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Congress Enacts Robust Protections for Tax Whistleblowers

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Although [plagued by delays and other challenges](#), the IRS Whistleblower Reward Program has achieved some success in encouraging insiders with information about significant tax underpayments to come forward. Since Congress established the IRS Whistleblower Program in 2006, whistleblower disclosures to the IRS have enabled the IRS to recover \$5 billion, and the Whistleblower Office has awarded whistleblowers approximately \$811 million.

But many whistleblowers are reluctant to come forward because there is no federal law protecting tax whistleblowers against retaliation. For several years, the IRS Office of the Whistleblower has called on Congress to enact statutory protections from retaliation. In its FY2018 [annual report to Congress](#), the IRS Whistleblower Office notes that

“[p]roviding whistleblowers with a zone of protection from economic or physical harm is imperative to the success of any whistleblower program as Congress has recognized in other whistleblower statutes . . . The need for greater protection of whistleblowers is amplified as sophisticated taxpayers are increasingly attempting to learn the existence or identity of a whistleblower.”

This week, Congress heeded that request by enacting robust whistleblower protections for tax whistleblowers, modeled on the whistleblower protection provisions of the Sarbanes-Oxley Act and False Claims Act. These new protections are included in the [Taxpayer First Act](#) (TFA), which the House passed on June 10, 2019, and the Senate passed on June 13, 2019. This bipartisan legislation will enhance the IRS’ ability to combat tax fraud, a laudable goal as the annual tax gap (taxes that are owed and not paid to the Treasury) [exceeds \\$400 billion](#). Providing protection against retaliation should encourage whistleblowers with high-value inside information about tax noncompliance to come forward.

Taxpayer First Act

The bill also improves the IRS whistleblower program by authorizing the IRS to communicate with whistleblowers during the processing of their claims, while also protecting taxpayer privacy, as well as extending anti-retaliation provisions to IRS whistleblowers that are presently afforded to whistleblowers under other laws. In addition, it modifies the private debt collection program to ensure lower-income Americans are not targeted; and codifies the Volunteer Income Tax Assistance, or VITA, program, enabling the IRS to provide up to \$30 million in matching grants to qualifying tax preparation sites.

The TFA includes several provisions protecting taxpayers and modernizing and reforming the IRS. Those reforms include: (1) establishing an independent office of appeals within the IRS, (2) protecting taxpayers from tax ID theft; (3) requiring the IRS to redesign the structure of the agency to improve efficiency, modernize technology systems, enhance cyber security and better meet taxpayer needs; and (4) putting in place new safeguards to protect taxpayers against recent IRS enforcement abuses of “structuring laws.”

The whistleblower provisions in the TFA protect whistleblowers from retaliation and improve the IRS whistleblower program by authorizing the IRS to communicate with whistleblowers during the processing of their claims, while also protecting taxpayer privacy. Section 1405(a)(1) requires the IRS Whistleblower office to provide the following status updates to a whistleblower or the whistleblower’s attorney:



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- Within 60 days after a case for which the whistleblower has provided information has been referred for an audit or examination, the IRS will inform the whistleblower of that referral.
- Within 60 days of a taxpayer making a payment of tax due to the whistleblower's disclosure, the IRS will provide notice of such payment to the whistleblower.

And upon written request from a whistleblower, the IRS is authorized to provide information about the status and stage of an investigation, and in the case of a determination of the amount of any award, the reasons for such determination.

Protecting Tax Whistleblowers Against Retaliation

Section 1405(b) of the TFA creates a private right of action for tax whistleblowers that have suffered retaliation. It prohibits any "employer, officer, employee, contractor, subcontractor, or agent" of an employer from retaliating against a whistleblower. Department of Labor (DOL) and Supreme Court precedent construing substantially similar statutory text in the Sarbanes-Oxley whistleblower protection law suggests that: 1) individuals (not just employers) can be held liable for retaliation; and 2) a contractor of an employer that retaliates against a whistleblower for disclosing a customer's tax fraud or tax underpayment would be liable for retaliation.

TFA Protected Whistleblowing

The TFA protects a broad range of disclosures about violations of IRS rules or tax fraud. It protects not only disclosures to the IRS, but also internal disclosures, including an employee's disclosure to a supervisor or "any other person working for the employer who has the authority to investigate, discover, or terminate misconduct." In particular, protected conduct includes:

- any lawful act done by the employee- (A) to provide information, cause information to be provided, or otherwise assist in an investigation regarding underpayment of tax or any conduct which the employee reasonably believes constitutes a violation of the internal revenue laws or any provision of Federal law relating to tax fraud, when the information or assistance is provided to the Internal Revenue Service, the Secretary of the Treasury, the Treasury Inspector General for Tax Administration, the Comptroller General of the United States, the Department of Justice, the United States Congress, a person with supervisory authority over the employee, or any other person working for the employer who has the authority to investigate, discover, or terminate misconduct, or
- (B) to testify, participate in, or otherwise assist in any administrative or judicial action taken by the Internal Revenue Service relating to an alleged underpayment of tax or any violation of the internal revenue laws or any provision of Federal law relating to tax fraud.

Note the following regarding the scope of protected whistleblowing:

- TFA whistleblower protection is not limited to disclosures of actual tax fraud. Instead, DOL and federal court precedent construing similar whistleblower protection laws protect a whistleblower's reasonable but mistaken belief that the conduct complained of constituted a violation of relevant law. The whistleblower, however, must demonstrate that they had an objectively reasonable belief which is assessed based on the knowledge available to a reasonable person in the circumstances with the employee's training and experience.
- Participating in an employer's internal investigation or in an IRS proceeding is protected under the TFA.
- The statutory text protecting a disclosure about a potential violation of the "internal revenue laws" likely encompasses a disclosure about a potential violation of IRS regulations. In *Chrysler Corp. v. Brown*, 441 U. S. 281 (1979), the Court held that the word "law" includes all regulations that have the "force and effect of law" (i.e., a "substantive" or "legislative-type" rule affecting individual rights and the product of a congressional grant of legislative authority). In other words, Section 1405(b) of the TFA will protect a broad range of disclosures about potential tax fraud or an alleged underpayment of tax.
- TFA whistleblower protection is limited to lawful acts, and therefore a whistleblower should be careful to comply with [26 USC § 6103](#) and other restrictions on the use of taxpayer information. As amended by the TFA, § 6103(k) will permit the IRS to disclose taxpayer information to IRS whistleblowers in the course of an investigation, but that provision also extends the criminal penalties associated with any unauthorized re-disclosures by whistleblowers receiving such information.
- Section 1405(b) appears to protect "duty speech" whistleblowing, i.e., disclosing potential tax fraud or tax underpayment in the course of the whistleblower performing their job duties.

Prohibited Retaliation

Similar to the SOX whistleblower protection law, the TFA prohibits a wide range of retaliatory acts, including discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against a whistleblower in the terms and conditions of employment. The catch-all category of retaliation (“in any other manner” discriminating against a whistleblower) includes non-tangible employment actions, such as “outing” a whistleblower in a manner that forces the whistleblower to suffer alienation and isolation from work colleagues. See *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, -003, ALJ No. 2007- SOX- 5 (ARB Sept 13, 2011). An employment action can constitute actionable retaliation if it “would deter a reasonable employee from engaging in protected activity.” *Id.* at 20.

Favorable Causation Standard for Tax Whistleblowers

Section 1405(b) of the TFA applies the causation standard and burden-shifting framework set forth in the [AIR21 Whistleblower Protection Law](#). Under that framework, the whistleblower prevails by proving that their protected whistleblowing was a contributing factor in the unfavorable personnel action taken by their employer. The DOL ARB has emphasized that the standard is low and “broad and forgiving”; protected activity need only play some role, and even an “[in]significant” or “[in]substantial” role suffices. *Palmer v. Canadian Nat’l R.R.*, ARB No. 16-035, ALJ No. 2014-FRS-154, at 53 (ARB Sept. 30, 2016)(emphasis in original). Examples of circumstantial evidence that can establish “contributing factor” causation include:

- temporal proximity;
- the falsity of an employer’s explanation for the adverse action taken;
- inconsistent application of an employer’s policies;
- an employer’s shifting explanations for its actions;
- animus or antagonism toward the whistleblower’s protected activity; and
- a change in the employer’s attitude toward the whistleblower after they engage in protected activity.

Once the whistleblower proves that their protected conduct was a contributing factor in the adverse action, the employer can avoid liability only if it proves by clear and convincing evidence that it would have taken the same adverse action in the absence of the whistleblower engaging in protected conduct.

Remedies for TFA Whistleblowers

A prevailing TFA whistleblower is entitled to make-whole relief, which includes:

- reinstatement;
- double back pay with interest;
- uncapped “special damages,” which courts have construed as encompassing damages for emotional distress and reputational harm; and
- attorney fees, litigation costs, and expert witness fees.

These remedies are substantially similar to the relief authorized in the anti-retaliation provision of the False Claims Act. Neither statute authorizes an award of punitive damages, but double back pay and uncapped special damages can be a potent remedy.

In addition to this new civil cause of action for workplace retaliation authorized by the TFA, the existing obstruction of justice statute criminalizes “interference with the lawful employment or livelihood of any person, for providing a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense.” 18 USC § 1513(e). Accordingly, some forms of whistleblower retaliation can have consequences beyond a retaliation case at the DOL. Moreover, as § 1513(e) is a predicate offense under RICO, a violation of the criminal prohibition against retaliation can give rise to a RICO claim, thereby offering the potential to recover treble damages. (if the whistleblower can meet the fairly onerous burdens required to prove a RICO claim).

Procedure

The statute of limitations for a TFA whistleblower retaliation claim is 180 days. The claim must be filed initially with OSHA, which will investigate the claim. If OSHA determines that there is reasonable cause to believe that a violation occurred, OSHA can order relief, including reinstatement of the whistleblower.

Either party can appeal OSHA’s determination by requesting a de novo hearing before the DOL Office of Administrative Law Judge (OALJ), but an employer’s objection to an order of preliminary relief will not stay the order of reinstatement. Once a TFA retaliation claim has been pending before the DOL for more than 180 days,

the whistleblower can remove the claim to federal court and try the case before a jury. TFA retaliation claims are exempt from mandatory arbitration.

Tax Fraud Whistleblower Program

Under [26 USC § 7623](#)(b), the IRS is *required to issue an award to tax whistleblowers of 15% to 30%* of proceeds collected from tax fraud or tax underpayments if:

- the whistleblower provides a tip that the IRS decides to take action on (a whistleblower cannot force the IRS to act on a tip);
- the amount in dispute (the tax underpayment, including interest and penalties) exceeds \$2 million (if the taxpayer is an individual, his or her gross income must exceed \$200,000 for at least one of the tax years in question); and
- the IRS collects tax underpayments resulting from the action (including any related actions).

During fiscal year 2018, the IRS awarded [\\$312M to tax fraud whistleblowers](#), and whistleblowers enabled the IRS to recover \$1,441,255,859.

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