Order No. 2.04, section 4.2; AfDB Whistleblowing and Complaints Handling Policy, sections 6.1 & 6.9.4; WFP ED2008/003, section 10; UN Sec. 16; ST/SGB/2005/21, section 5.2; OAS Model Law, Articles 10 and 11, 49; PSA (Can.), sections 28.17(1-3), 28.20(4), 28.24(2), 28.24(4); Aus. PIDA, Prov. 20, 21; Irish PDA, NZ PDA section 19; ACA (Korea), Articles 15 and 33(1); Slovenia Anti-Corruption Act, Article 23 (4), (6) and (7); Uganda WPA, sections VI.14 and 15; WPA (U.S.) 5 USC sections 1212(g), 1213(h); FRSA (U.S. rail workers) 49 USC 20109(i); NTSSA (U.S. public transportation) 6 USC 1142(h); STAA (U.S. corporate trucking industry) 49 USC 31105(h); Dodd Frank (U.S. financial services) sec. 748(h)(2) and 922(h)(2); Aus. PIDA, sec. 24; Belgium WPA, Art. 8, sec. 1, Art. 9, sec. 1; Irish PDA, sec. 16; Jam. PDA, section 24; Serbian WPA, Art. 10, 14, 18; Liberia EO, sec. 7(b), 9(c) and (d), 10(e); Malaysian Act 711, Whistleblower Protection Act 2010 (Malaysia WPA),

Sec. 8; Uganda WPA (sec. 14); Zambia PIDA, secs 12, 54.; Malta PWA, Arts. 6(1), (4), 18(1); OAS Staff Rule, secs. (c)(iv), (v).

**7. Protection Against Unconventional Harassment.** The forms of harassment are limited only by the imagination. As a result, it is necessary to ban any discrimination taken because of protected activity, whether active such as termination, or passive such as refusal to promote or provide training. Recommended, threatened and attempted actions can have the same chilling effect as actual retaliation. The prohibition must cover recommendations as well as the official act of discrimination, to guard against managers who “don’t want to know” why subordinates have targeted employees for an action. In non-employment contexts it could include protection against harassment ranging from civil liability such as defamation suits, and the most chilling form of retaliation – criminal investigation or prosecution. As previewed, a list of nations with rights broader than the employment context is enclosed as Attachment 2.

**Best Practices:** ADB Administrative Order No. 2.10, section 2.11; IDB Staff Rule No. PE-328, sections 2.41-2.44; UN ST/SGB/2005/21, section 1.4; WFP ED2008/003, section 4; World Bank Staff Rule 8.02, section 2.04; OAS Model Law, Article 28; Aus. PIDA, Prov. 10, 13, 14, 19; Irish PDA, Sec. 3, 12; ACA (Korea), Article 33; Uganda WPA, section V.9(2), V.10, and V.11; WPA (U.S. federal government), 5 USC 2302(b)(8) and associated case law precedents; FRSA (U.S. rail workers 49 USC 20109(a); NTSSA (U.S. public transportation workers) 6 USC 1142(a); CPSIA (U.S. corporate retail products) 15 USC 2087(a); SOX (U.S. publicly traded corporations) 18 USC 1514(a); ACCR of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(a); ACA (U.S. health care) Sec. 18C; FSMA (21 USC 1012(a); Dodd Frank (U.S. financial services industry) sec. 1057(a); Aus. PIDA, secs. 15, 23; Bosnia WPA, Art. 6; Irish PDA, secs. 2, 14, 15; Jamaican Public Disclosure Act, 2011, (Jam. PDA), section 2,15.2, and 16; Japan WPA, Art. 5; Peru Law. No. 29542, Articles 7, 22; Serbian WPA, Art. 2.7, 21; Liberia EO, Sections 1(a), (g) and (h), 12; Malaysia WPA, Sections 7(b), 9; New Zealand PDA, Sec. 18.; Uganda WPA, secs. 9(2), 10, 13; Malta PWA, Arts. 1(2), 4(1), 19; OAS Staff Rule, secs. (b)(vi),(e)(i).

**8. Shielding Whistleblower Rights From Gag Orders.** Any whistleblower law or policy must include a ban on “gag orders” through an organization’s rules, policies or nondisclosure agreements that would otherwise override free expression rights and impose prior restraint on speech. ;

**Best Practices:** WFP ED/2008/003, sections 8 and 11; World Bank Staff Rule 8.02, para. 4.03; Aus. PIDA, Prov. 10(1)(b) and 10(2)(b), 24,Iri 75; Irish PDA, Sec. 2; NZ PDA section 18; PIDA (U.K.), section 43(J); PDA (South Africa), section 2(3)(a, b); Ghana WPA, sec. 31; Uganda WPA, section V.12 and V.13; WPA (U.S.), 5 USC 2302(b)(8); Transportation, Treasury, Omnibus Appropriations Act of 2009 (U.S.), section 716 (anti-gag statute)(passed annually since 1988); FRSA (U.S. rail workers) 49 USC 20109(h); NTSSA (U.S. public transportation) 6 USC 1142(g); STAA (U.S. corporate trucking industry) 49 USC 31105(g); ACCR of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(d)(1); ACA (U.S. health care) Sec 18C(b)(2); FSMA (U.S. food industry) 21 USC

1012(c)(2); Dodd Frank (U.S. financial services industry) sections 748(h)(3) and (n)(1), 922(h)(3) and 1057(c)(2); Aus. PIDA, sec 20; Belgium WPA, Art. 3; Art. 15 Jam. PDA, Sections 15, 20; Serbian WPA, Art. 3, 21; Liberia EO, Sec. 4 (1)(k,l); India Whistleblower Protection Act, sec. 4; Malaysian WPA, Sec 6(5). Slovakia Act of 16 October on certain measures concerning the reporting of antisocial activities and on amendments to certain laws (Slovakia WPA), section 1 underview; Uganda WPA, secs. 10, 13; Zambia PIDA, sec. 4; Malta PWA, Arts. 3, 21.

**9. Providing Essential Support Services for Paper Rights.** Whistleblowers are not protected by any law if they do not know it exists. Whistleblower rights, along with the duty to disclose illegality, must be posted prominently in any workplace. Similarly, legal indigence can leave a whistleblower's rights beyond reach. Access to legal assistance or services and legal defense funding can make free expression rights meaningful for those who are unemployed and blacklisted. An ombudsman with sufficient access to documents and institutional officials can neutralize resource handicaps and cut through draining conflicts to provide expeditious corrective action. The U.S. Whistleblower Protection Act includes an Office of Special Counsel, which investigates retaliation complaints and may seek relief on their behalf. Informal resources should be risk free for the whistleblower, without any discretion by relevant staff to act against the interests of individuals seeking help.

**Best Practices:** United Nations Office of Staff Legal Assistance (for access to legal services)<sup>1</sup>; Aus. PIDA, Prov. 21, 58-63, 74; NZ PDA, sections 6B, 6C; Korean Independent Commission Against Corruption (Korea), First Annual Report (2002), at 139; WPA (U.S.), 5 USC 1212; Inspector General Act (U.S.) 5 USC app.; ACCR of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(b); U.S. WPA, 5 USC 1212-1219; Belgium WPA, Art. 3; Art. 15; Jam. PDA, section 21; Serbian WPA, Art. 14; Liberia EO sec. 16, Slovakia WPA, sec. 16; Zambia PIDA, sec. 40(2)(b); Malta PWA, Art. 12(2); OAS Sstaff Rule, sec. (f)(iv).

## **II. FORUM**

The setting to adjudicate a whistleblower's rights must be free from institutionalized conflict of interest and operate under due process rules that provide a fair day in court. The histories of administrative boards have been so unfavorable that so-called hearings in these settings have often been traps, both in perception and reality.

**10. Right to Genuine Day in Court.** This criterion requires normal judicial due process rights, the same rights available for citizens generally who are aggrieved by illegality or abuse of power. The elements include timely decisions, a day in court with witnesses and the right to confront the accusers, objective and balanced rules of procedure and reasonable deadlines. At a minimum, internal systems must be structured to provide autonomy and freedom from institutional conflicts of interest. That is particularly significant for preliminary stages of informal or internal review that inherently are

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<sup>1</sup> Unfortunately, in practice this office is severely understaffed and underfunded.

compromised by conflict of interest, such as Office of Human Resources Management reviews of actions. Otherwise, instead of being remedial those activities are vulnerable to becoming investigations of the whistleblower and the evidentiary base to attack the individual's case for any eventual day in a due process forum.

**Best Practices:** UN ST/SGB/2005/21, section 6.3; OAS Model Law, Articles 39, 40; Foreign Operations Act (U.S. policy for MDB's), section 1505(11); Aus. PIDA, Part 2, Subdiv. B, Prov. 14; NZ PDA, section 17; PIDA (U.K.) Articles 3, 5; PDA (S. Afr.), section 4(1); ACA (Kor.), Article 33; Romania WPA, Article 9; Uganda WPA, sections V.9(3) and (4); WPA (U.S.), 5 USC 1221, 7701-02; Defense Authorization Act (U.S.) (defense contractors) 10 USC 2409(c)(2); Energy Policy Act (U.S. government and corporate nuclear workers), 42 USC 5851(b)(4) and (c)-(f); FRSA (U.S. rail workers) 49 USC 20109(c)(2)-(4); NTSSA (U.S. public transportation) 6 USC 1142(c)(4)-(7); CPSIA (U.S. retail products) 15 USC 2087(b)(4)-(7); SOX (U.S. publicly traded corporations) 18 USC 1514(b); STAA (U.S. corporate trucking industry) 49 USC 31105 (c)-(e); ACCR of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(c)(3)-(5); ACA (U.S. health care) sec. 18C(b)(1); FMSA (U.S. food industry) 21 USC 1012(b)(4); Dodd Frank (U.S. financial services) sections 748(h)(1)(B)(i), 922(h)(1)(b)(1) and 1057(c)(4)(D); Irish PDA, Schedule 2; Serbian WPA, Art. 23, 2, 30; Liberia EO sec. 11(e); Malaysia WPA, Sec. 15; Uganda WPA, secs. 9(3) and (4); Zambia PIDA, sec. 49; Malta PWA, Art. 7; OAS Staff Rule, secs. (e)(iii) and (iv).

**11. Option for Alternative Dispute Resolution with an Independent Party of Mutual Consent.** Third party dispute resolution can be an expedited, less costly forum for whistleblowers. For example, labor-management arbitrations have been highly effective when the parties share costs and select the decision-maker by mutual consent through a "strike" process. It can provide an independent, fair resolution of whistleblower disputes, while circumventing the issue of whether Intergovernmental Organizations waive their immunity from national legal systems. It is contemplated as a normal option to resolve retaliation cases in the U.S. Whistleblower Protection Act.

**Best Practices:** Foreign Operations Act (U.S. MDB policy) section 1505(a)(11); WPA (U.S. federal government labor management provisions), 5 USC 7121; OAS Staff Rule, sec. (f)(ii).

### **III. RULES TO PREVAIL**

The rules to prevail control the bottom line. They are the tests a whistleblower must pass to prove that illegal retaliation violated his or her rights, and win.

**12. Realistic Standards to Prove Violation of Rights.** The U.S. Whistleblower Protection Act of 1989 overhauled antiquated, unreasonable burdens of proof that had made it hopelessly unrealistic for whistleblowers to prevail when defending their rights. The test has been adopted within international law, within generic professional standards for intergovernmental organizations such as the United Nations.



This emerging global standard is that a whistleblower establishes a *prima facie* case of violation by establishing through a preponderance of the evidence that protected conduct was a “contributing factor” in challenged discrimination. The discrimination does not have to involve retaliation, but only need occur “because of” the whistleblowing. Once a *prima facie* case is made, the burden of proof shifts to the organization to demonstrate by clear and convincing evidence that it would have taken the same action for independent, legitimate reasons in the absence of protected activity.

Since the U.S. government changed the burden of proof in its whistleblower laws, the rate of success on the merits has increased from between 1-5 percent annually to between 25-33 percent, which gives whistleblowers a fighting chance to successfully defend themselves. Many nations that adjudicate whistleblower disputes under labor laws have analogous presumptions and track records. There is no alternative, however, to committing to one of these proven formulas to determine the tests the whistleblower must pass to win a ruling that their rights were violated.

Best Practices: UN ST/SGB/2005/21, sections 5.2 & 2.2; WFP ED 2008/003, sections 6 and 13; World Bank Staff Rule 8.02, sec. 3.01; AfDB Whistleblowing and Complaints Handling Policy, section 6.6.7; Foreign Operations Act, Section 1505(11); Whistleblower Protection Act (U.S. federal government) 5 USC 1214(b)(2)(4) and 1221(e); Energy Policy Act of 2005 (U.S. government and corporate nuclear workers), 42 USC 5851(b)(3); FRSA (U.S. rail workers) 49 USC 20109(c)(2)(A)(i); NTSSA (U.S. public transportation) 6 USC 1142(c)(2)(B); CPSIA (U.S. corporate retail products) 15 USC 2087 (b)(2)(B), (b)(4); SOX (U.S. publicly-traded corporations), 18 USC 1514(b)(2)(c); STAA (U.S. corporate trucking industry) 49 USC 31105(b)(1); ACCR of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(c)(1); Aus. PIA, sec. 17; ACA, sec. 1558(b)(2); FSMA (U.S. food industry) 21 USC 1012(b)(2)(C) and (b)(4)(A); Dodd Frank (U.S. financial services industry) sec. 1057(b)(3); Bosnia WPA, Art. 2(b); Jam PDA, sec. 17; Serbian WPA, Art. 5.3, 11, 29; Liberia EO, sec. 1(m), 13(b); Norway Work Environment Act of 2005 (Norway Work Act), sec. 2.5; Slovenia Anticorruption Act (Slovenia ACA), Art. 25(5); OAS Staff Rule, sec. (b)(7).

**13. Realistic Time Frame to Act on Rights.** Although some laws require employees to act within 30-60 days or waive their rights, most whistleblowers are not even aware of their rights within that time frame. Six months is the minimum functional statute of limitations. One-year statutes of limitations are consistent with common law rights and are preferable.

Best Practices: ADB Administrative Order No. 2.10, section 6.5; WFP ED2008/003, section 7; UN ST/SGB/2005/21, section 2.1(a) & 5.1 (no statute of limitations); PIDA (U.K.), section 48.3; PDA (S. Afr.), section 4(1); Irish PDA, Sec. 24, Schedule 2(6); NZ PDA, section 17; ACA (Kor.) (no statute of limitations); WPA (U.S. federal employment) 5 USC 1212 (no statute of limitations); False Claims Act (U.S. government contractors), 42 USC 3730(h) and associated case law precedents; ; Energy Policy Act of 2005 (U.S. government and corporate nuclear workers), 42 USC 5851(b)(1); FRSA (U.S. railroad workers) 49 USC 20109(d)(2)(A)(ii); NTSSA (U.S. public transportation) 6 USC

1142(c)(1); CPSIA (U.S. corporate retail products) 15 USC 2087(b)(1); STAA (U.S. corporate trucking industry) 49 USC 31105(b)(1); ACCR of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(b)(1); ACA (U.S. health care industry) sec. 18C(b)(1); FSMA (U.S. food industry) 21 USC 1012O(b)(1); Dodd Frank (U.S. financial services industry) sec. 748(h)(1)(B)(iii), 922(h)(1)(B)(iii) and sec. 1057(c)(1)(A); Irish PDA, Schedule 2; Israel PEL, sec. 5(a); Serbian WPA, Art. 4; Zambia PIDA, sec. 42(3). Zambia PIDA, secs. 42(3), 56; OAS Staff Rule, sec. (e)(ii).

#### **IV. RELIEF FOR WHISTLEBLOWERS WHO WIN**

The twin bottom lines for a remedial statute's effectiveness are whether it achieves justice by adequately helping the victim obtain a net benefit and by holding the wrongdoer accountable.

**14. Compensation with “No Loopholes”.** If a whistleblower prevails, the relief must be comprehensive to cover all the direct, indirect and future consequences of the reprisal. In some instances this means relocation or payment of medical bills for consequences of physical and mental harassment. In non-employment contexts, it could require relocation, identity protection, or withdrawal of litigation against the individual.

Best Practices: AfDB Whistleblowing and Complaints Handling Policy, sections 6.5 & 6.6 and Statute of the Administrative Tribunal of the African Development Bank Art. XIII (1); OAS Model Law, Articles 17 and 18; Foreign Operations Act (U.S. policy for MDB's), Section 1505(11); Aus. PIDA, Prov. 14, 16; NZ PDA, section 17; ACA (Korea), Article 33; Irish PDA, Sec. 24; PIDA (U.K.), section 4; WPA (U.S. federal government employment), 5 USC 1221(g)(1); False Claims Act (U.S. government contractors), 31 USC 3730(h); Defense Authorization Act (U.S.) (defense contractors), 10 USC 2409(c)(2); Energy Policy Act of 2005 (U.S. government and corporate nuclear workers), 42 USC 5851(b)(2)(B); FRSA (U.S. railroad workers) 49 USC 20109(e); NTSSA (U.S. public transportation) 6 USC 1142(c)(3)(B) and (d); CPSIA (U.S. corporate retail products) 15 USC 2087(b)(3)(B) and (b)(4); ) STAA (U.S. corporate trucking industry) 49 USC 31105(b)(3)(B); ACCR of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(b)(2)(A), (B), and (b)(3); ACA (U.S. health care) sec. 18C(b)(2); FSMA (U.S. food industry) 21 USC 1012(b)(3)(B) and (b)(4)(B); Dodd Frank (U.S. financial industry) sec. 1057(c)(4)(B)(i) and 4(D)(ii); Bosnia WPA, Art. 2(f); Serbian WPA, Art. 22, 26; Liberia EO, sec. 13(a); Slovakia WPA, secs. 7-10, 13; Zambia PIDA, sec. 13; Malta PWA, Arts. 7,8.

**15. Interim Relief.** Relief should be awarded during the interim for employees who prevail. Anti-reprisal systems that appear streamlined on paper commonly drag out for years in practice. Ultimate victory may be merely an academic vindication for unemployed, blacklisted whistleblowers who go bankrupt while they are waiting to win. Injunctive or interim relief must occur after a preliminary determination. Even after

winning a hearing or trial, an unemployed whistleblower could go bankrupt waiting for completion of an appeals process that frequently drags out for years.

**Best Practices:** UN S T/SGB/2005/21, Section 5.6 and Statute of the United Nations Dispute Tribunal, Article 10(2); ADB Administrative Order No. 2.10, section 7.1; AfDB Whistleblowing and Complaints Handling Policy, sections 6.6.1, 6.6.5 & 9.6; World Bank Staff Rule 8.02, sec. 2.05; OAS Model Law, Articles 17, 32; Aus. PIDA, Prov. 15; U.K. PIDA section 9; Irish PDA, Sec. 11, Schedule 1; NZ PDA, section 17; WPA (U.S. federal government), 5 USC sections 1214(b)(1), 1221(c); CPSIA (U.S. corporate retail products) 15 USC 2087(b)(1); SOX (U.S. publicly-traded corporations), 5 USC 1214(b)(1); ACA (U.S. health care) sec. 1558(b)(1); FSMA (U.S. food industry) 21 USC 1012 (b)(2)(B); Dodd Frank, sec. 748(h)(1)(B)(i), 922 (h)(1)(B)(i) and sec. 1057(b)(2)(B); Irish PDA, Schedule 1; Serbian WPA, Art. 32-35; Malaysian WPA, sections 15(1)(b), 17 and 18(b); Slovakia WPA, sec. 7; Zambia PIDA, secs. 52-53; Malta PWA, Art. 7; OAS Staff Rule, sec. (e)(v).

**16. Coverage for Attorney Fees.** Attorney fees and associated litigation costs should be available for all who substantially prevail. Whistleblowers otherwise couldn't afford to assert their rights. The fees should be awarded if the whistleblower obtains the relief sought, regardless of whether it is directly from the legal order issued in the litigation. Otherwise, organizations can and have unilaterally surrendered outside the scope of the forum and avoided fees by declaring that the whistleblower's lawsuit was irrelevant to the result. Affected individuals can be ruined by that type of victory, since attorney fees often reach sums more than an annual salary.

**Best Practices:** AfDB Whistleblowing and Complaints Handling Policy, section 6.5.4; Statute of the Administrative Tribunal of the International Monetary Fund, Art. XIV (4); Statute of the Administrative Tribunal of the Asian Development Bank, Art. X (2); OAS Model Law, Art. 17; Aus. PIDA, Prov. 18; NZ PDA section 17; WPA (U.S. federal government), 5 USC 1221(g)(2-3); False Claims Act (U.S. government contractors), 31 USC 3730(h); Energy Policy Act (U.S. government and corporate nuclear workers), 42 USC 5851(b)(2)(B)(ii); ); FRSA (U.S. railroad workers) 49 USC 20109(e); NTSSA (U.S. public transportation) 6 USC 1142(d)(2)(C); CPSIA (U.S. corporate retail products) 15 USC 2087(b)(3)(B) and (b)(4)(C); SOX (U.S. publicly-traded corporations), 18 USC 1514(c)(2)(C); ); STAA (U.S. corporate trucking industry) 49 USC 31105(b)(3)(A)(iii) and (B); ACCR of 2009 (U.S. Stimulus Law), P.L. 111-5, Section 1553(b)(2)(C) and (b)(3); ACA (U.S. health care) sec. 1558(b)(1); FSMA (U.S. food industry) 21 USC 1012(b)(3)(C) and (4)(D)(iii); Dodd Frank (U.S. financial services) sec. 748(h)(1)(C), 922(h)(1)(C) and sections 1057(C)(4)(B)(ii) and (D)(ii)(III),

**17. Transfer Option.** It is unrealistic to expect a whistleblower to go back to work for a boss whom he or she has just defeated in a lawsuit. Those who prevail must have the ability to transfer for any realistic chance at a fresh start. This option prevents repetitive reprisals that cancel the impact of newly created institutional rights.

Best Practices: AfDB Whistleblowing and Complaints Handling Policy, section 6.5.5; UN SGB/2005/21, Section 6.1; United Nations Population Fund (UNFPA) “Protection against Retaliation for Reporting Misconduct or for Cooperating with an Authorized Fact-Finding Activity,” para. 26; WFP Executive Circular ED2008/003, para. 22; The United Nations Children's Fund (UNICEF) Whistleblower Protection Policy, para. 23; OAS Model Law, Article 18; PDA (S. Afr.), section 4(3); ACA (Korea), Article 33; WPA (U.S. federal government), 5 USC 3352; Serbian WPA, Art. 2, def. 7, Art. 28; South Africa PIDA, sec. 4(3); Liberia EO, sec. 11(f), Malaysian WPA, Sec. 19; Slovenia Anticorruption Act, Art. 25(4); Zambia PIDA, secs. 13(4)(c), 13(5), 47, 48, 49(3-4).

**18. Personal Accountability for Reprisals.** To deter repetitive violations, it is indispensable to hold accountable those responsible for whistleblower reprisal. Otherwise, managers have nothing to lose by doing the dirty work of harassment. The worst that will happen is they won't get away with it, and they may well be rewarded for trying. The most effective option to prevent retaliation is personal liability for punitive damages by those found responsible for violations. The OAS Model Law even extends liability to those who fail in bad faith to provide whistleblower protection. Another option is to allow whistleblowers to counterclaim for disciplinary action, including termination. Some nations, such as Hungary or the U.S. in selective scenarios such as obstruction of justice, impose potential criminal liability for whistleblower retaliation.

Best Practices: UN SGB/2005/21, section 7; UNFPA “Protection against Retaliation...” para. 29; UNICEF Whistleblower Protection Policy, para. 26; AfDB Whistleblowing and Complaints Handling Policy, section 6.6.4, 6.9.2; World Bank Staff Rule 8.01, sec. 2.01(a); OAS Model Law, Articles 12,13 41-46; NZ PDA, section 17; Aus. PIDA, Prov. 14, 19; Irish PDA, Sec. 13-15; ACA (Korea), Article 32(8); Article 32(8); Hungary, Criminal code Article 257, “Persecution of a conveyor of an Announcement of Public Concern”; Public Interest Disclosure Act, No. 108, section 32; Uganda WPA, sections VI.16 and 18; WPA (U.S. federal government) 5 USC 1215; ); FRSA (U.S. railroad workers) 49 USC 20109(e)(3); NTSSA (U.S. public transportation) 6 USC 1142(d)(3); CPSIA (U.S. corporate retail products) 15 USC 2087(b)(3)(B) and (b)(4)(C); SOX (U.S. publicly-traded corporations), 18 USC 1513(e); STAA (U.S. corporate trucking industry) 49 USC 31105(b)(3)(C); Bosnia WPA, Art. 12; Irish PDA, sec. 13; Jam. PDA, section 23; Serbian WPA, Art. 37, 39; Malaysian WPA, Sec. 16; Uganda WPA, sec. 16; Zambia PIDA, secs 42(1); 46(2), 50; OASD Staff Rule, sec. (b)(vi).

Some Multilateral Development Banks have created hybrid systems of accountability that indirectly protect whistleblowers from harassment by bank contractors. The banks' policies are to apply sanctions or even stop doing business with contractors who engage in whistleblower retaliation. AfDB Whistleblowing and Complaints Handling Policy, sections 6.2 and 6.3; ADB Administrative Order No. 2.10, section 8.5; Inter-American Development Bank Staff Rule No. PE-328, section 10.3 & 11.1; Aus. PIDA, sec. 23; Liberia EO, sec. 11(b)..

## **V. MAKING A DIFFERENCE**

Whistleblowers will risk retaliation if they think that challenging abuse of power or any other misconduct that betrays the public trust will make a difference. Numerous studies have confirmed this motivation. This is also the bottom line for affected institutions or the public – positive results. Otherwise, the point of a reprisal dispute is limited to whether injustice occurred on a personal level. Legislatures unanimously pass whistleblower laws to make a difference for society.

**19. Credible Corrective Action Process.** Whether through hotlines, ombudsmen, compliance officers or other mechanisms, the point of whistleblowing through an internal system is to give managers an opportunity to clean house, before matters deteriorate into a public scandal or law enforcement action. In addition to a good faith investigation, two additional elements are necessary for legitimacy.

First, the whistleblower who raised the issues should be enfranchised to review and comment on the draft report resolving alleged misconduct, to assess whether there has been a good faith resolution. While whistleblowers are reporting parties rather than investigators or finders of fact, as a rule they are the most knowledgeable, concerned witnesses in the process. In the U.S. Whistleblower Protection Act, their evaluation comments have led to significant improvements and changed conclusions. They should not be silenced in the final stage of official resolution for the alleged misconduct they risk their careers to challenge.

Second, transparency should be mandatory. Secret reforms are an oxymoron. As a result, unless the whistleblower elects to maintain anonymity, both the final report and whistleblower's comments should be a matter of public record, posted on the organization's website.

Another tool that is vital in cases where there are continuing violations is the power to obtain from a court or objective body an order that will halt the violations or require specific corrective actions. The obvious analogy for Intergovernmental Organizations is the ability to file for proceedings at Independent Review Mechanisms or Inspection Panels, the same as an outside citizen personally aggrieved by institutional misconduct.

Best Practices: ACA, (Korea), Articles 30, 36; Aus. PIDA, Prov. 43-54; Irish PDA, Schedule 3, Sec. 18; NZ PDA section 15; PSA (Can.), section 28.14(1) (1990); Japan WPA, Section 9 (2004); Slovenia Anti-Corruption Act, Articles 23 and 24; WPA (U.S. federal government), 5 USC 1213; Inspector General Act of 1978 (U.S. federal government), 5 USC app.; False Claims Act, 31 USC 3729 (government contractors); FRSA (U.S. railroad workers) 49 USC 20109(j); NTSSA (U.S. public transportation) 6 USC 1142(i); STAA (U.S. corporate trucking industry) 49 USC 31105(i); aus. PIDA, ses. 9-12, 18-19; Belgium WPA, Arts. 12, 14; Jam. PDA, section 18, 19, Third Schedule; Serbian WPA, Art. 14, 15, 18; Liberia EO Sec. 10; India WPA, sec. 5(8-9); Malaysia WPA, Secs. 12-13; Slovakia WPA, secs. 11-12; Zambia PIDA, sec. 58.

**20. Review.** The foregoing criteria are to evaluate whistleblower laws on paper. Unfortunately, due to ambiguities, reliance on bad faith officials for enforcement or cultural resistance, in many instances the new rights in practice might be traps that victimize the naïve. Every whistleblower law should include a formal review process that tracks how many whistleblowers use the new rights, whether they have proven effective empirically, and what changes should be enacted based on lessons learned.

Best practices: Aus. PIDA, secs. 21, 24; Irish PDA, sec. 2; Jam. PDA, Sec. 21, 27; Japan WPA, Supplemental Provisions, Art. 2