

Federal Whistleblower Protections (2012 – 2018)

Developments

Whistleblower Protection Enhancement Act (WPEA)

The WPEA overhauls the WPA, closes administrative loopholes, ends the Federal Circuit Court's monopoly on appeals, and does not roll back any rights. As with any significant reform that must survive a political gauntlet, this law certainly does not have every reform we have sought, but does have critically important upgrades to the broken system for federal whistleblowing. Overall, the WPEA is remarkably intact for a reform that survived a 12 year political gauntlet, including negotiations to lift additional holds by congressional offices. The WPEA replaces current legal land mines with reliable rights. Intensive dialogue between the Make It Safe Coalition, which GAP coordinates, the Obama administration, and both Chambers of Congress paved the way for passage of the Whistleblower Protection Enhancement Act in the 112th Congress.

Dr. Chris Kirkpatrick Whistleblower Protection Act

At the heart of the new rules is mandatory, agency-proposed disciplinary action when a supervisor is found responsible for prohibited personnel practices after an investigation by the U.S. Office of Special Counsel (OSC), the agency chief, agency Inspector General or a Merit Systems Protection Board (MSPB) Administrative Judge. The bill does not affect MSPB appeal rights available under current law. Nor does it even require final agency disciplinary action. But after an independent finding of illegal retaliation, agencies must propose action to seek accountability. Specifically, after a first finding, the agency must propose a three day suspension; after the second finding, termination. Previously, discipline could only occur after a special prosecution by the OSC under an extremely difficult legal test. It also outlaws access for employee medical records without consent; requires increased duties by agency chiefs to train managers and employees of whistleblower rights; requires intensified investigation of employee suicides, and provides for transfer preferences when probationary employees obtain temporary relief.

OSC Reauthorization Act of 2017

The legislation, included in the National Defense Authorization Act for Fiscal Year 2018, reauthorizes OSC through 2023. Importantly, the bill (in Section 1097) clarifies that when complying with OSC's information requests, federal agencies may not withhold information and documents from OSC by asserting common law privileges such as attorney-client privilege. The reauthorization measure also promotes greater efficiency and accountability within OSC, improves protections against retaliatory investigations and other forms of reprisal for whistleblowing, and requires managers across the federal government to respond appropriately to disclosures of waste, fraud, and abuse.

All Circuit Review Act

Historically federal whistleblowers could only file an appeal with the Federal Circuit Court of Appeals, which has a negative track record against whistleblower claims. *The All Circuit Review Act (H.R. 2229)* makes permanent a pilot program within the *Whistleblower Protection Enhancement Act (WPEA)* that allows federal whistleblowers to appeal their cases from the

Merit Systems Protection Board (the government board that hears federal worker cases) to any court of appeals where they live or work.

Whistleblower Protection Coordinators Act

The Whistleblower Protection Coordination Act makes permanent and strengthens the role of whistleblower protection coordinators in inspectors general offices. The Whistleblower Protection Coordination Act would make the program permanent and change the ombudsman title to “Whistleblower Protection Coordinator,” so that there is greater clarity around the official’s role. Specifically, the coordinator would assist inspectors general in whistleblower communications with other stakeholders such as the Office of Special Counsel and Congress, and help the inspectors general strengthen their own roles in investigating reprisal and whistleblower disclosures. The legislation also requires inspectors general to provide additional reporting to Congress on concrete steps taken to hold accountable individuals who engage in whistleblower retaliation.

Challenges

Intelligence Community Whistleblower Protections

In 2012, under Presidential Policy Directive 19 and the Intelligence Authorization Act, the Obama Administration provided intelligence community (IC) federal whistleblowers with the right to make a classified disclosure directly to their supervisors within the chain of command up to the agency head, whereas previously they could only make protected disclosures to the Office of Special Counsel and Inspectors General. They also have access to a board comprised of IC IGs to challenge whistleblower retaliation. However, IC federal whistleblowers still have some of the weakest whistleblower protections on the books, and IC government contractor employees have virtually no protections, even when they engage in legally protected whistleblowing.

Criminalization of Whistleblowing

Over the past few years there has been a surge in whistleblower protections against workplace retaliation, affecting federal and corporate workers alike. Finding it more difficult to justify firing truth-tellers in the face of these buttressed rights, retaliatory managers are increasingly using a new method of retribution – referring whistleblowers for criminal investigations and prosecutions when they engage in protected whistleblowing. The end result is while whistleblowers are now safer from firing for exposing wrongdoing, they are increasingly the targets of criminal investigations, referrals to the Department of Justice, and even prosecutions.

Court Access

Congress must take the next step to protect federal whistleblowers by providing them with access to a jury to challenge retaliation – a right that is currently enjoyed by most federal contractor and private sector employees, but not regular federal employees.