WHISTLEBLOWING

I. MICHIGAN WHISTLEBLOWER PROTECTION ACT: MCLA §15.361, et seq.; MSA §17.425, et seq.

A. In General

Michigan's WPA (MCL § 15.362) provides:

> An employer[1] shall not discharge, threaten, or otherwise discriminate against an employee[2] regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

B. Applicability

1. Employers. The WPA applies to all employers with one or more employees. Section 1(b).

2. Employees. Does not apply to prospective employees or job applicants. *Wurtz v. Beecher Metro Dist*, 495 Mich 242 (2014).

[1] An "employer" is defined under the WPA as "a person who has 1 or more employees. Employer includes an agent of an employer and the state or a political subdivision of the state." MCL § 15.361(b).
[2] An "employee" is defined as "a person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied…" MCL § 15.361(a).

C. Elements of the Claim – *all must be proven for a Plaintiff to make a prima facie showing of whistleblower retaliation*

1. "Engaged in protected activity"

   A "protected activity" under the WPA refers to actions where any employee (1) **reports** to a public body a violation of the law, a regulation, or rule, (2) **is about to report** such a violation to a public body, or (3) is being asked by a public body to participate in an investigation. *Manzo v. Petrella,* 261 Mich App 705, 712 – 713 (2004).

2. "About to Report"

   a. Where there is an actual report made, no further showing is required to satisfy this requirement.

   b. To prevail on the "about to report" claim, the plaintiff must show that he or she was "on the verge of" reporting an alleged violation. *Shallal v. Catholic Social Serv of Wayne County*, 455 Mich 604, 612 (1997).

   c. Plaintiff must show this by clear and convincing evidence. MCL 15.363(4); *Jennings v. County of Washtenaw*, 475 F Supp 2d 692, 722 (ED Mich 2007).

   d. A threat to report is generally not enough; there must be actual actions taken in furtherance of the threat. *E.g. Koller v. Pontiac Osteopathic Hosp*, 2002 WL 1040339 (Mich App). Relevant to the analysis is the steps taken to make the report, such as gathering evidence or making a determination of what agency to contract. *Jennings*, *supra* at 711-713.

e. Examples of where an employee **did meet** the "about to report" requirement

i. The employee told the president of the agency that she was going to report him, discussed the alleged unlawful activity with her supervisor and others, and produced a calendar entry where she had written "we need to report [the president]". *Shallal*, *supra*.

ii. The employee told his manager that he was going to report OSHA violations, took pictures of the premises to document the OSHA violations, and threatened to take the pictures to OSHA the week before he was fired. *Williams v. Boldon's Body Shop, LLC*, 2007 WL 1612116 (Mich App)

iii. The employee copied records, attempted to contact a reporting hotline, obtained a complaint form, and refused to answer her employer's questions about her "intentions to stop pursuing the matter." *Fogwell v. Klein*, 2001 WL 1134883 (Mich App).

iv. The employee reported the alleged violations to supervisors and the board of directors and contacted a state representative to attempt to determine what agency should be contacted about the alleged violations. *Lynd v. Adapt, Inc*, 200 Mich App 305 (1993).

v. The employee sent a detailed memorandum to the employer stating that the employee had no choice but to report the alleged unlawful activity to the "Michigan Department of Wage and Labor . . . and the United

States Department of Wage and Labor." *Caldwell v. Comm Health Ctr of Branch County*, 1998 WL 1990878 (Mich App).

f. Examples of where an employee **did not** meet the "about the report" requirement:

i. The employee called the human resources department to complain about alleged safety violations but did not actually threaten to report them (and, the Court noted, even if the employee had indicated an intent to file a complaint, that statement without more would not meet the test). *Jennings*, *supra*.

ii. The employee obtained a complaint form from OSHA but did not complete it. *Richards v. Sandusky Comm Schools*, 102 F Supp 2d 753 (ED Mich 2000).

iii. Despite the passage of time, the employee took no action after threatening to report. *Trosien v. Bay County*, 2005 WL 3505746 (Mich App). See also *Koller*, *supra* (no protection where threat to act not carried through); *Jiang v. University of Michigan*, 1998 WL 1989768 (Mich App) (holding same).

3. "Violation of law, regulation, or rule"

a. Violations of internal company policy alone do not satisfy this requirement, but the Supreme Court has held that a plaintiff need not advance the "public interest" and that the employee's motivations for filing the complaint are irrelevant. *Whitman v. City of Burton*, 499 Mich 861 (2016).

b. Includes threatened litigation by an employee: In *Trepanier v. Nat'l Amusements, Inc.*, 250 Mich. App. 578 (2002), the Michigan Court of Appeals held that seeking a personal protective order against a co-worker for harassing behavior could constitute "protected activity" for purposes of the WPA.

c. Includes actions taken within scope of employment; i.e., where reporting violations was part of the job description. *Terzano v. Wayne County*, 216 Mich App 522 (1996)

d. Includes actions taken by an employee to report (or about to report) violations of laws by the employer, co-workers, and third parties. *Dudewicz v. Norris-Schmid, Inc*, 443 Mich 68 (1993) (co-worker); *Dolan v. Continental Airlines/Continental Express*, 454 Mich 373 (1997) (customers).

e. Compare to federal standards – Dodd-Frank Act protects those employees who report even unauthenticated fraud.

4. "Public Body"

The Act defines "public body" as employees and officers of any local or state governmental unit, agency, board, commission, legislative body, judicial body, law enforcement agency, etc.

MCL 15.361(d) defines "public body" to mean all of the following:

a. a state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government.

b. an agency, board, commission, council, member, or employee of the legislative branch of state government.

c. a county, city, township, village, inter-county, intercity or regional governing body, a council, school district, special district, or municipal corporation, or a board, department, commission, council, agency, or a member or employee thereof.

d. any other body which is created by state or local authority which is primarily funded by or through state or local authority, or a member or employee of that body.

e. a law enforcement agency or any member or employee of a law enforcement agency.

f. the judiciary and any member or employee of the judiciary.

5. "Suffered an adverse employment action"

The WPA provides that an employer is prohibited from "discharg[ing], threaten[ing], or otherwise discriminat[ing] against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment" due to the employee's report of actual or suspected illegal activity. MCL 15.362

6. Causation

a. **Definition.** The employee must show that he "suffered an adverse employment action *as a result of* [his] engaging in the protected activity, *i.e.*, that there was some nexus or causal connection between the adverse employment action and the protected activity." *Garg v. Macomb County Mental*

Health Services, 472 Mich 263, 276, n. 5 (2005), emphasis in original.

b. **Timing**. The fact that an adverse employment action took place <u>after</u> alleged whistleblowing, without more, is not enough to prove causation. *West v. General Motors Corp*, 469 Mich 177 (2003).

c. **Required showing.** The employee must provide objective evidence that the employer was aware of the employee's report (or that the employee was about to report), that the employer received notice from the employee of same, that the person making the adverse employment decision knew about the report or threatened report, and the notice was given prior to termination. *Kaufman & Payton PC v. Nikkila*, 200 Mich App 250, 257-58 (1993).

d. Compare to Sarbanes-Oxley/Dodd-Frank (federal): Employees need only prove that the protected activity was "a contributing factor" to the employer's decision to take adverse employment action.

D. Burden Shifting

1. If the employee succeeds in proving its <u>prima facie</u> case, the burden shifts to the employer to show a legitimate reason for the adverse employment action. *Heckmann v. Detroit Chief of Police*, 267 Mich App 480 (2005).

2. If the employer carries its burden, the employee will have an opportunity to prove that the legitimate reason offered by the employer was not the true reason but was only a pretext for discrimination. *Id.* "A plaintiff can prove pretext either directly by persuading the court that a retaliatory reason more likely motivated

the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Roulston v. Tendercare (Michigan), Inc,* 239 Mich App 270, 281 (2000).

3. Compare to Sarbanes-Oxley/Dodd-Frank (federal): Companies have a heavier burden of proving by clear and convincing evidence that they would have taken the same adverse employment action absent the protected activity. Employees need only prove by a preponderance of the evidence that the protected activity was a contributing factor to the adverse employment action.

E. Statute of Limitations

Employees must file suit within 90 days of the alleged violation, or else the claim is barred. MCL 15.363(1). (Compare to Sarbanes-Oxley/Dodd-Frank, which gives federal whistleblowers 180 days).

F. Arbitration

In the absence of a clear agreement to arbitrate whistleblower claims, the employee's failure to submit the issue to arbitration will not preclude a civil action. *Hopkins v. City of Midland*, 158 Mich App 361 (1987). (Compare to Sarbanes-Oxley/Dodd-Frank, which expressly prohibits requiring arbitration of whistleblower claims).

G. Remedies

1. Damages. The Act allows recovery of back wages, full reinstatement of fringe benefits and seniority rights, and actual damages, as well as civil fines of up to $500. The court, in its discretion, may include reasonable attorney fees in any award.

2. Exclusive Remedy. The WPA pre-empts any public policy common law claim an employee may have arising out of the same facts.

Anzaldon v. Neogen Corp, 292 Mich App 626 (2011). The WPA is the exclusive remedy.

H. Posting Notice.

Covered employers must post notices to keep employees informed of their protections and other obligations under the Act.

II. HANDLING WHISTLEBLOWING IN YOUR WORKPLACE

A. Before the Whistle Blows – Protect yourself from a whistleblowing claim

There are certain steps every organization can take, no matter how large or small, to plan for when an employee "blows the whistle." Planning ahead can greatly reduce the stress and cost of dealing with the issue ad hoc.

1. **Whistleblowing Policy.**

a. Have a policy in your employee handbook that, at a minimum, encourages employees to raise matters of concern internally and explains to them how to do so. The policy may be posted around the workplace as a reminder of the company's stance on employee complaints along with the required governmental WPA postings in public areas (i.e., lunch room).

b. As part of the policy, make it clear that any supervisors or other employees who retaliate against others as a result of employee whistleblowing will face consequences or otherwise be disciplined.

c. The policy should provide multiple reporting channels for disclosures and spells out in exact terms the chain of reporting. This can be through a management

chain, Human Resources, or other designated individuals.

d. Designate a select group of people who will handle whistleblowing disclosures as they arise, to avoid a scramble once an issue comes up, and ensure employees are made aware of the chain(s) of reporting. This will enhance confidentiality and reduces the likelihood of reprisals being taken against whistleblowers by their direct supervisors. If possible, avoid potential conflicts of interest by excluding supervisors and managers from the assessment and investigation of any disclosure made by employees, and distinguish between individuals who discipline employees and who handle whistleblower investigations.

e. Encourage and promote confidentiality. It is important that employees do not fear reprisals or being otherwise ridiculed by their co-workers for "blowing the whistle." Remind those in the reporting chain about the need for confidentiality as well. You may wish to implement an anonymous complaint system or hotline.

2. **Corporate Culture.** Foster a corporate culture of disclosure starting from the top down. Make sure employees at every level understand that they will not be penalized for reporting any suspected issues in the workplace. Do not discourage or otherwise discriminate against employees who report potential issues.

3. **Employee training.**

   a. Whistleblowing. Regularly train and re-train employees across the organization, from top executives to human resources personnel to regular employees, on the existence of the whistleblowing policy and the organization's approach to whistleblowing (namely, that it is encouraged). Training may also include how to recognize retaliatory behavior/adverse employment actions. Also remind employees of the consequences of retaliation against whistleblowers.

   b. Performance Assessments. Train management to correctly and effectively document an employee's poor performance or disciplinary issues.

4. **Keep detailed personnel files and disciplinary records**. While not specifically related to whistleblowing *per se*, having a complete and thorough personnel file of each employee, including disciplinary records, will help disprove any claims of whistleblower (or any other kind) of discrimination following the termination of an employee.

   a. Ensure the records are very specific, including dates, so that there can be no questions about the company's motivations for terminating an employee should it become necessary. This is especially critical where an employee who "blows the whistle" is already in disciplinary trouble at work.

5. If your company is a publicly-traded company, the Sarbanes-Oxley Act requires that your organization have procedures

for employees to submit concerns about accounting or auditing matters without fear of suffering reprisals.

6. Conduct rigorous internal audits and maintain records of same. One way to undercut a whistleblower claim is to show that the organization is committed to transparency and compliance, and by showing a history of internal regulation, it can serve to de-legitimize the employee's claims by questioning the causation.

B. Once the Whistle Blows

Sometimes, it is not always possible to avoid a whistleblower claim. Following these tips will help ensure the process moves forward as smoothly as possible.

1. Upon receipt of a concern or complaint from an employee, ensure that each and every report is acted upon quickly and assessed appropriately. If corrective measures need to be taken, implement changes promptly. If it is determined that no corrections are needed, thoroughly document the investigative efforts and maintain the file.

2. Keep the whistleblower informed as to the status of your investigation as much as possible. You could use this opportunity to explain that the investigation is progressing but, because it is confidential, no further information can be given. That should be enough to reassure him or her that you are taking the disclosure seriously and there is no need to disclose it elsewhere – including to the media or the relevant public body.

3. Should an employee need to be disciplined or terminated during or after the pendency of a whistleblower investigation

he or she initiated, ensure the file is well documented so as to avoid any doubt as to the reason for discipline or termination.

4. Involve human resources in any decisions to discipline or terminate an employee during the pendency of an investigation to ensure there is no retaliatory motive.

5. Under no circumstances should you terminate an employee who has reported an alleged problem to a public body! This is true even if the employee did not come to you first with his or her concern.

6. If it appears the employee is attempting to use whistleblower protection to shield himself or herself from legitimate discipline, proceed warily. Make sure that you have a well-documented and more than adequate basis to establish that the employee's discipline or discharge had absolutely nothing to do with the employee's complaint.