

Legislative Updates to Whistleblower Protections for U.S. Federal Government Employees, Applicants, and Former Employees since 2017



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Office of the Special Counsel (OSC)

OSC is authorized to:

- **Investigate** allegations of prohibited personnel practices, including retaliation for whistleblowing and protected activity.
- Seek **corrective action** for employees.
- Seek **disciplinary action** against officials.
- Provide safe channel for **whistleblower disclosures**.

Overview of Whistleblower Retaliation Analysis

- **Protected Disclosure**

- Reasonable belief of a violation of law, rule, or regulation; gross mismanagement; gross waste; abuse of authority; a substantial and specific threat to public health or safety; and censorship of scientific information related to research, analysis, or technical information implicating the preceding enumerated forms of wrongdoing, such as a violation of law or substantial and specific threat to public health or safety.
- Disclosures of the above types of wrongdoing to Congress, including classified information so long as it is not classified by the intelligence community and does not reveal sources and methods.
- Exception: a disclosure of information that would otherwise be prohibited by law or required by executive order to be kept secret for national security or reasons related to foreign affairs.

- **Protected Activity**

- Exercising right to an appeal, complaint, or grievance granted by law, rule, or regulation to remedy a whistleblower retaliation claim.
- Testifying or assisting another individual in exercising their right to a retaliation-based appeal, complaint, or grievance.
- Cooperation with an Inspector General, an agency component responsible for internal investigation, or OSC.
- Refusal to obey an order that would violate a law, rule, or regulation.

Overview of Whistleblower Retaliation Analysis

- **Personnel Actions**
 - Removal from Federal Service
 - Suspension
 - Reprimand
 - Performance evaluation
 - Significant changes in duties, responsibilities, or working conditions
 - Decision concerning pay or benefits
 - Decision concerning education or training
 - Decision to order psychiatric testing or examination
 - Appointment, Promotion, Detail, Transfer, Reassignment
 - Reinstatement, Restoration, Reemployment
- **Establishing Retaliation**
 - The relevant disclosure or protected activity is a contributing factor in management's decision to take, fail to take, or threaten to take or fail to take, a personnel action with respect to the employee who made the disclosure or engaged in the protected activity.
- **Agency Defense**
 - Agency can demonstrate by clear and convincing evidence that it would have taken or not taken the relevant action absent any protected disclosure or protected activity.

Relevant Legislation

- Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017
- OSC Reauthorization Act (Section 1097 of the National Defense Authorization Act of 2018)
- 2017 Follow the Rules Act
- Additional Updates via annual National Defense Authorization Acts of 2020 and 2021.

Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017

- **New Prohibited Personnel Practice:**
Improper access of an employee's or job applicant's **medical records** in furtherance of any other prohibited personnel practice, such as whistleblower retaliation, or obstruction of one's right to compete for employment. See 5 U.S.C. § 2302(b)(14).

Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 and OSC Reauthorization

- **Required Proposed Discipline:** If OSC or the head of an agency (or other listed entity) determines that a supervisor has engaged in **whistleblower retaliation** or improper **access of medical records** in furtherance of any prohibited personnel practice, the agency shall propose* discipline of the subject as follows—
 - **First violation:** minimum **proposed 3-day** suspension, plus any other action, such as a reduction in pay, that the agency head determined appropriate;
 - **Second violation: proposed removal**

*The law does not prescribe the final discipline; it requires the agency to at least propose a minimum penalty. The employee is still entitled to due process to challenge the charges and penalty before the agency makes a final determination.

Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 and OSC Reauthorization

- **Supervisory Education and Training Requirements:** The head of each agency shall provide training, in consultation with OSC and the agency's Office of Inspector General, to agency supervisors on how to respond to complaints alleging a violation of whistleblower retaliation or retaliation for protected activity. This training shall be provided—
 - to employees appointed to *supervisory* positions in the agency who have not previously served as a supervisor; and
 - on an annual basis to all employees of the agency serving in a *supervisory* position.
- **Supervisory Performance Evaluations:** Each agency must include whistleblower protection as a critical element in the job requirements and appraisals/evaluations of supervisors.

Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 and OSC Reauthorization

- **Education and Training for Employees:** The head of each agency is responsible for disseminating to employees information concerning whistleblower protections; the role of OSC; and how employees can disclose to OSC, an Inspector General, Congress, or other approved/cleared agency employee, certain information such as classified information, the disclosure of which would otherwise be prohibited by law or specific executive orders concerning national security or foreign affairs.
- **Notification of Appeal Rights:** Each agency must notify employees of their rights to appeal actions to certain offices, such as OSC or the Merit Systems Protection Board.

OSC Reauthorization

- **Additional Protected Activity under 5 U.S.C. § 2302(b)(9)(C)**: In addition to protecting an employee for cooperating with, or disclosing information to, OSC or an agency's Office of Inspector General, the law now also protects employees for cooperating with, or disclosing information to, **an agency component responsible for internal investigation or review** of the agency (i.e., internal audit office or internal investigative office).

OSC Reauthorization

- **Retaliatory Investigations Covered**
 - OSC may pursue corrective action for an employee subjected by the agency to an investigation if that investigation was commenced, expanded, or extended in retaliation for whistleblowing or protected activity, regardless of whether the investigation led to a personnel action taken against the employee.
 - Previously, no corrective action was available without an actual retaliatory personnel action.

OSC Reauthorization

- **Enhancing OSC Authority**

- OSC must have timely access to relevant information and records for an investigation.
- OSC may report to Congress an agency's contumacy or failure to produce information and records.

- **Improving Disclosure Process**

- The time for OSC to review a disclosure of wrongdoing for referral to an agency extended from 15 days to 45 days.

Follow the Rules Act of 2017

- Amended 5 U.S.C. § 2302(b)(9)(d) to expand the scope of protected activity regarding refusal to obey an unlawful order
- Before
 - Protected Activity only included refusal to obey an order that would violate a law.
 - With respect to an order that would cause a violation of a rule or regulation, the expectation was to obey the order and then grieve it.
- After
 - Protected Activity now includes refusal to obey an order that would violate a law, rule, or regulation.

NDAA for FY 2020 and FY 2021

- **Disclosures to Congress:** Clarifying the protection of disclosures of enumerated wrongdoing to Congress, including those involving certain types of classified information so long as it does not reveal sources and methods, and was not classified by the intelligence community.
- **Nondisclosure Agreements:** Clarifying that agencies may not impose nondisclosure agreements and policies regarding whistleblowing to OSC, agency inspectors general, and agency investigators.