綜論

美國勞工部職業安全衛生署依各種法律反報復條款下專屬保護吹哨者之制度

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摘要

美國總共有21部有關環保、工安、航安、產品安全、鐵路安全、貨櫃安全、有毒物質控制等等有關公共安全之聯邦法律，規定其合法申訴或為其他吹哨行為之受雇人都集中由其勞工部職業安全衛生署保護其不受解雇或其他歧視與報復。在各該法律之反報復條款下，其國職業安全衛生法第11條(C)項規定，只是該署被授權主管之保護吹哨勞工的法律之一。其規定任何人不得因　受雇勞工或受雇勞工授權的代表，依各該法提起申訴或訴訟程序，或於訴訟程序中提供證詞，而被解雇或受到其他任何方式之不平等對待。由其立法可知，此21部法律多非職業安全衛生署主管之業務，卻授權專屬由職業安全衛生署主管其各該法中保護吹哨勞工之調查與有效的執行。

本文以法學文獻方法探討發現職業安全衛生署設置有區域執行者(Regional Administrator, RA)、區域調查監督官(Supervisor)、調查官(Investigator)、調查協助辦公室(Office of Investigative Assistance, OIA)、（案件受理）地區主管(Area Director, AD)、安全衛生遵循官(Compliance Safety and Health Officer, CSHO)、國家勞動律師官(National Solicitor of Labor, NSOL)、區域勞動律師官(Regional Solicitor of Labor, RSOL)、區域律師官(Regional Attorney)，以執行其此一業務。若該署調查後認定雇主有不當歧視或解雇行為，該署會發出決定書(a determination letter)，要求雇主支付積欠工資(back pay)、給勞工復職、賠償員工所支付的律師和專家證人費。並採取其他步驟，以提供受害勞工必要的救濟。

關鍵字：吹哨勞工、職業安全衛生署、安全衛生遵循官、區域調查監督官

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前言

簡言之，吹哨的意義是事業單位受雇勞工對其單位之非法、不道德或違反法令的慣行(practice)，向公眾或權責機關進行爆料。吹哨者保護制度牽涉言論自由、個別勞工忠實義務與社會對政府或事業單位監控之公共利益(Public Interest)。[1]而對吹哨者之保護，牽涉到如何平衡個別勞工應對雇主負忠實義務之私人利益與監督與防制政府或事業單位之違法不當行為之公共利益(Sauter, 1990:514)[2]。Mary Kreiner Ramirez(2007:183)認為由於吹哨行為是會威脅當權者，不管是左派或右派的當權者都不會喜歡[3]。然而Monique C. Lillard(2002:332)認為，在過去的15到20年內，決策者承認吹哨作為一個機制，其揭露不法行為的潛在效益越來越廣泛。新時期的到來似乎已是一個適當的時間來評估吹哨做為對企業的控制的一種手段與其影響[4]。

美國勞工部職業安全衛生署負責21部有關環保、工安、航安、產品安全、鐵路安全、貨櫃安全、有毒物質控制等等有關公共安全與證券之聯邦法律規定下，對其受雇勞工合法申訴或為其他吹哨行為時不受報復之保護。其21部吹哨者保護法律中(Office of Whistleblower Protection Program, 2011)[5]。其中含有職業安全衛生法(Occupational Safety & Health Act, OSHA)、海上運送協助法(Surface Transportation Assistance Act, STAA)、石棉災害緊急回應法(Asbestos Hazard Emergency Response Act, AHERA)[4]、國際安全貨櫃法(International Safety Container Act, ISCA)、一九七四年能源再組織法(Energy Reorganization Act of 1974, ERA)、乾淨空氣法(Clean Air Act, CAA)、安全飲用水法(Safe Drinking Water Act, SDWA)、聯邦水污染控制法(Federal Water Pollution Control Act , FWPCA)、有毒物質控制法(Toxic Substances Control Act, TSCA)、固體廢棄物處理法(Solid Waste Disposal Act, SWDA)[4]、綜合環境反應、補償、與責任法(Comprehensive Environmental Response, Compensation, and Liability Act , CERCLA)、21世紀Wendell H. Ford 飛行投資與改革法(Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, AIR21)、沙賓法第八章、管路安全改善法(Pipeline Safety Improvement Act, PSIA)、聯邦鐵路安全法(Federal Rail Safety Act, FRSA)、國家轉運系統安全法(National Transit Systems Security Act, NTSSA)、消費者產品安全改善法(Consumer Product Safety Improvement Act, CPSIA)等。

各該法皆明文禁止雇主解雇或歧視合法吹哨之勞工，因而皆有反報復條款規定。而且若雇主有解雇或歧視時，受害勞工得向職業安全衛生署控告雇主之不當的解雇行為與歧視對待之行為。例如，聯邦水污染控制法第1367條第1款規定禁止對依據該法提起訴訟的人或提供證詞的人員不平等待遇。其規定：「任何人不得因　受雇勞工或受雇勞工授權的代表，已經根據本章提起訴訟程序，或使之被提起，或者已經或是將要在因執行或實施本章的條款而產生的訴訟程序中提供證詞，而解雇或以其他任何方式不平等對該受雇勞工或該受雇勞工授權的代表，或者使其被解雇或使其被不平等對待。」

該署每年大約調查一千件申告案。2009年有24%是為構成違反之案件，而70%被駁回(dismissed)，而16%是勞工予以撤回。而其有違反之案件中，92%是和解處理。2009年美國有26個州有相同制度，而完成999件吹哨者

案件調查。19%是有違反之案件，而67%被駁回，而15%是勞工予以撤回。而其有違反之案件中，73%是和解處理。.於2010會計年度該署完成1,177件案件之調查，而該年全美有27州有相同制度，其共完成1,039件調查。2011會計年度該署完成2,698件案件之調查， 2012會計年度該署完成2,889件案件之調查，2013會計年度該署完成2,969件案件之調查，2014會計年度該署完成3,060件案件之調查。

本文研究動機擬探討該署之專屬保護受雇勞工合法吹哨時不受報復之執行制度，以及其保護之相似制度，以供借鏡。由於我國雖有一些受雇勞工吹哨保護規範，例如職業安全衛生法以及食品安全衛生管理法中，設有吹哨者保護之條文。然而，其制度對吹哨勞工而言，仍屬於會使其曝險於雇主之報復行為之中。本文之目的借由引介美國職安署之專屬保護受雇勞工合法吹哨行為不受報復之執行制度，以促進我國各種法律中，對吹哨者保護制度之設計，能更為實質的落實於保護勞工，以鼓勵合法吹哨行動，而間接有利於公眾利益。

該署專屬保護受雇勞工合法吹哨行為不受雇主報復之執行

對於受雇勞工舉發雇主違法行為，前述美國聯邦法雖然沒有一般總則性的保護規範，但散見於前述此些制定法中之反報復條款而給予保護。依據各該法律受不利對待之吹哨勞工皆得向職業安全衛生署提起控告(file complaints with OSHA)。

美國職業安全衛生署設有吹哨者保護計劃辦公室(Office of the Whistleblower Protection Program)，其中設有區域執行者、區域調查監督官、調查官、調查協助辦公室、（案件受理）地區主管、安全衛生遵循官、國家勞動律師官、區域勞動律師官、區域勞動律師官，以執行其對吹哨勞工之保護業務。依前述聯邦法，該辦公室之職責並不僅執行職業安全衛生法第11(c)條勞工因職業安全衛生事件而揭露其雇主在職業安全衛生領域之違法不當行為，而受報復時予以保護為限[5]。

其雇主之報復行為是構成一種就業歧視，而受雇勞工只要遇有如此之歧視行為，只需聯絡該署之區域辦公室。然而，受雇勞工向職業安全衛生署提起申告受雇主報復時，需舉證主張其所為之吹哨行為是一受保護之行為(protected activity)、被告雇主知道該一行為、被告雇主對其有不利之行為(adverse action)，而其受保護之之吹哨行為是導致該一不利行為之發生。其所謂的不利之行為被定義為是雇主可以嚇阻(dissuade)一有理性之受雇勞工不會從事受保護之吹哨行為的行為。而職業安全衛生法第11(c)條之規定雇主之不利益對待行為，並不以解雇為限(Swain, 1988: 59, 139)[6]。其視個案之情況而定，不利之行為可以包括解雇、黑名單、降級、不給加班費、不給升級、懲戒、不給福利、不雇佣或不重新雇佣、恐嚇威脅、對升遷之前景有影響之重新工作指派、減薪或減少得工作之時間。[1]

1. 須有符合各該法律規範具體合法吹哨行爲

此21部法律之吹哨者條款所規範勞工之具體合法吹哨行為之行為種類，含：

(1) 依據其中任何一項法律或為該法律之執行而啟動一個程序，或造成這種程序將被啟動(instituted or caused to be instituted any proceeding)；其包括促使依許多法定之程序因而進行、找律師、向工會報告、或即令是向地方報紙反映。

(2) 在任何此類程序中作證；
(3) 協助或參與任何此類程序，或協助或參與任何其他行動以實行這些法律的目的；或
(4) 為申訴的行為

而在前述許多法律之條款中，也規定保護勞工在其雇主的內部申訴(internal complaints)程序中的吹哨行為，亦不受其雇主解雇或歧視。勞工部的立場認為各該法律中之吹哨者保護條款，也保護因在雇主的內部申訴而被解雇或歧視之勞工。然而，雇主不得要求勞工先在內部報告才可對外吹哨。

而產生雇主報復行為之申訴並不以勞工之正式的申訴為限，勞工非正式的依職業安全衛生法第8(f)條而要求該署之各種檢查也屬之。

2. 需勞工向該署爲合法之申告

(1) 受報復勞工須在規定期間內提出申告(File Complaint)

每一個法律都要求申告勞工需在遭到報復後之一定期間內提出申告。例如，因揭發雇主職業安全衛生事件違法不當而受報復之勞工，其控告必需在事實發生日後三十日內提起之。而如海上運送協助法(Surface Transportation Assistance Act)需於180日內(180 days)、石棉災害緊急回應法(Asbestos Hazard Emergency Response Act)需於90日內(90 days)、國際安全貨櫃法(International Safe Container Act)需於60日內(60 days)、聯邦鐵路安全法(Federal Rail Safety Act) 需於180日內(180 days)、國家轉運系統安全法(National Transit Systems Security Act)需於180日內(180 days)。

(2) 向（案件受理）地區知該署主管申告。
(3) 勞工向該署之申告並無須符於一定之格式

例如，其申告行為可以網際網路提出(Monique C. Lillard：337)[4]。

(4) 受報復勞工需符於適用範圍內之勞工身份(status)

勞工是因參予受保護之吹哨行為(employee's participation in protected activity)而受保護，因而需符於適用範圍內之勞工身份。

(5) 受報復勞工所為需是參與受保護之吹哨行為

勞工向政府吹哨的動機，是與其應該受到吹哨保護是不相關的。國會並沒有要求吹哨者以利他主義的動機而為吹哨行為。即使勞工是基於對雇主有敵意而為吹哨行為，而導致監督機關對雇主之監督而使雇主受損，其吹哨行為仍屬受保護行為。勞工部認為，吹哨者有合理理由相信雇主是違反法律，雖然吹哨者從事吹哨行為可能有其他的動機，那是不相關的。保護吹哨行為之法規的目的是鼓勵勞工來投訴危害健康的事宜，使得採取補救行動為可能，如果這樣的制度強化勞工自身自私的動機，那就這樣吧。

而受保護之吹哨行為也不是事實上雇主有構成違法行為，吹哨者才需受到不被報復之保護(no actual

violation is required for protection)。

(6) 雇主對受保護勞工有不利益雇佣性行為(a subsequent adverse employment action)

雇主對勞工有不利益雇佣性行為，而使勞工相信其受到報復之歧視對待，勞工部規定勞工需相信其受有歧視對待，方符合於受保護之要件[2]。

(7) 吹哨行為與不利益雇佣性行為兩者間需有聯結(connection)關係。

3. 受保護吹哨勞工申告之效力

依*Marshall v. Springville Poultry Farm, Inc.,*一案，法院擴張解釋認為只要有申告則就與職業安全衛生法有相關聯，而受到該法11(c)之保護。而其並不以導致真的發現雇主有違法行為，勞工之吹哨行為才受保護。

4. 該署對申告案之處理程序

(1) 斡旋與處理協議

依該署之調查手冊第六章第II節之規定，該署收到控告後，會先進行斡旋，斡旋不成後進行調查(Occupational Safety & Health Administration: 2002)[7]。該署斡旋所生之處理協議(settlement)並不必然需得申告人之同意。處理協議可能只在於該署與雇主之間有效的達致。

(2) 調查與發出決定書

該署有90日之期間可以進行調查。若其調查後認定雇主對勞工有不當歧視或解雇之行為，該署會發出決定書(a determination letter)，通知雇主該申告與其調查結果。其可要求雇主支付積欠工資(back-pay)、給勞工復職、賠償勞工所支付的律師和專家證人費。並採取其他步驟，以提供受害勞工之必要的救濟。

(3) 向法院起訴請求執行該署之決定

勞工部可以向聯邦法院起訴請求執行其決定。依*Taylor v. Brighton Corp.,* 一案，美國第六巡迴法院認為申告勞工個人並無司法上之權利基礎，以依職業安全衛生法提起訴訟。其勞工部之起訴並不是代理勞工而為起訴[8]。事實上，有申告勞工曾嘗試起訴勞工部，請求該部以勞工部名義而起訴雇主，然而於*Winters v. Houston Chronicle Publ'g Co.*一案之判決，經法院駁回之[9]。

5. 該署爲受雇勞工提起訴訟方式

在美國之就業歧視防制法律下，被保護群體的勞工實現其主張雇主歧視之請求方法上，有兩個方法(theories)。一為差別對待方法（disparate treatment），而另一種為差別影響方法（disparate impact）。而差別影響方法為美國法所創新出來之請求主張之方法(Hunter & Shoben, 1998:108)[10]。其不必舉證出雇主之動機與意圖。因而，雇主不論是基於故意或過失都可能被訴構成就業歧視。

(1) 職業安全衛生署主管之吹哨行為保護訴訟僅罰故意歧視

然而，因職業安全衛生法第11(c)條是禁止故意歧視，因而該法下之受雇勞工合法吹哨行為之保護訴訟，僅能處罰故意之行為，也因而僅屬於適用差別對待方法。差別對待方法，涉及不利對待之動機(intent)，需

以各種證據方法確認出雇主不利對待之意圖。於以差別對待方法訴訟時，其各種證據方法，因其雇主之各種行為態樣不同，各種案件證據方法涉及「直接的證據證明歧視(direct evidence cases)」、「情況證據證明(circumstantial evidence cases)、「模式或慣行(pattern or practice cases)」以及「主觀準繩式(subjective criteria cases)」(Jones, Murphy & Belton, 1987: 73-127.)[11]。雖然法院對該條為寬鬆解釋(William R. Corbett , 1998:361)[12]，然而其訴訟最困難的部分仍為需發現予證明雇主為不利之雇佣性行為之不當的動機。

(2) 職業安全衛生法第11(c)條案件適用三段式舉證責任轉換制度

三段式舉證責任轉換制度，最早源於差別對待方法下之*McDonnell Douglas Corp. v. Green*一案而建立。美國聯邦職業安全衛生法第11(c)條之案件適用之[13]。舉證責任轉換的制度之三段式舉證責任的訴訟中，於起訴方對起訴的事實，舉證構成表面證據後，舉證責任就轉移到雇主，雇主需舉證對其僱佣上之行為為合法之免責抗辯，亦即由雇主來提出證據證明其行為不構成就業歧視。如果雇主無法舉證證明時，就可以認定起訴方之主張為成立。

因而，在此三段式舉證責任轉換制度下，該署建立差別對待之表面證據後，舉證責任即轉換於雇主。而在差別對待主張方法下，該署只證明了雇主有差別對待動機之事實本身，並不一定即能使雇主構成該法所禁止的就業歧視。舉證責任轉換後，如果雇主舉證其具備正當事由，雇主是可以對不同群體給予差別對待的，亦即雇主可以有合法之免責抗辯，其可使雇主之不利對待行為，不構成就業歧視。舉證責任即轉回該署，進而使該署在訴訟上還要對雇主所提之合理抗辯，予以質疑為僅是藉口(pretext)，而舉證其行為構成就業歧視。此舉證責任三段轉換分配之方式，為必需實行之證據方法。

A. 第一段是勞工建立符於表面證據之舉證(The plaintiff must first establish a prima facie case of discrimination)

該署依第11(c)條而提出表面證據於法院，是提出受雇勞工參與受保護之行為(employee's participation in protected activity)、一個接續而來之不利益雇佣行為(a subsequent adverse employment action)，以及其兩者間之一個聯結(connection)之證據。

B. 第二段是雇主免責抗辯(The defendant must produce evidence of a legitimate non-discriminatory reason for its actions.)

一旦該署滿足表面證據之舉證責任，雇主即有責任舉出合法而無歧視的理由，來抗辯其雇佣性行為與受雇人的吹哨無關，雇主若滿足此一舉證責任，則其原來被推定有歧視之基礎即已因而喪失(then the presumption of

discrimination dissipates)。

C. 第三段是勞工再提出推論證明雇主有歧視

舉證責任又回到該署身上，該署必須進一步舉證證明雇主所提出的理由只是一個掩飾的藉口、或該署針對雇主之免責抗辯行為，舉證其不符於合法免責抗辯。

其他吹哨者保護與相似反就業歧視制度非屬其專屬管轄業務

1. 其他吹哨者保護制度

職業安全衛生署主管之吹哨者保護制度並不管轄及於下述之吹哨者保護制度：

(1) 1998年吹哨者保護法（Whistleblower Protection Act of 1989）制度

該法是源於美國一九七八年文官體制改革法(Civil Service Reform Act)。一九七八年文官體制改革法建立保護吹哨之公部門勞工的基本規範。設立特別檢察官辦公室(the Office of the Special Counsel)，以負責保護吹哨之公部門勞工。

(2) 美國州法之吹哨者保護立法

美國之許多州都有州法保護吹哨勞工。各該法都以吹哨需確信是為公眾，而非為自己之利益而吹哨才受保護(Corbo, 1994:142)[14]。各州對行使爆料之接受對象之規定不一(Fernandez, 1994:74)[1]，許多州之規定是限制在勞工是對組織外部之爆料，而一些州對組織內部報告與外部的爆料，都予以保護。也有規定需強制的在內部報告者。

而加州要求吹哨勞工之行為，在勞工認為雇主違法不當上，需符合於客觀合理性原則，而康乃狄克州與緬因州之規定僅需勞工有實際或懷疑雇主違法不當之相信即可(Corbo, 1994:160)[14]。

2. 相似之反就業歧視立法

各種反就業歧視制度中，與本文探討之吹哨者保護之態樣相似者為民權法之禁止雇主歧視性報復。民權法之禁止雇主歧視性報復之就業歧視爭訟，俗稱為反歧視性報復之就業歧視爭訟。民權法第704(a)項規定：「其為雇主之不法的雇佣性行為(It shall be an unlawful employment practice)…，若雇主之行為是基於其任何受雇勞工因反對(oppose)雇主所為之依本副章(subchapter)規定的不法雇佣性行為，或者因受雇勞工依本副章規定而指控、作證、協助或參與任何形式的調查、訴訟、聽證，而雇主予以歧視者。」勞工部長曾說此條之規定與職業安全衛生法11(c)之規定用語上幾乎完全相同。

在其類型下之各種行為，也皆會受到民權法之保護。民權法禁止雇主對受雇勞工基於其民權法下之合法吹哨行為，而予勞工以歧視性報復，以保護勞動關系中處於弱勢地位之勞工。

我國行政機關執行保護合法吹哨工之制度欠缺

我國目前並無相似於前述美國之制度，因而我國之行政機關之保護吹哨勞工之制度與美國之職業安全衛生署執行保護合法吹哨勞工不受雇主報復之保護制度，根本無法進行比較。

我國行政機關遇有雇主以解雇或其他不利益對待而報復合法吹哨勞工時：

1. 以行政罰處罰雇主之報復行爲

我國職業安全衛生法公布後，我國職業安全衛生法第39條第1項規定：「工作者發現下列情形之一者，得向雇主、主管機關或勞動檢查機構申訴：

一、事業單位違反本法或有關安全衛生之規定。

二、疑似罹患職業病。

三、身體或精神遭受侵害。第4項規定：「雇主不得對第一項申訴之工作者予以解僱、調職或其他不利之處分。」此處申訴之保護規定，即為保護勞工之合法吹哨行為，依同法第4項不得對申訴之勞工予以解僱、調職或其他不利之處分。且依同法第四十五條第一項第二款規定，處新臺幣三萬元以上十五萬元以下罰鍰。其規定以行政罰而為嚇阻雇主之報復行為。

然而其仍欠缺行政機關之執行給予勞工保護不受解雇與報復之主管機關以及其認定原則與標準。其合法吹哨行為行為態樣似僅限於申訴，而限定報告（申訴）對象為內部之雇主與外部之主管機關或勞動檢查機構。其所規定的吹哨行為態樣含於前述討論之美國規定的類型之範圍。而向主管機關或檢查機構為吹哨行為之規定，也符合接受吹哨之適宜機構。且其之所以進行申訴，應係反對雇主之有關職業安全衛生之不當作為之反對行為，且若主管機關或檢查機構因申訴而進行調查之時，勞工之作證與其他參與行為亦態樣應包含在其申訴中。不應僅是限於報告之態樣。新修訂勞動檢查法第33條第4項規定：「事業單位不得對勞工申訴人終止勞動契約或為其他不利勞工之行為。」雖然規定保護吹哨勞工，但也僅只是在職業安全衛生與勞動條件之法律規範下之吹哨者之保護。而真正勞工合法吹哨時，勞工仍需自行面對雇主之報復，其訴訟經費必須自理，不論勝訴與否，可否復職都無法確保，而且並非當然有辦法獲得訴訟經費補助。遑論設置專屬機關代其提起提供訴訟而給予保護。

2. 食品安全衛生管理法規定行政機關提供勞工訴訟經費補助

而我國其他公共安全、食品、環保、交通、證券等法律下之吹哨行為之保護，僅在103年11月8日修正通過之食品安全衛生管理法第五十六條之一規定對吹哨勞工提供保護制度。但其保護制度僅限於中央主管機關衛服部為保障食品安全事件消費者之權益，得設立食品安全保護基金，而該基金之用途之一為可用於補助勞工因檢舉雇主違反該法之行為，遭雇主解僱、調職或其他不利處分所提之回復原狀、給付工資及損害賠償訴訟之律師報酬及訴訟相關費用。而至於我國其他各種相關法律則連吹哨者保護制度皆無。即使新修訂之食品安全衛生管理法，也並未指定對吹哨勞工保護之專屬之中央主管機關，甚至未將反報復條款予以規定。我國勞動部相關單位、並未被賦予依各種法律執行保護吹哨者不被解雇與報復之權限。包括職業安全衛生法與公共安全、食品、環保、交通、證券等法律下之吹哨行為之反報復條款保護，實宜如美國將各種法律下之吹哨者之保護，指派予勞動部專屬之單位進行保護。各該法律實需予以立法建立，而可維護合法吹哨勞工不受報復，而間接促進公共之利益之維護。

結論

Kohn & Carpenter(1986)稱因為許多核能有關機關因預算遭削減，吹哨者甚至已變成舉發公司威脅公眾健康和安全的消息的唯一來源。吹哨者因而成為公眾和政府發現雇主違法不當行為的唯一途徑[15]，足見吹哨制度之重要性。惟若無吹哨者保護制度，則無法鼓勵勞工之合法吹哨行為。

在紐約州議會正在考慮以何種類型的法律以保障吹哨者時，紐約州上訴法院在*Murphy v. American Home Products Corp.*一案中指出，這種對保護吹哨者之（需要的）承認，必須等待立法的行動賦予之。本案反應出法院在審查涉及吹哨者保護之爭議時，對公眾之公共利益之層面之利益，毫不予以考量。司法體系無法扮演制度性之保護角色，而立法機關與行政機關，方能扮演鼓勵吹哨與保護吹哨者之主要制度性之角色。

在該署提起之保護訴訟案件中，涉及以混合動機方法進行訴訟之案件增加。尤其是在爭執受保護之吹哨行為是促成勞工被解雇之原因之案件。美國法院會認定雇主違反法律報復勞工，如果勞工的受保護之吹哨行為是促成被解雇之一個重要原因，或者對勞工之解雇根本並不會發生，但是因為有合法吹哨行為而發生解雇行為。美國因有專屬保護合法吹哨勞工不受報復之執行機關，因而其法院之訴訟進行程度亦較完善可知。

我國之各種相關法律，極為欠缺各種吹哨者保護立法，且我國並無專屬執行保護合法吹哨勞工不受報復之主管機關，並無法與如美國依此一制度下，所建立之保護勞工之制度，是由專屬機關辦理而起訴。我國若參考美國此一制度，其專屬業務應由勞動部之職安主管機關負責。而我國最新訂定之吹哨者保護制度之食品安全衛生管理法，若遇雇主有以解雇或不利益對待時，該法也僅僅提供吹哨勞工訴訟經費補助。然而，勞工仍須自己面對以訴訟爭回工作或獲得賠償之折磨。各種訂有鼓勵吹哨之法律下之相關對合法吹哨勞工保護制度，以嚇阻雇主不報復勞工，且協助合法吹哨勞工之保護制度，極為欠缺。甚且，保護合法吹哨勞工，給予訴訟經費補助以對抗雇主之報復之制度，仍為我國目前最為創新之制度，而以之鼓勵勞工吹哨。賦予勞動部職安機關或其他機關，以專屬主管保護依據各種法律下合法吹哨之勞工不受雇主報復的制度，恐仍遙遙無期。其觀念的推動，仍尚未產生。我國的合法吹哨勞工的保護制度是勞工仍須自行面對報復之制度，其對吹哨勞工而言，所需冒之風險仍然高度存在，遇有遭受雇主報復時，設有補助訴訟經費，以助勞工對抗雇主報復，已是對合法吹哨勞工之最高保護。其保護不足，不言可喻。

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Commentary

A Study on the Whistleblower Protection Programs Administered by the U.S. Occupational Safety and Health Administration

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Abstract

The U.S. Occupational Safety and Health Administration(OSHA) enforces the whistleblower protection provisions of 21 statutes that govern the environment, industrial safety, aviation safety, consumer product safety, railway safety, safe containers, and toxic substances control. Among all the anti-retaliation provisions, section 11(c) of U.S. Occupational Safety and Health Act is only one of the statutes providing the prohibition. The provisions prohibit any employer from dismissing or retaliating in any way against any employee due to said employee exercising his/her rights to file a complaint, pursue litigation, or testify in a legal proceeding. While the 20 other whistleblower protection statutes are not enacted for labor protection purposes, they all empower OSHA to enforce whistleblower protection to protect workers from being discharged or retaliated.

By reviewing U.S. legal literature, we have found that OSHA appoints and set-ups Regional Administrators, Supervisors, Investigators, Offices of Investigative Assistance, Area Directors, Compliance Safety and Health Officers, National Solicitors of Labor, Regional Solicitors of Labor, and Regional Attorneys for enforcement. If any evidence supports an employee's allegation of unfair dismissal or other adverse action, OSHA will issue an order requiring the employer to reinstate the employee, pay back-pay, restore benefits, and carry out other possible remedies.

Keywords: Whistleblower, Occupational Safety and Health Administration, Compliance safety and health officer, Regional supervisor

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Introduction

Whistleblowing refers to an employee's disclosing illegal or unethical activities of the organization for which he/she works to the public or competent authorities. Whistleblower protection programs involve how to balance the freedom of speech, obligation of individual employee loyalty, and the public interest to supervise government departments or organizations by society.[1] The protection offered to whistleblowers involves the balance of personal interests in obligation of individual employee loyalty and public interests in the supervision of illegal or inappropriate activities of government departments or organizations (Sauter, 1990) (Sauter, 1990:514) [2]. Mary Kreiner Ramirez (2007:183) believed that as the actions of whistleblowers pose a threat to the authorities, both liberal and conservative authorities do not like it[3]. On the other hand, Monique C. Lillard (2002) believed that in the past 15 to 20 years, decision makers have admitted that,as a mechanism, the potential benefits of whistleblowing in uncovering illegal activities are increasingly vast. The arrival of a new era seemed to be an appropriate time for the evaluation of whistleblowing as a means of controlling corporations and their impacts[4].

The U.S. Occupational Safety and Health Administration (OSHA) enforces 21 whistleblower protection statutes that govern public safety and security in areas such as the environment, industrial safety, aviation safety, consumer product safety, railway safety, safe containers, and toxic substances control, and under federal laws, whistleblowers are provided with protection from retaliation. The 21 statutes stipulated in the Office of Whistleblower Protection Program, 2011 are the Surface Transportation Assistance Act (STAA), the Asbestos Hazard Emergency Response Act (AHERA) (the Office of Whistleblower Protection Program, 2011) [4], the International Safe Container Act (ISCA), the Energy Reorganization Act of 1974 (ERA), the Clean Air Act (CAA), the Safe Drinking Water Act (SDWA), the Federal Water Pollution Control Act (FWPCA), the Toxic Substances Control Act (TSCA), the Solid Waste Disposal Act (SWDA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), Chapter 8, Sarbanes-Oxley Act (SOA), the Pipeline Safety Improvement Act (PSIA), the Federal Rail Safety Act (FRSA), the National Transit Systems Security Act (NTSSA), and the Consumer Product Safety Improvement Act (CPSIA) , etc. [5].

Each statute clearly forbids employers from dismissing or discriminating against legal whistleblowers and thus contains anti-retaliation stipulations. When an employer dismisses or discriminates against a whistleblowing employee, the employee may file complaints with OSHA against the employer for inappropriate dismissal or discrimination actions. For example, Clause 1, Section 1367 of the Federal Water Pollution Control Act (FWPCA) forbids "adverse actions" against employees that file charges or provide testimony in accordance with the laws. The stipulation states that *"No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any*

authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act."

OSHA investigates approximately 1,000 cases every year. In 2009, 24% of the cases were found to be in violation; 70% were rejected, and 16% were withdrawn by employees. Among the violations, 92% were resolved through mediation. In 2009, 26 states in the U.S. had similar regulations and completed 999 whistleblowing investigations, of which 19% were found to be in violation, 67% were rejected, and 15% were withdrawn by employees. 73% of the violation cases were resolved through mediation. In the 2010 fiscal year, OSHA completed 1,177 investigations while 27 states in the U.S. had similar regulations and completed 1,039 investigations. OSHA completed 2,698 investigations in 2011, 2,889 investigations in 2012, 2,969 investigations in 2013, and 3,060 investigations in 2014.

This study aims to explore the implementation system of the whistleblower protection statutes enforced by OSHA and other similar protection mechanisms as a reference. Although Taiwan currently has certain employee whistleblowing protection regulations in place, such as the whistleblower protection clauses in the "Occupational Safety and Health Act" and the "Act Governing Food Safety and Sanitation", these systems still place whistleblowers at risk of exposure and employer retaliation. The aim of this study is to introduce OSHA's implementation system of whistleblower retaliation protection statutes in order to encourage whistleblower protection regulations in the various laws of Taiwan so that they may be better implemented to protect employees and encourage legal whistleblowing, which will indirectly benefit public interests.

Implementation of Whistleblower Protection Programs Run by the U.S. Occupational Safety and Health Administration (OSHA)

To expose the illegal activities of employers, although the aforementioned U.S. federal laws do not provide general protection provisions, retaliation protection clauses can be found scattered throughout the aforementioned acts. Whistleblowers that encounter employer retaliation may then file complaints with OSHA in accordance with those provisions.

The Office of the Whistleblower Protection Program established by the U.S.'s OSHA has appointed Regional Administrators (RA), Supervisors, Investigators, Offices of Investigative Assistance (OIA), Area Directors (AD), Compliance Safety and Health Officers (CSHO), National Solicitors of Labor (NSOL), Regional Solicitors of Labor (RSOL), and Regional Attorneys to implement whistleblower protection. According to the aforementioned federal laws, the responsibility of the Office goes beyond just performing the enforcement of Section 11(c) of the Occupational Safety and Health Act to provide whistleblower protection against retaliation due to the exposure of employers' illegal activities with regard to

occupational safety and health incidents [5].

Employer retaliation constitutes a form of employment discrimination, and employees suffering from such discrimination can contact the regional OSHA for help. However, when employees file complaints of employer retaliation with OSHA, the employee must provide evidence to assert that the whistleblowing action is a protected activity, that the employer is aware of the whistleblowing, the adverse actions taken by the employer, and that the protected whistleblowing is the cause of the adverse action. Such adverse actions are defined as actions that employers take to dissuade rational employees from engaging in protected whistleblowing; such adverse actions that are stipulated in Section 11(c) of the Occupational Safety and Health Act are not limited to just dismissal (Swain, 1988: 59, 139) [6]. Depending on individual cases, adverse actions may include firing, blacklisting, demoting, denying overtime, denying promotion, disciplining, denial of benefits, failure to hire or rehire, intimidation / harassment, reassignment affecting promotion prospects, and reducing pay or hours[1].

1. Lawful Whistleblowing in Compliance with the Provisions of Law is Required

Forms of legal whistleblowing actions found in the 21 provisions of whistleblower protection statutes include:

(1) Compliance with any provisions or implementation of the law that results in the institution of any proceeding or causes any proceeding to be instituted, including reporting it to solicitors, associations, or even local newspapers in compliance with the legal proceedings;

(2) Providing testament to any such proceedings;

(3) Assisting or participating in any such proceedings, or assisting or participating in any other actions implemented for the objectives of the law;

(4) Action of complaint.

The various aforementioned provisions and clauses also stipulated that the whistleblowing of employees in internal complaints should also be protected from dismissal or discrimination. The U.S. Department of Labor is of the opinion that the whistleblower protection provisions in the various laws should also protect employees that are dismissed or discriminated against due to internal complaints. However, employers are prohibited to require employees should file internal complaints prior to resorting to external whistleblowing.

Complaints of employer retaliation should not be limited to official employee complaints either. Informal employee complaints can also be investigated through various OSHA investigations in accordance with Section 8(f) of the Occupational Safety and Health Act.

2. Employees Must File Legal Charges with the Occupational Safety and Health Administration (OSHA))

(1) Employees Suffering Retaliation Should File Complaints within the Stipulated Time

Each statute's provision requires the complainant employee to file the complaint within a stipulated time after suffering the employer's retaliation. For example, an employee suffering from retaliatory action due to disclosing an employer's illegal activities with regard to occupational safety and health incidents should lodge a complaint within thirty days of the retaliatory action. These times may vary. While the Surface Transportation Assistance Act requires 180 days, the Asbestos Hazard Emergency Response Act requires 90 days, the International Safe Container Act requires 60 days, the Federal Rail Safety Act requires 180 days, and the National Transit Systems Security Act requires 180 days.

(2) Complaints shall be filed to the Occupational Safety and Health Administration (OSHA) through the Area Director

(3) Employee complaints are not required to conform to specific formats.

For example, the complaint action may be filed through the internet (Monique C. Lillard, 2002) [4].

(4) Employees suffering retaliation should have an acceptable employee status.

The employee will receive protection due to the employee's participation in the protected activity, so the employee should have an acceptable employee status.

(5) An employee suffering retaliation must be participating in a protected activity.

The intent of the whistleblowing employee should not be related to the employee requiring whistleblower protection. U.S. Congress does not require whistleblowers to participate in whistleblowing for altruistic intents. Even if the employee engages in whistleblowing due to hostility towards the employer, leading to supervision of the employer by supervisory authorities and employer damages, the whistleblowing action is still protected. The U.S. Department of Labor believes that the whistleblower has reasonable grounds to believe that the employer is in violation of the law, and whether the whistleblowing action is based on other motives is irrelevant. The objective of whistleblower protection provisions is to encourage employees to lodge complaints regarding matters of health hazards so that remedial actions can be taken. If such a system strengthens the selfish motivations of employees, then it cannot be helped.

Furthermore, the protected activity of whistleblowing does not require an actual violation to be found for whistleblowers to receive retaliation protection.

(6) Employers' Adverse Actions toward Protected Employees

When employers take adverse actions toward employees, such that the employees believe that they are the

objects of discrimination and retaliation, the U.S. Department of Labor stipulates that employees must believe that they are receiving discrimination treatment in order to meet the protection criteria [2].

(7) A connection must exist between the whistleblowing actions and the adverse actions.

3. Effectiveness of the Protected Whistleblower Report

According to the case of *Marshall v. Springville Poultry Farm, Inc.,* the court expanded the explanation, stating that as long as there is a complaint, it will be related to the Occupational Safety and Health Act and therefore subject to the protection under Section 11(c) of the Act. The whistleblowing actions of the employee should be protected regardless of the actual discovery of employer violations.

4. OSHA Complaint Case Procedures

(1) Mediation and Handling Settlements

According to the provisions set forth in Section 2, Chapter 6 of OSHA's Investigation Manual, after receiving a complaint report, OSHA will first conduct mediation. If mediation is unsuccessful, investigations will then be conducted (Occupational Safety & Health Administration, 2002)[7]. The settlements potentially reached in mediation may not necessarily require the approval of the complainant and may be reached only between OSHA and the employer.

(2) Investigation and Issuance of a Determination Letter

OSHA will conduct investigations within 90 days of the complaint, and if the investigations find the employer to have conducted inappropriate discrimination or dismissal behavior, OSHA will issue a determination letter to inform the employer of the complainant and the investigation findings. The determination letter may require the employer to pay back-pay, reinstate the employee, and pay for attorney fees and expert witnesses' fees. Other steps may also be taken to provide necessary relief for the employee.

(3) Appeal for Court Execution of OSHA Orders

The Department of Labor may file appeals with federal courts for court execution. In the case of Taylor v. Brighton Corp., the United States Court of Appeals for the Sixth Circuit ruled that the complainant individual does not have a judicial basis to file charges in accordance with the Occupational Safety and Health Act[8]. The charges filed by the Department of Labor are not filed on behalf of the employee. In fact, in one case, a complainant requested the Department of Labor to file charges against the employer. However, in the ruling of *Winters v. Houston Chronicle*

Publ'g Co., the case was rejected[9].

5. Occupational Safety and Health Administration Filing Charges Methods for Employees

Under the U.S. employment discrimination prevention provisions, employees in protected groups have two methods to assert employer discrimination treatment: disparate treatment and disparate impact. The disparate impact method is a relatively new assertion method established in the U.S. (Hunter & Shoben, 1998) [10]. As the method does not require providing evidence of employer motives and intentions, the employer may face charges of employment discrimination regardless of purposeful intent or negligence.

(1) Occupational Safety and Health Administration Whistleblowing Protection Only Offers Protection against Intentional Discrimination

However, since Section 11(c) of the Occupational Safety and Health Act forbids intentional discrimination, the protection lawsuits offered to legal whistleblowing under the provisions can only punish intentional behavior; thus, it can only be applied to situations of disparate treatment. The disparate treatment method involves identifying the intent of the adverse treatment and requires evidence of the employer's intent of adverse treatment. When handling cases of disparate treatment, the forms of evidence may be different depending on the various behaviors and attitudes of the employers and includes direct evidence cases, circumstantial evidence cases, pattern or practice cases, and subjective criteria cases (Jones, Murphy & Belton, 1987) [11]. Although the court offers a liberal interpretation of the law (William R. Corbett, 1998) [12], the challenges of the lawsuit lie in identifying the inappropriate intent behind the adverse employment actions of the employer.

(2) Section 11(c) of the Occupational Safety and Health Act Applicable in the Three-stage Burden of Proof System

The Three-stage Burden of Proof System first originated from the disparate treatment method in *McDonnell Douglas Corp. v. Green*[13]. It shall be applicable to U.S. federal cases under Section 11(c) of the Occupational Safety and Health Act. In lawsuits with the three-stage system, the plaintiff first produces evidence of assertion to establish the prima facie evidence and then the burden of proof shifts to the employer, who is then required to produce evidence for an affirmative defense to exempt their behavior; that is, the employer has to produce evidence that their actions do not constitute employment discrimination. If the employer is unable to do so, then the claims of the prosecution shall be established.

Therefore, under the Three-stage Burden of Proof System, after OSHA

has established the prima facie evidence for disparate treatment, the burden of proof shifts to the employer. Under this method, OSHA can only prove the employer's disparate treatment, but not necessarily that the employer's actions constitute the employment discrimination forbidden by law. After the burden of proof changes sides, if the employer can produce evidence of legitimate reasons, the employer may offer disparate treatment to different groups of employees, that is, the employer has a legitimate defense to justify the disparate treatment such that it does not constitute employment discrimination. At this point, the burden of proof returns to the Occupational Safety and Health Administration (OSHA), which challenges the employer's defense in litigation, raises doubts of pretext of the defense, and produces further evidence of employment discrimination. The Three-stage Burden of Proof Changing and Distribution System needs to be implemented for the evidence system.

A. First Stage: The plaintiff must first establish a prima facie case of discrimination.

The Occupational Safety and Health Administration (OSHA) should establish prima facie evidence before the court in accordance with Section 11(c), which shall be the evidence to prove the employee's participation in protected activity, subsequent adverse employment actions, and the connection between the two.

B. Second Stage: The defendant must produce evidence of a legitimate non-discriminatory reason for its actions.

Once OSHA satisfies the burden of proof for the prima facie evidence, the employer or defendant shall be required to establish a legitimate non-discriminatory reason in defense that the employment actions are not related to the whistleblowing actions. If the employer satisfies this burden of proof, then the presumption of discrimination is dismissed.

C. Third Stage: The plaintiff shall propose deductions to prove employer discrimination.

Once again, the burden of proof returns to OSHA, which now must submit additional evidence that the reasons raised by the employer were a pretext for a cover-up or propose evidence that the employer's defense does not conform to a legal exemption defense.

Other Whistleblower Protection and Similar Anti-Discrimination Systems Run by Non-Specialized Administrations

1. Other Whistleblower Protection Systems

The Whistleblower Protection Systems offered by the Occupational Safety and Health Administration (OSHA) do not include the following Whistleblower Protection Systems:

(1) Whistleblower Protection Act of 1989

This Act originated from the Civil Service Reform Act in 1978. Under the Civil Service Reform Act, basic regulations were established for whistleblowers who were employees of public departments. The Office of the Special Counsel was set up to protect whistleblowers working in public departments.

(2) U.S. State Legislations Governing Whistleblower Protection

Many states in the U.S. offer state whistleblowing statutes to protect whistleblowing employees. These laws have been established based on the assumption that the whistleblowing action must be for the sake of public interest and not personal gains in order to offer protection (Corbo, 1994:142)[14]. Each state has different regulations governing the acceptance of whistleblowers (Fernandez, 1994) [1]. Many states only offer protection for external whistleblowing while other states offer protection for both internal complaints and external whistleblowing. Some states also regulate mandatory internal complaints.

For example, in California, when employees believe their employers are engaged in illegal activities, the whistleblowing has to conform to objective and reasonable principles, while provisions in Connecticut and Maine only require the employee to actually believe or suspect the employer to be participating in illegal activities (Corbo, 1994:160) [14].

2. Similar Anti-Discrimination Legislation

Among the various anti-discrimination systems, the Prohibition of Employer Discriminatory Retaliation in the Civil Rights Act has a similar attitude as the whistleblower protection system explored in this study. The employment discrimination litigation due to prohibition of employer discriminatory retaliation in the Civil Rights Act is also commonly known as anti-discrimination litigation. Section 704(a) of the Civil Rights Act stipulates that *"It shall be an unlawful employment practice ... If the employer actions are due because an employee has opposed any practice, made an unlawful employment practice as stipulated in the subchapter, or due because the employee has made charges, testified, assisted or participated in any manner in an investigation."* The Secretary of Labor once commented that this clause has almost the same wording as the wording in Section 11(c) of the Occupational Safety and Health Act.

Actions of this type shall also fall under the protection of the Civil Rights Act. The Civil Rights Act prohibits employers from

discriminatory retaliation against employees that engage in legal whistleblowing under the Civil Rights Act in order to protect disadvantaged employees in labor relations.

The Lack of Whistleblowing Mechanisms in Taiwan's Administrative Departments

Currently, as Taiwan does not have any regulations similar to the aforementioned U.S. provisions, the whistleblower protection offered by Taiwan's administrative departments cannot be compared with the retaliation protection of legal whistleblowing offered by the U.S.'s Occupational Safety and Health Administration. When Taiwan's administrative departments encounter situations of an employer dismissing or taking retaliation action against legal whistleblowers, the following can be applied:

1. Administrative Penalties for Employer Retaliation

Since its promulgation, Taiwan's Occupational Safety and Health Act, Paragraph 1, Article 39 of the Act stipulates that "*Workers may file complaints with the employers, the competent authority, or labor inspection agencies if one of the following is discovered: 1. The business entities are in violation of this Act or related safety and health regulations; 2. A suspected occupational disease; 3. Physical or psychological harm.*" Paragraph 4 further stipulates that "*Employers shall not dismiss, transfer, or otherwise unfavorably treat workers who filed an appeal pursuant to Paragraph 1.*" The protection regulations offered to appeals, which refer to the legal whistleblowing action, are similar to Paragraph 4 where employers may not dismiss, transfer, or otherwise unfavorably treat employees. Subparagraph 2, Paragraph 1, Article 45 also stipulates that violations shall be subject to fines of no less than NT$30,000 but no more than NT$150,000. This provision is aimed to be an administrative penalty to dissuade employers from taking retaliation actions against whistleblowing employees.

However, the protection of employees from dismissal and employer retaliation by competent authorities, as well as their definition of principles and standards, are still lacking. The behavioral aspect of legal whistleblowing is limited to internal complaints and report (complaint) to employers and external competent authorities or labor inspection organizations. The stipulated aspect of the whistleblowing is consistent with the aforementioned U.S. regulations and the types. The provisions governing whistleblowing to competent authorities or inspection organizations also have to conform to the appropriate organizations for whistleblowing. The motives for whistleblowing should be to oppose the inappropriate actions of the employer with regard to occupational safety and health incidents. If the competent authority or inspection organization conducts inspection due to the whistleblowing, the testimony of the employee and other participation

actions or aspects shall also be considered instead of being limited to the report aspect. The new amended Paragraph 4, Article 33 of the Labor Inspection Act stipulates that "Business entities shall not terminate the labor contract of a worker who filed a complaint, or impose any actions that are against the rights of the workers." Although these provisions offer protection to whistleblowers, the protection can only be provided under the Occupational Safety and Health Act and Labor Law regulations. When an actual whistleblowing event occurs, the employee may still need to face employer retaliation and bear litigation fees regardless of success or failure. Reinstatement is not guaranteed, and the whistleblower will not necessarily obtain subsidies for the litigation costs, not to mention a specialized department to represent the whistleblowers in lawsuits and offer them protection.

2. Act Governing Food Safety and Sanitation Stipulates that Administrative Departments Should Provide Employee Litigation Cost Subsidies

In the whistleblower protection provision of other laws in Taiwan, such as public safety, food safety, environment, transportation and securities, only the amendment of Article 56-1 of the Act Governing Food Safety and Sanitation, which was passed on November 8th, 2014, provides protection to employees. However, that protection mechanism is only limited to the establishment of the Food Safety and Protection Fund by the central competent authority, the Ministry of Health and Welfare, in order to safeguard food safety and protect consumer rights. One of the uses of the fund is to offer financial subsidies to employees that face dismissal, transfer, or other adverse actions due to disclosure of their employer's illegal activities so that the whistleblowers may restore to their original states, obtain back pay, and pay for attorney fees and litigation costs of the damage compensation lawsuits. Taiwan has no other whistleblower protection regulations. Even the new amendments of the Act Governing Food Safety and Sanitation also fail to designate a central competent authority that can provide whistleblower protection and have also failed to promulgate retaliation protection clauses. Departments affiliated with the Ministry of Labor have not been authorized by the various laws to offer protection to whistleblowers from dismissal and retaliation actions, including the retaliation protection clauses in the Occupational Safety and Health Act and regulations such as public safety, food safety, environmental protection, transportation, and securities. It would be beneficial for Taiwan to learn from the whistleblower protection program of the U.S. and designate a specialized Ministry of Labor department to offer such whistleblowers protection. A number of laws need to be established through legislation in order to provide retaliation protection and indirectly promote the preservation of public interests.

Conclusion

Kohn and Carpenter (1986) believe that due to budget cuts in many nuclear facilities, whistleblowers have become the only source of information for disclosure of the corporate threat to public health and safety. Since whistleblowers have become the only means for the public and the government to discover illegal activities of an employer, the whistleblowing system is vital. Without whistleblower protection systems, the employees would be discouraged from practicing legal whistleblowing.

While the New York State Legislature is still contemplating the type of laws to implement to offer whistleblower protection, the New York Court of Appeals has indicated in *Murphy v. American Home Products Corp.* that the recognition of the (necessary) whistleblowing protection must be authorized through legislative action.The case reflected that when the court examines conflicts related to whistleblowing protection, the aspects of public interests shall not be taken into consideration. The judicial system is unable to play the role of institutional protection, and only legislative departments and administrative departments may encourage whistleblowing actions and implement institutional whistleblower protection.

In the protection lawsuits initiated by the Occupational Safety and Health Administration, litigation cases involving mixed motive methods are on the rise, especially in cases where the protected whistleblowing actions are the cause of dismissal. U.S. courts shall find an employer to be in violation of retaliation against employees if the protected whistleblowing of the employee is the primary reason for employee dismissal, or if the dismissal would not have happened at all had there been no legal whistleblowing activities. Because the U.S. has specialized execution departments to provide protection for legal whistleblowing from retaliation, the extent of court proceedings are more comprehensive and better understood.

The various laws in Taiwan are in desperate need for whistleblower protection legislation. As there are no specialized competent authorities to implement whistleblower retaliation protection, Taiwan may not be able to learn from the U.S., where employee protection systems are established under a common system and conducted and processed by a specialized department. If Taiwan can learn from the U.S. system, then the specialized operations should be conducted by the Occupation Safety and Health competent authority of the Ministry of Labor. In the latest amendment of the whistleblower protection system in the Act Governing Food Safety and Sanitation, when employees face employer retaliation, such as dismissal or adverse actions, the Act only provides litigation subsidies to the whistleblower. However, the employee will still need to resort to litigation to keep their jobs or endure the torments of damage compensation. Provisions that provide whistleblower protection systems under whistleblowing encouragement regulations to dissuade employers from retaliating against employees and assist in the protection mechanisms of legal whistleblowing are seriously lacking. What is worse, the legal protection of whistleblowers and the provision of litigation subsidies to fight against

employer retaliation remain the latest additions to Taiwan's systems to encourage employee whistleblowing. Granting authorization to the Occupation Safety and Health Department of the Ministry of Labor or other departments to establish a specialized competent authority that complies with various laws to protect legal whistleblowing activities from employer retaliation remains a distant objective. The promotion of this concept has not yet been conceived. In Taiwan's legal protection system for whistleblowers, employees must still face retaliation action themselves, and the risks to the whistleblowers are still high. The subsidies provided for litigation costs to help employees combat employer retaliation is the highest protection offered for legal whistleblowing, so the lack of protection is evident.

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