THE IMPACT OF EMPLOYMENT LAW AND PRACTICES ON BUSINESS AND SOCIETY: THE SIGNIFICANCE OF WORKER VOICE*

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INTRODUCTION

Time and time again, it has been shown to be important, for both business and society, for individuals to speak up when they encounter problems or wrongdoing in the workplace. The scandal at WorldCom broke only after employees spoke up and publicly "blew the whistle" on executives.[1] An Enron employee reported problems to the IRS in 1999, long before the firm's failure in 2001 and, some speculate, early enough to avoid a total failure of the firm.[2] In the wake of scandal, Volkswagen offered internal immunity to employees who blew the whistle regarding cheating on emissions tests and requirements.[3] In an effort to weed out the wrongdoers and put the company on a path toward recovery, Siemens offered immunity for whistleblowing employees when a scandal broke in connection with massive international bribery.[4]

Research also demonstrates the importance of employee voice, which sometimes takes the form of whistleblowing, for individual employee well-being. When employees feel unable to exercise their voice at work, there can be serious negative impacts for psychological and physical well-being.[5] Despite the negative impact of employee silence for both organizations and

1. *See* Susan Pulliam & Deborah Solomon, *How Three Unlikely Sleuths Discovered Fraud at WorldCom*, WALL ST. J., Oct. 30, 2002, http://www.wsj.com/articles/SB1035929943494003751 [https://perma.cc/QEM5-SKYG] (offering detailed background on the whistleblowing at WorldCom).

2. *See* David S. Hilzenrath, *IRS Pays Enron Whistleblower $1.1 Million*, WASH. POST, Mar. 15, 2011, https://www.washingtonpost.com/business/economy/irs-pays-enron-whistleblower-11-million/2011/03/15/ABFLAEb_story.html [https://perma.cc/X5Y5-UVQY] (quoting the whistleblower's lawyer).

3. Jack Ewing & Julie Creswell, *Volkswagen, Offering Amnesty, Asks Workers to Come Forward on Emissions Cheating*, N.Y. TIMES, Nov. 12, 2015, http://www.nytimes.com/2015/11/13/business/volkswagen-offering-amnesty-asks-workers-to-come-forward-on-emissions-cheating.html [https://perma.cc/42V3-D5ZQ].

4. Mike Esterl, *Siemens Amnesty Plan Assists Bribery Probe*, WALL ST. J., Mar. 5, 2008, http://www.wsj.com/articles/SB120465805725710921 [https://perma.cc/F882-HTSL].

5. *See* Michael Knoll & Rolf van Dick, *Do I Hear the Whistle . . . ? A First Attempt to Measure Four Forms of Employee Silence and Their Correlates,* 113 J. OF BUS. ETHICS 349, 353 (2013) (examining the correlation between different forms of employee silence and well-being); Leslie A. Perlow & Stephanie Williams, *Is Silence Killing Your Company?*, 81 HARV. BUS. REV. 52, 52 (2003) ("[S]ilence can exact a high psychological price on individuals, generating feelings of humiliation, pernicious anger, resentment, and the like."). *See also*, Michael Knoll & Rolf van Dick, *Authenticity, Employee Silence, Prohibitive Voice, and the Moderating Effect of Organizational Identification*, 8 J. POSITIVE PSYCHOL. 346, 346 (2013) (discussing the psychological effects of authenticity and linking authenticity to employee voice); Fons Naus et al., *Organizational Cynicism: Extending the Exit, Voice, Loyalty and Neglect Model of Employees' Responses to Adverse Conditions in the Workplace*, 60 HUM. REL. 683, 683-685 (2007) (suggesting that a company culture that encourages employees to be engaged will have a positive impact on employees' well-being).

employees, the reality is that there are often a number of serious barriers to speaking up in the workplace, including risking potential negative employment repercussions, such as termination.[6]

The risk of termination is especially realistic in jurisdictions where employment-at-will is the legal norm. Employment-at-will gives employers and employees the right to terminate employment at any time, with or without reason, provided the reason is not illegal, without legal consequence.[7] In the United States, employment-at-will is the applicable legal standard when there is not an employment contract, such as a collective bargaining agreement, executive contract, or other specific contract terms granting employment for a specific period of time.[8] There are exceptions to the doctrine,[9] but the reality is that most employment in the United States is at-will.[10]

In addition, employee protections provided by collective bargaining agreements may be on the decline. The U.S. Supreme Court recently heard the case of *Friedrichs v. California Teachers Association*, in which a mandatory payment of union dues was at issue.[11] The Court ultimately deadlocked on the issue, and thus the ruling of the lower court permitting mandatory union dues stands.[12] Yet some fear that the protection of unions will be a relic of the past if the Supreme Court decides in a later case that assessment of mandatory union dues is unconstitutional.[13] Twenty-eight

6. *E.g.*, Elizabeth W. Morrison, *Employee Voice Behavior: Integration and Directions for Future Research*, 5 ACAD. OF MGMT. ANNALS 373, 383 (2011) (discussing negative personal outcomes as one of numerous barriers to speaking up in the workplace); Frances J. Milliken et al., *An Exploratory Study of Employee Silence: Issues that Employees Don't Communicate Upward and Why*, 40 J. OF MGMT. STUD. 1453, 1469 (2003) (explaining that fear of negative labels is one cause of employee silence in the workplace).

7. *See, e.g.*, Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. OF LEGAL HIST. 118, 118 (1976) (discussing how employment-at-will can be terminated with notice); Lobosco v. N.Y. Tel. Co./NYNEX, 96 N.Y. 2d 312, 312 (2d Cir. 2001) (denying an employees' motion to dismiss despite his claim that he was being retaliated against for blowing the whistle); CAL. LAB. CODE § 2922 (Deering 2016) (stating that employees in California may be terminated at will).

8. RESTATEMENT OF EMPLOYMENT LAW: EMPLOYMENT CONTRACTS: TERMINATION §§ 2.01-2.02 (AM. LAW. INST. 2015).

9. LABOR AND EMPLOYMENT LAW, Ch. 259, §§ 259.03-259.06 (Matthew Bender).

10. *Id.* at § 259.02.

11. Friedrichs v. Cal. Teachers Ass'n, 2013 U.S. Dist. LEXIS 188995, at *1 (C.D. Cal. Dec 5, 2013) (ordering judgment on the pleadings in favor of the defendant, who compelled employees to support a specific collective bargaining agreement), aff'd by, Friedrichs v. Cal. Teachers Ass'n, 2014 U.S. App. LEXIS 24935 (9th Cir. Cal. Nov. 18, 2014); Luis v. U.S., 136 U.S. 1083 (2016).

12. *Id.*

13. The U.S. Supreme Court granted certiorari in Janus v. American Federation of State, County and Municipal Employees, Council 31, No.: 16-1466, 2017 U.S. LEXIS 4459 (cert. granted Sept. 28, 2017). This case presents another challenge to the constitutionality of

states[14] and the territory of Guam[15] have already established "right-to-work" laws declaring the compulsory joining of unions illegal, and U.S. federal government employees also have a similar protection.[16]

This paper argues that the current legal environment may negatively impact employees' willingness to exercise their voice in the workplace. To benefit the firm, the employees, and society, employers must adopt practices that provide employees a safe place to exercise their voice, despite the restrictive legal environment in which employees work. To this end, this paper connects the literature on employee voice and silence to the employment law presumptions about at-will employment, examining the negative impact these presumptions may have on employee voice. The paper then proposes that employers implement effective avenues for employee voice and internal whistleblowing, which allow employees to trust that their concerns will be heard, and suggests that doing so will provide positive benefits to both the firm and society.

This paper is organized as follows. Part I discusses the importance and role of employee voice, as well as some of the negative consequences associated with stifling voice. Part II discusses the legal environment of employment-at-will in the United States, which may play a large part in repressing employee voice. In Part III, the significance, benefits, and perils of whistleblowing as an aspect of voice are discussed and analyzed, and recent efforts to restrict whistleblowing are critiqued. Part IV continues with proposals for positive business practices to encourage worker voice followed by our concluding remarks.

I. SIGNIFICANCE OF VOICE

A. *Theoretical Overview*

The current research on employee voice spans across a variety of fields and topic domains, some of which are developing independently of each other.[17] Research that focuses on employee voice comes from a variety of sources including the literatures on organizational behavior, industrial relations (IR), and human resource management (HRM). More specifically,

mandatory union agency fees.

14. *Right to Work Frequently-Asked Questions*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND., http://www.nrtw.org/right-to-work-frequently-asked-questions/ [https://perma.cc/85Q8-FAXU] (last visited May 10, 2017).

15. *See* 22 GUAM CODE ANN. §§ 4101-4114 (2000) (prohibiting employers from requiring union participation).

16. 5 U.S.C. § 7102 (1978).

17. Michael R. Bashshur & Burak Oc, *When Voice Matters: A Multilevel Review of the Impact of Voice in Organizations*, 41 J. MGMT. 1530, 1531 (2015).

employee voice is considered an important factor in research on justice, proactive/prosocial work behavior, decision-making, and feedback.[18]

Three primary research streams can be said to dominate research on voice. One stream, deriving from Albert Hirschman's work, *Exit, Voice, and Loyalty*, views employee voice as a constructive response to dissatisfaction and alienation in the workplace.[19] Another more nascent research stream contends that voice is not necessarily a result of dissatisfaction; rather, it is an other-oriented behavior intended to promote the effective functioning of the organization.[20] Finally, more recent research on employee silence similarly views employee voice as a constructive behavior aimed at helping organizations solve problems, but it focuses on understanding some of the systemic obstacles to engaging in voice from an employee's perspective.

1. Voice to Communicate Dissatisfaction

Although it has declined in popularity,[21] the Exit/Voice/Loyalty/Neglect (EVLN) model—an extension of Hirschman's "exit/voice/loyalty" model—still illuminates the analyses of employee voice in the industrial relations and human resource management fields.[22] The model conceptualizes voice as one of four response categories to dissatisfaction or alienation in the workplace: (1) exit, (2) voice, (3) loyalty, and (4) neglect.[23] Exit and voice are both active methods of communicating dissatisfaction; voice is constructive and thus preferable to exit, which is considered destructive and inefficient.[24] Loyalty and neglect are passive responses: loyalty reflects hope of recovery whereas neglect accepts that recovery is not possible.[25] In the workplace, neglect can be manifested in a variety of

18. *Id.* at 1542-45.

19. *E.g.*, Hsin-Hua Hsiung, *Authentic Leadership and Employee Voice Behavior: A Multi-Level Psychological Process*, 107 J. BUS. ETHICS 349, 350 (2012) (noting two separate streams of employee voice research, including the Exit, Voice, Loyalty, and Neglect research and extra-role-behavior research).

20. *Id.*

21. *See* Elizabeth W. Morrison, *Employee Voice and Silence*, 1 ANN. REV. ORGANIZATIONAL PSYCHOL. & ORGANIZATIONAL BEHAV. 173, 176 (2014) [hereinafter *Employee Voice and Silence*] (noting the history of research of voice and silence).

22. *See* Bashshur & Oc, *supra* note 17, at 1536 (noting an analysis of HRM and ILR on the results of the effect of unionized voice on job attitude).

23. *See generally* Dan Farrell, *Exit, Voice, Loyalty, and Neglect as Responses to Job Dissatisfaction: A Multidimensional Scaling Study*, 26 ACAD. MGMT. J. 596 (1983) (discussing a study that focuses on workers' responses to job dissatisfaction).

24. *See* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984) (conducting studies that find that individuals in unions keep their jobs longer than those who are not in unions).

25. *Id.*

negative behaviors, including a lack of apparent interest or motivation, an increase in mistakes, absenteeism, and exploiting an organization's time for personal affairs.[26] The belief is that allowing employees to exercise their voice can improve the situation that is the cause of the employee alienation or dissatisfaction, and employees will subsequently become more satisfied with working conditions and less likely to quit the organization.[27] When the opportunity for voice is lacking but employees do not have the option to quit, they tend to withdraw and slip into neglect.

Proponents of this model tend to operationalize voice in terms of the presence or absence of formal and informal voice mechanisms. Although the most commonly studied manifestation of voice mechanisms in this literature is union representation,[28] other examples of voice mechanisms include grievance filing, whistleblowing, informal complaints, and participation in suggestion systems.[29]

2. Voice Mechanisms as an Opportunity to Create Perceived Justice

In the organizational justice context, opportunities for employee voice are viewed as a desirable structural feature of organizational procedures and policies that provides employees with a perceived chance to express their views to decision-makers.[30] Research on "process control," or the voice effect, has been particularly influential in the study of employee voice.[31] Process control was first observed by Thibault and Walker in their studies of dispute resolution in legal settings. They found that perceived control over the procedures that led to decisions made the procedures seem more fair,

26. Caryl E. Rusbult et al., *Impact of Exchange Variables on Exit, Voice, Loyalty, and Neglect: An Integrative Model of Responses to Declining Job Satisfaction*, 31 ACAD. MGMT. J. 599, 601 (1988).

27. *See generally* FREEMAN & MEDOFF, *supra* note 24 (theorizing that unionized individuals will be less likely to quit because grievance procedures provide a voice mechanism). Empirical studies have provided some support for this theory. *See* Derek R. Avery et al., *Does Voice Go Flat? How Tenure Diminishes the Impact of Voice*, 50 HUM. RESOURCE MGMT. 147 (2011) (finding a negative relationship between union presence and employee turnover); Roderick D. Iverson & Douglas B. Currivan, *Union Participation, Job Satisfaction, and Employee Turnover: An Event-History Analysis of the Exit-Voice Hypothesis*, 42 INDUS. REL. 101 (finding a negative relationship between union presence and employee intentions to quit).

28. *See generally* sources cited at *supra* notes 17-26.

29. *See* Bashshur & Oc, *supra* note 17, at 1532 (outlining voice in management research and outcomes).

30. Robert J. Bies & Debra L. Shapiro, *Voice and Justification: Their Influence on Procedural Fairness Judgments*, 31 ACAD. MGMT. J. 676, 676 (1988).

31. *See* Bashshur & Oc, *supra* note 17, at 1532 (outlining studies on process control and noting that process control is otherwise known as voice effect).

regardless of actual outcome.[32] Other studies have also found a positive relationship between process control and the perceived fairness of outcomes.[33]

Perhaps one of the most well-known models of procedural justice is the "group value" model, which suggests that people value their membership in groups because groups "offer symbols of identity, economic resources, and a way of validating behavior."[34] Fair procedures make members of the group feel valued.[35] Employee voice opportunities are thus positively linked with outcomes because they reduce uncertainty, increase individuals' felt control over the processes that lead to outcomes, and make individuals feel like valued members of the organization.[36]

3. The Pro-Social Conceptualization of Employee Voice

The proactive work behavior literature conceptualizes voice as a behavior, rather than in terms of the presence of voice-granting mechanisms or perceived voice opportunities.[37] Central to this research stream is the idea that the underlying motivation for employee voice is pro-social in nature.[38] That is, employee "[v]oice is motivated by the desire to bring about constructive change for the organization or for one or more stakeholders."[39] An employee is therefore more likely to engage in voice behaviors to the extent that she has a strong desire or sense of obligation to help the organization operate more effectively or appropriately via its employees, clients, or the external community.[40] As noted by Professor Morrison, empirical studies have provided support for this idea by "showing a

32. *Id.*

33. Yochi Cohen-Charash & Paul E. Spector, *The Role of Justice in Organizations: A Meta-Analysis*, 86 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 278, 284-86 (2001); Jason A. Colquitt et al., *Justice at the Millennium: A Meta-Analytic Review of 25 years of Organizational Justice Research*, 86 J. APPLIED PSYCHOL. 425, 436 (2001).

34. Stefanie E. Naumann & Nathan Bennett, *A Case for Procedural Justice Climate: Development and Test of a Multilevel Model*, 43 ACAD. MGMT. J. 881, 881 (2000).

35. *See generally* Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 115 (1992) (noting the social psychology of procedural justice).

36. Bashshur & Oc, *supra* note 17, at 1532-33.

37. Thomas W.H. Ng & Daniel C. Feldman, *Employee Voice Behavior: A Meta-Analytic Test of the Conservation of Resources Framework*, 33 J. ORGANIZATIONAL BEHAV. 216, 217 (2012).

38. *Employee Voice and Silence*, *supra* note 21, at 180.

39. *Id.* at 179-80; *see also* Linn Van Dyne & Jeffrey A. LePine, *Helping and Voice Extra-Role Behaviors: Evidence of Construct and Predictive Validity*, 41 ACAD. MGMT. J. 108, 109 (1998) (defining voice as a "promotive behavior that emphasizes expression of constructive challenge intended to improve rather than merely criticize.").

40. *Employee Voice and Silence*, *supra* note 21, at 180.

relationship between employee voice and a variety of internal motivational states reflecting a sense of commitment to the well-being of one's organization, coworkers, or customers."[41]

Many scholars in this area also conceive of voice as a type of organizational citizenship behavior.[42] But unlike some other organizational citizenship behaviors, voice is often seen as challenging rather than affiliatory, especially to managers and particularly when it is aimed at disrupting the status quo.[43] Furthermore, voice can only have positive effects when it reaches a target with the power to take action; this contrasts with other organizational citizenship behaviors, which generally do not require approval or action from above to have positive effects.[44] Thus, engaging in voice involves an element of personal risk for an employee, who may jeopardize her relationships with colleagues and supervisors by engaging in voice.

B. *The Impact of Voice*

Employee voice opportunities have been linked to numerous positive psychological, relational, and health-related outcomes. For the individual employee, the positive outcomes associated with perceiving that one has opportunities to "voice" one's concerns in the workplace include improved justice perceptions, better job attitudes, and increased satisfaction at work.[45] Positive outcomes such as team learning, improved work processes and innovation, and even crisis prevention have been observed at the unit and organizational levels.[46] Further, the suppression of voice behaviors and the perceived lack of voice opportunities can create feelings of stress, loss of control and loss of self-efficacy.[47]

Paradoxically, no significant correlation has been found between voice behaviors and objective performance (including both financial performance

41. *Id.*

42. *See, e.g.*, James R. Detert et al., *Voice Flows to and Around Leaders: Understanding When Units Are Helped or Hurt by Employee Voice*, 58 ADMIN. SCI. Q. 624, 626 (2013) ("Voice is a challenging, prosocial, organizational citizenship behavior specifically intended to be instrumental in improving the organization by changing existing practices.").

43. Subrahmaniam Tangirala & Rangaraj Ramanujam, *Exploring Nonlinearity in Employee Voice: The Effects of Personal Control and Organizational Identification*, 51 ACAD. MGMT. J. 1189, 1192 (2008).

44. *Id.* at 1191.

45. Bashshur & Oc, *supra* note 17, at 1531.

46. Jian Liang et al., *Psychological Antecedents of Promotive and Prohibitive Voice: A Two-Wave Examination*, 55 ACAD. MGMT. J. 71, 73 (2012).

47. E. W. Morrison & F. J. Milliken, *Organizational Silence: A Barrier to Change and Development in a Pluralistic World,* 25 ACAD. MGMT. REV. 706, 721 (2000).

and productivity rates),[48] although some empirical studies[49] suggest that when voice is heard but ignored, employee output substantially decreases.[50] One reason why there may be no observed positive relationship between voice behavior and objective performance measures is that the relationship is likely to be complex. That is, the relationship between voice behaviors and outcomes such as financial performance is likely to be both mediated and moderated by a number of factors, including the nature of the voice both in terms of content and delivery, the degree of management openness to the voice efforts, the reactions to the voicing attempt, whether the problem is solved, and the felt outcomes of voice for the employee. Also, mediating the relationship between voice and performance outcomes are more proximal outcomes of voice such as its effects on employee well-being, employee commitment, and the degree of trust across levels of the hierarchy.

1. Psychological Well-Being

Voice, whether characterized as a behavior or in terms of the availability of voice mechanisms, has been positively associated with numerous facets of psychological well-being, such as job satisfaction, outcome satisfaction, and organizational commitment.[51] Furthermore, employee satisfaction has been shown to increase when a greater number of voice mechanisms are available.[52]

Many of the positive individual-level attitudinal and behavioral effects

48. Bashshur & Oc, *supra* note 17, at 1534.

49. *See Employee Voice and* Silence, *supra* note 21, at 188 (discussing studies that show how employee voice being ignored can be detrimental and comparing Scott E. Seibert et al., *What do Proactive People Do? A Longitudinal Model Linking Proactive Personality and Career Success*, 54 PERSONNEL PSYCHOL. 845 (2001) *with* Steven W. Whiting et al., *Effects of Task Performance, Helping, Voice and Organizational Loyalty on Performance Appraisal Ratings*, 93 J. APPL. PSYCHOL. 125 (2008)).

50. *See* James E. Hunton et al., *A Field Experiment Examining the Effects of Membership in Voting Majority and Minority Subgroups and the Ameliorating Effects of Postdecisional Voice*, 81 J. APPL. PSYCHOL. 806 (1996) (describing a field study using eighty employees to examine the consequences of membership in voting majority and minority subgroups after trying to fix the negative outcome of the minority subgroup's decision).

51. *See* Colquitt et al., *supra* note 33, at 436 (finding a positive relationship between voice opportunities and outcome satisfaction, job satisfaction, and organizational commitment); Jeffrey P. Thomas et al., *Employee Proactivity in Organizations: A Comparative Meta-Analysis of Emergent Proactive Constructs*, 83 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 275, 289 (2010) (finding a positive relationship between informal voice behaviors and job satisfaction and affective organizational commitment); Ng & Feldman, *supra* note 37, at 221 (finding a negative relationship between informal voice behaviors and affective detachment from the organization and organizational disidentification).

52. *But see, e.g.*, Bashshur & Oc, *supra* note 17, at 1536 (noting that many studies report a negative relationship between union representation and dissatisfaction).

of voice can be linked to an individual's perception of personal control. In the organizational justice literature, the availability of opportunities to provide input has been closely linked with an employee's sense of personal control in the workplace.[53] In this context, personal control is defined as an employee's subjective belief in "her ability to effect a change, in a desired direction, on the environment."[54] Given the amount of time people spend at work,[55] it is unsurprising that employees wish to see themselves as active members of the organization, rather than passive cogs in the machine.[56] By voluntarily engaging in change-oriented behaviors, employees are able to assert their sense of personal control.[57] In contrast, lack of personal control is associated with an assortment of detrimental individual outcomes, such as dissatisfaction, stress, decreased performance, withdrawal symptoms, destructive tendencies, and even sabotage.[58]

Organizational justice scholars have also found a positive relationship between voice opportunities and perceived fairness; employees who perceive that they have input into procedures and outcomes are likely to view such procedures and outcomes as fairer.[59] If employees have more opportunities to provide work-related input, they have a greater sense of control, which increases the expectancy of effectively resolving workplace problems and issues through personal action.[60] They may also feel more like valued members of the organization if they perceive that they are treated fairly at the workplace.[61] It is important, however, that voice opportunities be legitimate; when employees' voices are heard but ignored, dissatisfaction

53. In organizational justice literature, "process control" is near-synonymous with the ability to provide input in the procedures that lead to outcomes. *See, e.g.*, Colquitt et al., *supra* note 33, at 426-28 (defining process control as a perception of procedural fairness).

54. David B. Greenberger & Stephen Strasser, *Development and Application of a Model of Personal Control in Organizations*, 11 ACAD. MGMT. REV. 164, 165 (1986).

55. In 2015, people who worked spent an average of 7.6 hours per day on work and work-related activities. *American Time Use Survey—2015 Results*, U.S. Dep't of Labor (June 24, 2016, 10:00 AM), http://www.bls.gov/news.release/pdf/atus.pdf [https://perma.cc/7D2W-CGCN].

56. Richard DeCharms, PERSONAL CAUSATION: THE INTERNAL AFFECTIVE DETERMINANTS OF BEHAVIOR at 274 (1968); Greenberger & Strasser, *supra* note 54, at 426, 435.

57. Blake E. Ashforth & Alan M. Saks, *Personal Control in Organizations: A Longitudinal Investigation with Newcomers*, 53 HUMAN REL. 311, 327-28 (2000).

58. Greenberger & Strasser, *supra* note 54, at 164.

59. Cohen-Charash & Spector, *supra* note 33, at 284-86.

60. Jerry B. Fuller et al., *Promoting Felt Responsibility for Constructive Change and Proactive Behavior: Exploring Aspects of an Elaborated Model of Work Design*, 27 J. ORGANIZATIONAL BEHAV. 1089, 1091 (2006); Sharon K. Parker et al., *"That's Not My Job": Developing Flexible Employee Work Orientations*, 40 ACAD. MGMT. J. 899, 903-04 (1997).

61. E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE, at 173-202 (1988).

increases,[62] and productivity decreases.[63]

Employees who consciously suppress their work-related thoughts, opinions, and suggestions because they believe that will not be valued may experience cognitive dissonance;[64] they believe that they have something important to express, but by remaining silent, their behavior is at odds with that belief.[65] Employees experiencing cognitive dissonance are predicted to be in a state of emotional tension, which increases stress and exacerbates stress-related outcomes. To resolve this dissonance, either their lack of voice or their beliefs must change, but as mentioned, the perceived risks associated with voicing their concerns create a significant barrier to engaging in voice behaviors.[66] As a result, an employee is more likely to resolve dissonance by reducing her belief about the importance of the issue she wishes to speak about, disassociating from the organization, or viewing herself as being a person who holds little influence, leading to "neglect" in the words of the EVLN model.[67]

2. Relationships

Constructive voice behaviors signal employee commitment and concern for the organization. According to social exchange theory, managers should recognize and reward employees who express voice.[68] However, studies tying voice behaviors to relational outcomes have produced less uniformly positive results.[69] In reality, individuals may not be so receptive to input—particularly when it is perceived as criticism from someone lower in the organizational hierarchy. Recent studies suggest that the impact of voice depends on the content of the message and how it is communicated. For example, Steven Whiting and colleagues found that

62. Robert Folger et al., *Effects of "Voice" and Peer Opinions on Responses to Inequity*, 37 J. PERSONALITY & SOC. PSYCHOL. 2253, 2254-55 (1979).

63. A field experiment placed eighty employees into voting majority and minority subgroups. In the absence of post-decisional voice, members of the minority subgroup perceived the decision as less fair and produced forty-one percent less output than members of the voting majority subgroup. *See* Hunton et al., *supra* note 50, at 806 (investigating the role of post-decisional voice to improve attitudinal differences and performance).

64. *Id.*

65. LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 9-14 (1957).

66. Morrison & Milliken, *supra* note 47, at 721.

67. *See* Bashshur & Oc, *supra* note 17, at 1547 (explaining that neglect is an outcome of an employee who feels that her voice has been ignored).

68. Bashshur & Oc, *supra* note 17, at 1533.

69. *See* Steven W. Whiting et al., *Effects of Message, Source, and Context on Evaluations of Employee Voice Behavior*, 97 J. APPL. PSYCHOL. 159, 159 (2012) (citing evidence to support the finding that voice leads to slower salary growth and a reduced likelihood of promotion).

employers perceive voice more positively when it provides a solution, it is given early in the process, it comes from a person who is viewed as trustworthy and an expert in the relevant area, and there is a norm for speaking up in the organization.[70] Employees who are able to effectively regulate their emotions while engaging in voice also receive better performance evaluations.[71] In contrast, a 2001 study found a negative relationship between proactive voice and career progression; the authors argued that employees whose proactive voice focuses on problems without providing innovative solutions may damage their workplace relations and, in turn, their own careers.[72]

Thus, providing employees with perceived voice opportunities has been hypothesized and often found to have positive consequences for employees in terms of their perceptions of control and fairness and resulting sense of commitment to the organization. However, managers are often less positive in their judgments of employees who exercise the opportunity to speak up about sources of dissatisfaction or even suggestions for improvement.

3. Health

Although the impact of voice on health-related outcomes has not been rigorously tested,[73] related studies on stress suggest that stifling voice may also have serious psychological and physical health effects.[74] In 1979, Robert Karasek first observed that personal control (as measured by latitude in decision-making) moderates the relationship between work and stress.[75] Feelings of work-related unfairness, work-related dissatisfaction, lack of trust in the organization,[76] and the suppression of work-related emotions[77] have all been described as examples of occupational stressors and strains.

Research provides abundant evidence that high levels of workplace stress are likely to lead to health problems, increased likelihood of accidents, and burnout.[78] Further, workplace stress may increase absenteeism, result in

70. *Id.*

71. Adam M. Grant, *Rocking the Boat but Keeping it Steady: The Role of Emotion Regulation in Employee Voice*, 56 ACAD. MGMT. J. 1703, 1709 (2013).

72. Seibert et al., *supra* note 49, at 864-68.

73. *Employee Voice and Silence*, *supra* note 21, at 179.

74. Robert Karasek, *Job Demands, Job Decision Latitude, and Mental Strain: Implications for Job Redesign*, 24 ADMIN. SCI. Q. 285, 302-04 (1979).

75. *Id*.

76. Ng & Feldman, *supra* note 37, at 221.

77. *See, e.g.*, JAMES W. PENNEBAKER, OPENING UP: THE HEALING POWER OF EXPRESSING EMOTIONS 9 (1997) (describing the suppression of emotions as a stressor that has mental and physical health implications).

78. James B. Avey et al., *Psychological Capital: A Positive Resource for Combating Employee Stress & Turnover*, 48 HUM. RESOURCE MGMT. 677, 679 (2008).

reduced productivity at work, and result in destructive patterns in the context of work.[79] Stress-induced medical conditions include bodily pains, dizziness, headaches, heart disease, asthma, and hypertension.[80] Chronic stress may weaken an individual's immune system and induce a state in which the body no longer has the capacity to adapt to stress, leading to high blood pressure, heart attacks, chronic fatigue, psychosis, and symptoms of depression.[81] Studies of workplace-related stress have shown that employees experiencing chronic stress may develop physical symptoms (such as unstable blood pressure, muscle tension, and headaches) and psychological symptoms (such as the decreased ability to concentrate and retain information, substance abuse, and clinical depression).[82] Stress may also exacerbate existing medical conditions,[83] particularly in the case of chronic stress.[84] Once ill, stress also makes recovery from illness more difficult.[85] The adverse health effects of workplace stress are reflected in increasingly high individual and organizational health care costs.[86] A 2016 study focusing on workplace stressors found that 120,000 deaths per year and five to eight percent of annual healthcare costs may be attributable to how U.S. companies manage their employees.[87]

C. *Voice and Silence*

Voice is conceptualized differently across literatures. Early work on employee voice characterized it as a constructive response to work-related dissatisfaction; employees who are unhappy with their jobs may voice their concerns, exit the organization, or remain hopeful that work conditions will change.[88] More recently, scholars have tended to describe voice as a

79. Thomas W. Colligan & Eileen M. Higgins, *Workplace Stress: Etiology & Consequences*, 21 J. WORKPLACE BEHAV. HEALTH 89, 93 (2006).

80. *Id.* at 91.

81. *Id.* at 92.

82. *Id.* at 93.

83. *See, e.g.*, Beverly E. Thorn et al., *A Randomized Clinical Trial of Targeted Cognitive Behavioral Treatment to Reduce Catastrophizing in Chronic Headache Sufferers*, 8 J. PAIN 938, 946-48 (2007) (finding that sufferers experienced fewer chronic headaches after suppressing stress-causing behaviors).

84. *How Stress Affects Your Health*, AM. PSYCHOL. ASS'N, http://www.apa.org/helpcenter/stress-facts.pdf [https://perma.cc/JF3G-67ME] (last visited Sept. 9, 2016).

85. *Id.*

86. *See* Colligan & Higgins, *supra* note 79, at 96 (linking workplace stress to increased cost of benefits to the employer).

87. Joel Goh et al., *The Relationship Between Workplace Stressors and Mortality and Health Costs in the United States*, 62 MGMT. SCI. 608, 608 (2016).

88. *See* FREEMAN & MEDOFF, *supra* note 24, at 247 (finding that the voice that unionism provides to its members serves as a source of both social and economic good).

behavior that is informal, extra-role, and pro-social.[89] Voice has been defined as "the informal and discretionary communication by an employee of ideas, suggestions, concerns, or information about problems . . . to persons who might be able to take appropriate action, with the intent to bring about improvement or change."[90] For our purposes, voice may be expressed informally, or via mechanisms such as grievance procedures or union membership. Silence, on the other hand, refers to the withholding of information from persons perceived to be able to take appropriate action.[91] It is important to note that silence is not merely the absence of voice, as "not speaking up can occur for many reasons, including having nothing meaningful to convey."[92] Similarly, the presence of voice behaviors does not imply the absence of intentional silence.[93]

Although scholars have taken different approaches to operationalizing and explaining employee voice, most agree on two matters: first, employee voice is beneficial;[94] and second, employees who are presented with a "latent voice opportunity"—that is, employees who possess potentially relevant or important work-related knowledge, opinions, concerns, or ideas[95]–often choose to remain silent.[96] Next, we analyze the inhibitors of employee voice and motivators of employee silence.

1. Barriers to Voice

In a recent study, 461 individuals were asked to describe occasions when they had intentionally stayed silent in response to an important work-related issue and their motives for doing so.[97] The most frequently expressed motivations for silence were that they "did not think it would do any good to

89. *Employee Voice and Silence*, *supra* note 21, at 174.

90. Frances J. Milliken et al., *Linking Workplace Practices to Community Engagement: The Case for Encouraging Employee Voice*, 29 ACAD. MGMT. PERSPECTIVES 405, 409-10 (2015) (quoting *Employee Voice and Silence*, *supra* note 21, at 174).

91. Craig C. Pinder and Karen P. Harlos, *Employee Silence: Quiescence and Acquiescence as Responses to Perceived Injustice*, 20 RES. IN PERS. AND HUM. RESOURCES MGMT. 331, 334 (2001); *Employee Voice and Silence*, *supra* note 21, at 174.

92. *Employee Voice and Silence*, *supra* note 21, at 174.

93. Chad T. Brinsfield, *Employee Silence Motives: Investigation of Dimensionality and Development of Measures*, 34 J. ORGANIZATIONAL BEHAV. 671, 672 (2013).

94. *Employee Voice and Silence*, *supra* note 21, at 177.

95. *Id.* at 179.

96. *See, e.g.*, Jennifer J. Kish-Gephart et al., *Silenced by Fear: The Nature, Sources, and Consequences of Fear at Work*, 29 RES. IN ORGANIZATIONAL BEHAV. 163, 165 (2009) ("Employees frequently remain silent in moments that call for voice, whether about matters relating to employee treatment . . . managerial behavior . . . or the outbreak and spread of corporate scandal.").

97. Brinsfield, *supra* note 93, at 674.

speak up," wished to avoid conflict, and feared negative consequences.[98] These motivations echo findings from previous employee interviews and surveys regarding employee voice, which appear to corroborate two principles: first, many employees are hesitant to speak up about work-related issues; and second, the two primary perceptions that inhibit voice are the fear of negative consequences at the workplace and doubts about the utility of engaging in voice.[99] Of course, whether an employee does engage in voice will likely be influenced by a wide variety of factors, including individual dispositional idiosyncrasies such as self-esteem, extraversion, and neuroticism.[100] However, two key influencers of the "voice choice," perceived risk and utility, are common across individuals.[101]

a. *Risk*

Engaging in change-oriented voice is risky because it inherently involves a challenge to the status quo. An employee may fear that by speaking up in a way that challenges work practices and decisions or that highlights a serious problem, she will be viewed as a troublemaker or complainer, lose respect or support from others at work, and face negative

98. *See id.* at 676 (listing the frequency of given reasons for remaining silent per participants' open-ended responses).

99. For a concise summary of surveys regarding employees' reluctance to engage in voice and their rationales for not doing so, see *Employee Voice and Silence*, *supra* note 21, at 178. In particular, a 1991 study found that over seventy percent of employees surveyed felt afraid to speak up about certain issues. *Id.*

100. Empirical studies in the pro-social behavior literature have identified a wide variety of dispositional and attitudinal factors as antecedents to, or moderating variables affecting, employee voice. *See, e.g.*, Joel Brockner et al., *The Moderating Effect of Self-Esteem in Reaction to Voice: Converging Evidence From Five Studies*, 75 J. PERSONALITY & SOC. PSYCHOL. 394, 404 (1998) (analyzing self-esteem); Fuller et al., *supra* note 60, at 1090-91 (focusing on felt obligation for constructive change); Liang et al., *supra* note 46, at 71 (examining psychological safety, felt obligation for constructive change, and organization-based self-esteem); J. Michael Crant et al., *Dispositional Antecedents of Demonstration and Usefulness of Voice Behavior*, 26 J. BUS. PSYCHOL. 285, 285 (2010) (defining the dimensions of personality in the Five-Factor model: openness, conscientiousness, extraversion, agreeableness, and neuroticism); Subrahmaniam Tangirala et al., *Doing Right Versus Getting Ahead: The Effects of Duty and Achievement Orientations on Employees' Voice*, 98 J. APPL. PSYCHOL. 1040, 1047 (2013) (discussing duty and achievement orientation). Note that these studies focused primarily on these individual factors as antecedents of voice, but in most studies, voice could just as easily be the predictor. Individual traits have also been linked to usage of voice mechanisms. *See, e.g.*, Michael Frese et al., *Helping to Improve Suggestion Systems: Predictors of Making Suggestions in Companies*, 20 J. ORGANIZATIONAL BEHAV. 1139, 1150 (1999) (focusing on self-efficacy and work-initiative predictors of suggestion system usage); *see also Employee Voice and Silence, supra* note 21, at 179-80 (discussing several studies).

101. Milliken et al., *supra* note 6.

job consequences (such as getting passed over for promotions or being fired).[102] In the corporate hierarchical setting, leaders and supervisors and the relationships they have with employees play particularly significant roles in the risk assessment.[103] This may be explained in part by the power imbalances inherent in hierarchical structures. Because higher-ups have power over subordinates' pay, promotions, work assignments, and continued employment, employees will be particularly wary of jeopardizing relationships with them.[104]

Even if leaders display openness to input and willingness to address concerns, employees may hold implicit, automatically-applied beliefs about the riskiness of speaking up within a hierarchy.[105] For example, employees may subconsciously "intuit" that embarrassing one's boss will result in negative consequences.[106] This may occur even if supervisors are objectively approachable and open to input.[107]

The perceived riskiness of speaking up is heightened when voice is critical; for example, when the thoughts or opinions at issue are critical of "existing or impending practices, incidents, or behaviors that may harm their

102. *See Employee Voice and Silence*, *supra* note 21, at 179 (explaining that avoiding negative consequences is a primary reason for avoiding expression of employee voice).

103. *See, e.g.,* Karen Harlos, *If You Build a Remedial Voice Mechanism, Will They Come? Determinants of Voicing Interpersonal Mistreatment at Work*, 63 HUM. REL, 311, 324 (2010) (finding that relative hierarchical power is one of the key determinants in deciding whether employees use formal voice mechanisms).

104. *See, e.g*., Isabel C. Botero & Linn Van Dyne, *Employee Voice Behavior: Interactive Effects of LMX and Power Distance in the United States and Colombia*, 23 MGMT. COMMC'N Q. 84, 98 (2009) (analyzing the positive relationship between leader-member exchange and voice); James R. Detert & Ethan R. Burris, *Leadership Behavior and Employee Voice: Is the Door Really Open?* 50 ACAD. MGMT. J. 869, 870 (2007) (investigating transformational leadership and managerial openness); James R. Detert & Linda K. Trevino, *Speaking Up to Higher Ups: How Supervisor and Skip-Level Leaders Influence Employee Voice*, 21 ORG. SCI. 249, 267 (2010) (noting that even the skip-level leaders may influence employees' decisions to exercise voice); Amy C. Edmondson, *Speaking Up in the Operating Room: How Team Leaders Promote Learning in Interdisciplinary Action Teams*, 40 J. MGMT. STUDIES 1419, 1142-44 (2003) (looking at the effectiveness of team leader actions on voice in an interdisciplinary context); Wu Liu et al., *I Warn You Because I Like You: Voice Behavior, Employee Identifications, and Transformational Leadership*, 21 LEADERSHIP Q. 189, 191 (2010) (assessing the characteristics of voice behavior and whom employees are most likely to speak out and speak up to); *see also Employee Voice and Silence, supra* note 21, at 180-82 (discussing the literature on the efficacy and safety of workplace voice).

105. *See Employee Voice and Silence*, *supra* note 21, at 183 (describing the learned origins of implicit beliefs).

106. *See id.* (citing James R. Detert & Amy C. Edmondson, *Implicit Voice Theories: Taken-for-Granted Rules of Self-Censorship at Work*, 54 ACAD. MGMT. J. 461, 461 (2011) (detailing the reluctance to voice concerns upward because of possible negative personal consequences)).

107. *Employee Voice and Silence*, *supra* note 21, at 183.

organization . . . ,"[108] or when they relate to perceived mistreatment.[109] Critical voice is riskier because "pointing out dysfunction more directly implies the failure of important stakeholders in the workplace."[110] Ambitious individuals may be particularly disinclined to voice a concern for fear that doing so would jeopardize their career.[111] This is troubling because critical voice serves important diagnostic and preventative functions for organizational health by drawing attention to previously undetected problems and flaws in organizational initiatives.[112] Liang and colleagues suggest that in certain settings, critical voice may be even more impactful than positive, "promotive" voice because developing and implementing new initiatives is costly and time-consuming, particularly for fast-paced organizations, whereas "prohibitive" voice may more efficiently place a stopper on losses.[113]

b. *Utility*

Because of the risks involved in speaking up at work, employees are unlikely to engage in voice if they perceive that doing so will be ineffective.[114] When group- or organization-level beliefs emphasize the value of voice, individuals' use of voice will be greater.[115] An individual

108. *Id.*; Liang et al., *supra* note 46, at 72 (also comparing "promotive" voice to "prohibitive" voice).

109. *See generally* Rusbult et al., *supra* note 26 (finding that informal voice behaviors addressing perceived mistreatment are more likely when the employee has alternative employment opportunities); *see also* Klaas et al, *infra* note 118, at 322.

110. Liang et al., *supra* note 46, at 85.

111. *See generally* Tangirala et al., *supra* note 100 (indicating, through an empirical study, that duty orientation and employee voice are positively related, whereas achievement orientation and employee voice are negatively related).

112. *See* Liang et al., *supra* note 46, at 75 (describing the important function of prohibitive voice by putting undetected problems on the company's radar).

113. *Id.*

114. Studies in the organizational justice realm demonstrate that while voice opportunity has a positive impact on employee attitudes and behaviors, voice that is heard, but ignored, has detrimental effects on employee attitudes and behaviors. *See* Bashshur & Oc, *supra* note 17, at 1534 (citing a study that found that heard but ignored voice resulted in a forty-one percent decrease in output as compared to when voice was acted upon).

115. *See* Elizabeth W. Morrison et al., *Speaking Up in Groups: A Cross-Level Study of Group Voice Climate and Voice*, 96 J. APPL. PSYCHOL. 183, 188 (2011) (relating group-level beliefs about the value of voice to individual use of informal voice); Desmond J. Leach et al., *The Effectiveness of Idea Capture Schemes*, 10 INT'L J. INNOVATION MGMT. 325, 341 (2006) (finding that use of nonmonetary rewards and recognition may help validate participation in formal mechanisms like suggestion systems); Cecilia Rapp & Jörgen Eklund, *Sustainable Development of a Suggestion System: Factors Influencing Improvement Activities in a Confectionary Company*, 17 HUM. FACTORS & ERGONOMICS IN MANUFACTURING & SERV. INDUSTRIES 79 (2007) (finding that use of suggestion systems is positively related to publicity

who perceives making constructive suggestions to be part of her prescribed work role is also more likely to engage in voice.[116] On the other hand, employees are more likely to remain silent when there exists a shared group-level perception that speaking up is futile.[117] Group-level attitudes toward voice also impact the use of voice mechanisms such as suggestion systems.[118] Employees are less willing to use suggestion systems when managers are indifferent; they are more willing to do so when the organization possesses a "learning culture."[119] "Research examining the use of formal grievance process to address perceived mistreatment has shown that employees are influenced by factors likely to affect the relative attractiveness of this form of voice over other possible responses,"[120] such as the availability of labor market alternatives, and factors that are likely to increase the cost of alternative responses.[121]

c. *Managerial Attitudes*

Employees' fears and skepticism regarding higher-ups' receptiveness to subordinate input are not without basis. According to Morrison, a recent series of studies suggest that when voice is seen as challenging the status quo rather than supporting it, managers are more likely to regard the employee as disloyal and threatening, and as a result, they are less likely to endorse the message; further, they are more likely to rate employees who engage in "prohibitive" voice as poor performers.[122] Morrison and Milliken assert that

campaigns designed to highlight the need for employees to improve organizational processes through the use of such mechanisms).

116. *See* Linn Van Dyne et al., *In-Role Perceptions Buffer the Negative Impact of Low LMX on Helping and Enhance the Positive Impact of High LMX on Voice*, 93 J. APPL. PSYCHOL. 1195, 1195 (2008) (finding that regarding voice as an in-role behavior amplifies the effect of high-quality leader-member exchange relationships on voice).

117. Morrison & Milliken, *supra* note 47, at 707 (detailing one of the reasons employees do not speak up is belief that it will make no difference). This is supported by a study linking upward, informal voice behaviors with perceptions regarding personal influence within the work group. *See* Vijaya Venkataramani & Subrahmaniam Tangirala, *When and Why Do Central Employees Speak Up? An Examination of Mediating and Moderating Variables*., 95 J. APPL. PSYCHOL. 582 (2010) (finding a positive relationship between work-flow centrality and voice behavior, with personal influence moderating this relationship).

118. *See* Brian Klaas et al., *The Determinants of Alternative Forms of Workplace Voice: An Integrative Perspective*, 38 J. MGMT. 314, 320 (2012) (detailing that in instances with group-level beliefs that highly value voice, individual use of voice is greater).

119. *See id.* at 319 (stating suggestion system use is lower when there is a perception that managers are indifferent to the suggestions and respond slowly).

120. *Id.* at 319-20.

121. *Id.* at 321.

122. *See Employee Voice and Silence, supra* note 21, at 188, (concluding that employers are apt to label an employee that challenges them as "rebellious").

managers' implicitly held beliefs and attitudes play a large part in shaping organizational "climates of silence."[123] People (managers in this case) often feel threatened by negative feedback and try to avoid receiving or absorbing it by employing defensive mechanisms, such as questioning the credibility of the source or dismissing the criticism as inaccurate.[124] Managers may feel a particularly strong need to avoid embarrassment, threat, and feelings of vulnerability, even if they genuinely wish to be receptive to input.[125] Negative feedback from subordinates is particularly unwelcome, and is likely to be seen as less legitimate and more threatening compared to feedback from above.[126] Recent studies indicate that managers may perceive employees who constantly express challenging voice as offensive, hostile, or disloyal.[127]

Moreover, managers are likely to hold a number of implicit beliefs about their subordinates and themselves that make them even more inclined to discredit change-oriented input from employees.[128] First, managers often assume that employees are: (1) motivated by self-interest and (2) effort-averse and, therefore, will not, without motivation, seek the best interests of the organization.[129] Second, managers may believe "management knows best," and that "hired hands should put up or shut up."[130] Third, managers often think that consensus is healthy and dissent is unhealthy.[131] The hierarchical structure of corporate organizations undergirds these beliefs; the further people progress upward within an organization, the less likely they are to identify with those below them.[132]

123. *See* Morrison & Milliken, *supra* note 47, at 708 (explaining how the climate of silence is created by fear of top management from receiving negative feedback from subordinates).

124. *See id.* (describing the ways managers try to deflect criticism).

125. *Id.*

126. *See id.* (detailing the intricacy of receiving feedback from subordinates).

127. Ethan R. Burris et al., *Speaking Up Versus Being Heard: The Dimensions of Disagreement Around and Outcomes of Employee Voice*, 24 ORGANIZATIONAL SCI. 22, 25 (2013) (describing how managers see employees who complain excessively as deceitful or hostile).

128. *See* Morrison & Milliken, *supra* note 47, at 708 (reporting on the implicit beliefs on managers).

129. *See id.* at 708-10 (explaining two of the implicit beliefs are that employees are (1) self-interested and (2) effort averse).

130. W. Charles Redding, *Rocking Boats, Blowing Whistles, and Teaching Speech Communication*, 34 COMM. ED. 245, 250 (1985). *See also* Michael J. Glauser, *Upward Information Flow in Organizations: Review and Conceptual Analysis*., 37 HUM. REL. 613, 614 (1984) ("[P]ervasive management ideology implies that managers direct, control, and reward, while subordinates accept responsibilities and follow through.").

131. Morrison & Milliken, *supra* note 47, at 710 (viewing consensus as healthy and discord as unhealthy).

132. *See* Seymour Lieberman, *The Effects of Changes in Roles on the Attitudes of Role Occupants*, 9 HUM. REL. 385, 385 (1956) (describing how a person's view will be impacted

As a result, it is easy to show how voice that was intended to benefit the organization may easily be misinterpreted as "unacceptably challenging authority, rocking the boat, merely complaining and wasting time . . . or showing off and not being a team player."[133]

Next, this manuscript identifies ways in which the legal environment may also stifle voice. To this end, Part II discusses typical employment relationships in the United States followed in Part III with an analysis of whistleblowing laws.

II. THE LEGAL ENVIRONMENT: EMPLOYMENT-AT-WILL

In every U.S. state, private employment is presumed to be "at will."[134] Generally, unless an employment contract specifies otherwise, an employee can be fired without cause. Likewise, an employee can leave a job for any reason without being subject to liability.[135] The lack of job security created by the employment-at-will standard may serve as a systemic barrier to exercising voice in and out of the workplace.

A. *Historical Underpinnings of the Employment-at-Will Doctrine*

The English common law rule and American practice in the nineteenth century largely converged by enforcing employment contracts of a fixed duration and disallowing premature termination without cause.[136] The main point of departure between the United States and English rules was the treatment of employment contracts of indefinite length.

This English rule, construing a hiring of an indefinite length to be for a

by his role in the social system).

133. Detert et al., *supra* note 42, at 628.

134. *See generally* Charles J. Muhl, *Monthly Labor Review: The Employment-at-will Doctrine: Three Major Exceptions*, BUREAU LAB. STAT (2001), http://www.bls.gov/opub/mlr/2001/01/art1full.pdf [https://perma.cc/9AKV-DA8M]. The U.S. fits the stereotype of "American Exceptionalism" very well in this regard because it is the only industrialized country in the world to be guided by employment-at-will. Ronald B. Standler, *History of At-Will Employment Law in the USA*, (2000) (citing Daniel A. Mathews, Note, *A Common Law Action for the Abusively Discharged Employee,* 26 HASTINGS L.J. 1435, 1447 n.54 (1975)), http://www.rbs2.com/atwill.htm [https://perma.cc/H2NW-XUFB].

135. *See* Muhl, *supra* note 134, at 3 (defining at-will to mean that it is terminable by either party for any reason).

136. *See* Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L. 85, 102-03 (1982) (stating how in the nineteenth century American courts followed the example of English common law for enforcing contracts of fixed duration).

year,[137] was thought to protect servants (and the communities, who under English poor laws, were responsible for maintaining their poor) from being discharged during the lulls of the planting and harvesting season while also protecting masters from servants leaving during the busy periods.[138]

Under the traditional view of the history of at-will employment in the United States, the states followed the substance of the English rule[139] before a seismic shift in the late-nineteenth century following the publication of the influential legal treatise, Horace G. Wood's *Master and Servant*. After this shift, employment without a set duration was prima-facie terminable at the will of either party.[140]

While some scholars doubt the importance of Wood's treatise,[141] the United States Supreme Court emphatically adopted the at-will rule in 1908. In *Adair v. United States*,[142] the Court reviewed the constitutionality of Section 10 of the Act of Congress of June 1, 1898. Section 10, which protected an employee's ability to join unions,[143] was struck down on the grounds that it interfered with an employer's personal liberty and right of property under the Fifth Amendment.[144] Seven years later, the Supreme Court struck down a similar state statute under the 14th Amendment, explaining that the statute interferes with the right to contract, a protected property right.[145]

137. 1 WILLIAM BLACKSTONE, COMMENTARIES *413.

138. *See* Feinman, *supra* note 7, at 120 (detailing the history of the principle and giving an example with planting and harvest seasons).

139. Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 67 (2000).

140. *See, e.g.*, Payne v. W. & A.R.R. Co., 81 Tenn. 507, 519-20 (1884) (ruling that termination at will not give rise to a legal wrong).

141. Some scholars present evidence that Wood's rule was not immediately accepted by all the states. *See, e.g.*, Summers, *supra* note 139, at 67 (referencing a New York Court of Appeals case that did not immediately accept Wood's rule). Other scholars doubt the influence of Wood's treatise in precipitating the adoption of the employment-at-will doctrine. Furthermore, historians have evidence that a number of states were not applying the English annual hiring rule long before Wood's treatise. As early as 1853, Georgia was not applying the English rule. *See* Henderson v. Stiles, 14 Ga. 135 (1853) (commenting that where an employment contract has no specified time, an employee may recover unpaid labor wages on a theory of quantum meruit; the annual hiring presumption of the English rule is not mentioned). Even after Wood's treatise, only one-third of states cited Wood for their adoption of their respective at-will rules between 1880 and 1900. Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 697 (1994).

142. Adair v. United States, 208 U.S. 161 (1908).

143. Section 10 of the Act of Congress of June 1, 1898, 30 Stat. 424, ch. 370.

144. Adair v. United States, 208 U.S. at 176.

145. Coppage v. Kansas, 236 U.S. 1, 13 (1915). These cases fall in line with the other cases striking down interference with the right to contract under substantive due process during the so-called *Lochner*-era. *See* Lochner v. New York, 198 U.S. 45, 53 (1905) (holding

Beginning in the mid-1930's, the original version of the at-will rule met its demise. Exceptions to the doctrine began to rise precipitated by the passage and subsequent judicial interpretation of the National Labor Relations Act, which gave employees the right to self-organize and join labor unions.[146] Today, the high courts of forty-nine states and the District of Columbia recognize some modern variant of the at-will employment rule.[147]

B. *Application of Employment-at-Will Today*

Despite "at-will" having the connotation of "for any reason," modern American law acknowledges that even at-will employees cannot be fired for literally any reason. The at-will presumption is just that—a presumption. Laws and contracts may alter the presumption and legal rules may limit its application. Two broad categories of exceptions to the at-will doctrine exist: those based on statutes and those based on common law. These categories are discussed next.

that a statute establishing maximum hours for bakers was unconstitutional under the "general right to make contract in relation to [one's] business [which is] part of the liberty of the individual protected by the [Fourteenth] Amendment. . . ."). The influence of laissez-faire economics evident in the *Lochner*-era, is often put forth as a reason for the abandonment of the English rule. *See* Jacoby, *supra* note 136, at 92-93 (indicating the impact laissez-faire theories impacted court's rulings). Additionally, the rise of the at-will rule coincides well with industrialization, so some legal historians posit a causal relationship. These historians reason that the more familial master-servant relationship increasingly became replaced by impersonal, commercial employment relationships, where employers no longer were expected to take on the responsibility of ensuring their employee's job security. *See, e.g.*, Feinman, *supra* note 7, at 123 (comparing the original conception of the master-servant relationship as a domestic relationship with the later attitude that the master-servant relationship was a commercial one). There are challengers to this belief though. *See, e.g.*, Morriss, *supra* note 141, at 703 (finding that the rule spread from the West and South to East and did not cover a majority of the population until the mid-1890's, well after many of the significant labor struggles stemming from capital and labor had taken place); *id.* at 682, 697, 745 (finding that the rise of the at-will rule is best correlated with the rise of elected judges; thus, the scholar hypothesized that the reason behind adoption of the rule must lie with the court as an institution, perhaps judicial desire for a simple rule or to keep decisions from going to a jury). *See also* Feinman, *supra* note 7, at 131-34 (claiming the rule was promoted by the "capitalists," who were combatting legal challenges by an emerging professional class and wanted to shift the risk of economic downturns to employees by being able to discharge them during downturns).

146. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (holding that an employer cannot use the right to discharge employees to "intimidate or coerce its employees with respect to their self-organization and representation. . . .").

147. Restatement of Empl. L. § 2.01 ("Montana is the only U.S. state to have enacted a statute requiring a showing of "good cause. . . .").

1. Statutory Exceptions to Employment-at-Will

Numerous federal statutes limit an employer's ability to freely discharge an employee. Some of these statutes relate to the exercise of employee rights: For example, an employer cannot discharge or take other adverse actions based on an employee's exercise of protected concerted activities,[148] refusal to take part in activities that are reasonably believed to be in violation of any law,[149] exercise of rights related to wage-and-hour standards,[150] exercise of rights secured by the Employee Retirement Income Security Act,[151] or request for leave under the Family and Medical Leave Act.[152] Other statutes deal with discharge related to certain characteristics of an individual employee. Employers are prohibited from discharging an employee on the basis of race, sex, color, religion, national origin,[153] age,[154] pregnancy,[155] or disability.[156] Federal statutes also protect employees that report, or assist in investigations of, employers' violations of federal acts such as the Sarbanes-Oxley Act,[157] wage violations,[158] health and safety violations,[159] or violations under the Clean Air Act[160] and Water Pollution Control Act.[161] States also have their own statutes that limit at-will employment.[162]

Finally, a number of states have enacted statutes protecting employees from discharge based on lawful activity outside of the workplace.[163] For

148. Labor Management Relations Act, 29 U.S.C. §§ 141-169 (1947).

149. Occupational Safety and Health Act, 29 U.S.C. § 660(c) (1985).

150. Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2016).

151. Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1151 (1974).

152. Family Medical Leave Act, 29 U.S.C. § 2614 (2008).

153. 42 U.S.C. § 2000e (1964).

154. Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (1985), *amended by* P.L. 104-208 §119 (1997).

155. 42 U.S.C. § 2000e(k) (1964).

156. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990), *amended by* P.L 110-325 (2008).

157. 18 U.S.C. § 1514A (2010).

158. 29 U.S.C. §§ 201–219 (2016).

159. 29 U.S.C. §§ 651–678 (1985).

160. 42 U.S.C. § 7622 (1977).

161. 33 U.S.C. § 1367 (1948).

162. *See, e.g.*, ALA. CODE § 25-5-11.1 (1975) (barring termination as the result of an employee bringing an action against their employer to recover workers' compensation benefits or filing notice of violation of a safety rule); MD. CODE ANN., LAB & EMPL. § 9-1105 (West 1991) (barring termination as the result of an employee bringing an action against their employer to recover workers' compensation benefits or filing notice of violation of a safety rule); NEB. REV. STAT. § 25-1640 (1979) (barring employee discharge or negative action due to jury duty).

163. *See, e.g.*, CAL. LAB. CODE § 96(k) (Deering 1999) (permitting claims for loss of wages from demotion, suspension, or discharge for non-working hour lawful conduct away

example, Connecticut protects employees who exercise certain federal and state constitutional rights provided the "activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer."[164] New York goes beyond this and protects employees who engage in legal "recreational activities," including legal use of consumable products, provided the activities are outside work hours, off of the employer's property, and do not involve the employer's equipment or property.[165] Most state statutes protecting employees for lawful activity outside of work contain exceptions for activity related to work or to the employer's business interests.[166]

2. Common Law Exceptions to Employment-at-Will

Much more complicated than the statutory exceptions to the at-will presumptiondsf are the common law exceptions. These judicially-created exceptiofadsns can be generally classified into three categories; those based on (a) implied contract, (b) the covenant of good faith, and (c) public policy.

a. Implied-in-Contract Exception

The implied-in-contract exception establishes a breach of contract

from employer's property); COLO. REV. STAT. § 24-34-402.5 (2007) (permitting claims for loss of wages from demotion, suspension, or discharge for non-working hour lawful conduct away from employer's property); CONN. GEN. STAT. ANN. § 31-51q (West 1983) (prohibiting discipline or discharge based on an employee's exercise of rights guaranteed by first amendment, so long as such activity does not materially interfere with the employee's job performance); N.Y. LAB. LAW § 201-d(2) (McKinney 1993) (outlawing certain employment actions in relation to various legal activities outside employment duties); N.D. CENT. CODE ANN. § 14-02.4-03 (West 2015) (outlawing certain employment actions in relation to various legal activities outside employment duties); *see also* Aaron Kirkland, *"You Got Fired? On Your Day Off?!": Challenging Termination of Employees for Personal Blogging Practices*, 75 UMKC L. REV. 545, 546 (2006) ("[S]ix states have enacted exceptions to the at-will presumption, making it more difficult for an employer to terminate an employee for off-duty conduct.").

164. CONN. GEN. STAT. ANN. § 31-51q (West 1983); *see also* Terry Morehead Dworkin, *It's My Life – Leave Me Alone: Off-the-Job Employee Associational Privacy Rights*, 35 AM. BUS. L.J. 47 (1997) (describing Ford Motor Company's "sociological department," which monitored employees to make sure they led clean lives).

165. N.Y. LAB. LAW § 201-d(2) (McKinney 1993).

166. *See, e.g.*, COLO. REV. STAT. § 24-34-402.5 (2007) (protecting lawful activity off an employer's premises during nonworking hours unless it "[r]elates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee . . ."); *see also* N.D. CENT. CODE ANN. § 14-02.4-03 (West 2015) (protecting "lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer.").

where an employer fires an employee when the circumstances surrounding the employment relationship dictate that the employee was not terminable at-will. This exception is commonly applied in cases involving written employer policies, such as employment manuals, which can contain provisions that limit the employer's power to discharge an employee.[167]

Even without express provisions, certain provisions can amount to an implied contract that limits the at-will doctrine.[168] For example, in *Toussaint v. Blue Cross & Blue Shield of Michigan*,[169] the Michigan Supreme Court ruled that the employer's employee manual and guidelines, which specified that employees would only be terminated for just-cause, created an implied contract overcoming the at-will presumption.[170] Some states have gone as far as to imply that an employer's creation of an atmosphere of job security is sufficient to overcome the at-will employment presumption.[171] Furthermore, oral assurances of job security may also be sufficient to overcome the presumption of employment-at-will.[172] Only thirteen states do

167. *See, e.g.*, Ferraro v. Koelsch, 124 Wis. 2d 154 (2003) (holding that an employee handbook may convert an employment at will relationship into one only terminable by the terms of the handbook).

168. *See, e.g.*, Cisco v. King, 205 S.W. 3d 808, 810 (Ark. App. 2005) (finding that employees terminated without cause are entitled to damages where their employment manual stated that "the tenure of an employee with permanent status shall continue during good behavior and satisfactory performance . . ."); Pine River State Bank v. Mettille, 333 N.W.2d 622, 626-628 (Minn. 1983) (holding that the general language regarding high job security of the "Job Security" section of an employee handbook was "no more than a general statement of policy" but the "Disciplinary Policy" was an offer creating an implied contract overcoming the at-will presumption because it set out in definite language an offer of a unilateral contract for procedures to be followed in job termination); Aberle v. City of Aberdeen, 718 N.W.2d 615, 621 (S.D. 2006) (stating that a policy or handbook providing exclusive grounds for employee discipline or discharge amounts to an implied contract binding the employer to a for-cause termination procedure when the language is not merely precatory or explicitly disclaims any deviation from at-will employment).

169. *See* Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 613-15 (1980) (stating that an employee's reliance on a provision in the employee manual stating that discharge would be for just cause only established an implied contract rebutting the at-will presumption).

170. *Id.* at 614.

171. *See, e.g.*, Bulman v. Safeway, Inc., 27 P.3d 1172, 1175 (Wash. 2001) ("[I]f an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises *of specific treatment in specific situations* and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship." (citing Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 230 (Wash. 1984))).

172. *See, e.g.,* Murphy v. Grower Serv. Corp., 2006 U.S. Dist. LEXIS 61006, at *8 (E.D. Mich. Aug. 17, 2006) ("In order for oral statements of job security to overcome the presumption of employment at-will, they must be clear and unequivocal." (citing Rowe v. Montgomery Ward & Co., 437 Mich. 627, 473 N.W.2d 268, 275 (Mich. 1991))); Ehrhardt v. Electr. & Instrumentation Unlimited, 220 F.Supp.2d 649, 655 (E.D. Tex. 2002) ("For an oral

not recognize the implied-contract exception.[173] Employers today often carefully word their handbooks and other materials given to employees and typically include disclaimers, thus largely avoiding claims of this kind.

b. *Implied Covenant of Good-Faith and Fair-Dealing*

Under the good-faith and fair-dealing exception, a court will read the implied covenant of good-faith and fair-dealing into every employment relationship.[174] This exception has been interpreted to mean either: (1) that terminations motivated by malice or made in bad faith are prohibited, or (2) that employer personnel decisions are subject to a just-cause standard.[175]

California courts were among the first to recognize the good-faith exception.[176] In *Cleary v. American Airlines, Inc.*,[177] the California appellate court acknowledged a terminated employee's eighteen years of service for the employer airline company in holding that the employee could only be fired for good cause.[178] The court stated that the employee's termination after such a long period of employment offended the implied covenant of good faith and fair dealing.[179] Interestingly, the court noted the importance of reading in the implied duty in order to "ensure social stability in our society."[180] Delaware courts applied the covenant of good-faith and fair-dealing in an at-will employment situation with regard to an employer's "bad faith or unfair dealing achieved by deceit or misrepresentation . . . to create

contract to exist, 'the employer must unequivocally indicate a definite intent to be bound not to terminate the employee except under clearly specified circumstances.'" (citing Montgomery County Hosp. Dist. v. Brown, 965 S.W.2d 501, 502 (Tex. 1998))); Schipani v. Ford Motor Co., 102 Mich. App. 606, 612-25 (1981) (denying a motion to dismiss on a breach of contract claim because, even though plaintiff had signed an agreement noting his employment was at-will, later assurances were deemed to possibly amount to an implied contract); Troy v. Rutgers, 774 A.2d 476, 482 (N.J. 2001) ("Oral promises . . . have been held to give rise to an enforceable obligation on the part of an employer.").

173. Muhl, *supra* note 134, at 4 (listing Delaware, Florida, Georgia, Indiana, Louisiana, Massachusetts, Missouri, Montana, North Carolina, Pennsylvania, Rhode Island, Texas, and Virginia as states not recognizing the implied-contract exception); *see also*, Parker v. United Airlines, Inc., 32 Wash. App. 722, 725-26 (1982) (stating that an employee's subjective understanding or expectations alone are not sufficient grounds to create an implied contract that overcomes the at-will presumption).

174. Muhl, *supra* note 134, at 10.

175. *See id.* (citing Shane and Rosenthal, EMPLOYMENT LAW DESKBOOK, § 16.03[8] (1999)).

176. *Id.* at 10.

177. 111 Cal. App. 3d 443 (1980).

178. *Id.* at 455-56.

179. *Id.* at 455.

180. *Id.*

fictitious grounds to terminate employment."[181] The covenant was first recognized in Idaho where an employer dropped an employee to part-time for using above-average sick-leave days although the employee had not used all her accrued sick leave.[182]

The vast majority of states reject the good-faith and fair-dealing exception to at-will employment.[183] According to a Florida court in *Catania v. Eastern Airlines, Inc.,*[184] inquiring into an employer's motivation behind the termination of an employee is too great of a task for the court to undertake.[185] Several other courts have elaborated that acknowledging a good-faith exception to the at-will presumption would essentially transform the presumption to one of for-cause.[186] The only states to recognize the good-faith exception are Alabama,[187] Alaska,[188] Arizona,[189] California,[190]

181. *See* E.I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436, 443-44 (Del. 1996) (holding that if a jury believed that an employer mounted a false campaign to discredit an at-will employee who criticized him, such campaign resulting in the employee being fired, the termination would amount to being in bad faith).

182. Metcalf v. Intermountain Gas Co., 778 P.2d 744, 749 (Idaho 1989) ("[A]ny action by either party which violates, nullifies or significantly impairs any benefit of the employment contract is a violation of the implied-in-law covenant of good faith and fair dealing which we adopt today.").

183. *See* Muhl, *supra* note 134, at 4 (listing the only states to recognize the good-faith exception as: Alabama, Alaska, Arizona, California, Delaware, Idaho, Massachusetts, Montana, Nevada, Utah, and Wyoming); *see, e.g.*, Fraser v. Nationwide Mut. Ins. Co., 135 F. Supp. 2d 623, 643 (E.D. Pa. 2001), *aff'd in part, vacated in part, remanded*, 352 F.3d 107 (3d Cir. 2003), *as amended*, (Jan. 20, 2004) (noting that Pennsylvania does not recognize the good faith and fair dealing exception to the at-will employment doctrine); O'Reilly v. Physicians Mut. Ins. Co., 992 P.2d 644, 649 (Colo. App. 1999) (declining to reconsider the dismissal of a claim for breach of implied duty of good faith and fair dealing); Horn v. N.Y. Times, 790 N.E.2d 753, 755-56 (N.Y. 2003) (recognizing the good faith and fair dealing exception only where it is consistent with agreed upon contract terms); Fitzgerald v. Salsbury Chem., Inc., 613 N.W.2d 275, 281 (Iowa 2000) (recounting the erosion of the at-will employment doctrine); City of Midland v. O'Bryant, 18 S.W.3d 209, 216 (Tex. 2000) (declining to impose a duty of good faith and fair dealing in police employment case).

184. 381 So. 2d 265 (Fla. Dist. Ct. App. 1980).

185. *Id.* at 267.

186. *See, e.g.*, Daniel v. Magma Copper Co., 127 Ariz. 320, 324 (Ct. App. 1980) (recognizing that reading in a good-faith exception would transform an at-will contract "into a hybrid contract under which the employee cannot be discharged unless his work is unsatisfactory or his services are no longer needed.").

187. Hoffman-La Roche, Inc. v. Campbell, 512 So.2d 725, 738 (Ala. 1987).

188. Becker v. Fred Meyer Stores, Inc., 355 P.3d 1110, 1116-17 (Alaska 2014).

189. Wagenseller v. Scottsdale Mem'l Hosp., 147 Ariz. 370, 383 (1985).

190. Foley v. U.S. Paving Co., 262 Cal. App. 2d 499, 505 (Ct. App. 1968).

Delaware,[191] Idaho,[192] Massachusetts,[193] Montana,[194] Nevada,[195] Utah[196] and Wyoming.[197]

c. The Public Policy Exception

Based on common law tort theories, the public policy exception is the most prevalent exception to the employment-at-will doctrine.[198] This exception protects employees from termination that would be contrary to federal or state public policy.[199]

Many states expand this doctrine beyond wrongful discharge to also cover wrongful demotion or other significant job-related detriment in contravention of public policy.[200] For example, the U.S. District Court for the District of Connecticut found that a teacher, who was also the teachers' union president, was protected from an unpaid suspension following the teacher being "quoted in a newspaper article criticizing the school district's reimbursement of administrators' advanced degrees."[201] The public policy exception has yet to be extended to a wrongful refusal to hire.[202]

191. E.I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436, 440-44 (Del. 1996).

192. Metcalf v. Intermountain Gas Co., 116 Idaho 622, 626-28 (1989).

193. Gram v. Liberty Mut. Ins. Co., 384 Mass. 659, 672 (1981).

194. Gates v. Life of Mont. Ins. Co., 196 Mont. 178, 184-85 (1982).

195. K Mart Corp. v. Ponsock, 732 P.2d 1364, 1370 (1987).

196. Berube v. Fashion Ctr., 771 P.2d 1033, 1046-47 (Utah 1989).

197. Wilder v. Cody Country Chamber of Com., 868 P.2d 211, 220 (Wyo. 1994).

198. Labor and Employment Law, Ch. 259, § 259.05 (Matthew Bender); Mark A. Fahleson, *The Public Policy Exception to Employment at Will-When Should Courts Defer to the Legislature*, 72 NEB. L. REV. 956, 958 (1993) (citing Frank J. Cavico, *Employment at Will and Public Policy*, 25 AKRON L. REV. 497, 497 (1992)); Brad Seligman, *At-Will Termination: Evaluating Wrongful Discharge Actions*, TRIAL, Feb. 1983, at 60, 61); Muhl, *supra* note 134, at 4.

199. *See, e.g.*, Cummins v. Mold-In Graphic Sys., 2001 Ariz. App. Unpub. LEXIS 2 (2001), *rev. denied*, 38 P.3d 12 (Ariz. 2002) (explaining that Arizona public policy can be found in federal laws); *see also* Silo v. CHW Med. Found., 45 P.3d 1162, 1169 (Cal. 2002) (relying, in part, upon the federal Constitution to determine public policy). *But see* Radicke v. Fenton, 2001 U.S. Dist. LEXIS 2362 (E.D. Pa. Mar. 8, 2001) (explaining that Pennsylvania law does not recognize federal statutes or regulations as statements of public policy).

200. *See, e.g.*, Glover v. NMC Homecare, Inc., 106 F. Supp. 2d 1151 (D. Kan. 2000) (recognizing that the tort of retaliatory discharge as a public policy exception to the at-will-employment doctrine extends to retaliatory demotion), *aff'd*, 13 Fed. Appx. 896 (10th Cir. 2001); *see also* Trosper v. Bag 'N Save, 734 N.W.2d 704, 706 (2007) (extending the public policy exception to demotion in addition to discharge).

201. Valenti v. Torrington Bd. of Educ., 601 F. Supp. 2d 427, 432 (D. Conn. 2009).

202. *See, e.g.*, Berrington v. Wal-Mart Stores, Inc., 696 F.3d 604, 609 (6th Cir. 2012) ("An employee's right to be hired or rehired . . . has never been recognized as actionable, under common law on public policy grounds."); Fontaine v. Clermont Cty. Bd. of Comm'rs, 633 F. Supp. 2d 530, 540 (S.D. Ohio 2007) ("[T]here is no cause of action under Ohio law for retaliation or for wrongful failure to hire in violation of public policy.").

Some state courts, including Alabama, Georgia, and New York, heavily disfavor or decline to create public policy exceptions to the at-will doctrine and rather leave the creation of such exceptions to the state legislatures.[203] Other jurisdictions recognize a judicially created public policy exception but limit it.[204] Yet other state judiciaries apply the public policy exception comparatively broadly. Utah's Supreme Court applied this exception to at-will employees of Wal-Mart who were discharged for exercising their right to self-defense when a confrontation with shoplifters became physical, despite Wal-Mart's policy requiring employees to withdraw from potentially violent situations.[205] The Supreme Court of New Jersey similarly allowed a claim of wrongful discharge violating claim against public policy when an employee, who was also a municipal council member, voted for an ordinance that was against the employer's interest and was subsequently discharged.[206]

The exceptions to the employment at-will doctrine provide important opportunities for employees to be able to find their voice in organizations. In many ways though, the common law exceptions have been supplanted by a new crop of legislative attempts to encourage whistleblowing. The next part, Part III, discusses the need to provide voice for whistleblowers, the legislative initiatives to accomplish this, and recent efforts by others to stifle the voice of whistleblowers.

III. WHISTLEBLOWING

A. *Efforts to Promote Whistleblowing*

The widespread adoption of whistleblowing legislation and popular acceptance of the idea today is a result of a long history of legislators' desires to get employees to speak up to stop fraud and wrongdoing within organizations and government, to facilitate law enforcement, and to protect public health and safety.[207] The first legislative enactments coincided with

203. Horn v. N.Y. Times, 790 N.E.2d 753, 759 (N.Y. 2003) ("We have consistently declined to create a common-law tort of wrongful or abusive discharge . . . grounded in a conception of public policy into employment contracts . . . ."); Reilly v. Alcan Aluminum Corp., 528 S.E.2d 238, 239-40 (2000) ("Although there can be public policy exceptions to the doctrine, judicially created exceptions are not favored, and Georgia courts thus generally defer to the legislature to create them."); Howard v. Wolff Broad. Corp., 611 So. 2d 307, 312 (1992) (affirming that the court, thus far, declines to recognize public policy exceptions to at-will employment and leaves the creation of such exceptions to the legislature).

204. *See, e.g.*, Winters v. Houston Chronicle Pub. Co., 781 S.W.2d 408, 409 (Tex. App. 1989) (finding that the "narrow" public policy exception was held not to apply to an employee reporting illegal act but only to employees who refuse to perform an illegal act).

205. Ray v. Wal-Mart Stores, Inc., 359 P.3d 614, 617, 636 (2015).

206. MacDougall v. Weichert, 677 A.2d 162, 167 (1996).

207. *See* Norman D. Bishara et al., *The Mouth of Truth*, 10 NYU J.L. & BUS. 37, 39 (2013)

the beginning of the court-created exceptions to employment at-will that are discussed above.[208] These statutes, passed after some calamity, banned retaliation. The presumption was that people within the organization who knew about problems were afraid of the consequences of coming forward; if employees were statutorily protected against retaliation, they would be more willing to speak out.[209] However, whistleblowers did not initially rely on the statutes because they provided no meaningful remedies. Thus, those who had lost jobs or suffered other detriment opted to sue under the common law theories, especially wrongful firing in violation of public policy, which allowed for punitive damages.[210] Further, the initial presumption may be wrong; as noted earlier in this article, social science studies report that factors other than fear of retaliation are important in deciding whether to report.[211] Some of these factors include the perceived need for strong evidence, the seriousness of the wrongdoing, the perceived likelihood that managers would listen and that the problem would be corrected, clear reporting channels, and an organizational atmosphere of openness that encourages voice.[212]

Statutory protection for whistleblowers rapidly grew in the late 1980's and 1990's, especially after legislators saw the efficacy of giving large rewards for information that could help governments recover wrongfully-claimed funds, conserve law enforcement resources, and stop wrongdoing earlier.[213] A key occurrence spurring the widespread adoption of whistleblowing legislation was the revision of the False Claims Act (FCA) in 1986.[214] The revised FCA allows a whistleblower to bring suit in the name

(describing why legislators encourage whistleblowing).

208. *See* Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 105-06 (2000) [hereinafter *The State of State Whistleblowers*] (determining that whistleblower protection statutes appeared at the same time as the erosion of the employment at-will doctrine).

209. *See* Terry Morehead Dworkin & Janet P. Near, *Whistleblowing Statutes: Are They Working?*, 25 AM. BUS. L.J. 241 (1987) (describing the impact of changes in the law on whistleblowing and concluding that statutes meant to encourage whistleblowing do not have their intended effect).

210. *Id.* at 241-47.

211. *See* Marcia Parmerlee Miceli & Janet P. Near, *The Relationship Among Beliefs, Organizational Position, and Whistle-Blowing Status: A Discriminant Analysis*, 27 ACAD. OF MGMT. J. 687, 701 (1984) (profiling both whistleblowers and non-whistleblowers and concluding that non-whistleblowers generally do not believe that speaking up is worth risking their careers and do not trust whistleblower protections).

212. Marcia A. Parmerlee et al., *Correlates of Whistle-Blowers' Perceptions of Organizational Retaliation*, 27 ADMIN. SCI. Q. 17, 27-31 (1982).

213. Bishara et al., *supra* note 207, at 39. Another possible advantage is self-monitoring if people are aware they may be reported for wrongdoing. *Id.* at 39-40.

214. *See* 31 U.S.C. §§ 3729-3733 (2012) (defining liability for false claims acts). The Act was originally enacted in 1863 in response to contractors cheating the government during the

of the government to recover wrongfully claimed federal funds, even if the government itself does not bring suit. If the information provided is new (unknown to the government) and leads to a recovery, the whistleblower can receive up to 30% of what is collected by the government.[215] Since such fraud usually involves large sums of money,[216] many successful whistleblowers become millionaires.[217] Whistleblowing suits under the FCA increased from an average of six per year pre-amendments,[218] to over 450 in 1998, and to thousands now.[219] Indeed, a recent five-week period was declared to be a record period for FCA whistleblower recoveries, resulting in about $500 million recovered by the government.[220] In fraud involving Medicare alone, the government has recovered $5.5 billion from 2007 to 2016.[221] While the increase in reward size clearly was important in generating reports, in part because it helps balance out the risks of whistleblowing,[222] other changes also contributed to the success. These

Civil War. By the 1980s, it had fallen into disuse. *See* Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. J. 1757, 1769 (2007) [hereinafter *SOX and Whistleblowing*] (detailing the history of the FCA).

215. 31 U.S.C. §3730 (d)(1)-(2) (2010).

216. The fraud was estimated to be around $100 billion per year or more in the last decade. Fines are assessed and recovery amounts can be triple, which leads to the large awards. Originally, the suits tended to involve defense contracting. Now, the focus has shifted to Medicare and other health fraud. Most cases end in settlements. *SOX and Whistleblowing*, *supra* note 214, at 1769.

217. *See The State of State Whistleblowers*, *supra* note 208, at 101 (noting that the FCA has made millionaires of most of the successful whistleblowers); *Qui Tam Statistics*, 12 FCA & QUI TAM Q. REV. 41 (1998) (demonstrating that the whistleblower award has increased since 1998); *Fraud Statistics – Overview*, U.S. Dep't of Justice (Dec. 23, 2013), https://www.justice.gov/sites/default/files/civil/legacy/2013/12/26/C-FRAUDS_FCA_Statistics.pdf [https://perma.cc/37CV-AX3G] [hereinafter *Fraud Statistics*] (analyzing settlements, judgments, and relator share awards from 1987 to 2013).

218. Steve France, *The Private War on Pentagon Fraud*, 76 A.B.A. J. 46, 48 (1990).

219. *Fraud Statistics – Overview*, *supra* note 217, at 1.

220. *Record Period for Whistleblower Recoveries*, CONSTANTINE CANNON (Aug. 8, 2016), http://constantinecannon.com/whistleblower/record-period-whistleblower-recoveries#V7soPdKANBc [https://perma.cc/KX78-SV62] [hereinafter *Record Period*] (stating there were twenty-three recoveries from June 27, 2016 to August 1, 2016, involving a variety of false claims of multiple medical-related issues, financial fraud, government contracting, grant, and customs fraud; and that most FCA recoveries involve settlements).

221. *See* The Editorial Board, *Fraud and Other Threats to Medicare*, N.Y. TIMES (July 28, 2016), http://www.nytimes.com/2016/07/28/opinion/fraud-and-other-threats-to-medicare.html? _r=0 [https:// perma.cc/72TB-DJZD] (stating that, in its nine-year history, the Medicare Fraud Strike Force, an alliance for combined action among local, state and federal agencies, has garnered information resulting in over 2,000 convictions, mostly resulting in prison terms; arguing also that stopping fraud results in better care because medical fraud frequently includes obtaining tests that are not needed).

222. A study by the University of Chicago and Toronto University reported that in industries covered by the FCA, employees were substantially more likely to report major frauds than those in areas not covered. *See* Alexander Dyke et al., *Who Blows the Whistle on*

include increased certainty that an award would be made, the extension of the statute of limitations, guaranteed participation in the process, and the development of a well-developed bar specializing in FCA claims.[223]

The success of the FCA in recovering government funds has resulted in a proliferation of reward legislation at both the federal and state levels. However, for a variety of reasons, these state and federal laws have not been as successful as the FCA.[224] Crises caused by financial and corporate wrong doing led to the passage of the Sarbanes-Oxley Act in 2002[225] and the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010.[226] Both laws provide important protections and significant financial reward incentives for whistleblowers.[227] These statutes have also been successful in generating reports and recoveries.[228] The passage of the Deficit Reduction Act of 2005, designed to combat Medicaid Fraud, gave states an additional financial incentive to pass FCA-type legislation, and many more have done so.[229] Success under the FCA also led the Internal Revenue Service to revise its reward program in order to help recover unreported or underreported taxes.[230] The revisions again have led to huge increases in reports and some

Corporate Fraud, 65 J. FIN. 2213, 2215 (2010).

223. *See* Elleta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 278-83 (1992) [hereinafter *Get Rich*] (detailing how various statutes have created important financial incentives to encourage whistleblowing).

224. *See SOX and Whistleblowing*, *supra* note 214, at 1764–73 (describing the inadequacy of various whistleblower protections); Bishara et al, *supra* note 207, at 56 (noting that the success of whistleblower protections has been met with resistance due to the complicated nature of the claims, judicial decisions, and statutory features).

225. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C.); 18 U.S.C. § 1514A (Supp. II 2002).

226. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841 (2010).

227. *See Whistleblower Awards Top $100 Million*, SEC, https://www.sec.gov/page/whistleblower-100million [https://perma.cc/438V-GMLT] (last visited Oct. 10, 2016) (pointing out that the SEC has paid over $100 million to whistleblowers from 2013 to 2016, with the largest award being $30 million).

228. *See* Bishara, et al*., supra* note 207, at 49-50 (discussing that some states even allow the whistleblower to collect more than the 30% allowed under the FCA); Cal. Gov. Code § 12652(g) (2012) (allowing for a collection of up to 50% of the amount recovered by the government).

229. *See* 42 U.S.C.A. § 1396b (2006) (requiring State governments to carry some of the burden of Medicaid costs and incentivizing them to pass FCA-type legislation) (current version at 42 U.S.C.A. § 1396(b) (2015)).

230. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 406(a)(1), 120 Stat. 2922, 2958-59 (2006). The amount of the "tax gap" was estimated to be $385 million in 2014. *See* Denise M. Farag & Terry Morehead Dworkin, *A Taxing Process: Whistleblowing Under the I.R.S. Reward Program*, 26 S. L.J. 19, 20 (2016) (discussing that the amount of the "tax gap" was estimated to be $385 million in 2014); *id.* at 43-44 (explaining that the recoveries under the IRS program have taken a long time between the report and the recovery).

significant recoveries. In August 2016, two whistleblowers recovered $17.8 million for reporting on a Swiss bank that helped U.S. taxpayers hide money from the IRS.[231] The case is important in another regard: The U.S. Tax Court, for the first time, allowed the award to include part of the criminal fines and civil forfeitures collected from the bank.[232] States have also observed the success of rewards, and in times of financial need have passed FCA-type laws.[233]

Whistleblowing legislation covering a wide variety of areas exists outside the reward structure. Today, all states have some form of whistleblower statutory protection and many states have several statutes.[234] Numerous measures have also been enacted on the federal level.[235] Additionally, courts have extended whistleblower protection under statutes not specifically passed to protect whistleblowers,[236] and federal employees are protected under the Civil Service Reform Act and its numerous revisions.[237] Despite all the legislation, there is no general whistleblower protection, and employees can "fall through the cracks" and not be protected. Thus, new whistleblower legislation and protections are being proposed and passed.[238]

231. *Record Period, supra* note 220, at 1.

232. *Id.*

233. *See, e.g.*, Indiana False Claims and Whistleblower Protection Act, IND. CODE § 5-11-5.5 (West Supp. 2007) (defining the necessary elements for false claims and whistleblower protection); Michigan Medicaid False Claim Act, MICH. COMP. LAWS §§ 400.601-400.615 (1977) (describing remedies and penalties for fraudulent acts).

234. *See The State of State Whistleblowers*, *supra* note 208, 132-175 (listing each state's whistleblower protection laws).

235. *See* Bishara et al., *supra* note 207, at 40-41 (providing examples of the steps legislators have taken to promote protection).

236. *The State of State Whistleblowers*, *supra* note 208, at 103-04.

237. *See SOX and Whistleblowing*, *supra* note 214, at 1766-67 (detailing the history and objective of the Civil Service Reform Act and the Office of Special Counsel). Protection for federal employees has proved to be particularly problematic. Government employees also have some protections under the Constitution. *See also* Pickering v. Bd. Of Educ., 391 U.S. 563, 574 (1968) (holding that a teacher's right to speak with respect to issues of public importance cannot be grounds for dismissal).

238. *See, e.g.*, *CFTC Proposed Regulations Will Protect Whistleblowers and Prohibit Gag Clauses*, NAT'L L. REV. (Aug. 31, 2016), http://www.natlawreview.com/article/cftc-proposed-regulations-will-protect-whistleblowers-and-prohibit-gag-clauses [https://perma.cc/6BSW-RKZE] (writing about proposed regulations, such as §165.19(b), which would disallow the use of confidentiality and pre-dispute arbitration clauses in employment agreements); *A.G. Schneiderman Proposes Bill to Reward and Protect Whistleblowers Who Report Financial Crimes*, N.Y. ST. OFF. OF ATT'Y GEN. (Feb. 26, 2015), http://www.ag.ny.gov/press-release/ag-schneiderman-proposes-bill-reward-and-protect-whistleblowers-who-report-financial [https://perma.cc/C9E7-GL8E] (describing a new proposal by AG Eric Schneiderman, which would benefit employees who report illegal activity in various industries).

B. *Efforts to Silence Whistleblowing and Voice*

While legislators,[239] scholars, and others have recognized the importance of employee voice and whistleblowing, business has been reluctant to embrace it, despite the fact that intra-organizational disclosures can benefit the organization.[240] The problems at Volkswagen are but one current example of failed reporting in the workplace.[241] Not only do businesses not embrace whistleblowing, they often work against it. With their outsized power in contrast to individuals or consumer groups, they are succeeding in getting anti-whistleblowing legislation enacted. Businesses also put up barriers to voice within the organization. Three examples illustrate these efforts: "ag-gag" laws, non-disclosure agreements,[242] and unrealistic performance pressure on employees, exemplified by recent disclosures at Wells Fargo.

1. Ag-Gag Laws

Perhaps the most active legislative efforts to stifle disclosure involve the food production industry. Legislators in several states have enacted "ag-gag" laws—laws that prevent employees and other people from using undercover tactics to expose cruelty to animals and pollution caused by mega

239. Senators have proposed that July 30 be designated as Whistleblower Appreciation Day because "Congress has an obligation to stand up for individuals who risk their jobs and reputations to shine a light on threats to public safety." Rudy Takala, *Senators Propose 'Whistleblower Appreciation Day'*, WASH. EXAMINER, June 30, 2016, http://www.washingtonexaminer.com/senators-propose-whistleblower-appreciation-day/article/2595398 [https://perma.cc/XGA2-L3CQ].

240. Bishara et al, *supra* note 207, at 40. Internal whistleblowing can be an efficient and inexpensive source of information about organizational mistakes and can stop problems quicker than if the information has to go outside the organization. It can also help protect the reputation of the organization. *See id.*

241. *See* William Boston, *Volkswagen's Legal Battles Heat Up Around the Globe,* WALL ST. J., Aug. 24, 2016, at B1 (describing Volkswagen's emissions-cheating scandal); Nick Kostov, *Tougher French Probe of Emissions Is Urged*, WALL ST. J., Aug. 24, 2016, at B2 (finding that manufacturers like Volkswagen and Renault cheat on their laboratory tests).

242. Another recent example of stifling voice is a security policy instituted by the Arizona House of Representatives requiring extensive background checks on reporters before they could get floor privileges. Access was changed after a reporter publicized a lawmaker's misdeeds. *See* Bob Christie, *Arizona Rules Restrict Reporters Who Reject Background Check*, SEATTLE TIMES, Apr. 8, 2016, at A5 (recounting the House session that discussed the rules regarding restriction of access for journalists); Richard Ruelas, *Arizona House Reverses Stand: Reporters Allowed on House Floor*, ARIZONA REPUBLIC (Apr. 12, 2016), http://www.azcentral.com/story/news/politics/legislature/2016/04/12/arizona-house-reverses-stand-reporters-allowed-house-floor/82935632/ [https://perma.cc/W5EF-G8ET] (reporting on the change in policy for journalists).

livestock operations.[243] Some individuals get a job at one of these places in order to gather evidence of objectionable procedures and practices. Exposure can lead to enforcement actions by agencies and backlash from consumers against the operators and owners.[244] Ag-gag statutes vary but generally make it a crime to gain unauthorized access to farming operations and/or to record or film activities on a farm or agricultural operation unless the individuals have the owner's permission.[245] States do not put many resources into inspection and enforcement.[246] For example, despite reports of cruelty to pigs in Illinois' 12 million pigs-a-year market, the Illinois Bureau of Animal Health and Welfare found no animal welfare violations or infractions from 2011 through 2016.[247] Thus, issues have been successfully raised by individuals taking jobs in organizations and secretly recording the conditions and abuse.[248]

243. *State Ag-Gag Laws*, CONSTANTINE CANNON, http://constantinecannon.com/whistleblower/whistleblower-ag-gag-laws [https://perma.cc/B3F6-3DR4] (last visited Sept. 10, 2016) (defining ag-gag laws); Warren Richey, *'Ag-gag' Laws Head to Court: So Far, Animal Rights Activists Are Winning,* CHRISTIAN SCI. MONITOR (Dec. 31, 2015), http://www.csmonitor.com/USA/Justice/2015/1231/Ag-gag-laws-head-to-court-So-far-animal-rights-activists-are-winning [https://perma.cc/BF4P-BWUB]. At least ten states have "ag-gag" laws, and others are considering them. States with laws include Idaho, Iowa, Kansas, Missouri, Montana, North Carolina, North Dakota, Utah, and Wyoming. Individuals have exposed conditions at a turkey farm, the whipping of cows, confinement of hens, and treatment of animals at slaughterhouses. Many of the undercover videos and reports have led to changes, sometimes from big corporations such as McDonalds that buy the agricultural products. *See, e.g.*, Johnathan Chew, *Ex-McDonald's Suppliers Plead Guilty to Abusing Chickens*, FORTUNE (Oct. 30, 2015), http://fortune.com/2015/10/30/mcdonalds-chicken-abuse/ [https://perma.cc/86LB-RJKL] (describing the animal cruelty incident associated with McDonald's poultry providers and McDonald's subsequent pledge to no longer use chicken supplied by such means).

244. The chairman of Perdue Farms, one of the largest chicken suppliers in the U.S., is now publicizing that, in response to changing consumer tastes and desires, they are stopping the use of antibiotics. They are also going to put chickens to sleep before killing them and their goal is to double the activity of their chickens in the next two years by putting enhancements in their houses. Jim Perdue, *Chickens Without Antibiotics*, WALL ST. J., Oct. 17, 2016, at R10.

245. *E.g.*, IOWA CODE § 717A.3A (2012) (detailing offenses related to agricultural production); IDAHO CODE ANN. § 18-7042 (2014) (imposing penalties upon individuals who knowingly interfere with agricultural production).

246. *See* David Jackson & Gary Marx, *Whipped, Kicked, Beaten: Illinois Workers Describe Abuse of Hogs*, CHICAGO TRIBUNE, Aug. 4, 2016, http://www.chicagotribune.com/newswatchdog/pork/ct-pig-farms-abuse-met-20160802-story.html [https://perma.cc/5LNQ-KWWW] (explaining that Illinois has just six inspectors for all good animals—including pigs, chickens, and cows—who are responsible for how animals are fed, confined, and medicated who also investigate reports of conditions in pet stores and petting zoos, among others).

247. *Id.*

248. *Id.*

North Carolina adopted a law allowing employers to pursue civil charges against employees who, by gaining access to the nonpublic areas of the employer's facilities to take pictures, shoot video, or copy data or documents, use this information "to breach the person's duty of loyalty to the employer."[249] If challenged, it is unlikely to be upheld. Breach of the duty of loyalty was long ago found to be trumped by the public interest in whistleblowing.[250] However, the threat of a lawsuit and possible punitive damages of up to $5,000 per day are likely to be a deterrent to employee voice until the statute is successfully challenged.

Idaho was one of the first states to pass "ag-gag" legislation.[251] The law protected large agricultural operations, such as factory farms, by criminalizing a common animal abuse and mistreatment whistleblower tactic. The law made it a crime to obtain employment with an agricultural production, use force, threat, misrepresentation or trespass to enter an agricultural production facility, and obtain records of an agricultural production, with the intent to cause economic injury to the facility's operations.[252] Further, it criminalized entering an agricultural production facility not open to the public and, without express consent from the facility's owner, making an audio or video recording of the conduct of the facilities' operations.[253]

In August, 2015, the Idaho statute was struck down as a violation of the Free Speech and Equal Protection Clauses.[254] The judge found the law "poses a particularly serious threat to whistleblowers' free speech rights" and circumvents established "whistleblowing statutes by punishing employees for publishing true and accurate recordings on matters of public concern."[255] A key determinant in the ruling was the animus shown by legislators who compared animal rights activists to "terrorists, persecutors, vigilantes, blackmailers, and invading marauders who swarm into foreign territory and destroy crops . . . ."[256] So far, attempts to stifle employee speech and

249. N.C. GEN. STAT. § 99A-2 (2016).

250. *See Get Rich*, *supra* note 223, at 333-34 (noting that the duty of loyalty has taken a backseat to the protection and rights of employees in the whistleblowing context).

251. *See* IDAHO CODE ANN., *supra* note 245 (punishing misconduct related to animals and agricultural production generally).

252. *Id.*

253. *Id.*

254. *See* Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1195 (D. Idaho 2015) (holding that the statute was unconstitutional because it violated free speech protections and equal protection).

255. *Id.* at 1208.

256. *Id.* at 1210. Wyoming has also enacted "ag-gag" legislation. WYO. STAT. ANN. §40-27-101 (2015) (amended 2016). State legislators received complaints from ranchers about environmentalists who went on their land to gather water samples to give to federal and state agencies. Richey, *supra* note 243. The trespass statute was then amended to make it illegal

whistleblowing have had mixed success.[257]

There is another precedent that can be called upon to overturn such statutes. During the Civil Rights era of the 1960s and 1970s, "testers" were used to gain evidence of housing and employment discrimination.[258] For example, in employment opportunities, a company would get two resumes that were essentially identical except for the name. When the individuals show up for an interview, one is black, and the other is white. If the employer consistently chooses the white person, or tells the black applicant that the job has just been filled, etc., that is used as evidence of discrimination.[259] Most courts eventually upheld such evidence despite the argument of lack of standing because the person did not really want the job and therefore there was no injury.[260]

to trespass on open land and/or private property with the intent to collect "resource data." Dan Frosch, *Wyoming Trespassing Laws Under Fire*, WALL ST. J., Feb. 19, 2016, at A3. It provides for consequential and economic damages as well as recovery of litigation costs. WYO. STAT. ANN. §40-27-101 (2015) (amended 2016). The statute recently survived a challenge to its constitutionality under the First Amendment right to free speech. "The Supreme Court 'has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned . . . .'" W. Watersheds Project v. Michael, 196 F. Supp. 3d 1231, 1242 (D. Wyo. 2016). Other states have taken a different approach. Colorado, for example, offers immunity for those who report animal abuse. COLO. REV. STAT. § 18-9-209 (2005).

257. Indeed, they have even had some negative effects. For example, a study found that "ag-gag" laws eroded trust in farmers and increased support for animal welfare legislation. Andrew Amelinckx, *New Study Finds "Ag-Gag" Laws Erode Trust in Farmers*, MODERN FARMER, Mar. 29, 2016, http://modernfarmer.com/2016/03/ag-gag-laws-erode-trust-farmers/ [https://perma.cc/87BM-BEWV] (stating that the reaction was as strong among the demographic category of rural, conservative omnivores as among the category of urban, liberal, vegetarians). The study also indicated a negative perception of how well farmers are taking care of the environment. An earlier study of members of the cattle industry reported that sixty percent of the 500 readers did not think "ag-gag" laws were a good idea to pursue. *Id.* The study was published in BEEF Magazine. *Id.* Environmental groups and photographers were upset by the passage of the Wyoming law, not just animal rights activists. The National Press Photographers Association, among others, joined in a suit against it. Frosch, *supra* note 256.

258. The tactics are still in use today. *See* Daniel Beekman, *Landlords Accused of Biased Practices*, SEATTLE TIMES, May 3, 2016, at B1 (describing potential bias against renters after Seattle's Office for Civil Rights employed "testers" to expose illegal discrimination).

259. Similarly, if a white person and a black person, matched as evenly as possible, try to rent an apartment and the white person is repeatedly chosen, that is evidence of discrimination. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 374 (1982) (detailing a specific injury exists when a black person is told apartments are not available while a white person is told there are vacancies).

260. *See generally* EEOC Notice, *Enforcement Guidance: Whether "testers" Can File Charges and Litigate Claims of Employment Discrimination*, Equal Employment Opportunity Commission (May 22, 1996), https://www.eeoc.gov/policy/docs/testers.html [https://perma.cc/GN5A-EPJL] (establishing the Commission's position that "testers" may file charges and litigate the claims they bring).

2. Provisions in Employment Contracts

One tactic used by employers to stifle whistleblowing is to require applicants and employees to sign agreements requiring them to take all disputes to arbitration. Many also require employees to not join class actions. This practice grew after the Supreme Court in *Circuit City Stores, Inc. v. Adams*[261] upheld a mandatory arbitration clause in a case involving discrimination and tort claims.[262] These agreements are under attack in various ways.[263] There have been several bills introduced in Congress to overturn the *Circuit City Stores, Inc. v. Adams* ruling, but they have been unsuccessful.[264] The NLRB has taken the position that arbitration agreements banning class actions violate federal law guaranteeing the right of workers to concerted activity.[265] The Consumer Finance Protection Bureau is seeking to ban mandatory arbitration clauses in many types of consumer contracts.[266] The Labor Department has issued a rule that will allow investors to file class action lawsuits if they feel financial advisors working on retirement accounts are not doing so in the best interests of their clients.[267] In general, however, the agreements are in effect. The

261. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, (2001).

262. *Id.* at 113-14 (finding that the Federal Arbitration Act covers not only commercial contracts, but employment contracts as well). Between 2010 and 2014, the courts sent 470 worker lawsuits to arbitration, a 315 percent increase from the period 2005-2009. James von Bergen, *Employee vs. Employer: The Battle Over Arbitration*, SEATTLE TIMES, Oct. 16, 2016, at D7.

263. *See, e.g.*, CONSUMER FIN. PROTECTION BUREAU, *CFPB Proposes Prohibiting Mandatory Arbitration Clauses that Deny Groups of Consumers their Day in Court*, (May 05, 2016), http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-prohibiting-mandatory-arbitration-clauses-deny-groups-consumers-their-day-court/ [https://perma.cc/Y22F-N98A] (specifying the need for prohibiting mandatory arbitration clauses that deny consumers their day in court).

264. *See* Bishara et al, *supra* note 207, at 106-07 (detailing that many Congressional Representatives introduced the Preservation of Civil Rights Protections Act, which would overturn the decision in Circuit City Stores, Inc. v. Adams).

265. *See* von Bergen, *supra* note 262 (highlighting the position held by the National Labor Relations Board that arbitration agreements that ban class actions violate federal laws guaranteeing the right of workers to band together for protected concerted activity).

266. *See* Martha Neil, *CFPB Seeks to Ban Mandatory Arbitration of Consumer Disputes over Banking, Credit Cards and Loans*, A.B.A. J. (May 05, 2016), http://www.abajournal.com/news/article/cfpb_seeks_to_ban_mandatory_arbitration_of_banking_credit_card_and_mortgage [https://perma.cc/P4B7-GX3Y] (stating that the Bureau has passed a rule which will ban mandatory arbitration clauses in employment contracts).

267. *See* Andrew Ackerman and Leslie Scism, *Obama Retirement-Savings Rule Faces Industry-Led Court Battle*, WALL ST. J., May 31, 2016, http://www.wsj.com/articles/industry-groups-prepare-lawsuit-over-obama-retirement-rule-1464704230 [https://perma.cc/UHF3-QXFP] (stating that the rule requires financial advisors to act as fiduciaries).

disadvantage to whistleblowers of mandatory arbitration is that they are unlikely to get punitive damages. This leaves many whistleblowers who suffer retaliation in essentially the same place as they were before the whistleblower protection statutes were passed. They cannot sue in tort, and the remedies in arbitration are inadequate. Additionally, employers are shielded from publicity about their wrongdoing, so society also suffers; for example, by preventing the public from understanding how prevalent certain problems and practices are.

Covenants are used to stifle speech in other ways. The use of contract law to try to suppress employee speech and whistleblowing is not new. Brown & Williamson asserted a confidentiality agreement against the main tobacco whistleblower in 1995, and Food Lion used similar agreements to stop evidence of its practices.[268] The use of such agreements grew rapidly in the 1990s, and today they are almost ubiquitous. As noted, whistleblowing protections also grew rapidly during this period, and today valid whistleblowing is generally seen as trumping the interest in keeping the information secret when litigated.[269] This does not mean that organizations no longer try to use them to stifle speech. The threat of a lawsuit can go far in keeping someone silent. It can also keep those who are aware of the threatened lawsuit against another person silent.

Perhaps in recognition of the ultimate futility of enforcing confidentiality agreements against whistleblowers, companies are trying to bolster their protection through additional agreements. For example, some companies are trying to thwart whistleblowing by requiring employees to sign agreements to forgo government whistleblower awards in order to be eligible for severance pay or to receive a commission.[270] The Securities and Exchange Commission (SEC), which has recently stressed the importance of whistleblower information in helping to ensure protection for the securities markets, is investigating these agreements because they create a chilling

268. *See* Terry Morehead Dworkin & Elletta Sangrey Callahan, *Buying Silence*, 36 AM. BUS. L. J. 151, 151-52 (1998) (detailing how an employer used a confidentiality agreement against a former employee to prevent him from testifying about tobacco industry practices).

269. *See* Sys. Operations, Inc. v. Scientific Games Dev. Corp., 414 F. Supp. 750, 763 (D. N.J. 1976) (determining that it would be improper to enjoin a whistleblower when the information they wish to share serves the public interest); *see also* EEOC v. Astra U.S.A., Inc., 929 F. Supp. 512, 518 (D. Mass. 1996) (noting an emerging judicial trend not to allow private contractual agreements to thwart the public good), *modified*, 94 F. 3d 738 (1st Cir. 1996).

270. *See* Press Release, SEC, *Company Punished for Severance Agreements that Removed Financial Incentives for Whistleblowing*, SEC (Aug 16, 2016), https://www.sec.gov/news/pressrelease/2016-164.html [https://perma.cc/9WS3-TNX2] (declaring a company that required employees to waive their ability to acquire money from the SEC's whistleblower program was fined $340,000).

effect on reporting wrongdoing.[271] A SEC Commissioner called it an intimidation through "pre-taliation" rather than through retaliation.[272] In one case, the SEC brought an enforcement action against BlueLinx Holdings for requiring outgoing employees to sign severance agreements that said they waived their right to monetary recovery if they filed a complaint with the SEC or other federal agency.[273] In another case, it brought action against KBR for including improperly restrictive language in confidentiality agreements.[274] It found the company in violation of Dodd-Frank whistleblower provisions because the company "required witnesses in certain internal investigations interviews to sign confidentiality statements with language warning that they could face discipline and even be fired if they discussed the matters with outside parties, without the prior approval of KBR's legal department."[275]

3. Unrealistic Pressure on Employees: The Wells Fargo Example

Wells Fargo (Wells) was the king of cross selling among banks.[276] It was also employing a system of high pressure performance management reinforcing an aggressive sales culture.[277] The program strongly pushed

271. *See* Press Release, SEC, *SEC: Companies Cannot Stifle Whistleblowers in Confidentiality Agreements*, SEC (April 1, 2015), https://www.sec.gov/news/pressrelease/2015-54.html [https://perma.cc/2VWN-XGNT] [hereinafter *Companies Cannot Stifle Whistleblowers*] (detailing the potential of the pre-notification requirement in the confidentiality agreements and its discouragement effect).

272. *See* Erika Kelton, *SEC Hits Back at KBR and Other Corporate Bullies Who Threaten Whistleblowers*, FORBES, (Apr. 2, 2015), http://www.forbes.com/sites/erikakelton/2015/04/02/sec-hits-back-at-kbr-and-other-corporate-bullies-who-threaten-whistleblowers/#54f39f5c1519 [https://perma.cc/3M88-KMJP] (defining "pre-taliation" as a corporate strategy to preemptively curtail whistleblowing through intimidation).

273. *See* Press Release, SEC, *Company Paying Penalty for Violating Key Whistleblower Protection Rule*, SEC (Aug. 10, 2016), https://www.sec.gov/news/pressrelease/2016-157.html [https://perma.cc/G4LF-E9SV] (specifying how the agreement between BlueLinx and its employees forced the employees to choose between possible whistleblower awards or their severance pay and other post-employment benefits).

274. *Companies Cannot Stifle Whistleblowers*, *supra* note 271.

275. *See id.* (stating that KBR agreed to pay $130,000 in settlement and to change the wording in its confidentiality agreements).

276. *See* Aaron Back, *Wells Fargo's Questionable Cross-Selling Strategy*, WALL ST. J., Sept. 9, 2016, at B12, http://www.wsj.com/articles/wells-fargos-questionable-cross-selling-strategy-1473444334 [https://perma.cc/4G9L-8CKZ] (detailing how Wells Fargo opened over half a million credit-card accounts its customers did not want).

277. *See* Michael Corkery & Stacy Cowley, *Wells Fargo Warned Workers Against Sham Accounts, but 'They Needed a Paycheck'*, N.Y. TIMES, Sept. 16, 2016, http://www.nytimes.com/2016/09/17/business/dealbook/wells-fargo-warned-workers-against-fake-accounts-but-they-needed-a-

employees to sign up customers for credit card accounts, overdraft services,[278] and other types of products. The pressure was so strong that many employees created fake accounts for customers and signed them up for things they did not want in order to meet sales goals.[279] Employees reportedly opened around two million credit card accounts which customers may not have wanted.[280]

Several years before the settlement, the issue of fraudulent account openings had become internally known and had been the subject of a story in the Los Angeles Times.[281] Wells eventually terminated 5,300 employees for improper practices,[282] held two-day ethics seminars and when the wrongdoing continued, encouraged employees to report it.[283] What Wells did not do was change the very aggressive sales targets that led to the problem, resulting in the wrongdoing continuing. Only several days after widespread publicity and arranging settlements did Wells announce it was revamping its compensation model—and then not until months later did it actually do so.[284]

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paycheck.html?action=click&contentCollection=DealBook&module=RelatedCoverage&region=EndOfArticle&pgtype=article [https://perma.cc/6UR2-KL9C] [hereinafter *They Needed a Paycheck*] (proposing that the root cause of the sham accounts was the high sales goals and management pushing the goals ever higher).

278. *See* Anna Maria Andriots & Emily Glazer, *Wells Pushed Overdraft Services*, WALL ST. J., Oct. 11, 2016, at C1 (expounding how a regulation was passed in 2010 which required banks to get customer permission for overdraft protection so the banks developed possibly shady means to get said permission and subsequent fees).

279. *See* Emily Glazer, *Wells Fargo Fined for Sales Scam*, WALL ST. J., Sept. 9, 2016, at A1 (stating that Well Fargo was hit with a $185 million fine for opening as many as 2 million debit and credit-card accounts without customer approval). Employees also allegedly transferred funds from authorized customer accounts to temporarily fund ones without customer permission, sometimes resulting in fees for insufficient funds for the customer. They also issued debit cards and assigned personal ID numbers without the customer's knowledge. *Id.*

280. *Id.* The fine Wells Fargo is paying in settlement is in part for opening those accounts. *Id.*

281. *See* Brady Mullins, et al., *How the Scandal Unfolded*, WALL ST. J., Oct. 14, 2016, at A8 (noting an investigation in the Los Angeles Times). Whistleblowers had come forward with information about the wrongdoing, but the government allegedly failed to investigate it. *See* Liz Wagner & Mark Villareal, *Former Federal Investigator Says Government Didn't Investigate Wells Fargo Whistleblower Cases*, NBC BAY AREA (Oct. 18, 2016), http://www.nbcbayarea.com/news/local/Former-Federal-Investigator-Says-Government-Didnt-Investigate-Wells-Fargo-Whistleblower-Cases-397518261.html [https://perma.cc/E8US-MB7J] (detailing how two employees sent complaints to the Whistleblower Protection Program under OSHA and the complaints went uninvestigated).

282. *See They Needed a Paycheck*, *supra* note 277 (detailing the number of number of employees who lost their jobs).

283. *See id.* (describing measures taken by Wells Fargo to address the issues it was facing).

284. *See id*. (highlighting the change in compensation structure to deemphasize hitting sales goals).

Even further, the Chief Executive of Wells, John Stumpf, blamed the staff for the wrongdoing.[285] Wells may have provided avenues for whistleblowing and instructed employees as to what wrongdoing the executives were most concerned with, but not changing the incentives and pushing the responsibility for the wrongdoing to the lowest levels by the CEO did nothing to build the trust necessary to encourage voice. In fact, one could argue that it did just the opposite—provided an organizationally-sanctioned incentive for silence.

The fallout from the company's actions continues. Wells has agreed to pay a $185 million fine in settlement with the Consumer Financial Protection Bureau[286] and has also settled with the Office of the Comptroller of the Currency and the City Attorney of Los Angeles.[287] It is under investigation by Congress and at least three states.[288] Wells' stock price has fallen, the chairman and CEO has resigned,[289] and customer applications for credit cards and checking accounts have fallen by twenty and twenty-five percent, respectively.[290]

Misconduct, like that of Wells Fargo's, is a "systemic risk" in the financial and banking industries.[291] To properly mitigate this risk, companies

285. *See* Emily Glazer and Christina Rexrode, *Wells Boss Says Staff at Fault for Scams*, WALL ST. J., Sept. 14, 2016, at A1 (noting the top two bankers at the bank blamed the rank and file staff members for the scandal).

286. *See They Needed a Paycheck*, *supra* note 277 (stating the penalty assessed against Wells Fargo for their behavior). The fine is the largest ever assessed by the CFPB. Alistar Gray, *Record Fine for Wells Fargo After Staff Set Up Secret Accounts to Hit Sales Goals*, FIN. TIMES, Sept. 8, 2016, at 1.

287. *See* Yuka Hayashi, *Wells Fargo Is Getting Heat*, WALL ST. J., Sept. 17 - 18, 2016, at B2 (describing the settlement with the Office of the Comptroller of the Currency).

288. *See id.* (noting that California also is investigating Wells for identity theft); James Rufus Koren, *California Attorney General Investigating Wells Fargo on Allegations of Criminal Identity Theft*, LA TIMES, Oct. 18, 2016, http://www.latimes.com/business/la-fi-wells-fargo-harris-20161018-snap-story.html [https://perma.cc/KZ9A-L6BZ] (pointing at the creation of unauthorized accounts as criminal identity theft).

289. *See* Emily Glazer, *Wells Chief Quits Under Attack*, WALL ST. J., Oct. 13, 2016, at A1 (stating the CEO has resigned).

290. *See* Aaron Back, *Wells Fargo Enters Fog of Uncertainty*, WALL ST. J., Oct. 14, 2016, http://www.wsj.com/articles/wells-fargo-enters-fog-of-uncertainty-1476468212 [https://perma.cc/P62M-SRA9] (noting a twenty-five percent slump in new checking accounts being opened and a twenty percent slump in new credit cards when compared to the prior year).

291. *See* Julia-Ambra Verlaine, *Carney: Misconduct Is a 'Systemic Risk'*, WALL ST. J., Sept. 1, 2016, at C3 (stating the frequency of banking misconduct can lead to great systemic risk in financial institutions and markets). After bringing charges against Wells Fargo, the Office of the Comptroller of the Currency has asked large and regional banks for information about their incentive compensation and sales practices. *See* Emily Glazer & Christina Rexrode, *Banks Sales Draw Inquiry*, WALL ST. J., October 26, 2016, at C3 (describing the OCC's interest in formally getting the large and midsize banks' sales practices).

need employees to speak up. But before they will, they must have some investment and trust in the organization. Rather than set unrealistic goals and routinely get rid of employees who do not meet them, it would be far better to lead with buy-in from below, and encourage rather than punish.

IV. PROPOSALS FOR WORKPLACE PRACTICES

At-will employment as well as ag-gag legislation and contractual provisions requiring arbitration for the resolution of all disputes are external forces that disincentivize the exercise of employee voice. Because a meaningful opportunity to have voice in the workplace is important to employees, the employer, and society, external barriers that may make employee voice less likely should be countered with internal processes and practices that are aimed at facilitating upward communication of concerns by employees. There are several actions employers can take to encourage employees to speak up.

A first step in promoting employee voice is to have strong statements and support from top management encouraging employees to raise their concerns and stressing a non-retaliation policy. This should have a prominent place in materials provided to new hires, and it should also be republished annually to all employees.[292] To bolster the company's policy, there should be a summary of activity in that annual message and details regarding how various issues brought to the attention of management were resolved.[293] It should also include measures taken against those who retaliated against employees who reported. Training should include what the organization considers wrongful and how to deal with it.

Furthermore, someone high in the organization should be appointed to monitor the reporting system. There should be more than one reporting channel in case one of the designated monitors is involved in the wrongdoing.[294] Many companies have established hot lines to receive

292. *See* Marcia Miceli et al, *A Word to the Wise: How Managers and Policy-Makers can Encourage Employees to Report Wrongdoing*, 86 J. BUS. ETHICS 379, 383-85 (2008) [hereinafter *A Word to the Wise*] (explaining the importance of training on raising concerns, avoiding retaliation, and realizing when retaliation is occurring).

293. For example, this could be done by category—e.g., 250 issues were raised regarding disputes between coworkers or dissatisfaction with supervisor actions (studies have shown that these kinds of "personnel" issues are the most common kinds raised). Co-worker disputes were mediated, and X percent were resolved to the parties' satisfaction. Also, X percent were still in discussion.

294. *See A Word to the Wise*, *supra* note 292, at 388 (explaining the importance of multiple, effective communication channels). There is likely to be such a system in place in larger organizations because this an EEOC best practice for sexual harassment legal compliance. *See Best Practices For Employers and Human Resources/EEO Professionals*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

reports in response to SOX.[295] The presumed advantage of this is anonymity for the whistleblower.[296] Investigation of complaints should be swift and thorough. To the extent possible, the identity of the reporter should be protected, if so requested. The reporter should be kept informed of what is going on, including the result of the investigation. Measures taken against a retaliator should be commensurate with the retaliation.

In addition, the employer should incentivize employees to report wrongdoing. This need not be monetary.[297] Building incentives into the organization's reward structure may help the employer avoid the detriments of external whistleblowing.[298] "[O]bservers of wrongdoing consider the costs and benefits of acting, along with other factors. The simplest interpretation of motivational theory would suggest that providing valued employer rewards for internal whistle-blowing would increase its frequency . . . ."[299] It would also emphasize the employer's desire for the activity. For example, sharing stories of how an individual who helped the organization address a problem got promoted would help employees see that speaking up about problems was valued in the organization.

An organization can have the best procedures and guidelines in place but without another feature—trust—they will not be used. Employees must trust that if they report, they will be taken seriously, something will be done, and negative consequences will not follow. To increase the probability that employees will "trust" their managers to respond positively to their concerns, it may be helpful to train managers on the causes and consequences of employee silence so that they have more empathy for their employees' worries about speaking up. It may also be helpful to train managers on how to respond when an employee speaks up about a problem or concern. If

https://www.eeoc.gov/eeoc/initiatives/e-race/bestpractices-employers.cfm [https://perma.cc/Y9L5-F8MV] (last visited Oct. 4, 2016) (detailing the complaint process). SOX has also made the adoption of established whistleblowing mechanisms necessary for all publicly traded companies. 15 U.S.C. §78j-1.

295. *See SOX and Whistleblowing*, *supra* note 214, at 1761 ("[T]he organizational response to this requirement has been to contract with an independent hotline company to receive the reports."); *see also A Word to the Wise*, *supra* note 292, at 388 (noting the existence of international hotlines for anonymous whistleblowing).

296. *See A Word to the Wise*, *supra* note 292, at 387-89 (describing how one of the obstacles to employees internally blowing the whistle is lack of trust and fear or retaliation, and how anonymity can help solve those hurdles).

297. While large monetary awards have resulted in an increase whistleblowing, *see* discussion of the False Claims Act and its progeny above, something as simple as a prime parking space with the employee's name on it could reinforce the message.

298. *A Word to the Wise*, *supra* note 292, at 380 (describing the benefits of internal whistleblowing, including saving the firm's reputation and protection from legal and legislative responses to the wrongdoing).

299. *Id.* at 386.

managers are trained on what to do with information that suggests a need to take action, formal whistleblowing may not be needed.[300]

The rethinking of raises and bonuses can also encourage voice. For example, an employee who saves the company money through reporting that leads to the uncovering of embezzlement, could be given a percentage of the savings as a bonus.[301] Information about illegal activity that helps stop it has many benefits to the company, some intangible, such as avoidance of negative publicity. This is also worthy of a monetary award. This person could also be identified as a valuable employee through a monthly assessment, and cited as someone who should move forward.[302] Many companies already give incentives for useful suggestions,[303] and the monthly meetings may be a more regularized way of capturing the information if suggestions are solicited and rewarded.

CONCLUSION

Increased opportunities for employees to voice their concerns in the workplace may result in increased job satisfaction and increased employee retention. The increased sense of control associated with employee voice is also linked to other positive outcomes such as increased physical and psychological well-being.For these reasons, it is paramount that organizations find ways to facilitate employee voice.

To facilitate voice in the workplace, managers should create policies and structures that facilitate employees' sense of belonging and commitment to the well-being of the organization.[304] Employees should also be incenti vized to "speak up" about issues or problems they encounter in the workplace so as to overcome the perceived structural barriers to voice and the perceived risks of whistleblowing. Any attempt to increase worker voice and whistle blowing should be done carefully and thoroughly, as these changes, if improperly implemented, can lead to even more silence and wrongdoing.

300. *See* Lauren Weber, *At Kimberly-Clark, 'Dead Wood' Workers Have Nowhere to Hide*, WALL ST. J., Aug. 21, 2016, at A1 (explaining that Kimberly-Clark provides training sessions on giving and receiving difficult feedback).

301. *See A Word to the Wise*, *supra* note 292, at 385-86 (detailing one way to incentivize whistleblowing).

302. *See, e.g.*, Rachel Emma Silverman, *Companies Rethink Annual Pay Raises*, WALL ST. J., Aug. 23, 2016, at B6 (stating that the Chief Executive of BetterWorks reviews employee compensation every month and makes adjustments if necessary).

303. *See* J.B. Arthur & C.L. Huntley, *Ramping up the Organizational Learning Curve: Assessing the Impact of Deliberate Learning on Organizational Performance Under Gainsharing*, 48 ACAD. MGMT. J. 1159, 1159 (2005) (examining the relationship between gainsharing and helpful suggestions).

304. *See Employee Voice and Silence*, *supra* note 21, at 180 (highlighting the need for an internal sense of commitment to improvement and assistance).