International Employment Lawyer

Whistleblowing

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01. Which body of rules govern the status of whistleblowers?

Germany

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The status of whistleblowers in Germany, as in other EU member states, is primarily governed by European law. The relevant legislation is Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons reporting infringements of Union law (EU Whistleblower-Directive).

The German legislature has incorporated the EU-Whistleblower-Directive into German law by enacting the Whistleblower Protection Act ("Hinweisgeberschutzgesetz") which – largely – entered into force on July 2, 2023.

If the Whistleblower Protection Act (hereinafter referred to as "HinSchG") should meet specific concerns under European law, this will be pointed out separately in the following.

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United States

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There is no uniform private sector "whistleblower protection law" in the United States. Rather, the United States has enacted numerous different whistleblower statutes in the course of regulating particular industries, claims made to the government and commercial activity. Indeed, the United States has enacted whistleblower protections in areas as diverse as workplace safety and health, airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health insurance reform, motor vehicle safety, nuclear, pipeline, public transportation agency, railroad, maritime and securities laws.

One of the most prominent and commonly invoked whistleblower protection statutes is the Sarbanes-Oxley Act of 2002 (SOX), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank). SOX protects employees of certain companies from retaliation for reporting alleged mail, wire, bank or securities fraud; violations of the Securities and Exchange Commission (SEC) rules and

regulations; or violations of federal laws related to fraud against shareholders. SOX covers employees of publicly traded companies and those companies' subsidiaries, as well as (in some instances) contractors, subcontractors, and agents of those employers.

Dodd-Frank also contains whistleblower protection provisions (ie, anti-retaliation provisions), one specific to activities regulated under the Securities Exchange Act, and another specific to activities regulated by the Commodities Exchange Act.

In addition, Dodd-Frank established a whistleblower bounty program, which enables individuals who report original information leading to an enforcement action by the SEC that results in monetary sanctions exceeding $1 million to receive between 10% and 30% of that recovery.

The Internal Revenue Service (IRS) similarly pays monetary awards of between 15% and 30% of recovered amounts exceeding $2 million to individuals who provide information regarding alleged tax noncompliance.

Another prominent whistleblower statute is the federal False Claims Act (FCA), which allows persons and entities with evidence of fraud against federal programs or contracts to sue the wrongdoer on behalf of the United States government in what is referred to as a "qui tam" action. A qui tam plaintiff, referred to as a "relator," is protected from retaliation and, if successful, can receive between 15% to 30% of the total recovery from the defendant, whether through a favourable judgment or settlement.

Likewise, several states have similarly enacted whistleblower statutes, including California, Illinois and New York. Many states also have their own false claims laws that allow individuals to file "qui tam" lawsuits against those who defraud the state.

Further, over half of the states in the United States recognise a common law claim of retaliatory discharge in violation of public policy, which may present a risk of punitive damages.

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02. Which companies must implement a whistleblowing procedure?

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In principle, companies that regularly employ 50 or more employees are obliged to set up an internal reporting system (section 12 (1), (2) HinSchG). For companies with between 50 and 249 employees, this obligation will only apply from 17 December 2023 (section 42 HinSchG).

For certain employers, particularly in the financial and insurance sectors or for data provision companies, the obligation to set up an internal reporting office applies irrespective of the number of employees as of the entry into force of the Act (section 12 (3) HinSchG).

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Section 301 of SOX requires the audit committee of publicly traded companies to establish procedures for

the receipt, investigation and treatment of confidential, anonymous complaints regarding questionable accounting or auditing practices. Section 301 allows for flexibility in developing appropriate procedures in light of a company's circumstances, so long as the required parameters are met.

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03. Is it possible to set up a whistleblowing procedure at a Group level, covering all subsidiaries?

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According to the explanatory memorandum of the Whistleblower Protection Act, it is legally permissible to implement an independent and confidential internal reporting office as a "third party" within the meaning of article 8(5) of the EU Whistleblower Directive at another group company (eg, parent company, sister company or subsidiary), which may also work for several independent companies in the group (section 14 (1) HinSchG). However, the European Commission has already announced in two statements during the legislative process that a group-wide whistleblower system does not meet the requirements of the EU Whistleblower Directive. The question of the compatibility of the regulation with EU law will only arise in practice at a later stage, provided that this question needs to be clarified in court.

The Whistleblower Protection Act in line with the EU Directive further provides that several private employers with between 50 and 249 employees employed on a regular basis may commonly implement and operate an internal reporting office to receive notifications. However, the legal obligation to take action to remedy the violation and the corresponding duty to report back to the person making the report has to remain with the individual employer.

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Yes, this may be done. Section 301 does not expressly mandate separate whistleblowing procedures for different subsidiaries.

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04. Is there a specific sanction if whistleblowing procedures are absent within the Company?

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If there are no whistleblowing procedures in the company (ie, an internal reporting system is not implemented and operated), this constitutes an administrative offence punishable by a fine. This fine may amount to up to 20,000 EUR (section 40 (2) No. 2, (5) HinSchG).

At this point, it should be noted that there is a high incentive for employers to implement an internal reporting channel, since the external reporting channel is available to the whistleblower in any case. Consequently, if an internal reporting office were not implemented or operated, the whistleblower would be forced to report directly to the external reporting office. As a result, the employer would not be able to make internal corrections without the reported information leaving the company.

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There is no specific, pre-designated sanction for failure to implement a whistleblower procedure. However, the lack of a clear process for raising concerns can expose an employer to significant legal and reputational risk as incidents of improper conduct will be less likely to be discovered and appropriately remedied.

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05. Are the employee representative bodies involved in the implementation of this system?

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Although the implementation of a whistleblower system is based on a legal obligation, the works council only has to be involved under certain circumstances.

At first, the employer is, in principle, already obliged to inform the works council in good time and comprehensively about everything it requires to carry out its duties. This information requirement should enable the works council to review whether co-determination or participation rights exist or whether other tasks have to be carried out according to the German Works Constitution Act (BetrVG).

For instance, instructions concerning the orderly conduct of employees are subject to co-determination. These instructions are intended to ensure an undisturbed work process or to organise the way employees live and work together in the company. If, in the course of the implementation of a whistleblower system, the already existing contractual obligations are extended or regulations regarding the specific reporting procedure are introduced (eg, in the form of a reporting obligation on the part of employees), the organisational behaviour would be affected and the works council must therefore be involved (section 87 (1) No. 1 BetrVG).

Furthermore, in the context of setting up an internal reporting channel, the Whistleblower Protection Act only stipulates that whistleblowers must be given the option of submitting a report to the whistleblowing system in text form or verbally. This could, of course, also be provided via digital channels - eg, via software- or web-based solutions. Should the introduction and use of such technical equipment in the relevant case allow the employer to monitor the behavior or performance of employees (eg, those who deal with the complaint), further co-determination rights of the works council according to section 87 (1) No. 6

BetrVG can be triggered.

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Employers with unionised employees may have a duty to bargain with the union if the whistleblower program can be deemed to affect the terms and conditions of employment of the union members.

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06. What are the publicity measures of the whistleblowing procedure within the company?

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The Whistleblower Protection Act does not oblige the company itself to publish any information regarding the internal reporting office or the internal reporting channel implemented. However, the internally implemented reporting office must have clear and easily accessible information available on the external reporting procedure and relevant reporting procedures of European Union institutions, bodies or agencies (section 13 (2) HinSchG).

The current explanatory memorandum to the Whistleblower Protection Act also contains the more detailed, but not legally binding, reference that the information can be made available via a public website, company intranet or a bulletin board that is accessible to all employees. In this context, it is recommended that the company also refers to the internally implemented reporting office or the internal reporting channel in the same way. This helps to counteract the risk that potential whistleblowers will report primarily via the external reporting channel.

Furthermore, the German Supply Chain Due Diligence Act (LkSG) also provides for the implementation of complaint mechanisms so that the regulatory requirements of companies can also be met through a uniform reporting system. Within its scope of application, the LkSG also provides for the publication of procedural rules for such a reporting system in text form as well as for annual reporting obligations on what measures the company has taken as a result of complaints.

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There is no specific legal requirement to publicise an employer's whistleblower procedure. However, it is best practice to notify employees in as many places as possible (eg, in the employee handbook, code of conduct or website) of the employer's anti-retaliation policy and mechanisms for raising complaints,

including doing so anonymously.

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07. Should employers manage the reporting channel itself or can it be outsourced?

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In principle, the Whistleblower Protection Act intentionally does not specify which persons or organisational units are best qualified to carry out the tasks of the internal reporting office or to manage the corresponding reporting channel. However, the internal reporting office may not be subject to any conflicts of interest and it also must be independent. The EU Whistleblower-Directive mentions, for instance, the head of the compliance department or the legal or data protection officer as possible internal reporting offices.

If, in addition to the (internal) persons responsible for receiving and processing internal reports, other (external) persons have to be involved in a supporting activity, this supporting activity is legally only permissible to the extent that is necessary for the supporting activity. This applies, for example, to IT service providers that provide technical support for reporting channels.

It is also legally permissible to appoint a third party to carry out the tasks of an internal reporting office, including the reporting channel (section 14 (1) HinSchG). Third parties may include lawyers, external consultants, trade union representatives or employee representatives.

However, engaging a third party does not relieve the employer of the obligation to take appropriate action to remedy a possible violation. In particular, for follow-up actions to check the validity of a report, there must be cooperation between the commissioned third party and the employer.

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A reporting channel can be managed internally or outsourced.

Advantages of an internal reporting channel include:

- better understanding of the organisation; and
- better understanding of the context in which complaints may arise and be escalated.

Advantages of a third-party reporting channel include:

- increased independence and transparency; and
- broader expertise in handling whistleblower reports.

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08. What are the obligations of the employer regarding the protection of data collected related to the whistleblowing procedure?

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The internal reporting office implemented by the employer is, initially, authorised to process personal data insofar as this is necessary for the fulfilment of its task under the Whistleblower Protection Act (10 HinSchG). The wide-ranging processing authority allows the personal data contained in the reports to be both received and analysed by the reporting office. In addition, new personal data may be recorded and further processed during the implementation of the follow-up measures.

The employer's obligation to protect the data collected in the course of the whistleblowing procedure is then directly based on the European General Data Protection Regulation (GDPR) and the German Federal Data Protection Act. This means, for instance, that data processing has to be limited to the extent necessary to fulfil the tasks of the internal and external reporting channel – data minimisation principle, (article 5 (1) lit. c) GDPR).

Finally, the processing of personal data is complemented by the confidentiality requirements of internal (and external) offices, (section 8 HinSchG).

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The United States Department of Labor has issued a notice instructing parties to redact private information, such as Social Security Numbers, birth dates and financial account numbers from submissions filed in connection with hearings conducted by the Office of Administrative Law Judges.

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09. What precautions should be taken when setting up a whistleblowing procedure?

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The reporting channels must be designed in such a way that only the persons responsible for receiving and processing the reports as well as the persons assisting them in fulfilling these tasks have access to the incoming reports. It must, therefore, be ensured that no unauthorised persons have access to the identity of the person making the report or to the report itself. This has implications for the technical design of the internal reporting channel.

Also, the persons entrusted with running the internal reporting office must indeed be independent in the exercise of their activities and the company must ensure that such persons have the necessary expertise. Therefore, smaller or medium-sized companies should especially assess whether it will be more efficient to assign an experienced external ombudsperson to receive and initially process incoming reports. However, the ombudsperson who takes the call in this case is a witness bound to tell the truth, even if this is, for example, a company lawyer.

According to the German Whistleblower Protection Act, the internal whistleblowing reporting office is not obliged by law to accept or process anonymous reports; however, they “shall” be processed. Companies should therefore assess carefully whether they provide systems that enable anonymous reports, as this may increase the number of abusive reports and make enquiries impossible. On the other hand, some ISO standards require the receipt of anonymous reports. Therefore, should a company seek certification according to these ISO standards, the whistleblower procedure to be set up must allow for the processing of anonymous reports.

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Key elements of an effective whistleblowing procedure include:

- repeated and consistent messaging from senior leadership regarding the employer’s commitment to creating a “culture of compliance” and encouraging employees to bring forth good-faith complaints without fear of retaliation;
- policies and procedures for receiving, investigating and addressing employees’ complaints;
- policies and procedures for receiving, investigating and addressing complaints of retaliation;
- anti-retaliation policies and related training for employees and managers; and
- program oversight through ongoing monitoring and periodic audits.

Employers should continuously review and update their policies and procedures to ensure that they keep pace with developments in the business, legal and regulatory landscape.

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10. What types of breaches/violations are subject to whistleblowing?

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The Whistleblower Protection Act´s material scope of application goes beyond European legal requirements. It extends the material scope of application to all violations that are subject to punishment (section 2 (1) No. 1 HinSchG). Additionally, violations subject to fines are included insofar as the violated regulation serves to protect life, body, health or the rights of employees or their representative bodies (section 2 (1) No. 2 HinSchG). The last alternative covers not only regulations that directly serve occupational health and safety or health protection, but also related notification and documentation requirements, for example under the Minimum Wage Act. Thus, as a result, section 2 (2) No. 2 HinSchG covers the majority of administrative offences in the context of employment.

Finally, the Whistleblower Protection Act also provides for a list of infringements that predominantly correspond to the relevant areas of law according to the recitals of the EU Whistleblower Directive.

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Whistleblowing protections under federal law apply to complaints concerning a broad array of subjects, including, but not limited to:

- Fraud and Financial Issues
  - Anti-Money Laundering Act;
  - Consumer Financial Protection Act;
  - Criminal Antitrust Anti-Retaliation Act;
  - SOX;
  - Taxpayer First Act;
- Employee Safety
  - section 11(c) of the Occupational Safety and Health Act (OSH Act);
- Environmental Protection
  - Asbestos Hazard Emergency Response Act;
  - Clean Air Act;
  - Comprehensive Environmental Response, Compensation and Liability;
  - Energy Reorganization Act;
  - Federal Water Pollution Control Act;
  - Safe Drinking Water Act
  - Solid Waste Disposal Act;
  - Toxic Substances Control Act;
- Consumer Product, Motor Vehicle, and Food Safety
  - Consumer Product Safety Improvement Act;
  - FDA Food Safety Modernization Act;
  - Moving Ahead for Progress in the 21st Century Act;
- Transportation Services
  - Federal Railroad Safety Act;
  - International Safe Container Act;
  - National Transit Systems Security Act;
  - Pipeline Safety Improvement Act;
  - Seaman’s Protection Act;
  - Surface Transportation Assistance Act;
  - Wendell H Ford Aviation Investment and Reform Act for the 21st Century
- Health Insurance
  - Affordable Care Act

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11. Are there special whistleblowing procedures applicable to specific economic sectors or professional areas?

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The Whistleblower Protection Act itself does not distinguish between different sectors regarding the internal reporting process. However, it contains an enumerative list of regulations from other statutes that take precedence over the Whistleblower Protection Act for the reporting of information on violations; these regulations are therefore lex specialis compared to the Whistleblower Protection Act (section 4 (1) HinSchG). Priority special provisions are, among others, regulated by the Money Laundering Act, the Banking Act, the Insurance Supervision Act and the Stock Exchange Act.

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Different whistleblower statutes employ different procedures. For example, an employee cannot file a SOX whistleblower claim in a federal district court before filing a complaint with the Occupational Safety and Health Administration (OSHA) and exhausting all administrative remedies. An employee alleging retaliation under Dodd-Frank, by contrast, need not first file a complaint with OSHA; they may proceed directly to court. Similarly, many state whistleblower statutes do not erect any administrative hurdles.

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12. What is the legal definition of a whistleblower?

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A whistleblower is a natural person who, in the context of his or her professional activity or in the preliminary stages of professional activity, has obtained information about violations and reports or discloses it to the – internal or external – reporting offices provided for under the Whistleblower Protection Act (section 1 (1) HinSchG).

The Whistleblower Protection Act also applies to the protection of persons who are subject to a report or disclosure, as well as other persons who are affected by a report or disclosure, (section 1 (2) HinSchG).

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For purposes of the anti-retaliation provisions in Dodd-Frank, a whistleblower is defined by SEC Rule 21F-2 as an individual who “provide[s] the Commission with information in writing that relates to a possible violation of the federal securities laws (including any law, rule, or regulation subject to the jurisdiction of the Commission) that has occurred, is ongoing, or is about to occur.” In Digital Realty Trust, Inc v Somers

(2018), the United States Supreme Court held that the anti-retaliation provision of the Dodd-Frank Act only applies to individuals who have provided information regarding a violation of the securities laws externally to the SEC; internal reports are insufficient to trigger the protections under the statute. SOX is broader than Dodd-Frank in this regard, as it protects an individual who only complains internally.

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13. Who can be a whistleblower?

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Whistleblowers may be employees, but also, for instance, self-employed persons, volunteers, members of corporate bodies or employees of suppliers. In addition to persons who obtain knowledge in advance, such as in a job interview or during pre-contractual negotiations, the scope of protection also includes those for whom the employment or service relationship has been terminated. As a result, the status of a whistleblower is not dependent on formal criteria such as type of employment.

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SEC Rule 21F-2 provides: “A whistleblower must be an individual. A company or other entity is not eligible to be a whistleblower.”

Although SOX generally applies only to publicly traded companies, the Supreme Court held in Lawson v FMR LLC (2014) that SOX’s whistleblower protections extend to employees of a publicly traded company’s contractors and subcontractors.

Although typically applied in the employer-employee context, the courts have held that the SOX whistleblower protections also extend to shareholders who provide information to the SEC.

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14. Are there requirements to fulfil to be considered as a whistleblower?

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To be qualified as a whistleblower, the person providing the information must have obtained the information in the context of his or her professional activity or in the preliminary stages of professional

activity. Information about violations falls within the substantive scope of the Act only if it relates to the employing entity or another entity with which the whistleblower is or has been in professional contact.

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Yes, though the answer to this question will depend upon the context. To qualify as a whistleblower for purposes of collecting a bounty award under Dodd-Frank, the individual must provide original information that leads to successful enforcement action.

For purposes of the anti-retaliation provisions in many whistleblower protection statutes, the individual must: engage in “protected activity” as defined under the various whistleblower statutes; suffer an adverse employment action (such as a demotion or termination); and demonstrate that the protected activity was the cause of the adverse employment action.

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15. Are anonymous alerts admissible?

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The Whistleblower Protection Act does not state that the employer must set up reporting channels in such a way that anonymous reports are admissible (section 16 (1) HinSchG). Also, external reporting offices do not have to process anonymous reports (section 27 (1) HinSchG). According to the Whistleblower Protection Act, however, anonymous reports “shall” be processed by the internal and external reporting offices. Against this background, employers are entirely free to choose whether to provide systems that allow for the submission and processing of anonymous reports or not.

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Yes. Section 301 of SOX requires covered employers to implement mechanisms for the submission of anonymous employee complaints.

Whistleblowers seeking bounty awards according to Dodd-Frank can also make anonymous complaints. However, an anonymous whistleblower must be represented by an attorney in connection with their submission of information and claim for an award, and must disclose their identity to the SEC before any award will be paid.

Protection of the identity of FCA whistleblowers is more limited. They can file a lawsuit under seal initially, but the seal typically will only remain in effect for 60 days if the government agrees to pursue the case.

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16. Does the whistleblower have to be a direct witness of the violation that they are whistleblowing on?

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In principle, the whistleblowers do not have to be direct witnesses to a violation. However, they must have obtained information about violations in connection with or before their professional activities. Violation information is defined as a reasonable suspicion or knowledge of actual or potential breaches and attempts to conceal such breaches that have occurred or are very likely to occur (section 3 (3) HinSchG). However, only whistleblowers acting in good faith are protected from any discriminatory measures as a result of their report.

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No. A whistleblower seeking a bounty award under Dodd-Frank may qualify for an award if they provide “independent analysis” of publicly available information. For a submission to qualify as “independent analysis,” the whistleblower cannot simply point to publicly available information. Rather, the whistleblower must use publicly available materials to show important insights about the possible securities law violations that are not apparent on the face of the materials.

Likewise, an individual who blows the whistle under SOX need only have a reasonable belief that one of the forms of fraud referenced in section 806 of SOX or a securities violation occurred.

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17. What are the terms and conditions of the whistleblowing procedure?

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The whistleblower procedure requires – in its broad outlines – that the personal and material scope of the Whistleblower Protection Act is applicable. Assuming this, the whistleblower must have obtained information about violations in connection with his or her professional activities or in advance of professional activities. In a further step, the whistleblower must report or disclose these violations to the

internal and external reporting bodies responsible. The Reporting Office will issue an acknowledgement of receipt to the person making the report within seven days. Within three months of the acknowledgement of receipt, feedback will be provided to the whistleblower on planned and already taken follow-up measures and their reasoning. This information will be documented in compliance with the principle of confidentiality. This documentation will be deleted two years after the conclusion of the proceedings.

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Please refer to question 9.

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18. Is there a hierarchy between the different reporting channels?

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There is no legally binding hierarchy between internal and external reporting channels. Therefore, the whistleblower has, in principle, the right to choose whether to report the violations externally or internally. However, in cases where effective internal action can be taken against violations, whistleblowers are to give preference to reporting to an internal reporting office. If an internally reported violation is not remedied, the whistleblower making the report is free to contact an external reporting office (section 7 (1) HinSchG).

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Yes. As noted above, under the Supreme Court holding in Digital Realty, the anti-retaliation provision of the Dodd-Frank Act only protects individuals who have provided information externally to the SEC and does not apply to internal reports.

The SOX anti-retaliation provision, in contrast, covers whistleblowers who raise their concerns internally within the company without going to the SEC.

This distinction matters because there are several important differences between the Dodd-Frank and SOX anti-retaliation provisions:

- The statute of limitations for Dodd-Frank claims is up to 10 years, which is substantially longer than the 180-day statute provided in SOX;
- Dodd-Frank allows for double back pay, unlike SOX, which provides for single back pay; and

- An employee alleging retaliation under Dodd-Frank can file suit directly in federal district court without first being required to exhaust administrative remedies, unlike SOX, which only permits a lawsuit to be filed after administrative remedies have been exhausted.

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19. Should the employer inform external authorities about the whistleblowing? If so, in what circumstances?

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Once the reporting process at the internal reporting office is completed, the internal reporting office can take various follow-up actions. In addition to internal investigations, the process can also be handed over to a competent authority for further investigation (section 18 No. 4 HinSchG).

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An employer may have an obligation to inform external authorities about misconduct discovered as a result of whistleblowing in some instances. For example, the discovery of potential shareholder fraud may in certain circumstances need to be disclosed to the SEC.

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20. Can the whistleblower be sanctioned if the facts, once verified, are not confirmed or are not constitutive of an infringement?

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As a principle, the disclosure of inaccurate information about violations is prohibited under the Whistleblower Protection Act (section 32 (2) HinSchG). A whistleblower may, however, not be sanctioned if the facts, after being verified, are merely not confirmed or do not constitute a violation in the final analysis. If the information disclosed was incorrect, the following legal consequences will apply:

On the one hand, the whistleblower must compensate for any damage resulting from intentional or grossly negligent reporting or disclosure of incorrect information (section 38 HinSchG). The whistleblower's liability

for damages is based on the fact that a false report or disclosure has far-reaching consequences for the person affected or accused. The effects may no longer be completely reversible. According to the Whistleblower Protection Act, claims for damages resulting from merely negligent incorrect reporting should not arise. Besides, only whistleblowers acting in good faith are protected from further repercussions.

On the other hand, the whistleblower acts improperly if he intentionally discloses incorrect information in violation of section 32 (2) of the Whistleblower Protection Act (section 40 (1) HinSchG). This administrative offence may be punished with a fine of up to 20,000 EUR (section 40 (5) HinSchG).

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Not if the whistleblower had a subjectively and objectively reasonable belief that misconduct had occurred.

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21. What are the sanctions if there is obstruction of the whistleblower?

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Retaliation against the whistleblower is prohibited under the Whistleblower Protection Act. This also applies to threats and attempts at retaliation (section 36 (1) HinSchG). In addition, it is prohibited to interfere or attempt to interfere with reports or communications between a whistleblower and the reporting office (section 7 (2) HinSchG).

If the whistleblower was nevertheless obstructed, the following legal consequences will apply: if a retaliation occurs, the person causing the violation must compensate the whistleblower for the resulting damage. However, this does not entitle the whistleblower to an employment relationship, a vocational training relationship, any other contractual relationship, or career advancement.

In addition, taking an illegal reprisal or interfering with the communications between the whistleblower and the reporting office constitutes an administrative offence, which can be punished with a fine of up to 50,000 EUR (section 40 (2) No. 3, (5) HinSchG).

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Depending on the applicable statute, an employee whistleblower who demonstrates that they were subject to retaliation may be entitled to compensatory damages including back pay, costs, attorney fees, reinstatement, and front pay in lieu of reinstatement where reinstatement is not feasible.

In addition, SEC Rule 21F-17 prohibits any conduct by employers that could be construed as impeding an employee's ability to report to the SEC. The SEC has issued penalties based on severance, separation or restrictive covenants containing confidentiality clauses that limited an employee's ability to communicate with the SEC or participate in an SEC investigation. Unlike the SOX and Dodd-Frank anti-retaliation protections, the protections against actions taken to impede reporting possible securities law violations are not limited to the employee-employer context, and have also been extended to agreements that would impede investors from communicating with the SEC.

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22. What procedure must the whistleblower follow to receive protection?

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To obtain protection, the whistleblower generally has to contact the responsible internal or external reporting offices. Disclosure of information about violations directly to the public is subject to strict conditions. This is only permissible, for example, if there is a risk of irreversible damage or in cases where the external reporting agency has not taken the required measures (section 32 (1) HinSchG).

The whistleblower providing the information must further act in good faith (ie, must have reasonable cause to believe, at the time of the report or disclosure that the information disclosed is true, and the information relates to violations that fall within the material scope of the Whistleblower Protection Act (section 33 (1) No. 2 and 3 HinSchG).

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OSHA administers more than 20 whistleblower statutes, with varying time limits for filing a whistleblower complaint, ranging from 30 to 180 days.

A SOX whistleblower must first file a complaint with OSHA. OSHA will then conduct an investigation. If the evidence supports an employee's claim of retaliation, OSHA will issue an order requiring the employer to put the employee back to work, pay lost wages, restore benefits, and provide other relief, as appropriate. The exact requirements depend on the facts of the case. If the evidence does not support the employee's claim, OSHA will dismiss the complaint.

After OSHA issues a decision, the employer or the employee may request a full hearing before an administrative law judge (ALJ). A final decision by an ALJ may be appealed to the Department of Labor's Administrative Review Board (ARB). A decision by the ARB can then be appealed to a federal appellate court.

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23. What is the scope of the protection?

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The most fundamental part of the protection is the prohibition of retaliation against the whistleblower. Therefore, the reporting or disclosing of information may not result in unjustified disadvantages such as disciplinary measures, dismissal or other discrimination against the person providing the information. In Addition, the Whistleblower Protection Act still contains a reversal of the burden of proof if the whistleblower suffers a disadvantage in connection with their professional activities. However, it is presumed that the disadvantage is a reprisal for the tip-off only if the whistleblower also asserts this themself. It should be noted, however, that the reversal of the burden of proof in favour of the whistleblower will only apply in labour court disputes and not in fining proceedings.

Furthermore, the Whistleblower Protection Act contains an exclusion of responsibility. Thus, a whistleblower cannot be made legally responsible for obtaining or accessing information that he or she has reported or disclosed, unless the obtaining or accessing of the information and the procurement or access as such constitutes an independent criminal offence (section 35 (1) HinSchG). In addition, a whistleblower does not violate any disclosure restrictions and may not be held legally responsible for the disclosure of information made in a report or disclosure if he or she had reasonable cause to believe that the disclosure of the information was necessary to detect a violation.

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Whistleblowers are protected from adverse employment actions (which the Department of Labor construes broadly) and any actions that would impede them from reporting their concerns (as noted above).

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24. What are the support measures attached to the status of whistleblower?

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At first, the person providing the information may not be subject to legal liability for obtaining or accessing information that he or she has reported or disclosed. This does not apply if the procurement or access as such constitutes an independent criminal offence (section 35 (1) HinSchG).

In addition, whistleblowers are protected by a comprehensive prohibition of retaliation. Therefore, any adverse consequences caused by disclosure are prohibited. These include, for example, dismissal, disciplinary measures or salary reductions (section 36 (1) HinSchG). Measures that violate the prohibition are void under section 134 of the Civil Code. The prohibition of retaliation is rounded off by a reversal of the

burden of proof. According to this, it is presumed that a disadvantage that occurs after a disclosure is retaliation. As a consequence, the person who has disadvantaged the whistleblower has to prove that it is factually justified and was not based on the report or the disclosure if the whistleblower also asserts the disadvantage himself (section 36 (2) HinSchG).

In addition, the whistleblower is entitled to damages in the event of a violation (section 37(1) HinSchG).

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Several governmental entities maintain websites containing various resources for whistleblowers, including information about the relevant legal protections, the procedures for filing complaints, and answers to frequently asked questions. These include the SEC's Office of the Whistleblower, OSHA, the ARB, and the IRS.

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25. What are the risks for the whistleblower if there is abusive reporting or non-compliance with the procedure?

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If a whistleblower abusively reports a violation, this may initially give rise to criminal liability. Possible criminal offences are pretending to have committed a criminal offence (section 145d of the Criminal Code), false suspicion (section 164 of the Criminal Code) or offences of honour (section 185 et seq of the Criminal Code).

The whistleblower providing the abusive information also must compensate for any damage resulting from intentional or grossly negligent reporting or disclosure of incorrect information (section 38 HinSchG). Furthermore, there may be competing claims for damages, for example under section 823 (2) of the Civil Code in conjunction with a protective law.

Moreover, the whistleblower commits an administrative offence if he or she intentionally discloses inaccurate information. This may be punished with a fine of up to 20,000 EUR (section 40 (1), (6) HinSchG).

In principle, the whistleblower is free to decide whether he or she reports a violation through the internal or the external reporting channel (section 7 (1) HinSchG). However, if a violation is disclosed to the public directly (ie, without first using internal or external reporting channels and without there being an exceptional circumstance for this), the whistleblower is generally not subject to the protection of sections 35 to 37 of the Whistleblower Protection Act. Only in narrow exceptions is the whistleblower still protected, for example, if there is a danger of irreversible damage or comparable circumstances may represent an immediate or obvious threat to the public interest.

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Whistleblowers who fail to follow all required procedures may be unable to successfully assert a retaliation claim or collect a bounty award from the SEC.

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