



# LEGAL EASE

## AVIATION LAW MADE SIMPLE

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## Whistleblower Statute Can Impact Your Business

**W**hat do you think of when you hear the term “whistleblower?” Someone revealing government improprieties? Someone pointing out a major fraud by a corporation? An employee who exposes serious safety problems before they could harm a consumer?

Can you imagine one of your own employees being a whistleblower?

Most AEA members can’t even conceive they might have an issue warranting whistleblowing. Nonetheless, AEA members need to be careful of the whistleblower statute because disgruntled employees can use it against repair stations.

### Is My Business Affected?

The whistleblower statute applies to air carriers and their contractors and subcontractors. The term “air carrier” means anyone who provides air transportation — transportation of passengers, property or mail by aircraft for compensation — or operation of aircraft in furthering a business or vocation.

Air carriers’ contractors and subcontractors include companies performing safety-sensitive functions by contract for an air carrier. Maintenance and/or alteration services performed by a repair station would fall within this definition.

This is similar to the recently expanded scope of the drug-testing rules, which means if your repair sta-

tion is required to comply with the Part 121 and/or Part 135 drug-testing rules, you likely are covered by the whistleblower statute as well.

The whistleblower statute likely does not apply to a repair station whose business consists solely of maintaining and/or altering general aviation aircraft (those performing no services for Part 121 and/or Part 135 air carriers).

### What is the Whistleblower Statute?

The whistleblower statute states, “No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions or privileges of employment because the employee (or any person acting pursuant to a request of the employee) does any of the following:

- 1) Reveals to the government or to the employer any alleged violation of any FAA order, regulation or standard, or any other provision of federal law relating to air carrier safety.
- 2) Files a complaint or legal action relating to any alleged violation of any FAA order, regulation or standard, or any other provision of federal law relating to air carrier safety.
- 3) Testifies, assists in or otherwise participates in any proceeding related to an FAA order, regulation or standard, or any other provision of federal

law relating to air carrier safety.

In short, this law makes it illegal to take any type of adverse employment action in retribution for the employee’s participation in bringing to light (to the government or to the employer) any sort of violation of safety laws — any FAA rule or standard represents a safety law.

### What is an Adverse Employment Action?

The whistleblower act protects against more than just terminations. An employee can avail himself of the protections of the whistleblower statute if he or she is the victim of any type of adverse employment action, including failure to obtain a promotion or other benefit. This means you must be careful to treat whistleblowers fairly in all employment issues, including promotions, bonuses and benefits.

An employee who is forced to quit may also be the victim of an adverse employment action if he or she can demonstrate the resignation was actually a constructive discharge. A constructive discharge occurs when the company forces an employee to quit, such as when the company willfully makes conditions in the workplace so uncomfortable the employee has no choice but to quit. Because of concerns about constructive discharge, it is important for repair stations to ensure workplace issues are resolved promptly and professionally.

## How is the Whistleblower Statute Misused?

The whistleblower statute protects employees who make bona-fide claims concerning illegal and unsafe behavior. This protection is designed to support safety. However, like any good law, it is important to make sure the law is not misused. There is a grave potential for misuse of the whistleblower statute if its application is not reviewed carefully.

A disgruntled employee who anticipates an adverse employment action (such as termination or being passed over for promotion) can misuse the law to cause unfounded mischief. Such an employee can make a report to the employer or to the government of alleged safety violations and, by doing so, the employer establishes a prima facie predicate for filing a whistleblower action against any adverse employment action following the report.

In several recent cases, it appears some employees filed complaints specifically because they knew their days were numbered and termination was imminent. Following termination, such employees have threatened lawsuits and whistleblower reports if the employer fails to pay a substantial settlement.

When it drafted the new law, Congress anticipated potential employee misuse of this statute; therefore, there are several clauses to limit misuse. An employer can recover a penalty of \$1,000, as well as attorneys' fees (at the discretion of the trial judge) if an employee brings a frivolous whistleblower claim. In addition, the protections of the law do not apply if the employee is responsible for illegal behavior. This clause prevents a whistleblower from gaining the protections of the law when the whistleblower was personally responsible for the violation upon which the whistleblowing complaint was predicated.

## How Do I Protect My Repair Station?

Many potential strategies exist for protecting your business against whistleblower liabilities. Some companies are afraid to fire employees who legitimately should be fired. Some companies might refrain from self-audits for fear of revealing issues that could be used by disgruntled would-be whistleblowers.

It doesn't make sense to damage your business because of fear of liability related to the whistleblower statute. Instead, you should carefully review, document and prepare your employment decisions to ensure they comply with the law.

The whistleblower statute actually can be of benefit to your business if it forces you to engage in better business practices.

There is a two-fold process representing a much better way to approach compliance with the whistleblower statute.

First, keep careful records of your employment decisions, accurately portraying the reason you took the employment-related actions you have taken. Periodic employee reviews can be of great help in this regard if they have been candid about the employee's strengths and weaknesses.

Your employment records practices should include more than just records of your decisions to fire personnel. The records also should include decisions to promote one employee over another; decisions to offer a new form of employee benefit; or any other decision that could be construed to provide an employment advantage to one employee not available on the same terms to another. Make certain your reasons for taking the employment action(s) are legitimate.

These employment decision records are especially valuable in a whistle-

blower case because, if the employer can demonstrate by clear and convincing evidence the employer would have taken the same unfavorable personnel action in the absence of the protected behavior, then the employer will have an absolute defense against whistleblower claims.

These types of employment action records can be especially valuable when an employment action, such as termination, is based on a long-standing pattern and practice (such as if the employee has repeated misconduct despite efforts to counsel the employee on proper behavior). In such cases, the employee who anticipates being fired might make a whistleblower predicate report to establish a foundation for the whistleblower claims. Documentation clearly showing the decision to terminate the employee was made substantially before the whistleblowing event (and, therefore, was not based on the whistleblowing event) can serve as an excellent defense.

The second way to protect yourself against complaints by whistleblowing employees is to ensure compliance in your facility, which helps eliminate the predicate offenses to permit whistleblowing. You also should employ a regular practice of accepting employee comments about safety and compliance findings, as well as implementing corrective action in response to them. This process should be documented to demonstrate how it has functioned in the past.

Aside from the fact that root-cause analysis and documented corrective action have been proven to be an important part of quality assurance in the aviation industry, accepting employee findings and implementing corrective action in response to them helps to show your company has a

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regular pattern and practice of accepting employee constructive criticism with no adverse response from management. Thus, it is unreasonable to believe the company would have broken with past practice to fire a whistleblower because of the whistleblower's critical report.

Whistleblower complaints of unfair employment discrimination are on the rise, and the government is increasing its investigation of such claims. All repair stations should be careful to ensure their employment decisions are performed in a manner calculated to ensure regulatory compliance and to minimize exposure to potential wrongful termination liability. □

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