WHISTLEBLOWER PROTECTION ACT

OFFICE OF THE WHISTLEBLOWER OMBUDS
COACHING THE HOUSE ON BEST PRACTICES

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OVERVIEW

The Whistleblower Protection Act (WPA) prohibits retaliation against most executive branch employees when they blow the whistle on significant agency wrongdoing or when they engage in protected conduct such as testifying before Congress. This resource covers the basics of the law's protections and functionality, as well as key enforcement bodies. Individuals considering blowing the whistle should do so under advisement of a whistleblower attorney.

Who Is(n't) Covered?

Most executive branch employees, former employees, and applicants fall within the WPA's protections. Employees of the Government Publishing Office, a legislative branch agency, are also covered.

Some executive branch employees are **excluded** from the WPA's protections, including (but not limited to):

- Political appointees (e.g., inspectors general)
- Uniformed military service members
- Noncareer Senior Executive Service employees
- Employees of the **18 intelligence community "elements"** and the FBI
- Members of the U.S. Public Health Service Commissioned Corps
- Officers of the National Oceanic and Atmospheric Association (NOAA) Commissioned Corps
- Employees of the U.S. Postal Service
- Individuals working in a position that involves significant policy-determining, advocating, or advisory duties

PROTECTIONS UNDER THE WPA: DISCLOSURES AND CONDUCT

The WPA outlines several categories of lawful disclosures and protected conduct at 5 U.S.C. § 2302(b)(8)-(9).

Protected Disclosures of Information

The WPA protects covered employees who disclose information that they reasonably believe evidences:

- A violation of any law, rule, or regulation
- Gross mismanagement
- A gross waste of funds
- An abuse of authority
- A substantial and specific danger to public health or safety

The WPA also protects disclosures regarding agency policy decisions and/or censorship related to research, analysis, or technical information if the consequences of the policy decision or censorship at issue would result in the misconduct listed above.

Who Can Receive Disclosures?

The WPA protects disclosures made to any recipient as long as the underlying information is not restricted from release by executive order or statute. When information is restricted, the WPA still protects disclosures to Congress, federal inspectors general, the Office of Special Counsel, and authorized individuals within the whistleblower's agency.

Common recipients of protected disclosures include:

- Congress
- The Office of Special Counsel (OSC)
- Offices of Inspectors General
- Co-workers or managers
- Nongovernmental organizations
- The media

Legal Disclaimer: This document is for general informational purposes only. Its contents are not legal advice.

A note on classified information: The WPA protects disclosures of classified information to Congress if the information being disclosed was classified by the head of a non-intelligence element agency and if the disclosure does not reveal intelligence sources and methods. (5 U.S.C. § 2302(b)(8)(C)).

Investigating the Disclosure

Whistleblower disclosures are frequently investigated by the Office of Special Counsel (OSC), offices of inspectors general, Congress, the media, and nongovernmental organizations, for example. Of note, disclosures to OSC follow a time-bound investigation process through which OSC can order an agency investigation of the whistleblower's disclosure, controlled by statutory requirements. The final investigative report, redacted to preserve confidentiality, is eventually made public on OSC's website and is shared with leadership of the congressional committees of jurisdiction and with the president.

Protected Conduct

In addition to protecting disclosures of information, the WPA also prohibits retaliation when covered employees engage in certain conduct, including:

- Exercising any appeal, complaint, or grievance right
- Testifying
- Lawfully assisting another person with exercising their rights
- Cooperating with the investigation of an inspector general or other agency investigator, or the Office of Special Counsel
- Refusing to obey an order that would require violation of a law, rule, or regulation

Gag-Orders — Whistleblower rights supersede agency policy restricting speech: Agencies cannot prevent employees from blowing the whistle through policy, order, or agreement. Any restriction on employee speech must contain the clause in 5 U.S.C. § 2302(b)(13) that reaffirms whistleblower rights are still in place.

ENFORCEMENT PROCESS

The WPA prohibits those with authority from taking, failing to take, or threatening to take certain "personnel actions" because of a covered employee's whistleblowing. The process for seeking relief from unlawful retaliation is complex and may involve several different entities and strict time limits for administrative filings. For example, the law imposes a three-year statute of limitations for filing a retaliation claim. (5 U.S.C. § 1214(a)(6)(A)(iii)).

Office of Special Counsel (OSC)

OSC is an independent executive branch agency that **investigates and can prosecute** unlawful whistleblower retaliation. If OSC finds unlawful retaliation, it can recommend that the agency take corrective action including disciplinary action against the retaliator. OSC can also seek to enforce its recommendations through the Merit Systems Protection Board (MSPB), a quasi-judicial agency.

While the claim is pending, OSC can seek temporary relief or "stays" of the pending personnel action. OSC also maintains an **Alternative Dispute Resolution** program through which a whistleblower and agency can try to negotiate terms for settlement.

If OSC does not obtain relief within 120 days, the whistleblower can take their claim directly to the MSPB.

Merit Systems Protection Board (MSPB)

The MSPB is an independent, quasi-judicial federal agency that, among other functions, receives and adjudicates whistleblower retaliation claims under the WPA. MSPB employs administrative judges (AJs) as well as a three-member board to hear appeals.

Whistleblowers who experienced personnel actions such as termination, suspension of more than 14 days, or reduction in grade or pay may appeal those actions directly to the MSPB. For other, less severe personnel actions, whistleblowers must first exhaust administrative options through OSC before taking their case to the MSPB. Note that whistleblowers who can go directly to MSPB may first file with OSC if they choose.

Whistleblowers who do not succeed at the MSBP may appeal their case to federal appeals court but are not entitled to a jury trial.

Arbitration — The role of unions: All collective bargaining agreements with federal employee unions designate prohibited personnel practices as a violation of the agreement. Employees may pursue their rights through this option which begins with a grievance and, if necessary, includes an arbitration hearing. Importantly, covered employees must choose between this option and the civil service channels with OSC and MSPB. If the employee chooses to pursue relief through their union, the union, rather than the employee, is the party in the case.

Burdens of Proof

To prevail in their case, a whistleblower must establish that their whistleblowing was a contributing factor in the personnel action they either experienced or are being threatened with.

To do that, the whistleblower must demonstrate by a preponderance of the evidence (more likely than not) that:

1. They made a protected disclosure under the law (or managers believed that they did or intended to, even if mistaken)
2. Agency officials responsible for the challenged personnel action knew, or should have known, of the disclosure
3. Agency officials took, threatened, or failed to take a personnel action following the disclosure
4. There is a causal connection between the disclosure and the personnel action

If the whistleblower meets that burden, the burden then shifts to the agency to prove, by clear and convincing evidence (a more onerous standard) that it had a legitimate reason for ordering the personnel action against the whistleblower. If the agency satisfies that burden, they win the case, and the personnel action stands. If not, the whistleblower prevails.

Duty Speech Exception

Some employees routinely investigate and disclose wrongdoing as a normal part of their job duties. Under the WPA, if these employees want to challenge retaliation that occurs following this "duty speech" whistleblowing, courts apply a higher burden of proof. Namely, the employee must prove that their employer intended to retaliate against them.

Relief Available

The enforcement provisions of the WPA aim to remedy the retaliation. The MSPB may order relief in the form of:

- Reinstatement or transfer including back pay and benefits lost
- Reasonable and foreseeable consequential damages (e.g., medical costs and travel expenses)
- Compensatory damages such as emotional distress, pain and suffering, or damage to reputation
- Attorney's fees and costs to prevail, including costs incurred from a retaliatory agency investigation

ADDITIONAL RESOURCES

Congressional Research Service: **The Whistleblower Protection Act (WPA): A Legal Overview**

House Office of the Whistleblower Ombuds: Fact Sheet: **Whistleblowers and Offices of Inspectors General**

Oversight.gov/whistleblowers: **Where to Report Fraud, Waste, Abuse, or Retaliation**

U.S. Office of Special Counsel: **OSC Services**

U.S. Merit Systems Protection Board: **Overview of Whistleblower Retaliation as a Prohibited Personnel Practice**