

MEMORANDUM

To: Jeff Ruch, Executive Director
Public Employees for Environmental Responsibility

From: Laura Wilkes-D'Amato

Subject: **Waivers of Sovereign Immunity in DOL-Enforced Whistleblower Law**

Date: July 6, 2018

I. Questions Presented

Which of the whistleblower laws enforced by the Department of Labor waive sovereign immunity?

II. Brief Answer

Of the twenty-five whistleblower statutes enforced by the Department of Labor,¹ six include a complete waiver of federal sovereign immunity from suit. Fourteen contain no such waiver, and six contain a partial waiver for certain federal employees or agencies. The statutes are listed in the table below and color-coded for quick access. Green indicates total waiver, orange indicates partial waiver, and red indicates no waiver of federal sovereign immunity. My impression is that several of the statutes that do not waive sovereign immunity do not necessarily need to, because the statutes are designed to protect individuals from the actions of private companies.

III. Statutes

Statute	Citation	Sovereign Immunity Waived?
Affordable Care Act (ACA), Section 1558	29 U.S.C. § 218C	Yes ²
Asbestos Hazard Emergency Response Act (AHERA)	15 U.S.C. § 2651	No; only applies to State and local educational agencies
Clean Air Act (CAA)	42 U.S.C. § 7622	Yes ³
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)	42 U.S.C. § 9610	Yes ⁴

¹ Notable whistleblower statutes *not* enforced by the DOL include 12 U.S.C. § 1790b (protecting employees of credit unions and employees of the National Credit Union Administration); 12 U.S.C. § 1831j (protecting employees of “insured depository institutions” and Federal banking agencies); 30 CFR 865.11 (protecting both public and private employees engaged in surface coal mining and reclamation operations (enforced by DOI)); 42 U.S.C. 7239 (protecting DOE employees and contractors engaged in DOE’s “defense activities”); 31 U.S.C. § 3729 (protecting disclosures of false claims (sovereign immunity not waived)); 5 U.S.C. § 2303 (protecting FBI employees); 29 U.S.C. §§ 2615, 2617 (protecting employees invoking the FMLA); and 26 U.S.C. § 7263 (providing awards for whistleblowers in the IRS (enforced by Dept. of Treasury)).

² 29 U.S.C. § 203(d).

³ 42 USC § 7602(e).

⁴ *Id.* at 27.

Consumer Financial Protection Act of 2010 (CFPA), Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010	12 U.S.C.A. § 5567	No⁵
Consumer Product Safety Improvement Act (CPSIA)	15 U.S.C. § 2087	No⁶
Energy Reorganization Act (ERA)	42 U.S.C. § 5851	No, with some exceptions for certain federal contractors⁷
FDA Food Safety Modernization Act (FSMA), Section 402	21 U.S.C. § 399d	No⁸
Federal Railroad Safety Act (FRSA)	49 U.S.C. § 20109	No⁹
Federal Water Pollution Control Act (FWPCA)	33 U.S.C. § 1367	For violations occurring at Federal facilities¹⁰
International Safe Container Act (ISCA)	46 U.S.C. § 80507	No¹¹
Longshore and Harbor Workers' Compensation Act (LHWCA)	33 U.S.C. § 948a	Yes¹²
Migrant and Seasonal Agricultural Workers Protection Act (MSPA)	29 U.S.C. § 1855	No¹³
Mine Safety and Health Act of 1977 (MSHA)	30 U.S.C. § 815	No¹⁴
Moving Ahead for Progress in the 21st Century Act (MAP-21)	49 U.S.C. § 30171	No¹⁵
National Transit Systems Security Act (NTSSA)	6 U.S.C. § 1142	Yes¹⁶

⁵ I am not sure that it would make sense to waive here; the act appears to be designed primarily to protect consumers against the actions of private companies.

⁶ I am not sure that it would make sense to waive here; the act appears to be designed primarily to protect consumers against the actions of private companies.

⁷ 42 U.S.C. § 5851(a)(2).

⁸ 21 U.S.C. § 321(e).

⁹ *Flakker v. N.J. Transit Rail Operations, Inc.*, No. 18-1046, 2018 U.S. Dist. LEXIS 101272 (E.D. Pa. June 18, 2018) at 8-10.

¹⁰ *Berkman*, *supra* note 4 at 27-28.

¹¹ UNITED STATES DEPARTMENT OF LABOR, Whistleblower Investigations Manual 9 (Jan. 28, 2016), available [here](#).

¹² *T.M. v. Navy Exchange*, 41 BRBS 320 (ALJ) (Dec. 20, 2006).

¹³ 29 U.S.C. § 1802(9).

¹⁴ 30 U.S.C. § 802(f); *Meredith v. Fed. Mine Safety & Health Review Comm'n*, 177 F.3d 1042 (D.C. Cir. 1999).

¹⁵ 49 U.S.C. § 31132(2)(B).

¹⁶ 6 U.S.C. § 1131(5)

Occupational Safety and Health Act (OSH Act), Section 11(c)	29 U.S.C. § 660	Only for USPS Employees¹⁷
Pipeline Safety Improvement Act (PSIA)	49 U.S.C. § 60129	No¹⁸
Safe Drinking Water Act (SDWA)	42 U.S.C. § 300j-9(i)	Yes¹⁹
Sarbanes-Oxley Act (SOX)	18 U.S.C.A. § 1514A	No²⁰
Seaman's Protection Act (SPA), as amended by Section 611 of the Coast Guard Authorization Act of 2010, P.L. 111-281	46 U.S.C. § 2114	No²¹
Solid Waste Disposal Act (SWDA)	42 U.S.C. § 6971	If violation occurs at a Federal facility²²
Surface Transportation Assistance Act (STAA)	49 U.S.C. § 31105	No²³
Toxic Substances Control Act (TSCA)	15 U.S.C. § 2622	Only for complaints involving lead-based paint at Federal facilities²⁴
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21)	49 U.S.C. § 42121	No²⁵

IV. Conclusion

Of the twenty-five whistleblower statutes enforced by the Department of Labor, six include a complete waiver of sovereign immunity from suit. Fourteen contain no such waiver, and six contain a partial waiver for certain federal employees or agencies.

¹⁷ Whistleblower Investigations Manual, *supra* note 12, at 7-1.

¹⁸ 49 U.S.C. § 60129(2)(a) and § 60101(a)(17).

¹⁹ SDWA § 1447, available [here](#).

²⁰ I am not sure that it would make sense to waive here; the act appears to be designed primarily to protect consumers against the actions of private companies.

²¹ I am not sure that it would make sense to waive here; the act appears to be designed primarily to protect employees against the actions of private companies.

²² *Berkman*, *supra* note 4 at 29.

²³ 49 U.S.C. § 31105(j)(2).

²⁴ 15 U.S.C. § 2688; *Stephenson v. National Aeronautics & Space Administration*, ARB No. 98-025; ALJ No. 94-TSC-5 (July 18, 2000).

²⁵ 49 U.S.C. § 31132(3)(B).