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NOTES

CAN YOU BLOW MY WHISTLE? A HARMONIOUS MARRIAGE OF STATE LEGISLATION AND FEDERAL PROTECTIONS TO CREATE A MORE PERFECT UNION OF PRIVATE WHISTLEBLOWER RIGHTS

I. INTRODUCTION

A. A Tale of Corruption

Edward Snowden, Mark Felt, Sherron Watkins, and Daniel Ellsberg. Some of these names may look more familiar than others, but the fact remains that they all share one common, distinct characteristic; they are all whistleblowers. Whether the arena is government, politics, or business, these people have played an integral role in helping spread information and ultimately protect the public by exposing corrupt or unethical behavior. The difference between these names and the names of people who blow the whistle on their employer, however, is that many


2. Mark Felt, more commonly known as “Deep Throat,” was a former FBI official who provided information in connection with President Nixon’s involvement in Watergate, resulting in Nixon’s resignation from office. Hicks, supra note 1. Daniel Ellsberg was credited as the military analyst who leaked the “Pentagon Papers,” which revealed the extent of the Johnson administration’s deception to the public regarding U.S. military and political involvement in Vietnam before the war. Id. More recently, whistleblower Edward Snowden leaked government documents to the public which showed how and the extent to which the U.S. government collects information on private citizens. Id; see also Associated Press, supra note 1 (detailing Sherron Watkins’ involvement as a whistleblower in one of the largest financial controversies in American history. Ms. Watkins was credited as the whistleblower that exposed the fraudulent accounting and finance practices of Enron, eventually leading to their collapse in 2001).

3. See Hicks, supra note 1; see also Associated Press, supra note 1.
of the people listed above become household names and end up on the
news and in history books, while the names of workplace whistleblowers
remain largely unknown. So why then, should the government make
every effort to protect these people’s rights?

The federal government has had a compelling interest in enacting
meaningful legislation to streamline the whistleblowing process in order
to protect employee’s rights. Therefore, whistleblowers working in the
public sector of the United States, either for the federal government or in
some other public capacity, are provided seemingly unyielding
protections by the government. Employees exposing corruption and
illegal acts, especially in industries that have a great impact on public
health and welfare, are free to express their concerns about fraudulent or
unethical practices under the shield of the federal statute. As a result of
these protections, employees in the public sector have thus had many
successful whistle-blowes with little to no repercussions implemented on
said whistleblowers. This comes in contrast with the hand that many

4. "[F]or every whistleblower who finds himself plunged into the limelight, a dozen more pass unnoticed.... [B]eyond WikiLeaks whistleblower Chelsea Manning and Snowden, most Americans would be hard-pressed to think of another whistleblower from the last decade.” Rob Price, Ronald Ridenhour, Phil Zimmerman, and 5 Other Whistleblowers You Should Know, DAILY DOT (June 11, 2014), http://www.dailydot.com/politics/ronald-ridenhour-phil-zimmerman-whistleblowers-edward-snowden-unknown/.

5. See 29 U.S.C. § 218(c) (2012) (stating that an employer cannot discharge or discriminate against an employee who has engaged in common acts of whistleblowing such as: providing information regarding violations, testifying, and participating in a proceeding); see also Jason Zuckerman, Congress Strengthens Whistleblower Protections for Federal Employees, A.B.A. (Nov./Dec. 2012), http://www.americanbar.org/content/newsletter/groups/labor_law/lflash/1212_abael_flash/le1_flash12_2012spec.html (explaining that whistleblowers play a crucial role in exposing various threats to public health and safety); see also Federal Whistleblower Protections, NAT'L WHISTLEBLOWERS CTR., http://www.whistleblowers.org/index.php?option=com_content&amp;task=view&amp;id=816&amp;Itemid=129 (last visited Dec. 22, 2016) (listing protections available to whistleblowers under federal law).

6. See Whistleblower Protection Enhancement Act of 2007, H.R. 985, 110th Cong. § 10(e)(1)-(2) (2007) (enacted) (explaining that nothing in this section may be construed to authorize the discharge, demotion, or discrimination of whistleblowers and that their rights may not be preempted, modified, or derogated); see also NAT'L WHISTLEBLOWERS CTR., supra note 5 (listing protections available to whistleblowers under federal law).

7. See Zuckerman, supra note 5 (explaining how the Whistleblower’s Protection Enhancement Act of 2012 strengthened whistleblower protection, which was crucial for those acting to expose threats to public health); see also Whistleblower Protection Enhancement Act (WPEA), GOVT ACCOUNTABILITY PROJECT, https://www.whistleblower.org/whistleblower-protection-enhancement-act-wpea (last visited Dec. 27, 2016) (explaining how the WPEA provided protection for those revealing government corruption).

whistleblowers in the private sector have been dealt when dealing with a situation where they should blow the whistle, but may fail to do so because of inadequate or nonexistent protections.\(^9\)

The public sector was not always so forthcoming when it came to protecting the rights of whistleblowers.\(^10\) However, that all changed when Harriette Walters, an employee at the Office of Tax and Revenue in Washington D.C., committed fraud.\(^11\) Ms. Walters stole over $48 million from the District, which went seemingly unnoticed for eighteen years.\(^12\) Upon investigation, the D.C. Council concluded that Ms. Walters was able to orchestrate such a large-scale theft “undetected” because there was a lack of protections enacted for whistleblowers.\(^13\) Many employees felt insecure because there was nothing that provided them with adequate protections, neither internally nor externally, and they were unsure of what the outcome would be if they spoke out against this fraudulent behavior.\(^14\) As a result, none of the other employees felt comfortable reporting the theft, even though they were very much aware that it was being committed.\(^15\) As a matter of fact, during the eighteen years that this fraud was being committed, not one employee felt safe enough to report this crime.\(^16\) When asked why no one reported the misconduct, all that an assistant to the senior Office of the Chief Financial Officer had to say was “snitches get stitches,” expressing the sentiment for whistleblowers at this time.\(^17\) Taking this apparent fear of reporting, and coupling it with the widespread fraud that was known by others and perpetuated by Ms. Walters for so long, was the primary impetus for the D.C. legislature to amend its Whistleblower Protection Act in order to achieve a more focused goal of protecting employees in the private sector.\(^18\)


\(^12\) Id.

\(^13\) Id.

\(^14\) See id.

\(^15\) Id.

\(^16\) Id.

\(^17\) Id.

\(^18\) Id.
The Whistleblower Protection Act (hereinafter "WPA") has a long legislative history that significantly grew more and more protective of federal employee's rights over the years.19 It all began in 1978, when whistleblower rights were initially addressed in the Civil Service Reform Act (hereinafter "CSRA").20 The CSRA set out rules and regulations for federal civilian employees.21 More importantly, this act gave employees their first ever protections against retaliation from their employers in the event an incompetent employee was reported.22 This newfound ability to report other employees for improperly performing their duties without fear of retaliation was seemingly the first attempt at establishing whistleblower protections for employees.23 Although ambitious in nature, the whistleblower protection regulation found in the CSRA was not enough, as employees were still being terminated for disclosing inter-business violations.24 For example, in Fiorillo, a correctional officer was suspended and subsequently demoted from his job because he made allegations regarding the improper conduct of the supervisory board at his place of work.25 Mr. Fiorillo assumed that his statements would be protected under the CSRA, as they were true and required an intervention of justice.26 However, the United States Court of Appeals determined that because Fiorillo's primary motivation for the disclosure was not for "the public good" and instead for his own personal reasons, he was not protected by the CSRA.27 The Fiorillo case established that employee motives would be taken into consideration when determining if the protections outlined in the CRSA would be implemented or not.28 The enactment of the WPA recognized that Fiorillo was not the only case producing unfavorable outcomes to employees, and therefore was created to remedy this.29

In 1989, the WPA was enacted by Congress to protect federal employees from retaliation if they blew the whistle on activities that

21. Id. § 3.
22. Id. § 2301(6)-(9).
24. Id. at 6; see also Fiorillo v. U.S. Dep't of Justice, Bureau of Prisons, 795 F.2d 1544, 1546 (Fed. Cir. 1986).
25. Fiorillo, 795 F.2d at 1545.
26. Id. at 1561.
27. Id. at 1550.
28. Id.
would constitute malfeasance within the government. Congress stated further that the CSRA was to be expanded to:

strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by—(1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and (2) establishing...that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.30

Clearly, it was the goal of Congress to allow federal employees to feel as though they could freely voice their concerns in a safe and protected environment.31 However, there were limits as to who exactly was permitted to assert these rights.32 An employee first had to be considered a “covered employee” under the statute.33 To be considered a “covered employee” meant that a person had to either be a current or former employee or an applicant for employment in the government’s executive branch.34 Next, the covered employee had to ensure that their disclosure fell under the “protected disclosures” prescribed by the statute.35 This provision was purposely drafted to be very broad, and thus protected “any disclosure,” unlike the provision in CSRA, which allowed deference to the Court in deciding if a disclosure was protected or not.36 In fact, the Fiorillo decision was the reason why disclosures were no longer limited to those motivated by a public concern, and the reason why the court was therefore no longer allowed to prevent certain disclosures that may indicate a government’s wrongdoing.37 This was duly noted in the Senate Report that supplemented the newly drafted

30. 5 U.S.C. § 1201(b).
31. See OIG, supra note 19.
32. See 5 U.S.C. § 2302(b)(8).
33. Id. § 2302(2)(A).
34. Id.
35. Id. § 2302(2)(D).
The report stated in part, "[r]egardless of the official’s motives, personnel actions against employees should quite simply not be based on protected activities such as whistleblowing." The only exception to this intentionally broad rule was that any disclosure expressly prohibited by law or protected by an Executive Order was stringently not protected by the WPA. This meant that although whistleblower protections were greatly expanded, there were still some barriers that could be the cause of some uncertainty or hesitation for employees looking to report. Another potential reporting concern presented in the WPA that employees had to take into consideration when reporting came in the form of the particular disclosures that were required be made in order to access the protections in the act. The WPA mandated that employee disclosures must be made with a reasonable belief that the wrongdoing was true, and must be made on the basis of gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety.

Almost two decades after the WPA was enacted, and shortly after the Harriet Walters’ crime was eventually exposed, more protections continued to surface for employees blowing the whistle in the public sector. The Whistleblower Protection Enhancement Act of 2007 (hereinafter “WPEA”) was created to amend the prior WPA and afford more rights to federal employees, such as those who specialize in national security issues like the Central Intelligence Agency. Disclosures were also expanded in the WPEA, making it mandatory that any disclosure, regardless of time, place, or certainty, would be protected. Washington D.C. amended its Whistleblower Protection Act to allocate more protections to employees who have information that may uncover corruption, fraud, or illegal acts within the workplace.

39. *Id.*
41. *See id.* (explaining that there are limitations to disclosures, specifically, any disclosure not explicitly prohibited by law or protected by an Executive Order is not afforded protection).
42. *See id.* (explaining certain initial requirements that are needed before being able to receive protection under the act, including having a reasonable belief that there has been violations of a law or regulation).
43. *Id.*
45. *Id.*
46. *Id.*
The recent amendments to the D.C. WPA protect a disclosure "without restriction to time, place, form, motive, context, forum, or prior disclosure made to any person by an employee or applicant..." An employee's communication therefore does not have to be an original disclosure to qualify for protection under the D.C. WPA, an element that was not originally included before the amendment. Today, this act is considered to be the strongest public sector protection statute in the country. Many other states and local governments have used the D.C. WPA as a template when drafting more stringent protections for their employees in the public sector.

It is clear that federal and state governments have made the move toward taking adequate steps to protect public sector employees, however, private sector employees in the United States still fear consequences in situations where they should rightfully blow the whistle. This is mainly due to the lack of protections afforded to them. Private sector employees, especially those in the financial, health care, and pharmaceutical industries, for the most part lack adequate statutory protections that will enable them complete freedom and confidence to whistle-blow without the fear of possible repercussions. They may be subject to retaliation in the form of dismissal, harassment, intimidation, or in some instances even violence. The health and pharmaceutical industries are fields where employee protections should be at their most prevalent, due to the implications these industries have on the health and wellbeing of the general populous, yet that does not seem to be the case.

49. See id.
50. Oswald & Zuckerman, supra note 11, at 1.
51. See id.
54. Id.
57. See infra Part II.
corruption is significantly heightened in environments such as these where the reporting of wrongdoing is not supported or protected either by employers or by shelter of the law. The effects of fraud going undetected in such large and influential corporate structures are damaging not only to the government’s economy, but, more importantly, to the general welfare of the public as a whole.

B. Why Whistleblow?

A whistleblower is an employee who reports employer wrongdoing to a governmental or law-enforcement agency. They play an important role in promoting positive organizational change by exposing crucial issues that may adversely affect the public if left unchecked. They play a role so important, in fact, that Congress elected by unanimous vote to have an entire day honoring whistleblowers. Moreover, in the past four decades, whistleblowers have been credited with protecting the public welfare by exposing fraud and corruption in areas ranging from politics, to business, and even sports and entertainment. The means by which whistleblowers go about achieving this goal is by spotting potential issues or trouble areas within an organization and bringing these problems to the light by reporting them either to the appropriate governmental agency, the media, or internally—if an organization has an internal whistleblower protocol. However, when the protection for these people should be at its most powerful, it is at its most vulnerable.

The lack of protections and incentives for whistleblowers in the private sector, especially in industries that have the potential to greatly affect the public, have been a cause of concern for many employees

59. See infra Part I.B.
60. Whistleblower, BLACK’S LAW DICTIONARY (10th ed. 2014).
64. Id. at 390.
65. See infra notes 92-105 and accompanying text.
looking to expose corrupt and potential harmful practices of employers. In 1972, Thomas A. Robertson, a Director of Development at Firestone, sent a memo warning top management at the company of a safety issue with one of its tire models. His report was ignored and the tire was kept on the market. The result was hundreds of serious injuries and more than three dozen deaths stemming from the defective tires; most, if not all, of which could have been avoided if Firestone had an internal whistleblower policy, or if Robertson had an appropriate outlet to blow the whistle externally.

More recently, in 2010, reports have revealed that not much ground has been made in terms of arming private sector employees with the tools necessary to protect the public against the harmful actions of corporate giants. Cheryl Eckard, a quality control employee of pharmaceutical giant GlaxoSmithKline (hereinafter “GSK”), was assigned to monitor and report on production at GSK’s manufacturing plant in Puerto Rico. What she discovered during her investigation was contaminated production equipment, water tainted with bacteria, and, worst of all, over-the-counter drugs being mixed in with prescription medications. Ms. Eckard voiced her concerns to upper management, who assured her that a report had been submitted to the Food and Drug Administration (hereinafter “FDA”), and that GSK had been cleared of any violations.


68. Id.

69. Id.; see also Higgins & Summers, supra note 66 (detailing the failures of the auto industry to remedy their continued corporate culture of complacency more than forty years after the Firestone Tire incident). Steven Oakley, a safety inspector at General Motors, recounts the feeling of being “too afraid to insist on safety concerns with the Cobalt after seeing his predecessor ‘pushed out of the job for doing just that.’” Id. This corporate culture of fear and complacency at GM was cited as one of the main reasons why ignition issues with the Cobalt failed to surface resulting in thirteen deaths and fifty-four crashes. Id.


71. Id.

72. Id.

73. Id.
Ms. Eckard was rewarded for her efforts by being downsized out of the company. Luckily, the malfeasance of GSK was eventually discovered and an action was brought against them under the False Claims Act, but not before adulterated and defective pharmaceutical drugs made it past the production process and were released to the public, subsequently causing harm to those who bought the drugs.

Meanwhile, in the public sector, Congress has enacted a wide range of laws that both protect and incentivize employees looking to expose any wrongdoings of their employer. The False Claims Act (hereinafter “FCA”), the CSRA, the Whistleblower Protection Act (hereinafter “WPA”), and the Sarbanes-Oxley Act (hereinafter “SOX”) are some examples of widely known acts of Congress that have expanded the rights of whistleblowers in the public sector—or whistleblowers of private companies doing work in the public sector—while also outlining the consequences that an employer may face if retaliation occurs. The variety of laws in this area have been hugely effective in encouraging employees to blow the whistle and expose corrupt or illegal practices in the public sector. In the past five years, the federal

74. In her interview with 60 Minutes, Ms. Eckard recalls an incident with the Vice President of Manufacturing during this period where she was asked to stop coming into work upset over the condition of the Puerto Rico plant:

The director of manufacturing at the factory, maybe he was the [Vice President] of manufacturing at the factory, he pulled me aside and said, “We can all tell that you’ve been crying. You come here every day and your eyes are swollen because you’ve been crying. So I want to ask you to stop that.” And I said to him, “You know, I do cry. I cry at night. I cry in the morning. And what I don’t understand is why I’m the only one. Why aren’t you crying?”

75. Id.
76. Id.
77. Id.
78. See JON O. SHIMABUKURO & L. PAIGE WHITAKER, CONG. RESEARCH SERV., R42727, WHISTLEBLOWER PROTECTIONS UNDER FEDERAL LAW: AN OVERVIEW 1 (2012) [hereinafter, SHIMABUKURO & WHITAKER, AN OVERVIEW].
79. See DOYLE, supra note 52.
82. SHIMABUKURO & WHITAKER, AN OVERVIEW, supra note 78, at 12.
83. Id. at 1.
84. Id.
85. Id. at 12.
86. See, e.g., Reuben Guttman, Claiming Credit for False Claims Act in 2014?, THE HILL (Jan. 7, 2015, 12:00 PM), http://thehill.com/blogs/congress-blog/the-administration/228651-
government has recovered over $24 billion for successful claims under the FCA alone. This is partially due to the built-in incentive system of the FCA that works as additional motivation for employees contemplating whether or not to blow the whistle. The same results cannot be shown, however, for employees in the private sector where whistleblower cases are at an all-time high and rising.

Although progress relating to employee rights and protections when blowing the whistle has been made, finding a permanent and effective resolution to this growing issue for whistleblowers in the private sector has continued to remain a major point of contention. Existing protections for these types of employees generally consist of company policies and bylaws, supplemented by a patchwork of federal and state laws.

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90. SHIMABUKURO & WHITAKER, AN OVERVIEW, supra note 78.


uniformity amongst the states in either the statutory or common law scheme of protections. 93 Although the federal government has enacted a variety of acts which have addressed whistleblowing against private sector employers, 94 none have come close to providing these employees with the protections or incentives they need to feel confident enough to actually blow the whistle.

C. Summary

This Note will discuss the issues relating to the rights of employees in the private sector who attempt to expose corrupt or illegal practices of their employer by whistleblowing, especially in major consumer industries, such as the financial, healthcare, and pharmaceutical industries. 95 It will address the issues relating to employee’s rights when whistleblowing in the these types of industries and why greater protections are necessary, 96 the successes and failures of individual state efforts to protect whistleblowers in the private industry, 97 and the extent of federal efforts by the government to address and extend protections to the private sector. 98 This Note will also explore the merits of proposed federal legislation aimed at protecting the rights of private whistleblowers by mirroring the protections and incentives set up in the False Claims Act (hereinafter “FCA”) in combination with the foundational barriers created by individual state legislation to create more streamlined, uniform protections for whistleblowers. 99


95. See generally infra Section II.

96. See generally infra Section II.

97. See generally infra Section III.

98. See generally infra Section IV.

99. See generally infra Section V.
II. ISSUES RELATING TO WHISTLEBLOWING IN THE HEALTHCARE AND PHARMACEUTICAL INDUSTRIES

A. Cases and Controversies

Whistleblower protections for employees in the healthcare and pharmaceutical industries are especially important because of the direct effect these industries have on the health and welfare of the public.\(^{100}\) For example, the pharmaceutical industry supplied about $329 billion worth of drugs to consumers in the United States in 2013.\(^{101}\) This is an industry where, even under the supervision of the FDA, as many as fifty percent of drugs produced each year can end up being defective.\(^{102}\) Moreover, this is an industry where the failure to properly regulate these defective drugs can be the cause of more than 40,000 deaths per year.\(^{103}\) There are, however, solutions to reducing these staggering numbers, such as increasing protections for employees who bear witness to the instrumentalities that allow pharmaceutical companies to produce and distribute defective drugs.\(^{104}\)

Providing whistleblowers with added protections may help them bring to light issues that an organization may be turning a blind eye to—something that can be extremely detrimental when it comes to protecting the good of the public.\(^{105}\) As such, it is imperative that employees of companies in these industries have access to unfettered statutory protections so that they can feel confident in alerting the public of corporate misconduct.\(^{106}\) Laws addressing whistleblowers in these areas have been proven to be effective in protecting employees of the public sector,\(^{107}\) but there has also been some applicability of these laws, although limited, in the private sector when dealing with cases concerning health and safety.\(^{108}\)

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100. See generally Ravishankar, supra note 67 (describing various examples of how the public welfare was directly harmed because of the healthcare and pharmaceutical industries).


102. See id.

103. See id.

104. See Ravishankar, supra note 67.

105. Id.

106. Id.

107. Id.

One of the most prevailing examples of a successful private sector whistle-blow relating to health and safety was evident in the *Franklin* case. In 2001, David Franklin, a former Parke-Davis employee, exposed the illegal marketing of an epilepsy drug, Neurontin. He was an internal employee for this pharmaceutical company, who had knowledge that his employers were marketing Neurontin for illnesses such as headaches, bipolar disorder, and other neurological disorders. The issue in this case was that Neurontin was being fraudulently advertised to the public as an effective solution for various psychiatric illnesses, when in reality there was evidence that showed the contrary. In fact, the drug was not at all effective for any of the aforementioned illnesses. After the Parke-Davis CEO was found guilty of committing criminal and civil violations under the Food, Drug, and Cosmetics Act, he was ordered to pay fines totaling $430 million. Not only were the penalties a substantial victory for the Plaintiffs, but the publicity that stemmed from this case brought to light the very real possibility of rampant fraud that can continue to grow in the pharmaceutical industry if left unchecked. It was stated that *Franklin* represented one of the largest False Claims Act recoveries against a pharmaceutical company in U.S. history while also being the first off-label promotion settlement under the False Claims Act. Due to the success of this case, a new standard of accountability for pharmaceutical industry marketing claims was established that could not have been accomplished unless David Franklin blew the whistle.

The *Franklin* case was just the beginning of a long-term battle that would continue over the next fifteen years and still be fought today. Although Dr. Franklin was able to unveil fraudulent misconduct

109. See generally United States ex rel. Franklin v. Parke-Davis, 147 F. Supp. 2d 39, 45-46 (D. Mass. 2001) (holding that if it could be proven that the off-label marketing of Neurontin caused doctors to prescribe the drug and submit prescriptions to Medicaid, then the company would be liable under the False Claims Act).

110. See id. at 45.

111. See id. at 48-49.

112. Id. at 49.

113. Id. at 45.

114. See John N. Joseph et al., Enforcement Related to Off-Label Marketing and Use of Drugs and Devices: Where Have We Been and Where Are We Going?, 2 J. HEALTH & LIFE SCI. L. 73, 95 (2009).


116. See id. at 194-95.

117. See Joseph et al., supra note 114, at 75-76.
occurring by the pharmaceutical industry and its paid consultants, other companies were still committing crimes and getting away with it. Due to the lack of whistleblower protections, these other companies were still committing fraud that had gone largely unnoticed, which was—and is still—having major adverse impacts on the general population. In a large amount of cases involving incidents in the workplace, where employees who may have the most useful information refuse to report or speak up because of fear of retaliation, the health and welfare of the public remains at a grave risk.

B. The Effects of Fraud Occurring in the Pharmaceutical Industry

The effects of a drug being adulterated into something it is not by manufacturing giants in the pharmaceutical industry can be extremely damaging to the population as a whole. As seen most clearly in the Franklin case, pharmaceutical control of the healthcare system, including doctors and pharmacists, resulted in a high number of patients paying a great deal of money, for a drug that did nothing to help their illness. This is a prime example of just one way a person can be greatly harmed by the misconduct that exists in such an industry. The only upside, however, is that Parke-Davis was only able to deceive patients to a limited extent (most were only effected monetarily), and was later found and convicted of its fraudulent conduct. In this instance, nobody was killed or deeply injured by the effects of their conduct—due to the whistleblower who unmasked the truth—but the effects could have had significantly worse ramifications if the actions

118. See Franklin, 147 F. Supp. 2d at 52.
119. See, e.g., Neil Getnick, U.S. Whistleblower Cases Soar in Health and Pharma (Op-Ed), LIVE SCIENCE (Oct. 3, 2014, 1:48 AM), http://www.livescience.com/48136-us-whistleblower-cases-are-soaring.html (discussing endorsement from the Internal Revenue Service to further combat companies such as Shire Pharmaceuticals, LLC, which paid $58,900,000 in a settlement).
120. Id.
121. Jennifer S. Bard, What to Do When You Can’t Hear the Whistleblowing: A Proposal to Protect the Public’s Health by Providing Whistleblower Protection for Medical Researchers, 9 IND. HEALTH L. REV. 1, 5 (2012).
122. See id. at 4-5; see also Joseph et al., supra note 114, at 75.
123. See Franklin, 147 F. Supp. 2d at 48-49.
124. See id.
125. See Joseph et al., supra note 114, at 95.
126. See, e.g., Franklin, 147 F. Supp. 2d at 48-49 (explaining that the essence of the Relator’s claim is that the company engaged in fraudulent conduct which included consciously making false statements to physicians causing them to submit claims ineligible for payment by the government under Medicaid).
127. See id.
of the company had gone unchecked.\textsuperscript{128}

In 2004, the public indeed felt the effects of this exact same type of activity in greater force when it was found that the manufacturers of the drug Vioxx knew that the drug caused an increased risk of heart attack, but it was still kept on the market for five years.\textsuperscript{129} After Merck released the drug in 1999, reports began to come out from doctors and scientists about how Vioxx had a tendency to increase the risk of heart attack for patients taking the drug for less than two years.\textsuperscript{130} In some studies, it was even found that Vioxx could cause this risk for patients within the first two weeks of taking the drug.\textsuperscript{131} These reports were denied and suppressed until 2004 when Merck voluntarily pulled their drug from the worldwide market.\textsuperscript{132} The ensuing result was the creation of a multidistrict litigation (hereinafter “MDL”) for potential claimants on a nationwide scale.\textsuperscript{133} This lead to more than 60,000 claims being filed against the company, resulting in 35,000 successful claims and the creation of a $4.85 billion settlement fund.\textsuperscript{134} While seemingly a victory for patients, the fact that 35,000 claims were found to be meritorious means that a substantial portion of the public was actually and seriously harmed by this drug.\textsuperscript{135} Had the doctors and scientists, or even regular employees of Merck, been equipped with adequate whistleblower protections at the outset—whether internally or externally—and felt comfortable enough to report the wrongdoing earlier on, harm of this extent could very likely have been avoided, or at least greatly mitigated.\textsuperscript{136}

Allowing private sector employees a guaranteed protection in the event of a whistle-blow will significantly decrease the variety of damaging effects that are now commonplace in the pharmaceutical industry.\textsuperscript{137} For one, due to fraudulent misrepresentations, such as

\begin{itemize}
\item \textsuperscript{128} See, e.g., Bard, \textit{supra} note 121, at 10-11 (discussing the GlaxoSmithKline case in which the company concealed known dangers of suicide by individuals using its drug Paxil).
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} \textit{Id.}
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} \textit{See id.}
\item \textsuperscript{136} \textit{See id.}
\item \textsuperscript{137} See, e.g., David C. Radley et al., \textit{Off-label Prescribing Among Office-Based Physicians}, 166 \textit{ARCHIVES INTERNAL MED.} 1026, 1021 (2006) (supporting that damaging effects in the pharmaceutical industry, such as off-label practices, should be given more attention in order to protect both employees and consumers).
\end{itemize}
fraudulent marketing practices, a company may mislabel prescription medication and market the drug for one use when it is actually approved for another use.  

People become victims of taking medicine they think will help their conditions, but instead become severely injured as a result of mislabeling, as was true for the 35,000 injured claimants in the Vioxx litigation.  

Second, fraud in the pharmaceutical industry greatly impacts the government’s Medicaid and Medicare expenses, costing taxpayers billions of dollars, yet in the same respect decreasing the industries’ amounts owed to the states.  

Third, pharmaceutical industries are notorious for understating or overstating the efficiency of a drug’s use, despite a lack of supporting clinical data.  

Companies will often make blanket statements or sweeping generalizations about a drug to bolster its popularity, when there is in fact little or no clinical data to support their claims.  

Finally, the most common practice of off-label marketing that is widely propagated in the pharmaceutical industry, as well as some conspiring physicians and paid clinical consultants, is to use off-label marketing to increase revenue while providing almost no factual support to the off-label “capabilities” of the drug in question.  

Unless the FDA has reviewed a company’s clinical trial data to see if the results support the drug for a specific use, that drug is not considered safe or effective and will thus be subject to an off-label violation if improperly represented.  

Although it is a nice thought that the FDA will catch all of these harmful marketing, manufacturing, and distributing practices, the reality is that they are unequipped to handle the sheer depth of coverage necessary for this complete protection of industry.  

In the more recent years, it has been evident that a failure to whistle-blow in the pharmaceutical industry has also had a huge impact.
on the securities industry.\textsuperscript{146} Because of the misconceptions that are perpetuated by pharmaceutical companies when they deceive the public about the possible "revolutionary" expectations from these drugs, the stock of that company rapidly increases.\textsuperscript{147} As public perception and media hype for the prospect of a potential "blockbuster" drug grows, it causes the companies market price to balloon.\textsuperscript{148} Once the public becomes aware of the false claims, and results are not being produced as expected, the balloon pops and the stock price of that company rapidly decreases.\textsuperscript{149} As a result, the Securities and Exchange Commission (hereinafter "SEC") has been forced to take the reins and deal with many pharmaceutical fraud cases over the past decade.\textsuperscript{150} These enforcement efforts have been focused mainly on condemning the companies to comply with FDA regulations in a hopeful attempt to prevent further falsities from occurring.\textsuperscript{151}

\textbf{C. The Growing Trend to Stop a Reoccurring Problem}

The question still lingers as to whether someday every industry in the private sector will be subjected to the same consequences that the CEO in Franklin encountered if they choose to act in a fraudulent manner.\textsuperscript{152} In industries such as these that greatly involve the public health and welfare, it is the duty of the federal government to enact legislation that addresses concerns involving corporate corruption or wrongdoing.\textsuperscript{153} The creation of a uniform federal act, which would provide adequate protections and incentives for employees who blow the whistle on employers, would undoubtedly accomplish this goal. A piece of legislation aimed at unifying and streamlining protections will also alleviate the stress on agencies such as the FDA and SEC, which have dumped countless resources into chasing and enforcing the harmful or fraudulent activity of these companies.\textsuperscript{154}

\begin{footnotesize}
\begin{enumerate}
  \item[147.] See id.
  \item[148.] See id.
  \item[149.] See id.
  \item[150.] See id.
  \item[151.] See id.
  \item[152.] See Joseph et al., supra note 114 at 75.
  \item[153.] See Zuckerman, supra note 5.
  \item[154.] See, e.g., Joseph et al., supra note 114; see also Sec. Exch. Comm’n, FY 2016 Budget Request By Program, https://www.sec.gov/about/reports/sec-fy2016-budget-request-by-program.pdf (last visited Oct. 21, 2016) (explaining the difficulty, with numerous revisions to guidance, to
\end{enumerate}
\end{footnotesize}
CAN YOU BLOW MY WHISTLE?

This trend has seemingly already begun with the provisions enacted recently by the SOX, affording legal protections to whistleblowers in publicly traded companies for the very first time. The SOX grants broad authority to enforcing the provisions aimed at protecting whistleblowers. In addition to widening the jurisdictional scope over whistleblowers, the SOX also requires publicly traded companies to develop independent "audit committees" and establish internal whistleblower procedures aimed at protecting the confidentiality of employees who file allegations against their employers. As long as this trend continues and meaningful efforts are taken to protect the rights of employees, issues affecting society such as health, safety, and corporate corruption can be prevented by whistleblowers, and businesses can finally be held accountable in new areas.

III. STATE ACTIONS TO PROTECT THE RIGHTS OF PRIVATE EMPLOYEES AND THEIR INSUFFICIENCIES

A. Enter: the States

Attempts by state legislation to afford protections to whistleblowers in the private sector have had varying effects on the way employee's rights are protected and the ways in which they are able to bring their claims. States, such as New York, California, Texas, and New Jersey,

address regulation of off-label use of products).


156. "Section 3(b) of the SOX provides for a broad grant of jurisdictional authority for the SEC and/or the Department of Justice to enforce (civilly or criminally) all of the requirements contained in the SOX, including the four whistleblower-related provisions." Id. The law provides that:

A violation by any person of this Act [i.e., the SOX], any rule or regulation of the Commission issued under this Act, or any rule of the Board shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or the rules and regulations issued thereunder, consistent with the provisions of this Act, and any such person shall be subject to the same penalties, and to the same extent, as for a violation of that Act or such rules or regulations.

Id.

157. Id. at 1.

158. See Ravishankar, supra note 67.

159. See N.Y. LAB. LAW § 740 (McKinney 2015) (discussing, via federal/state statutes/cases, an employee's protections for whistleblowing, and the scope of retaliatory action that can be taken by an employer against an employee who engages in such behavior); Conscientious Employee Protection Act, N.J. STAT. ANN. § 34:19-1 (West 2011); see also Yuval Feldman & Orly Lobel, The
all have inconsistent statutes—or lack thereof—which struggle to promulgate adequate whistleblower protections for private sector employees. Unfortunately, the irregularity of each state’s laws do not address the pharmaceutical industry, along with many other important consumer industries, and are not effective in fully securing whistleblowers in their efforts to express fraud and misconduct or ensure uniform protection across the nation. The variety of laws that address whistleblowers also create confusion and inconsistency in the application of the law for protecting employees.

B. Cases and the Effectiveness of Statutes in Protecting Private Employee’s Rights

An array of cases involving the effectiveness of state whistleblower statutes, as they relate to illegal activities in the private sector, have displayed the successes and failures of employee-plaintiffs in being able to bring whistleblower claims across the U.S. First, New York has whistleblower protections in place for private employees, such as the New York False Claims Act State Finance Law. These laws, however, are largely ineffective because they do not actually protect the rights of employees. There is always some discrepancy that invalidates the employee-plaintiff’s claims and ultimately makes their chances of prevailing very slim. For example, in Bordell v. Gen. Elec. Co., the plaintiff alleged he was unlawfully discharged after he reported alleged violations by his employer to the Department of Energy (hereinafter “DOE”). The report asserted that the plaintiff’s employer failed to record that certain employees were being exposed to radiation, a requirement mandatory under the DOE. New York Labor Law

section 740(2)(a) provides that an employer shall not take any retaliatory personnel action against an employee because such employee discloses, or threatens to disclose, to a supervisor, or to a public body an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation which violation creates and represents a substantial and specific danger to the public health or safety. The plaintiff referenced the Civil Service Law which allowed for "a reasonable belief" to be sufficient in proving that a violation occurred. The court dismissed the plaintiff's claim because no actual proof was provided, a necessary factor under New York labor law.

Many other cases in New York have ruled against employee-plaintiffs due in part either to elements not being fully satisfied under the statute or simply a lack of sufficient evidence. In Bompane v. Enzolabs, Inc., the employee filed suit against the employer under New York Labor Law section 740 claiming that she was fired in retaliation for making a complaint to the county health department regarding the employer's non-compliance with smoke-free work area rules under New York Public Health Law sections 1399-o and 437-4. The court ruled that the employer had a valid grounds for firing the employee-plaintiff due to the fact that there was no finding of "substantial and specific danger to the public health or safety." Basically, the plaintiff blew the whistle on dangerous activity in the workplace and was not protected by any New York statute, because there was simply not enough apparent danger. This growing trend of inadequate workplace protection among employers in New York, and employers of other states shows the need for a federal protection aimed at protecting workplace whistleblowers.


169. N.Y. LAB. LAW § 740(2)(a) (Mckinney 2015); Bordell, 622 N.Y.S.2d at 1002.
170. Bordell, 622 N.Y.S.2d at 1002.
171. Id.
173. See Bompane, 608 N.Y.S. 2d at 990; N.Y. LAB. LAW § 740(4).
174. See Bompane, 608 N.Y.S. 2d at 990; see also N.Y. PUB. HEALTH LAW § 1399-o(a) (2012); SUFFOLK COUNTY CODE § 754-4 (2003).
175. Bompane, 608 N.Y.S.2d at 992 (citations omitted).
176. Id.
California similarly provides another example of how seemingly adequate state whistleblower laws can leave a concerned employee exposed when attempting to report wrongdoing of their employer.\textsuperscript{178} In California, protections for whistleblowers were significantly altered in 2014.\textsuperscript{179} The California Labor Code was edited to read:

\begin{quote}
[T]he purpose of [this statute] which is to encourage workplace whistleblowers to report unlawful acts without fearing retaliation. To establish a prima facie case of retaliation, a plaintiff must show that she engaged in protected activity, that she was thereafter subjected to adverse employment action by her employer, and there was a causal link between the two.\textsuperscript{180}
\end{quote}

As a result of this addition, the Code created a prerequisite to asserting a violation of section 1102.5.\textsuperscript{181} The prerequisite was that there must be the existence of an employer-employee relationship at the time the allegedly retaliatory action occurred.\textsuperscript{182} Although this seems like a step in the right direction, California employees are still fearful that whistleblowing may have serious retaliations, since there are still many elements that must be satisfied before a claim can be properly brought.\textsuperscript{183} Under the statute, employees must report the alleged violation to a government or law enforcement agency in order to be protected; therefore courts will likely not rule in an employee’s favor if the report was made internally to supervisors.\textsuperscript{184} Also, there is still uncertainty as to a whistleblower’s fate if they are not the first to report misconduct.\textsuperscript{185} For instance, in \textit{Hager v. County of Los Angeles}, the

\textsuperscript{178} See, e.g., Hager, 228 Cal. App. 4th at 1549, 1552.
\textsuperscript{179} See CAL. LAB. CODE § 1102.5(4)(26) (2016).
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\textsuperscript{184} See WORKPLACE FAIRNESS, supra note 183.
defendant raised the issue of a "first report rule" in order to get the court to dismiss plaintiff's retaliation claims. Although he did not prevail, many other plaintiffs in similar California cases have suffered the repercussions of being a second reporter of a fraudulent scheme, and thus, suffer as an unprotected party against retaliation. The argument was that only the first person to report fraud will be protected from retaliation, however everyone reporting after that is considered "fair game." 

In complete contrast to the possibility of California's "fully" protected workplace whistleblower statute, is the current condition of Texas' whistleblower laws. In Texas, there is still no statute that protects an employee who was unlawfully discharged from his employment because he blew the whistle. Further outlining this contention is Winters v. Houston Chronicle Pub. Co., where a Plaintiff was fired from his employment with the Defendant, a private employer, when he alleged that the Defendant engaged in criminally deceptive trade practices. The Texas Supreme Court affirmed the firing, holding that Texas, as an at-will employment state, only recognized wrongful discharge by employers in general for an employee's refusing to perform an illegal act, and from public employers under limited and well-specified circumstances. The court declined to recognize a new exception for wrongful discharge for private employers or extend the current state of whistleblower protections in Texas. There are no protections for private employees prescribed by statute in Texas, but rather a hodgepodge of varying public sector protections and common law doctrine on wrongful discharge. In states like Texas, which has no whistleblower protection statute for private sector employees, there has been a push to combat the disparity of protections and ineffectiveness of the law in this area by examining other effective

LEXIS 10973 (Nov. 25, 2014).
186. Id.
187. Id. at 1551-52.
188. Id. at 1549.
190. Id. at 649-50, 685.
192. Id. at 726.
193. Id. at 724.
laws. However, to this day there has still not been any adequate protection enacted to protect these private sector employees.

New Jersey state law protects employees for whistleblowing under the Conscientious Employee Protection Act (hereinafter “CEPA”). Under this statute, employees who wish to disclose, object to, or refuse to participate in illegal activities, are protected from retaliation by their employers. It is sufficient that employees simply have the reasonable belief that these activities are illegal or in violation of public policy. The CEPA is very protective of most employee decisions regarding whistleblowing. However, New Jersey case law established that these protections only exist when there is a significant harm posed to the public. Private harm or harm posed to the complaining individual is not enough.

As demonstrated in Mehlman v. Mobil Oil Corp., the employee-plaintiff objected to a practice of his employer “that he reasonably believed was incompatible with a clear mandate of public policy designed to protect the public health and safety of citizens of another country.” After reviewing the facts, the court found that the retaliation inflicted upon him by his employer was a violation of the CEPA. Dr. Mehlman, was an employee of Mobil’s Medical Department, responsible for ensuring environmental health and regulating toxicology tests for the company. After a business trip to Japan, Mehlman discovered that the gasoline that was to be used in a major business transaction, was in fact very harmful to humans due to the high percentage of benzene. Mehlman was terminated from his employment at Mobil soon after his discovery and subsequent reporting of the hazardous gasoline. Although Mobil argued that Mehlman was terminated “for cause,” Mehlman insisted that his rights under CEPA

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195. Maxwell, supra note 189 at 658, 661.
196. See id. at 685.
198. Id. § 34:19-3.
199. Id. § 34:19-3 cmt. 16.
200. See Barratt v. Cushman & Wakefield of New Jersey, Inc., 675 A.2d 1094, 1098 (N.J. 1996) (finding that the plaintiff’s whistleblowing affected the real estate market as a whole, rather than the specific employer).
201. See id. at 1100 (distinguishing the plaintiff from those in cases where the whistleblower’s actions affected only one specific employer).
203. Id. at 1015.
204. Id. at 1001-02.
205. Id. at 1003.
206. Id. at 1004.
were violated.\textsuperscript{207} Mehlman had the burden of proving a violation of CEPA occurred, and during trial he “introduced several guidelines, regulations, treatises and other sources to establish a clear mandate of public policy concerning the public health, safety or welfare.”\textsuperscript{208} The court ruled in Mehlman’s favor, affirming a generous amount of damages previously awarded following a trial by jury.\textsuperscript{209} In this case, there was a clear harm that was posed to the public. However, plaintiffs in cases such as Barratt \textit{v. Cushman}, that bring claims against their private sector employers, are not as likely to prevail when there is a different type of harm that is being instituted.\textsuperscript{210} Robert Barratt, a partner in one of the most exclusive real estate agencies in Jersey City, drafted a letter to the real estate commission advising them that a broker in his agency had been found guilty of misconduct.\textsuperscript{211} Barratt had sent this letter against the advice of Cushman & Wakefield’s attorney, and shortly thereafter was fired by his employer for notifying the commission of such activity.\textsuperscript{212} Barratt decided to bring action against his employer, stating in essence that he was discharged unlawfully under CEPA.\textsuperscript{213} After much discussion, the Court decided that although Barratt was definitely harmed because he was retaliated against for whistleblowing on his employer, but he was not protected under CEPA.\textsuperscript{214} CEPA sought to discourage behavior that would harm the public welfare, as demonstrated in Mehlam.\textsuperscript{215} Because the only harm here was Barratt being threatened by his employer’s misconduct in a private capacity, rather than there being some harm to the public, Barratt’s claim would afford him no remedies by the court.\textsuperscript{216}

\section*{C. To Apply or Not to Apply State Logic—That is the Question}

The attempts by different states to create whistleblower protection laws for private-sector employees is a start to the idea that a federal
mandate should be created. However, providing protection to whistleblowers through specific provisions in different laws of different states constitutes a fragmented approach and results in protection of only specific persons or for the reporting of specific offenses. For example, as was demonstrated by New Jersey's attempt to create a cohesive whistleblower law, the CEPA is a protection to encourage employees in the private sector to report illegal and unethical workplace activities; however, it only protects those employees who can prove a significant harm is posed to the public. This varies greatly from the complete lack of protections whistleblowers in Texas receive. The discrepancies between these two systems are echoed throughout the United States for whistleblowers, and end up leaving private sector employees with differing levels of rights and protections, depending on the state they happen to live and work in.

Due to the lack of uniformity amongst the states, employees are left with uncertainty regarding their state's statutes and whether or not they are being afforded protections. Because employee confusion is a trend occurring throughout the United States regarding ununiformed whistleblower laws, it is important that all employees are not only afforded protections, but that those protections are complete and absolute when discussing the coverage of persons. For example, first, all workers should be covered by a strict whistleblowing statute that will protect all people who decide to report misconduct within their industry, whether that industry be within a public or private sector. It can be argued that even participants in an industry, those who are not necessarily employees working for a pay or salary, should also be afforded protections. This added provision is necessary because misconduct can occur in the face of those who do not technically work for an organization, but may be aware of possible misconduct due to their participation and therefore presence in the industry. Also, it is

218. OECD, supra note 58 at 9.
219. Barratt, 675 A.2d at 1094.
220. Maxwell, supra note 189.
221. See id. at 668; Barratt, 675 A.2d at 1094.
222. See OECD, supra note 58 at 9.
223. See id.
224. Id.
225. Id.
226. See id.
essential that whistleblower protection laws provide an outline demonstrating viable causes of action an employee can raise when he or she suspects misconduct within their workplace. A law that solely limits the claims a whistleblower can raise to corruption is not sufficient enough to be fully protective. Finally, the whistleblowing laws should contain narrow provisions that specifically express what whistleblowing is and the exact protections one will be afforded for taking such action against their place of work or place of participation. The wide variation of state statutes and common law doctrine create an invariable environment of subpar protections where employees cannot feel confident in reporting information about the malfeasance of their employer. If fear and uncertainty about an employee’s job security and financial future rules their decision-making process when it comes to reporting corrupt or illegal practices of employers, a dangerous game is being played with the health and welfare of the public. Although these state laws afford some level of protection to private whistleblowers, the success rate and awareness of these protections is not nearly as prevalent as it could or should be when dealing with the sensitive issue of employees’ rights. Additionally, the varying protections from state-to-state lead to inconsistent results across the United States and do not instill confidence in reporting systems. The ever-present threat of retaliation and being shunned from an industry looms over the head of the altruistic employee like a dark cloud, looking to rain down stigmatization and financial instability if they report employer wrongdoing. It is evident that efforts of the federal government, however, can put an end to this reign.

227. See id.
228. See id. at 11.
229. Id. at 10-11.
231. See id.
232. See Michaels, supra note 162.
233. See id.
IV. EFFORTS OF THE FEDERAL GOVERNMENT TO EXTEND WHISTLEBLOWER PROTECTIONS TO PRIVATE EMPLOYEES

A. The Legislative Road Thus Far

Efforts have been taken by both the state and federal legislature to extend protection to the private sector, but they remain largely ineffective in actually protecting employees and incentivizing them to speak out against employers. This is due mainly to the private costs and barriers associated with being a whistleblower, and the inadequacy of current federal legislation to address this issue. Atop the long list of private costs an employee must take into consideration before blowing the whistle is fear for their economic future. Many employees have reconsidered reporting the bad acts of their employers after contemplating the future ramifications such actions could pose to their careers.

In two separate instances, the lives of two whistleblowers and their families were jeopardized after reporting corporate wrongdoing. In 2005, James Holzrichter was awarded $6.2 million for his participation in revealing that his employer, Northrup Grumman, had been intentionally inflating the pricing of their products and lying about the progress of their projects. Before he actually received this award, however, Holzrichter had to wait sixteen years for a settlement to be reached and the money to be disbursed. During this time, he and his family suffered a great deal, which was attributable to his involvement as a whistleblower. He was unable to find work as an auditor, presumably because of the stigma associated with his name after he

236. Higginbottom, supra note 66.
237. Depoorter & De Mot, supra note 9 ("[A] whistle blower faces substantial financial and other risks. Evidence thresholds and imperfect enforcement leave the whistle blower vulnerable to retaliation (e.g.[,] harassment, threats of termination, suspension, non-promotion, reassignment, transfer, denial of training, withholding wages or other benefits, closer supervision and scrutiny, or pester ing). Former employees are stigmatized and black listed on the job market as whistle blowers. The private costs of the whistle blower may thus prevent disclosure of insider information at the socially optimal time.").
238. Id. at 159.
239. Higgins & Summers, supra note 66.
240. Hallman, supra note 234.
241. Id.
242. Id.
243. See id.
reported his former employer. After receiving 400 rejection letters, Holzrichter had to resort to scrubbing toilets and delivering newspapers to provide for his family. At one point, he was even forced to move his family into a homeless shelter because of his dire financial condition and inability to find other work. If having to deal with seeing his family endure this lifestyle for sixteen years was not enough, when the settlement finally concluded, Holzrichter only received $2.3 million of the award after attorney's fees and taxes were deducted.

Similarly in 2007, Kyle Lagow, a former supervisor for a subsidiary of Countrywide, sued Countrywide alleging that they had pressured appraisers into committing widespread fraud and falsely inflating mortgage values. In the years leading up to receipt of his $14.5 million award—which was similarly reduced to a small fraction of a principal due to taxes and attorney's fees—Lagow and his family suffered from poverty and hardship because of Lagow's inability to obtain work. Stricken with cancer and unable to find work, Lagow was thrust into the same situation he was trying to avoid for others by whistleblowing; he was forced into foreclosing on his house. Although both of these whistleblowers eventually saw portions of their awards, the stories of hardship and stress not only on themselves, but on their families, may be crippling to future employees considering whether it is actually worth it to blow the whistle.

Most of the current federal laws that address private-sector whistleblowers contain damages provisions, most of which only allow

244. See id.
245. See id.
246. Id.
247. Id. When asked whether his experience was worth it, Holzrichter stated: "I don't know if it was worth it. I have the money, but how can I give my children their childhood back?" Id.
248. Id.
249. Id.
250. Id.
for reinstatement and/or back pay. Probably the most progressive of the acts in terms of attempting to incentivize employees has been the Dodd-Frank Wall Street Reform and Consumer Protection Act (hereinafter "Dodd-Frank Act"). The Dodd-Frank Act provides damages available to employees in relevant part as follows: "An individual who prevails in a whistleblower action will be awarded reinstatement, back pay with interest, and compensation for any special damages sustained as result of the discharge or discrimination, including litigation costs and reasonable attorney's fees." It goes on further to explain that "[a]n individual who prevails in a [whistleblower] action under Section 21F . . . is entitled to reinstatement, two times the amount of back pay otherwise owed to the individual, including interest, and compensation for litigation costs, expert witness fees, and reasonable expenses." The purpose and effect of the "doubling" damages provision in this act is most in line with the type of motivation that employees in the private sector have been shown to be responsive to. Under this attempted reform of the securities industry, the pot is, essentially, sweetened for whistleblowers who observe financial misconduct and are considering reporting. None of the acts, however, including the recent whistleblower provisions added to the SOX and Dodd-Frank Act, provide a model by which an employee can obtain a percentage of the fines imposed upon their employer. Additionally, the acts do not address any of the areas of private industry where whistleblower protections may be needed most.

In the fall of 2008, the American financial regulatory system was

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253. See id.
254. Justin Blount & Spencer Markel, The End of the Internal Compliance World as We Know it, or an Enhancement of the Effectiveness of Securities Law Enforcement? Bounty Hunting Under the Dodd-Frank Act's Whistleblower Provisions, 17 FORDHAM J. CORP. & FIN. L. 1023, 1034-36 (2012) ("The design of the Dodd-Frank bounty program borrows the successful aspects of its predecessors while rectifying the significant flaws that rendered other programs ineffective. The combination of fortified job security and potentially huge cash bounties, reminiscent of other similar programs, will undoubtedly catch the eye of thousands of potential bounty hunters.").
255. SHIMABUKURO & WHITAKER, AN OVERVIEW, supra note 78, at 5.
256. Blount & Markel, supra note 254 (emphasis added).
258. See id.
259. See SHIMABUKURO & WHITAKER, CONG. RESEARCH SERV., supra note 252 at 1-14.
260. See id.
broken due to the lack of oversight throughout all operations. Major investment bankers took excessive risks with little to no direction, which was a main cause of the drastic decline that occurred in our system. For example, risks taken by irresponsible lenders forced many consumers into immense debt and later bankruptcy. As a result, Americans were left unemployed and subsequently in massive debt.

In an attempt to remedy and prevent this disaster from ever occurring again, President Barack Obama signed the Dodd-Frank Act into federal law on July 21, 2010. The Dodd-Frank Act, also known as "[t]he most far reaching Wall Street reform in history," was established to prevent excessive risk-taking in the American financial regulatory system that, once upon a time, led to the financial crisis. The Dodd-Frank Act included provisions to enforce financial stability, change the bank regulatory structure, and increase oversight on insurance policies. Amongst these additions, the requirement to provide protections to consumers and capital markets was also drafted. Within this provision, Title IX of the Dodd-Frank Act was created to:

strengthen[] the regulatory oversight of securities and capital markets activities by the SEC, and create[] new protections for investors in the form of increased private rights of action, the broadened ability of the SEC to bring aiding-and-abetting claims against violators of the federal securities laws, and directing the SEC to study and perhaps create a federal fiduciary duty for broker-dealers, akin to that for investment advisers, to protect retail customers.
In essence, Title IX was a revolutionary amendment to the Dodd-Frank Act, giving the SEC the power to create an Investor Protection Fund that would incentivize people with evidence regarding securities related violations to come forward and also be used as a reward for said whistleblowers who provide information regarding an SEC action.

The Dodd-Frank Act is known to be one of the most progressive of the acts mostly because of the incentive program it provides. As aforementioned, the Act allows for employees to report securities related violations with the promise of an established pay-out by the SEC as provided by Title IX. More specifically, Subtitle B of the 1934 Securities and Exchange Act was amended to provide the SEC with a "whistleblower bounty program." This bounty program allows an individual to be awarded an aggregate amount of money if they "voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action."

The statute further provides that the amount a whistleblower can be awarded for such acts is dependent upon the amount of monetary sanctions collected upon judgment of the court. For example, an individual cannot collect less than ten percent or more than thirty percent of the sanctions awarded. Further, the statute explains how the Commission is given the final discretion in determining whether more or less awards should be given to the individual whistleblowers. Under their discretion, the amount of money to be awarded is generally determinative on factors that the Commission has outlined, such as: how significant the information provided by the whistleblower proves to be, how much assistance the whistleblower provided, and the degree of the whistleblower’s participation in internal compliance systems.

271. *Id.* at 105.
272. *Id.*
274. *See Mayer Brown, supra* note 268.
277. *Id.* at § 78u-6(b)(1)(A).
278. *Id.* at § 78u-6(b)(1)(B).
279. *Id.* at § 78u-6(c)(1)(A).
280. *Id.* at § 78u-6(c)(1)(B); Sean McKessy, *What Happens to Tips*, U.S. SEC. & EXCHANGE COMMISSION, https://www.sec.gov/about/offices/owb/owb-what-happens-to-tips.shtml (last visited
According to Sean McKessy, the Chief of the SEC’s Office of the Whistleblower, a person submitting a specific, timely, and credible tip of an alleged securities violation is given the upmost anonymity.281 By law, the SEC is required to keep the whistleblower’s identity completely protected, thus ensuring that no information can be distributed that may incriminate such a person.282 This enables a whistleblower to remain fully protected throughout the potential investigation.283 The tip provided will be evaluated by the SEC and its attorneys to determine if it contains anything viable to bring a case of substance.284 Of course, before any wrongdoing can be alleged by the Commission, an investigation must take place.285 If and when the SEC investigates the tip, and a sanction over one million dollars is then charged, the whistleblower can finally recover for the information given.286 Additionally, the law also provides SEC whistleblowers job protection and a sense of confidentiality for the information that was exchanged.287

The bounty program, created by the Dodd-Frank Act and enforced by the SEC, has proven widely successful since its creation for whistleblowers sharing information.288 In fact, on January 15, 2016, the SEC announced a whistleblower award of more than $700,000 given to an individual who provided detailed information to the SEC regarding a securities violation in a corporation that led to a successful enforcement action.289 The Press Release boasted how “[t]he SEC’s whistleblower program has paid more than $55 million to 23 whistleblowers since the program’s inception in 2011.”290

The bounty program created by the Dodd-Frank Act and enforced by the SEC was a great start to incentivize individuals to come forward with possible securities violations.291 The SEC has stated that full protections are afforded to whistleblowers to maintain their anonymity
and confidentiality, however this statement is dubious. This program has been proven to be ununiformed throughout the various Circuits, most notably the Second and Fifth Circuits, because of the various interpretations each court applies when determining how much protection a whistleblower is actually given. Due to this lack of consistency among the Courts, a person may still face retaliation by employers when they report an alleged securities violation. The division between the courts was most notably recorded in two cases, Berman v. Neo@Ogilvy, LLC and Asadi v. G.E. Energy (USA), LLC. In Berman, the Second Circuit Court of Appeals held in 2015 that an employee “is entitled to pursue Dodd-Frank remedies for alleged retaliation after his report of wrongdoing to his employer, despite not having reported to the Commission before his termination.” The Berman decision was one the majority of district courts had agreed with in the past. Due to this agreement, Berman, as a whistleblower, would be allowed to pursue Dodd-Frank remedies for alleged retaliation, even though he did not report to the SEC before the alleged retaliation occurred. This decision was completely different from Asadi, a Fifth Circuit case, where the court had decided two years prior that the plain language written in the statute should be interpreted to mean that only those who blow the whistle externally by providing information to the SEC will be protected under the anti-retaliation provision. Until the Supreme Court is able to determine one uniform law regarding which classes of whistleblowers may use the anti-retaliation provision against

292. See 15 U.S.C. § 78u-6(h)(2)(A); see also 17 C.F.R. § 240.21F-7 (2011) (listing the exceptions as to when the Commission may disclose a whistleblower’s identity).
293. See Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 153-54 (2d Cir. 2015) (discussing the conflicting results among courts when encountering this issue); see also Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620, 630 (5th Cir. 2013) (reaching a different conclusion than that of Berman on this issue). Both show that each circuit has a different interpretation of the anti-retaliation provision when determining whether a whistleblower will be protected from possible backlash by an employer in the event of a successful whistleblow.
294. See Berman, 801 F.3d at 154-55 (dealing with an employee who had faced retaliation from his employer).
295. Id.
296. Asadi, 720 F.3d at 630.
297. Berman, 801 F.3d at 155.
299. Berman, 801 F.3d at 155.
300. Asadi, 720 F.3d at 630.
their employers, employees are faced with inconsistent levels of protections based solely on the jurisdiction they happen to be in.\textsuperscript{301}

The pharmaceutical industry has also benefited from the creation of the Dodd-Frank Act, because it has allowed scientists, mathematicians, and other pharmaceutical insiders the protection of anonymously disclosing misconduct relating to corporate fraud or securities fraud within the industry.\textsuperscript{302} However those benefits are meant to extend mainly to the public sector employees in the industry. It is still an issue of concern that private sector employees working in the pharmaceutical industry are afforded very little federal protections in the event of a whistle-blow.\textsuperscript{303}

By increasing the protections given to private employees by statute and essentially sweetening the pot through an incentives or bounty program, employees will be more likely to expose corrupt or illegal practices of employers.\textsuperscript{304} A system which provides financial incentives along with increased protections has been an effective tool in motivating employees to blow the whistle.\textsuperscript{305} In 2009, a former sales representative for Pfizer collected over $50 million stemming from his participation in uncovering Pfizer’s fraudulent healthcare practices.\textsuperscript{306} In the same settlement, six other whistleblowers received a collective of more than $100 million for their roles played in the case.\textsuperscript{307} Although this action

\textsuperscript{301} Debevoise, supra note 298 at 1, 4 (stating that the ultimate decision will be left up to the United States Supreme Court to decide). Employers should also be wary of the circuit split for the possible consequences when using measures similar to retaliation towards their employees after a whistle blow. Id.


\textsuperscript{306} Gardiner Harris, Pfizer Pays $2.3 Billion to Settle Marketing Case, N.Y. TIMES (Sept. 2, 2009), http://www.nytimes.com/2009/09/03/business/03health.html?_r=0.

\textsuperscript{307} Id. Top marketing executive, George Cuoto, was also involved in blowing the whistle on a separate drug company, Bayer, for attempting to defraud Medicare. Jennings, supra note 305. He
was related to a private company defrauding public healthcare systems,\textsuperscript{308} the method used to incentivize employees was proven to be an effective motivator in encouraging employees to speak out against the illegal practices of their employers.\textsuperscript{309}

B. Barriers in the Reporting Process

In addition to being discouraged from whistleblowing by a lack of incentivization, employees in the private sector often lose confidence in the reporting system due to a variety of barriers they face when attempting to whistle-blow.\textsuperscript{310} Before most whistleblowers can actually bring their claims, a case investigator is typically assigned to assess the merit of each individual claim.\textsuperscript{311} These case investigators, however, are often inundated with more cases than they can deal with, leading to a large delay in investigation times.\textsuperscript{312} In many cases, a single investigation can take almost a half a year to reach resolution.\textsuperscript{313} This is due mainly to the fact that these case investigators, on average, are assigned three times as many claims to investigate than the accepted, manageable caseload that they were meant to handle.\textsuperscript{314} Even if whistleblowers manage to make it over this hurdle and their claims are preserved, only about three percent of those claims end up being found to have merit.\textsuperscript{315} To make matters worse, only about twenty percent of those three percent of claims end up reaching resolution.\textsuperscript{316} In addressing Professionals for the Public Interest, the Occupational Safety and Health Administration (hereinafter “OSHA”) Assistant Secretary of Labor stated:

received twenty-four percent of the $257 million settlement with Bayer as a result of his cooperation with the government in the suit. \textit{id.}

\textsuperscript{308} The pharmaceutical companies in these instances defrauded Medicare, Medicaid, and state healthcare systems by off-label marketing of drugs, inflating the prices of drugs, and participating in kick-back programs. \textit{id.;} Harris, \textit{supra} note 306.

\textsuperscript{309} Harris, \textit{supra} note 306.

\textsuperscript{310} Michaels, \textit{supra} note 162.

\textsuperscript{311} \textit{id.}

\textsuperscript{312} \textit{id.}

\textsuperscript{313} \textit{id.}

\textsuperscript{314} Case investigators are typically assigned seventeen cases, when the “accepted, manageable caseload” is meant to be set at six to eight cases per investigator. \textit{id.} This is due mainly to programs being underfunded to begin with and then the workforce continuing to be overburdened by additional responsibilities, with little to no increase in funding. \textit{id.}

\textsuperscript{315} \textit{id.}

\textsuperscript{316} \textit{id.}
I do not believe that the vast majority of whistleblower claims are simply without merit. Instead, it appears to me that there are a series of institutional, administrative and legislative barriers that stand between many whistleblowers and justice. These barriers, and our failure to protect legitimate whistleblowers creates an injustice for these workers, and it discourages other workers from asserting rights... When two-thirds of whistleblower complaints are dismissed, it sends workers a clear message—a very unfortunate message: “The odds are against you.”

When meritorious claims are falling by the wayside and employees are feeling like “the odds are against them,” a dangerous message is being sent to employers that they do not have to take considerable care in the way they are treating their employees or the manner in which they are conducting their business.

C. Federal Attempts at Creating a Uniform Law for Private Whistleblowers

In an attempt to establish widespread protections for whistleblowers in the private sector, the Private Sector Whistleblower Protection Streamlining Act of 2007 was introduced to Congress in 2007 and then re-introduced in 2012, under a similar name. Although this piece of legislation was ultimately not enacted, its focus was geared towards providing “whistleblower protections for private sector, state, and municipal employees who are retaliated or discriminated against by an employer for disclosing threats to public safety or violations of federal law.” Rather than having twenty-two individual pieces of federal legislation that addressed varying areas of the private sector, this act

317. Id.
318. Id.
320. The same bill was introduced to Congress five years later under the name “Private Sector Whistleblower Protection Streamlining Act of 2012.” Private Sector Whistleblower Protection Streamlining Act of 2012, H.R. 6409, 112th Cong. (2d Sess. 2012).
321. Id.
would have consolidated the protections, defined the covered industries, and created a centralized administrative agency to monitor and regulate whistleblowing. This would have ensured universal protection for both public and private employees who make the decision to blow the whistle, while also clarifying the protocol for whistleblowers to follow if they wish to file a claim. The Act would have also created a branch of Department of Labor to handle and streamline whistleblower claims, appropriately named the Whistleblower Protection Office.

While the job of the Whistleblower Protection Office has been assumed by OSHA, the issue of statutory uniformity and clarity still remains. Even though there are reporting protocols set in place by the current piecemeal of private protections, and a regulatory body in place to enforce them, properly navigating through the variety of statutes can be difficult because they are often very complex and contain potential pitfalls for employees looking to receive any sort of compensation or otherwise. For example, an employee may be barred from bringing their claim if they are unaware of different filing periods and wait too long to bring their claim against their employer. While the window of opportunity to bring a claim in some instances may be as much as 180 days, in other instances the filing window period may be as little as thirty days. This leads to many employees either missing their opportunity or hastily filing without adequate enough information to properly develop their claim. In a 2010 presentation, the Assistant Secretary of Labor at OSHA, David Michaels, was quoted saying:

323. See H.R. 6409.
324. Id.
325. Id.
328. Michaels, supra note 162.
329. See The Whistleblower Protections Programs, supra note 326.
331. OSHA Fact Sheet: Your Rights as a Whistleblower, supra note 94.
332. For example, an employee looking to bring a claim of retaliation against an employer under the SOX or the Dodd-Frank Act has a window of 180 days to bring their claim, whereas the same employee looking to bring the same claim under the Occupational Safety and Health Act or the Federal Water Pollution Control Act will only have a 30 day window to appropriately bring their claim. Id.
333. Michaels, supra note 162.
I’d like to say that all our whistleblower cases conclude as satisfactorily as these cases, and that workers nationwide feel emboldened to speak out. Sadly, the news is otherwise. Any review of the whistleblower protections will reveal a patchwork of laws protecting whistleblowers that has resulted in inconsistent, confusing and sometimes contradictory provisions.334

Assistant Secretary Michaels goes on to explain the flaw in private sector whistleblower laws by stating: "[a]long with an inconsistent, confusing collection of provisions, we find unsatisfying outcomes of complaints. Too few complaints are reaching resolutions intended by the whistleblower protections."335 Citing the inconsistencies between programs,336 as a major hindrance on the effectiveness of the statute’s whistleblower cases being properly disposed of, Assistant Secretary Michaels, also stated that "[t]here is little question that more change is coming" in terms of whistleblower reform.337

Keeping in line with the words of Assistant Secretary Michaels, the Supreme Court, in a recent 2014 decision, extended whistleblower protection to employees in the financial industry whose private employers engage in activities serving public companies.338 The Court in Lawson v. FMR LLC339 held that employees of private contractors and sub-contractors doing business in the public sector were covered under SOX, even though the Act did not explicitly allow for this.340 The Court

334. Id.
335. Id.
336. Beyond the funding issues, our enforcement program faces other difficulties and inconsistencies between programs:
   - Filing deadlines vary among statutes from 30 to 180 days.
   - Seven OSHA-enforced statutes permit preliminary reinstatement of a complainant; only eight authorize punitive damages.
   - A different eight statutes give complainants the right to seek direct final enforcement in district court.
   - Most newer statutes permit a 'kick-out provision,' where complainants may remove their cases to district court and obtain hearings if DOL has not ma[d]e a decision within a prescribed number of days.
   - Statutes also differ according to burdens of proof required to show retaliation.

337. Id.
338. See Lawson v. FMR LLC, 571 U.S. __, 134 S. Ct. 1158, 1159 (2014) (holding the SOX whistleblower protection extends to employees of private contractors serving public companies).
339. Id. at 1158.
340. See id. at 1176.
reasoned that increasing whistleblower protections beyond the plain wording of the statute was not only in conformance with the purpose of the statute, but a necessary precaution in ensuring proper safeguards were put in place to prevent another incident similar to what had happened with Enron.\(^3\) By doing this, the Court in Lawson was essentially expressing their willingness to extend whistleblower protections to different classes of private employees for the sake of protecting the public against the threat of future financial disasters.

Additionally, in late 2014, the SEC awarded an informant $30 million for providing information that led to a successful enforcement action as a part of their whistleblower bounty program.\(^4\) The bounty program provides that the SEC may award a whistleblower monetary compensation for coming forward with “high-quality original information that leads to a Commission enforcement action in which over $1 million in sanctions is ordered.”\(^5\) The monetary award generally ranges from ten percent to thirty percent of the total amount collected from a successful SEC action against an employer.\(^6\) The undisclosed whistleblower provided the SEC with valuable information concerning ongoing fraud that would have been difficult for the SEC to detect.\(^7\) This award represents the largest payout the SEC has given to a whistleblower by more than double since the inception of the bounty program in 2011.\(^8\) The director of the enforcement division of the SEC even commented on the depth of this award stating, “[t]his record-breaking award sends a strong message about our commitment to whistleblowers and the value they bring to law enforcement.”\(^9\)

This recent expansion of employees’ rights and protections evidences the readiness of both the courts and administrative agencies to accept legislation aimed at protecting and incentivizing employees in the private sector who blow the whistle on their employers. A 2015 study of whistleblower patterns showed that OSHA is considering other options

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341. See id. at 1169-70.
344. Id.
345. See Huddleston, Jr., supra note 342.
346. See id.
347. Id.
and "exploring additional ways to increase damage awards" when it comes to motivating private sector employees to blow the whistle.\textsuperscript{348} The federal government has also become more aware of the value of whistleblowers and as a result has taken more aggressive efforts in terms of pursuing claims and encouraging whistleblowers to provide information.\textsuperscript{349} It is clear from the push to provide additional protections and the recent reaction to instances involving whistleblowers by both the Executive and Judicial branches that the United States is ready and willing for the Legislature to take action to calm this continuing conflict for workplace whistleblowers.

V. RESOLUTION BASED ON FCA AND STATE LEGISLATIVE FRAMEWORK

A. Success of the FCA in Incentivizing Employees

The FCA has been relatively successful in exposing corruption and illegal acts of employers in the public sector by creating an incentive system.\textsuperscript{350} In 2014, the Department of Justice recovered $5.69 billion as a result of whistleblower participation and "qui tam actions"\textsuperscript{351} against private companies doing business in the public sector.\textsuperscript{352} In most cases, employees were able to bring claims against their employers under the FCA because the companies had defrauded the government in some way, usually by attempting to make an end run around agency approval in some way or by causing healthcare systems such as Medicare and Medicaid to be economically defrauded.\textsuperscript{353} The incentive system in the FCA for bringing these claims works to award employees a percentage of the fine imposed upon a company relative to the amount of involvement of the employee in the investigatory and resolution efforts of the case.\textsuperscript{354} The purpose of the incentive system in the FCA is to motivate employees to speak out against their employers when they uncover corrupt or illegal acts, while counteracting the fear for their

\textsuperscript{348} Friedman, supra note 89.
\textsuperscript{349} See Pearlman, supra note 342.
\textsuperscript{350} See Guttman, supra note 86.
\textsuperscript{351} A "qui tam action" is defined as an "action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." \textit{Qui Tam}, BLACK'S LAW DICTIONARY (10th ed. 2014).
\textsuperscript{352} See Guttman, supra note 86; see also Getnick, supra note 119 (claiming an average of $3.7 billion in annual recoveries as a result of successful FCA claims).
\textsuperscript{353} See Guttman, supra note 86.
\textsuperscript{354} See Callahan & Dworkin, supra note 88, at 281-84.
financial future, which comes from potentially being blackballed from their industry, and all the other pressures associated with reporting a malfeasant employer.355

Just as the FCA provides motivation for employees of private companies doing business in the public sector, the same can and should be done for all employees in the private sector by grafting this historically successful system onto new legislation aimed at private sector employees. There are two viable options to achieve this: (1) expand the current Act to extend to all private sector employees, or (2) enact a stand-alone piece of uniform federal legislation separate from both the FCA and the current assortment of statutes and common law doctrine. The first option would only require an amendment be made to the current law to include a new category of employees. To achieve this end, an amendment would theoretically extend FCA coverage beyond protecting employees of private companies having some involvement in the public sector to all employees of all private companies regardless of involvement in the public sector. The second option, however, would require Congress to create an entirely new law aimed at whistleblower protections. Although this presents more of a legislative obstacle than the first option, option two will give lawmakers the ability to design a wholly inclusive law from the ground up protecting all whistleblowers and, for the first time, will provide them the opportunity to address and remedy the past failures of attempted federal whistleblower legislation. Much like the attempts of the Private Sector Whistleblower Protection Streamlining Act of 2007,356 and subsequent reintroduction of the Private Sector Whistleblower Protection Streamlining Act of 2012,357 a new law would be able to give potential whistleblowers a centralized agency to report claims to, along with a uniform process for the filing of claims.

Applying either method will provide a streamlined system by which employees can file complaints and communicate information about wrongdoing with greater ease of accessibility, while also creating a windfall system relative to their efforts. A system that makes reporting processes easier and rewards employees for doing the right thing will facilitate an environment where a much-needed increase in whistleblower participation will be inevitable.

355. See id. at 285-86; Depoorter & De Mot, supra note 9.
357. Id.
In amending the current legislation or creating an entirely new law, it is instructive to look at the past successes and failures of similar laws to develop a practical framework with staying power. After looking at the aforementioned analysis of various states’ laws and federal legislation in regards to whistleblower’s protections, it is easy to determine that applying New Jersey’s CEPA, in conjunction with the FCA, would be the most conducive to creating a more uniform federal act. It is clear that the FCA’s incentive system should be adopted in this proposed uniform federal act, as it has a history of motivating employees to blow the whistle for a payout; however, one may ask why is the CEPA an important provision in this framework? The CEPA has been widely successful in New Jersey, by allowing both private employees protections they have never been afforded, and by protecting the public from potentially dangerous situations. In fact, the New Jersey CEPA has been described as “the most far reaching ‘whistleblower statute’ in the nation,” as it is one of the only whistleblowing statutes that extends protections to private employees. According to statistical data gathered through Verdict Search, an employee bringing a suit in violation of the CEPA, was sought to prevail at trial more than eighty percent of the time. Out of thirty total verdicts in New Jersey between January 2005 and December 2011, twenty-five of these cases ruled in the plaintiff’s favor. Moreover, the average damages award being granted to injured employees is upward of about $1.1 million. There have also been a variety of cases that demonstrate the effectiveness of this Act and show that the CEPA has really broadened the rights of employees in the private sector. For example, in 2003, an

359. See supra Part I.B.; supra Part III.B.
360. See supra Part V.A.
361. See supra Part III.B.
362. MCMORAN, O’CONNOR, & BRAMLEY, P.C., supra note 358; see also N.J. STAT. ANN. §§ 34:19-1-34:19-8.
363. MCMORAN, O’CONNOR, & BRAMLEY, P.C., supra note 358.
364. Id.
365. Id.
employee of DuPont Changers Works filed multiple complaints with OSHA as well as DuPont’s management alleging unsafe working conditions on the job site.\textsuperscript{367} These working conditions, such as searches in pitch darkness near oncoming traffic or mismanagement in the phosgene reactor, were both harmful to the employees of DuPont as well as the public.\textsuperscript{368} Plaintiff Seddon alleged in his complaint that his employer retaliated against him for making such complaints about the intolerable working conditions.\textsuperscript{369} As a result, the New Jersey Supreme Court awarded the Plaintiff over $1.2 million.\textsuperscript{370} Other cases in New Jersey closely mirrored this result.\textsuperscript{371} In \textit{Hennessey v. Atl. County Dep’t of Pub. Safety},\textsuperscript{372} the Plaintiff walked away with almost $1.5 million in damages after successfully blowing the whistle on corrupt practices within the Bergen County Prosecutor’s Office.\textsuperscript{373}

It is also essential to examine how some states have failed at protecting whistleblowers in the private sector, and how these statutes should act as a guidance for how not to draft a successful whistleblower law. As mentioned previously in this article, Texas has absolutely no regulation in place that will protect a private sector employee who blows the whistle on someone within the company and is later retaliated against.\textsuperscript{374} Essentially, Texas’ lack of legislation will provide no guidance when creating a more uniform federal law as proposed in the text.\textsuperscript{375} However, states such as New York and California do contain some kind of direction in regards to whistleblowing, yet have proved to be failures in the private industry.\textsuperscript{376} For example, New York’s statute on its face explains that an employee will be given their day in court if they are ever retaliated against for disclosing wrongful conduct within their workforce.\textsuperscript{377} Although seemingly protective in nature, this statute

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{*1} (D.N.J. Oct. 22, 2008).
\item \textsuperscript{367} \textit{Donelson}, 20 A.3d at 387.
\item \textsuperscript{368} Id.
\item \textsuperscript{369} Id. at 387-88.
\item \textsuperscript{370} Id. at 389.
\item \textsuperscript{371} See, e.g., \textit{Hennessey}, 2008 U.S. Dist. LEXIS 84936 at \textsuperscript{*1}.
\item \textsuperscript{372} See id.
\item \textsuperscript{374} See supra Part III.B.
\item \textsuperscript{376} See \textit{N.Y. Lab. Law § 740} (McKinney 2015); see also \textit{CAL. Lab. Code § 1102.5} (West 2011).
\item \textsuperscript{377} See \textit{N.Y. Lab. Law § 740} (McKinney 2015).
\end{itemize}
\end{footnotesize}
has been struck down throughout New York courts due to random circumstances invalidating the various employees' claims, such as a lack of substantial danger to the public. The discrepancy that lies in this regulation, making the chances of prevailing very unlikely, is that it is too favoring towards the employer. New York has yet to realize that an employee is the underdog in whistleblowing situations, facing immense amounts of scrutiny from employers just because they are attempting to cure misconduct. When drafting a new federal uniform law, the failure of New York's labor law to actually afford employees protections should be taken into consideration. The California law regarding whistleblowers could also be looked at as completely unsuccessful in actually providing protections. Although in short it is stated that the law was created to "encourage workplace whistleblowers to report unlawful acts without fearing retaliation," it is clear that it is not as simple as it appears to be. An employee must satisfy an estimated four requirements to get their case heard, and then must be cautious to not violate one of the many exceptions underlying the statute, such as the "first report rule." It is essential that a uniform law proposal examines the faults contained in the California statute and attempts to remedy them by being very specific as to how an employee can prevail when bringing a whistleblowing claim. Also, a new federal law must be aware of the concealed exceptions lying within the California regulation and be cautious to avoid making the same errors in the drafting process.

By mirroring the FCA's incentive system for public employees and coupling it with the protections afforded by successful state legislative

379. See, e.g., id. (displaying a case where an employer prevailed because the New York Labor Law was not drafted in the best interest of the employee's protections).
380. See id. at 989; see also Bordell v. Gen. Elec. Co., 922 F.2d 1057, 1060-61 (2d Cir. 1991). These two cases both ruled in the employer's favor because both employees failed to satisfy all necessary requirements that are outlined in the statute. Bompane, 608 N.Y.S.2d at 994-95; Bordell, 922 F.2d at 1061. As a result, both employers were fired from their employment due to their whistleblowing. Bompane, 608 N.Y.S.2d at 995.
381. See, e.g., Bordell, 922 F.2d at 1057 (displaying a failure that should be taken into consideration).
382. See CAL. LAB. CODE § 1102.5 (West 2011).
383. Id.
385. See, e.g., id. (showing the faults in the California Labor Code where employers are favored over employees).
386. See id.
acts for private employees, while avoiding the errors made in failed state laws, a more uniform federal act can be created to protect the rights of whistleblowers in the private sector.

C. Conclusion

Creating a system where employees have a more free flow system to disseminate information about corrupt or illegal practices of employers, while also ensuring protection against retaliation and being blackballed from a particular industry, will create an environment where employees from all industries feel more comfortable. Coupling this with an incentive system to provide altruistic employees with a windfall will hopefully provide employees with the motivation they need to blow the whistle and ultimately prevent harmful acts of corporate giants from reaching the public. In addition to all of the socioeconomic and legal reasons in support of whistleblower reform, it is entertaining to consider that giving these workplace whistleblowers more rights and protections may even make it so that the names of these people become household names, like America’s famous whistleblowers.

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