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## Whistleblower Protections for Federal Employees

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# Whistleblower Protections for Federal Employees

## Summary

This report discusses the federal statutory protections for federal employees who engage in "whistleblowing," that is, a disclosure made by an employee evidencing illegal or improper government activities.

With the enactment of the Civil Service Reform Act of 1978, the first statutory protections for federal employee whistleblowers were created. The law was designed to encourage the disclosure of government illegality, waste and corruption by strengthening and improving protection of federal employee rights, and preventing reprisals against employees taken because of employee whistleblowing. As a result of findings that the statutory protections were inadequate, however, beginning with the ninety-ninth Congress, legislative attempts were made to increase whistleblower protection. Finally, in 1989, Congress and the Bush Administration reached a consensus on this legislation and the Whistleblower Protection Act of 1989 was enacted. Dissatisfied with its impact, Congress strengthened that legislation in 1994.

Specifically, the protections cover most federal executive branch employees and would become applicable where a "*personnel action*" was taken "*because of*" a "*protected disclosure*" made by a "*covered employee*." The whistleblower protections may be raised within basically four general forums or proceedings: (1) in employee appeals to the Merit System Protection Board of an agency's adverse action against the employee, known as "Chapter 77" appeals; (2) in actions instituted by the Office of Special Counsel; (3) in an individually maintained right of action before the Merit Systems Protection Board (known as an individual right of action, or IRA); and (4) in grievances brought by the employee under negotiated grievance procedures.

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# Whistleblower Protections for Federal Employees

## Background

**Original Statutory Protections.** Federal employees who disclose illegal or improper governmental practices, "whistleblowers," first received statutory protection from reprisal personnel actions with the enactment of the Civil Service Reform Act of 1978 (CSRA).<sup>1</sup> The law was designed to encourage the disclosure of government illegality, waste, and corruption by protecting whistleblowers from reprisal.

As stated in the Senate Report concerning the whistleblowing provisions of the civil service reform legislation:

Often, the whistle blower's reward for dedication to the highest morale principles is harassment and abuse. Whistle blowers frequently encounter severe damage to their careers and substantial economic loss. Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast Federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a Federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of

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<sup>1</sup> Civil Service Reform Act of 1978, P.L. 95-454, 92 Stat. 1114.

certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.<sup>2</sup>

Among its provisions, the CSRA created the Merit Systems Protection Board (MSPB) and the Office of Special Counsel (OSC) to investigate and adjudicate allegations of prohibited personnel practices or other violation of the merit system. Under the statute, employees subjected to significant adverse personnel actions, including removal, reduction-in-grade, reduction-in-pay, and suspensions of more than fourteen days, could appeal directly to the MSPB for redress, regardless of the agency's reason for taking the personnel action.<sup>3</sup> For less significant personnel actions, such as transfers or denials of promotions, employees could not appeal to the MSPB directly, but could seek assistance from the OSC, *if* the action was based on a "prohibited reason."<sup>4</sup>

Prohibited reasons included reprisal for whistleblowing; reprisal for the exercise of appeal rights; engaging in discrimination; engaging in nepotism, willfully obstructing any person's right to compete for employment; or taking or failing to take a personnel action if the taking of or failure to take such action violated any law, rule, or regulation regarding merit systems principles.<sup>5</sup> Personnel actions based on prohibited reasons are called "prohibited personnel practices."<sup>6</sup> Employees subjected to adverse personnel actions that were taken solely for prohibited reasons could simultaneously appeal to the MSPB<sup>7</sup> and seek assistance from the OSC.<sup>8</sup> If the OSC determined that there were reasonable grounds to believe that a prohibited personnel practice occurred, it had authority to seek a postponement or "stay" from the MSPB. Moreover, if the OSC determined that corrective action was indicated, it could request the MSPB to consider the matter; the OSC did not, however, have litigating authority to appeal the MSPB's decision in federal court.<sup>9</sup>

In 1984, the MSPB found that, in practice, the CSRA contributed little to the protection of whistleblowers. Statistics illustrated that no measurable progress had been made in overcoming federal employee resistance to reporting instances of fraud, waste, and abuse. Indeed, the percentage of employees who did not report

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<sup>2</sup> S.Rept. 969, 95<sup>th</sup> Cong., 2d Sess. 8 (1978).

<sup>3</sup> 5 U.S.C. § 7513(d).

<sup>4</sup> 5 U.S.C. § 1206(a)(1982), repealed by Whistleblower Protection Act of 1989, P. L. 101-12, 92 Stat. 1114.

<sup>5</sup> 5 U.S.C. § 2302(b).

<sup>6</sup> 5 U.S.C. § 2302(a).

<sup>7</sup> 5 U.S.C. § 7701(c)(2)(B) (affirmative defense).

<sup>8</sup> 5 U.S.C. § 1206(a)(1).

<sup>9</sup> For a detailed discussion of the original federal statutory protection of whistleblowers, see "Overview of Whistleblower Protections In Federal Law," by Jack H. Maskell, Legislative Attorney, (CRS Report 86-1018A, Nov. 26, 1986), which this report updates.

government wrongdoing due to fear of reprisal almost doubled between 1980 and 1983.<sup>10</sup>

Congress identified two major sources of concern. First, Senate and House committee studies indicated that the OSC had viewed its primary role to be that of protector of the merit system rather than as protector of the employees who comprise that system.<sup>11</sup> Further, they found that employees were distrustful of the OSC due to what was viewed as the OSC's apathetic and sometimes positively detrimental practices toward employees seeking its assistance.<sup>12</sup> Second, Congress noted that restrictive MSPB and federal court decisions had hindered the ability of whistleblowers and other alleged victims of prohibited personnel practices to win redress.<sup>13</sup>

**Legislative Responses.** In response to this perceived lack of whistleblower protection, in 1987, S. 508, the "Whistleblower Protection Act," was introduced.<sup>14</sup> Similar to legislation that had been introduced but not enacted in the ninety-ninth Congress, S. 508, *inter alia*, would have granted the OSC litigating authority so that it could appeal decisions of the MSPB in federal court and would have eased the burden of proof to be met by an employee seeking to establish a claim that an adverse personnel action had been taken because of whistleblowing: an aggrieved employee would have been required to prove that retaliation against whistleblowing was merely "a factor" of a personnel action, rather than a "significant" or a "predominant" factor. Once the employee had made out a *prima facie* case of reprisal by proving that the whistleblowing was a factor in the personnel action, the agency would then have had the burden of proving by "clear and convincing evidence," which is a higher standard than the then-existing statute required, that the whistleblowing was not a "material factor" in the personnel action.

**Reagan Veto.** On October 26, 1988 President Reagan pocket vetoed S. 508, the "Whistleblower Protection Act," criticizing it for redesigning the whistleblower protection process in such a manner that "employees who are not genuine whistleblowers could manipulate the process to their advantage simply to delay or avoid appropriate adverse personnel actions."<sup>15</sup> Specifically, he cited objection to reducing the employee's burden of proving that a whistleblowing disclosure was a substantial factor in the agency's personnel decision and to imposing a heavier burden upon the department or agency to prove by "clear and convincing" evidence that the

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<sup>10</sup> H.Rep. 413, 100<sup>th</sup> Cong., 2d Sess. 5 (1988).

<sup>11</sup> S.Rept. 413, 100<sup>th</sup> Cong., 2d Sess. (1988) [hereinafter Senate Report] (accompanying S. 508), at 7-10; H.Rept. 274, 100<sup>th</sup> Cong., 2d Sess. (1988) [hereinafter House Report] (accompanying H.R. 25), at 20-25.

<sup>12</sup> See Senate Report, at 7-11; House Report, at 19-21.

<sup>13</sup> Senate Report at 11-16; House Report at 25-29.

<sup>14</sup> S. 508, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1987).

<sup>15</sup> 24 Weekly Comp. Pres. Doc. 1377 (Oct. 31, 1988).

same personnel decision would have been made absent the disclosure.<sup>16</sup> He concluded that these standards of proof inequitably favored the employees over management.

President Reagan also cited constitutional concerns with a provision that would have prohibited prior executive review of reports or testimony by the Special Counsel or his employees when requested by a congressional committee<sup>17</sup> and with a provision that would have authorized the Special Counsel to appeal Merit System Protection Board decisions in federal court.<sup>18</sup> Implementation of the latter provision, he asserted, would have resulted in two executive branch agencies litigating their disputes in federal court, thereby conflicting with the constitutional grant of Executive power authorizing the President to supervise and resolve disputes among subordinates.<sup>19</sup>

In a joint effort by Congress and the Bush Administration to reach a consensus on whistleblower legislation, without eviscerating provisions that would increase the protection of federal whistleblowers, S. 20, the "Whistleblower Protection Act of 1989," was signed into law on April 10, 1989.<sup>20</sup> A substantial change between S. 20 and earlier legislation was the deletion of provisions that would have enabled the Special Counsel to oppose other executive branch agencies in court. One proponent of the bill maintained that although the constitutional objections that had been raised concerning these provisions were "little more than legal window dressing on an essentially ideological argument," the Committee on Post Office and Civil Service agreed to the modification because it decreased the power of the Special Counsel, which the Committee perceived was in the best interest of whistleblowers.<sup>21</sup>

**Effects of the Original 1989 Protections.** Congress envisioned the Whistleblower Protection Act of 1989 as a comprehensively protective statute; however, a study of its operation during the four years following its enactment led to a congressional finding that the law was counterproductive.<sup>22</sup> Passage of the law was followed by an increase from 30 to 50 percent, in the number of Federal employees challenging fraud, waste, and abuse. However, at the same time, retaliation resulting from these complaints rose from 24 percent to 37 percent; fewer than 10 percent of individuals exercising their legal remedies were helped; and 45 percent of individuals

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<sup>16</sup> Id. (Citing S. 508, 100<sup>th</sup> Cong., 2d Sess. § 1221(e) (1988)).

<sup>17</sup> Id. (Citing S. 508, 100<sup>th</sup> Cong., 2d Sess. § 1217 (1988)).

<sup>18</sup> Id. (Citing S. 508, 100<sup>th</sup> Cong., 2d Sess. § 1212(d)(3)(A) (1988)).

<sup>19</sup> Cf. 135 Cong. Rec. S2782 (daily ed. March 16, 1989). Memorandum from the American Law Division of the Congressional Research Service to Senate and House Subcommittees, concluding that constitutional objections of the President to provisions in legislation would not likely be sustained by a reviewing court.

<sup>20</sup> Whistleblower Protection Act of 1989, P.L. 101-12, 103 Stat. 16 (5 U.S.C. § 1201 et seq.).

<sup>21</sup> 135 Cong. Rec. H751 (daily ed. March 21, 1989). See generally Rosenberg, Congress's Prerogative Over Agencies And Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive, 57 Geo. Wash. L. Rev. 627 (1989).

<sup>22</sup> H.Rept. 769, 103d Cong., 2d Sess. 12 (1994).

reported that exercising their new rights caused them even more trouble.<sup>23</sup> In addition, between 1989 and 1993, less than 20 percent of employees bringing cases to the MSPB were successful.<sup>24</sup> In the Federal Circuit, aggrieved employees fared even worse, prevailing only twice on the merits of the whistleblower defense between 1982 and 1993.<sup>25</sup>

The vulnerability of whistleblowers' legal rights following the implementation of the 1989 Act is clearly illustrated in *Clark v. Department of the Army*.<sup>26</sup> In that case, a former Department of the Army employee claimed that her removal was in retaliation for whistleblowing. Her termination was upheld by the MSPB and on appeal, by the Federal Circuit. The court's actions, which contributed to the decision to amend the Act, were criticized in the report of the Committee on Post Office and Civil Service:

[T]he Court erased the Act's clear legislative intent that protected whistleblowing may not play any factor in personnel actions, unless the agency demonstrates by clear and convincing evidence that it was an immaterial factor.

*Clark* effectively canceled the whistleblower defense, by permitting an agency simultaneously to defeat a prima facie case through meeting the same burden of supporting its personnel action that exists under section 7701(c), whether or not the employee raises an affirmative defense.<sup>27</sup>

Despite the documented lack of success with the original statute, Congress indicated the importance of whistleblower protections by strengthening and improving the provisions of the 1989 Act with the passage of the 1994 amendments.

### **The Whistleblower Protection Act of 1989, as Amended**

The Whistleblower Protection Act of 1989, as amended in 1994, applies to a reprisal personnel action taken on or after July 9, 1989.<sup>28</sup> The Act amends federal law to: (1) allow the awarding of reasonable attorney fees by agencies to prevailing parties in certain cases;<sup>29</sup> (2) subject to review in whistleblower cases any agency decision to require psychiatric testing or examination of an employee or any other significant

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<sup>23</sup> Id. At 13. See also Office of Policy and Evaluation, Merit Systems Protection Board, "Whistleblowing in the Federal Government: An Update" (1993).

<sup>24</sup> H.Rept. 769, 103d Cong., 2d Sess. 17 (1994).

<sup>25</sup> *Sullivan v. Dept. Of Navy*, 720 F.2d 1266 (Fed. Cir. 1983); *Marano v. Dept. Of Justice*, 2 F.3d 1137 (Fed. Cir. 1993).

<sup>26</sup> *Clark v. Dept. Of Army*, 977 F.2d 1466 (Fed. Cir. 1993), cert. Denied, 510 U.S. 1091 (1994).

<sup>27</sup> H.Rept. 769, 103d Cong., 2d Sess. 18 (1994).

<sup>28</sup> 5 U.S.C. § 2302.

<sup>29</sup> 5 U.S.C. § 1204.



changes in duties, responsibilities, or working conditions made by the agency;<sup>30</sup> (3) make agency heads responsible for ensuring that their employees are informed of whistleblower rights and remedies;<sup>31</sup> (4) make compliance with merit systems principles a factor in Senior Executive Service performance appraisals;<sup>32</sup> (5) provide for the application of certain merit systems provisions to certain Department of Veterans Affairs personnel;<sup>33</sup> (6) allow corrective actions by the Merit Systems Protection Board to include placing the individual, as nearly as possible, in the position he or she would have been had the prohibited personnel practice not occurred, as well as reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages;<sup>34</sup> (7) provide aggrieved individuals (including, specifically, the employees of the Resolution Trust Corporation and Thrift Depositor Protection Oversight Board) with a choice of remedies with respect to certain prohibited personnel practices;<sup>35</sup> (8) and revise the definition of "covered position" with respect to prohibited personnel practices.<sup>36</sup>

**Congressional Intent.** The stated congressional intent of the 1989 Whistleblower Protection Act, as amended, is consistent with the stated intent in the original legislation. In enacting the original provisions, Congress made clear that:

The purpose of this Act is to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by-- (1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and (2) establishing ... that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.<sup>37</sup>

**Statute.** The operative statutory protections are embodied in the definition of "prohibited personnel practices" set forth in the Act:<sup>38</sup>

§ 2302. Prohibited personnel practices

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<sup>30</sup> 5 U.S.C. § 2302(a)(2)(A).

<sup>31</sup> 5 U.S.C. § 2302(c).

<sup>32</sup> 5 U.S.C. § 4313(5).

<sup>33</sup> 5 U.S.C. § 2105.

<sup>34</sup> 5 U.S.C. § 1214.

<sup>35</sup> 12 U.S.C. § 1441a.

<sup>36</sup> 5 U.S.C. § 2302(a)(2)(B).

<sup>37</sup> 5 U.S.C. § 1201 nt.

<sup>38</sup> 5 U.S.C. § 2302(b)(8).

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of--

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

## Elements of Whistleblowing Cases

In order to trigger the statutory whistleblower protections, a case must contain the following elements: a *personnel action* that was taken *because of a protected disclosure* made by a *covered employee*.<sup>39</sup>

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<sup>39</sup> Id.

**Covered Employees.** Although anyone may disclose whistleblowing information to the Special Counsel for referral to the appropriate agency, the Special Counsel may order an investigation and require a report from the head of the agency only if the information is received from a covered employee. In addition, with few exceptions, prohibited personnel practices apply only to covered employees. Hence, as a threshold matter, it is important to note which federal employees are statutorily covered.

Generally, current employees, former employees, or applicants for employment to positions in the executive branch of government in both the competitive and the excepted service, as well as positions in the Senior Executive Service are considered covered employees.<sup>40</sup> However, those positions which are excepted from the competitive service because of their "confidential, policy-determining, policy-making, or policy-advocating character,"<sup>41</sup> and any positions exempted by the President based on a determination that it is necessary and warranted by conditions of good administration,<sup>42</sup> are not protected by the whistleblower statute. Moreover, the statute does not apply to federal workers employed by the Postal Service or the Postal Rate Commission,<sup>43</sup> the General Accounting Office, the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Imagery and Mapping Agency,<sup>44</sup> the National Security Agency, and any other executive entity that the President determines primarily conducts foreign intelligence or counter-intelligence activities.<sup>45</sup> As a result of the 1994 whistleblower amendments, "Government corporations" are also exempt from coverage except in the case of an alleged prohibited personnel practice described under 5 U.S.C. § 2302(b)(8).<sup>46</sup>

**Protected Disclosures.** "[A]ny disclosure of information" which the employee "reasonably believes" evidences "a violation of any law, rule, or regulation" or evidences "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety" is protected on the condition that the disclosure is not prohibited by law nor required to be kept secret by Executive Order.<sup>47</sup> Moreover, "any disclosure" made to the Special Counsel or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, which the employee "reasonably believes" evidences "a violation of any law, rule, or regulation," or evidences "gross

<sup>40</sup> 5 U.S.C. § 2302(a)(2)(B).

<sup>41</sup> 5 U.S.C. § 2302(a)(2)(B)(i).

<sup>42</sup> 5 U.S.C. § 2302(a)(2)(B)(ii).

<sup>43</sup> 5 U.S.C. § 2105(e).

<sup>44</sup> The Central Imagery Office was exempted from coverage with the passage of the 1994 whistleblower amendments. The agency was renamed the "National Imagery and Mapping Agency" with the passage of the National Defense Authorization Act for Fiscal Year 1997. P.L. 104-201, § 1122(b)(1).

<sup>45</sup> 5 U.S.C. § 2302(a)(2)(C).

<sup>46</sup> *Id.*

<sup>47</sup> 5 U.S.C. § 2302(b)(8)(A).

mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety" is also protected.<sup>48</sup> The 1994 whistleblower amendments mandate that agency heads inform their employees of these protections.<sup>49</sup>

***Any Disclosure of Information.*** As a result of the Whistleblower Protection Act of 1989 and amendments, the statute now expressly provides that "any disclosure of information" is protected. Changing the phrase "a disclosure" to "any disclosure" was done to emphasize the point that the courts, the OSC, and the MSPB should not erect barriers to disclosures which will limit the necessary flow of information from employees with information of government wrongdoing.<sup>50</sup> In the Committee Report, the Senate specifically criticized the Federal Circuit decision in *Fiorello v. Department of Justice*,<sup>51</sup> where an employee's disclosures were found not to be protected because the employee's "primary motivation" was not for the public good, but rather, personal motives.<sup>52</sup> The court reached this conclusion despite lack of any indication in the CSRA that the motives of an employee are relevant to deciding whether a disclosure is protected.<sup>53</sup> The change of "a disclosure" to "any disclosure" was not reflected in case law following enactment of the 1989 Act. This lack of responsiveness by the courts and the MSPB was one factor prompting Congress to amend the whistleblower statute in 1994. In the report accompanying the amendments, it is noted that:

Perhaps the most troubling precedents involve the Board's inability to understand that "any" means "any." The WPA protects "any" disclosure evidencing a reasonable belief of specified misconduct, a cornerstone to which the MSPB remains blind. The only restrictions are for classified information or material the release of which is specifically prohibited by statute. Employees must disclose that type of information through confidential channels to maintain protection; otherwise there are no exceptions.<sup>54</sup>

***Reasonable Belief.*** For a disclosure to be protected, an employee must have a "reasonable belief" that the information is true. This is substantially a good faith requirement. In theory, the actual veracity of any disclosure does not affect whether a disclosure is protected.<sup>55</sup> In addition, for those disclosures enumerated under section 2302(b)(8)(A) which do not have to be kept confidential, the statute does not specify to whom the disclosures must be made in order to qualify as protected.<sup>56</sup>

<sup>48</sup> 5 U.S.C. § 2302(b)(8)(B).

<sup>49</sup> 5 U.S.C. § 2302(c).

<sup>50</sup> S.Rept. 413, 100<sup>th</sup> Cong., 2d Sess. 13 (1988).

<sup>51</sup> 795 F.2d 1544 (Fed. Cir. 1986).

<sup>52</sup> S.Rept. 413, 100<sup>th</sup> Cong., 2d Sess. 13 (1988).

<sup>53</sup> *Id.*

<sup>54</sup> H.Rept. 769, 103d Cong., 2d Sess. 18 (1994).

<sup>55</sup> S.Rept. 413, 100<sup>th</sup> Cong., 2d Sess. 12 (1988).

<sup>56</sup> *Id.*

*Subject Matter of Disclosure.***a. In General**

The statutory language of the whistleblower protections requires the disclosure to evidence:

- (i) a violation of any law, rule, or regulation, or;
- (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;
- (iii) and not be prohibited by law or Executive Order, except when the disclosure is made to the Special Counsel or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures.

The 1989 Act limited evidence of mismanagement as set forth in the CSRA to only "gross" mismanagement. As explained in the Senate Report,

While the Committee is concerned about improving the protection of whistleblowers, it is also concerned about the exhaustive administrative and judicial remedies provided under S. 508 that could be used by employees who have made disclosures of trivial matters. CSRA specifically established a de minimis standard for disclosures affecting the waste of funds by defining such disclosures as protected only if they involved "a gross waste of funds." Under S. 508, the Committee establishes a similar de minimis standard for disclosures of mismanagement by protecting them only if they involve "gross mismanagement."<sup>57</sup>

As to the subject of danger to public health and safety, the Senate Report accompanying the CSRA legislation explained that general criticisms or complaints, or those of a non-substantial nature, were not intended to be covered:

With respect to the latter category, the Committee intends that only disclosures of public health or safety dangers which are both *substantial* and *specific* are to be protected. Thus, for example, general criticism by an employee of the Environmental Protection Agency that the Agency is not doing enough to protect the environment would not be protected under this subsection. However, an allegation by a Nuclear Regulatory Commission engineer that the cooling system of a nuclear reactor is inadequate would fall within the whistleblower protections.<sup>58</sup>

Whistleblowing disclosures that are made public must not contain information the disclosure of which is prohibited by law or which is prohibited by an Executive

<sup>57</sup> Id. At 13.

<sup>58</sup> S.Rept. 969, 95<sup>th</sup> Cong., 2d Sess. 21 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 2730. See *Prescott v. H.H.S., Institute of Child Health and Development*, 6 M.S.P.B. 216, 221 (1981), where termination of research into child abuse and neglect did not show that a "substantial and specific danger existed as to the public health or safety."

Order in the interest of national defense or the conduct of foreign affairs.<sup>59</sup> Disclosures which are otherwise "protected" disclosures may be made, however, regardless of statutory Executive Order secrecy requirements, to the Special Counsel or to an Inspector General of an agency or to an employee designated by the agency head to receive disclosures.<sup>60</sup>

*b. Disclosures to Members of Congress*

The Whistleblower Protection Act of 1989, as amended, provides that the whistleblowing provisions are "not to be construed to authorize...the taking of any personnel action against an employee who discloses information to the Congress".<sup>61</sup> The Congress sought to protect its right to receive even "confidential" information from federal employees, without the employee's fear of reprisals:

The provision is intended to make clear that by placing limitations on the kinds of information any employee may publicly disclose without suffering reprisal, there is not intent to limit the information an employee may provide to Congress or to authorize reprisal against an employee for providing information to Congress. For example, 18 U.S.C. 1905 prohibits public disclosure of information involving trade secrets. That statute does not apply to transmittal of such information by an agency to Congress. Section 2302(b)(8) of this act would not protect an employee against reprisal for public disclosure of such statutorily protected information, but it is not to be inferred that an employee is similarly un-protected if such disclosure is made to the appropriate unit of the Congress. Neither title I nor any other provision of the act should be construed as limiting in any way the rights of employees to communicate with or testify before Congress.<sup>62</sup>

In addition to the protections provided by the whistleblower statute, an employee is guaranteed the right to freely petition or furnish information to Congress, a Member of Congress, a committee, or a Member thereof.<sup>63</sup>

**Personnel Actions.** The whistleblower statute protects employees from reprisals in the form of an agency taking or failing to take a "personnel action." This encompasses a broad range of actions by an agency having a negative or adverse impact on the employee. The statute specifically defines the term "personnel action" to include eleven areas of agency activity:

(2) For the purpose of this section--

<sup>59</sup> 5 U.S.C. § 2302(b)(8).

<sup>60</sup> Id.

<sup>61</sup> 5 U.S.C. § 2302(b).

<sup>62</sup> H.Rept. 1717 (Conference Report), 95<sup>th</sup> Cong. 2d Sess. 128, 132 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 2861.

<sup>63</sup> 5 U.S.C. § 7211.

- (A) "personnel action" means--
- (i) an appointment;
  - (ii) a promotion;
  - (iii) an action under chapter 75 of this title or other disciplinary or corrective action;
  - (iv) a detail, transfer, or reassignment;
  - (v) a reinstatement;
  - (vi) a restoration;
  - (vii) a reemployment;
  - (viii) a performance evaluation under chapter 43 of this title;
  - (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;
  - (x) a decision to order psychiatric testing or examination; and
  - (xi) any other significant change in duties, responsibilities, or working conditions;

with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;<sup>64</sup>

The 1989 Act protected employees from only ten personnel practices. According to the House Report:

One reason for the WPA's disappointing record is the plethora of coverage gaps that leave many reprisal victims defenseless. Some are due to erroneous statutory interpretations by hostile implementing agencies and fora. Many, however, are because the ten actions listed in 5 U.S.C. 2302(a)(2)(A) reflect the outer boundaries of whistleblower protection. The list has not kept pace with the creativity of effective harassment tactics.<sup>65</sup>

To remedy the problem, the 1994 whistleblower amendments added the performance of psychiatric testing or examinations to the list of personnel practices that may violate the law.<sup>66</sup> This provision is not applicable to an employee whose case was before the Board prior to the enactment of the 1994 whistleblower amendments.<sup>67</sup>

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<sup>64</sup> 5 U.S.C. § 2302(a)(2)(A).

<sup>65</sup> H.Rept. 769, 103d Cong., 2d Sess. 14 (1994).

<sup>66</sup> 5 U.S.C. § 2302(a)(2)(A).

<sup>67</sup> *Caddell v. Department of Justice*, 96 F.3d 1367 (Fed. Cir. 1996).

The final category of covered personnel actions was intended to embrace significant actions or changes which, in relation to an employee's overall duties, responsibilities, or working conditions, are inconsistent with his or her professional qualifications, training, grade, or rank. The Conference Report provided a detailed discussion of the types of actions which may fall within or be excluded from the final category of personnel actions:

To be covered under this provision a personnel action must be significant, but it need not be expected to result in a reduction in pay or grade. It must also be inconsistent with an employee's salary or grade level. Thus, for example, if an individual is currently employed and assigned duties or responsibilities consistent with the individual's professional training or qualifications for the job, it would constitute a personnel action if the individual were detailed, transferred, or reassigned so that the employee's new overall duties or responsibilities were inconsistent with the individual's professional training or qualifications. Or, if an individual holding decisionmaking responsibilities or supervisory authority found that such responsibilities or authority were reduced so that the employee's responsibilities were inconsistent with his or her salary or grade level, such an action could constitute a personnel action within the meaning of this subsection.

This is not intended to interfere with management's authority to assign individuals in accordance with available work, the priorities of the agency, and the needs of the agency for individuals with particular skills or to establish supervisory relationships. Moreover, it is the overall nature of the individual's responsibilities and duties that is the critical factor. The mere fact that a particular aspect of an individual's job assignment has been changed would not constitute a personnel action, without some showing that there has been a significant impact as described above on the overall nature or quality of his responsibilities or duties.<sup>68</sup>

**Nexus Between a Protected Disclosure and a Personnel Action.** The 1989 Act changed the definition of prohibited reprisals against whistleblowers such that personnel actions taken "because of" protected conduct are prohibited, rather than personnel actions taken "as a reprisal for" protected conduct, as set forth in the original statute. The amendment was made because the phrase, "as a reprisal for" has been interpreted to require a showing of an improper, retaliatory motive, on the part of the acting official.<sup>69</sup> Two disciplinary action cases, *Starrett v. Special Counsel*<sup>70</sup> and *Harvey v. M.S.P.B.*,<sup>71</sup> required employees to show proof of the acting official's state of mind. These cases stand for the proposition that reprisal will not be found even if an agency's actions against an employee were based on factors arising from protected

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<sup>68</sup> H.Rept. 1717 (Conference Report), 95<sup>th</sup> Cong. 2d Sess. 128, 129-130(1978), reprinted in 1978 U.S. Code Cong. & Ad. News 2861.

<sup>69</sup> S.Rept. 413, 100<sup>th</sup> Cong., 2d Sess. 16(1988).

<sup>70</sup> 792 F.2d 1246 (4<sup>th</sup> Cir. 1986).

<sup>71</sup> 802 F.2d 537 (D.C. Cir. 1986).



whistleblowing activities, so long as the agency officials were motivated by valid management reasons and not by any intent to "punish" the employee.<sup>72</sup> Congress's intent under the new definition is that a showing of the official's state of mind is no longer required. "Regardless of the official's motives, personnel actions against employees should quite simply not be based on protected activities such as whistleblowing."<sup>73</sup>

The amendment also expanded the definition contained in the original statute of prohibited reprisal against whistleblowers to include "threats to take or fail to take" a personnel action against a whistleblower.<sup>74</sup> "Mere harassment and threats, without any formally proposed personnel actions, can constitute a prohibited personnel practice under this language," as explained in the joint statement.<sup>75</sup> Testimony before Congress suggested that this definitional change would assist the OSC in providing additional or expedited assistance to whistleblowers.<sup>76</sup>

## Forums Where Whistleblower Protections May Be Raised

There are four general forums or proceedings where whistleblower protections may be raised: (A) in employee appeals to the Merit Systems Protection Board (MSPB) of an agency's adverse action against the employee, known as "Chapter 77" appeals;<sup>77</sup> (B) in actions instituted by the Office of Special Counsel (OSC);<sup>78</sup> (C) in an individual right of action;<sup>79</sup> and (D) in grievances brought by the employee under negotiated grievance procedures.<sup>80</sup> As a result of the 1994 whistleblower amendments, an aggrieved employee affected by a prohibited personnel action is precluded from choosing more than one of the above remedies.<sup>81</sup>

**"Chapter 77" Appeals.** The MSPB is authorized to hear and rule on appeals by employees regarding agency actions affecting the employee and which are appealable to the Board by law, rule, or regulation.<sup>82</sup> Types of agency actions against employees which are appealable to the MSPB and in which an employee may raise the defense of reprisal for whistleblowing as a "prohibited personnel practice" include adverse actions against the employee for "such cause as will promote the efficiency

<sup>72</sup> S.Rept. 413, 100<sup>th</sup> Cong., 2d Sess. 15 (1988).

<sup>73</sup> *Id.* At 16.

<sup>74</sup> *Id.*

<sup>75</sup> 135 Cong. Rec. S2784 (daily ed. March 16, 1989) (joint explanatory statement on S. 20 submitted by Senator Levin during floor debate).

<sup>76</sup> S.Rept. 413, 100<sup>th</sup> Cong., 2d Sess. 16 (1988).

<sup>77</sup> 5 U.S.C. § 7701.

<sup>78</sup> 5 U.S.C. §§ 1211-1215.

<sup>79</sup> 5 U.S.C. § 1221.

<sup>80</sup> 5 U.S.C. § 7121.

<sup>81</sup> 5 U.S.C. § 7121(g)(2).

<sup>82</sup> 5 U.S.C. § 7701, 5 U.S.C. § 1205.

of the service" generally referred to as conduct-based adverse actions;<sup>83</sup> and performance-based adverse actions against employees for "unacceptable performance."<sup>84</sup> In such appeals, an agency's decision and action will not be upheld if the employee "shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title."<sup>85</sup> As provided for in the 1989 Act, if the MSPB finds that an employee or applicant for employment has prevailed in an appeal, the employee or applicant may be provided with interim relief, pending the outcome of any petition of review.<sup>86</sup> Moreover, the Special Counsel may not intervene in a "Chapter 77" appeal without the consent of the individual bringing the appeal.<sup>87</sup>

**Actions by the Office of Special Counsel.** As established by the Whistleblower Protection Act of 1989, the OSC is now an agency independent from the MSPB.<sup>88</sup> Its primary responsibilities, however, have remained essentially the same as set forth in the CSRA. With the goal of protecting employees, former employees, and applicants for employment from prohibited personnel practices, the OSC has the duty to receive allegations of prohibited personnel practices and to investigate such allegations,<sup>89</sup> as well as to conduct an investigation of possible prohibited personnel practices on its own initiative, absent any allegation.<sup>90</sup> The intent of Congress in enacting the OSC provisions has been clearly stated:

There should be no doubt about legislative intent in passing this bill. Individuals should be able to go to the Special Counsel to make a disclosure under section 1213, to complain about a prohibited personnel practice under section 1214, or to allege a violation of another law within the jurisdiction of the Special Counsel under section 1216, without any fear that the information they provide or the investigation they set off will be

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<sup>83</sup> 5 U.S.C. § 7513(a), see 5 U.S.C. § 7513(d) as to appealability under § 7701.

<sup>84</sup> 5 U.S.C. § 4303(a), see 5 U.S.C. § 4303(e) as to appealability to the MSPB under § 7701.

<sup>85</sup> 5 U.S.C. § 7701(c)(2)(B).

<sup>86</sup> 5 U.S.C. § 7701(b)(2)(A).

<sup>87</sup> 5 U.S.C. § 1212(c)(2).

<sup>88</sup> 5 U.S.C. § 1211(a). This section established the Office of Special Counsel, provides that it will be headed by the Special Counsel, and that it shall have a judicially noted official seal. The Senate report states that although the MSPB and the OSC had "separated themselves administratively in 1984," the whistleblower legislation "completes this process by establishing the OSC as an independent agency." S.Rept. 413, 100<sup>th</sup> Cong., 2d Sess. At 18. The Special Counsel, appointed by the President with the advice and consent of the Senate, may only be removed from office for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C.A. § 1211(b).

<sup>89</sup> 5 U.S.C. § 1212(a)(2).

<sup>90</sup> 5 U.S.C. § 1214(a)(5).

used against them. Simply put, the Special Counsel must never act to the detriment of employees who seek the help of the Special Counsel.<sup>91</sup>

The Special Counsel has several avenues available through which to pursue allegations, complaints, and evidences of reprisals for whistleblowing activities, including (1) requiring agency investigations and agency reports concerning actions the agency is planning to take to rectify those matters referred;<sup>92</sup> (2) seeking an order for "corrective action" by the agency before the MSPB;<sup>93</sup> (3) seeking "disciplinary action" against officers and employees who have committed prohibited personnel practices;<sup>94</sup> (4) intervening in any proceedings before the MSPB, except that in cases where an individual has brought an individual right of action (IRA) under Section 1221 or a Chapter 77 appeal, the OSC must first obtain the individual's consent;<sup>95</sup> and (5) seeking a stay from the MSPB for any personnel action pending an investigation.<sup>96</sup>

**(1) Investigations.** As a result of the 1994 whistleblower amendments, once a whistleblowing complaint has been received by the OSC, that office must make the required determination within 240 days.<sup>97</sup> The amendments also require that, within fifteen days of a complaint's receipt, OSC must determine whether there is a substantial likelihood that the information "discloses a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety."<sup>98</sup>

If a positive determination is made and the information was sent to the Special Counsel by an employee, former employee, applicant for employment, or an employee who obtained the information acting within the scope of employment,<sup>99</sup> the Special Counsel must transmit the information to the appropriate agency head and require that the agency head conduct an investigation and submit a written report.<sup>100</sup> The identity of the complaining employee may not be disclosed without such individual's consent, unless the Special Counsel determines that disclosure is necessary to avoid imminent danger to health and safety or an imminent criminal violation.<sup>101</sup> The Special Counsel then reviews the reports as to their completeness and the reasonableness of the

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<sup>91</sup> 135 Cong. Rec. H748 (daily ed. March 21, 1989) (joint explanatory statement on S. 508 submitted by Rep. Sikorski during floor debate).

<sup>92</sup> 5 U.S.C. § 1213(c).

<sup>93</sup> 5 U.S.C. § 1214(b)(2).

<sup>94</sup> 5 U.S.C. § 1215(b).

<sup>95</sup> 5 U.S.C. § 1212(c); *supra* at 16-17, *infra* at 23-24.

<sup>96</sup> 5 U.S.C. § 1212(b)(1).

<sup>97</sup> 5 U.S.C. § 1214(b)(2)(A)(i).

<sup>98</sup> 5 U.S.C. § 1213(b).

<sup>99</sup> 5 U.S.C. § 1213(c)(2).

<sup>100</sup> 5 U.S.C. § 1213(c)(1).

<sup>101</sup> 5 U.S.C. § 1213(h).

findings<sup>102</sup> and submits the reports to Congress, the President, the Comptroller General,<sup>103</sup> and the complainant.<sup>104</sup>

If the Special Counsel does not make a positive determination, however, he or she may only transmit the information to the agency head with the consent of the individual.<sup>105</sup> Further, if the Special Counsel receives the information from some source other than the ones described above, he or she *may* transmit the information to the appropriate agency head who shall inform the Special Counsel of any action taken.<sup>106</sup> In any case evidencing a criminal violation, however, all information is referred to the Attorney General and no report is transmitted to the complainant.<sup>107</sup>

Throughout its investigation, OSC must give notice of the status of the investigation to the individual who brought the allegation. The 1994 amendments changed the period of this notification from 90 to 60 days.<sup>108</sup> In addition, the amendments require that no later than 10 days before the termination of an investigation, a written status report including the proposed findings and legal conclusions must be made to the individual who made the allegation of wrongdoing.<sup>109</sup>

**(2) Corrective Actions.** If in any investigation the Special Counsel determines that there are "reasonable grounds to believe" a prohibited personnel practice exists or has occurred, the Special Counsel must report findings and recommendations, and may include recommendations for corrective action, to the MSPB, the agency involved, the Office of Personnel Management and, optionally, to the President.<sup>110</sup> If the agency does not act to correct the prohibited personnel practice, the Special Counsel may petition the MSPB for corrective action.<sup>111</sup> The MSPB, before rendering its decision, is required to provide an opportunity for oral or written comments by the Special Counsel, the agency involved, the Office of Personnel Management, and written comments by any individual who alleges to be the victim of the prohibited personnel practices.<sup>112</sup>

The whistleblower protection statute makes it easier than had been the case prior to enactment for a complainant to prove retaliation for whistleblowing in a corrective action before the MSPB. The Special Counsel need only prove by a

<sup>102</sup> 5 U.S.C. § 1213(e)(2).

<sup>103</sup> 5 U.S.C. § 1213(e)(3).

<sup>104</sup> 5 U.S.C. § 1213(e)(1).

<sup>105</sup> 5 U.S.C. § 1213(g)(2).

<sup>106</sup> 5 U.S.C. § 1213(g)(1).

<sup>107</sup> 5 U.S.C. § 1213(f).

<sup>108</sup> 5 U.S.C. § 1214(a)(1)(C)(ii).

<sup>109</sup> 5 U.S.C. § 1214(a)(1)(D).

<sup>110</sup> 5 U.S.C. § 1214(b)(2)(B).

<sup>111</sup> 5 U.S.C. § 1214(b)(2)(C).

<sup>112</sup> 5 U.S.C. § 1214(b)(3).

preponderance of the evidence that the disclosure was a "contributing factor" in the personnel action, instead of a "significant factor."<sup>113</sup> The sponsors of the legislation defined a "contributing factor" to mean "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."<sup>114</sup> They also proffered one possible method of proving that an action was a contributing factor: "show that the official taking the action knew (or had constructive knowledge) of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action."<sup>115</sup> This test was specifically designed to overrule the MSPB's adoption of the Supreme Court's approach in *Mt. Healthy School District v. Doyle*.<sup>116</sup> Under *Mt. Healthy*, an employee must prove that the protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in the employer's personnel action in order to overturn that action.<sup>117</sup> In a letter from Attorney General Richard Thornburgh to Senator Carl Levin, incorporated within the 1989 Act's exhaustive legislative history, the Attorney General explained the importance of this change:

By reducing the excessively heavy burden imposed on the employee under current case law, the legislation will send a strong, clear signal to whistleblowers that Congress intends that they be protected from any retaliation related to their whistleblowing and an equally clear message to those who would discourage whistleblowers from coming forward that reprisals of any kind will not be tolerated. Whistleblowing should never be a factor that contributes in any way to an adverse personnel action.<sup>118</sup>

In addition, once the MSPB renders a final order or decision of corrective action, complainants now have the right to judicial review in the U.S. Court of Appeals for the Federal Circuit.<sup>119</sup>

In what is probably the most significant change from the original statute, the 1989 Act increases the standard by which an agency must prove its affirmative defense that it would have taken the personnel action even if the employee had not engaged in protected conduct. Once the complainant's *prima facie* case of reprisal has been established by showing that the whistleblowing was a contributing factor in the personnel action, the government is required to demonstrate by "clear and convincing evidence" that it would have taken the same personnel action even in the absent of

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<sup>113</sup> 5 U.S.C. §1214(b)(4)(i).

<sup>114</sup> 135 Cong. Rec. H747 (daily ed. March 21, 1989) (explanatory statement on Senate Amendment to S. 20 submitted by Representative Sikorski during floor debate).

<sup>115</sup> *Id.* At H749 (daily ed. March 21, 1989) (joint explanatory statement on S. 508 submitted by Representative Sikorski during floor debate).

<sup>116</sup> 429 U.S. 274 (1977).

<sup>117</sup> 135 Cong. Rec. H747 (daily ed. March 21, 1989) (explanatory statement on Senate Amendment to S. 20 submitted by Representative Sikorski during floor debate).

<sup>118</sup> *Id.*

<sup>119</sup> 5 U.S.C. § 1214(c).

such disclosure.<sup>120</sup> Under the original statute, the government's standard of proof was a "preponderance of the evidence." "Clear and convincing evidence," although a lesser standard than the criminal standard of "beyond a reasonable doubt," is greater than "preponderance of the evidence." In their explanatory statement, the sponsors justify imposing the heavier burden by noting that "when it comes to proving the basis for an agency's decision, the agency controls most of the cards--the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases."<sup>121</sup> *Ergo*, the sponsors concluded, it is appropriate to impose this heavier burden of proof.<sup>122</sup>

**(3) *Disciplinary Actions.*** Proceedings for disciplinary action against an officer or employee who commits a prohibited personnel practice may be instituted by the Special Counsel by filing a written complaint with the MSPB.<sup>123</sup> After proceedings before the MSPB or an administrative law judge,<sup>124</sup> if violations are found, the MSPB may impose any of various disciplinary action, including removal, reduction in grade, debarment from federal employment for a period not to exceed five years, suspension, reprimand, or an assessment of civil fines up to \$1,000.<sup>125</sup> In addition, the 1994 whistleblower amendments provide that the agency involved may be held responsible for reasonable attorney's fees.<sup>126</sup> In the case of presidentially appointed and Senate confirmed employees in "confidential, policy-making, policy-determining, or policy-advocating" positions, the complaint and the statement of facts, along with any response from the employee, are to be presented to the President for disposition in lieu of the presentation to the Board.<sup>127</sup> The 1989 Act also provides that the OSC may recommend, to the appropriate federal agency head, disciplinary action against members of the uniformed services or contractor personnel, who have engaged in a prohibited personnel practice against a federal employee.<sup>128</sup>

**(4) *Intervention.*** As a matter of right, the Special Counsel may intervene or otherwise participate in any proceedings before the MSPB, except that in cases where an individual has brought an individual right of action (IRA) under Section 1221 or a Chapter 77 appeal, the OSC must first obtain the individual's consent.<sup>129</sup>

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<sup>120</sup> 5 U.S.C. § 1214(b)(4)(B).

<sup>121</sup> 135 Cong. Rec. H747 (daily ed. March 21, 1989) (explanatory statement on Senate Amendment to S. 20 submitted by Representative Sikorski during floor debate).

<sup>122</sup> *Id.*

<sup>123</sup> 5 U.S.C. § 1215(a)(1).

<sup>124</sup> 5 U.S.C. § 1215(a)(2)(C).

<sup>125</sup> 5 U.S.C. § 1215(a)(3).

<sup>126</sup> 5 U.S.C. § 1204(m)(1).

<sup>127</sup> 5 U.S.C. § 1215(b).

<sup>128</sup> 5 U.S.C. § 1215(c)(1).

<sup>129</sup> 5 U.S.C. § 1212(c).

(5) *Stays*. Upon application by the OSC, a member of the MSPB may "stay" or postpone, for forty-five days, pending an investigation, a personnel action which the Special Counsel has reasonable grounds to believe constitutes a prohibited personnel practice, unless the member determines that a stay would not be appropriate under the circumstances.<sup>130</sup> If no MSPB member acts within three days of the OSC application, by operation of law, the stay becomes effective.<sup>131</sup> After the employing agency has had an opportunity to comment on the appropriateness of extending a stay, the MSPB may extend it.<sup>132</sup> At any time the MSPB may terminate a stay, unless the motion to terminate was made by the MSPB, the OSC, or an agency.<sup>133</sup> In that case, it may only terminate a stay after providing notice and opportunity to comment to the OSC and to the individual on whose behalf the stay was ordered.<sup>134</sup>

### **Individual Right of Action (IRA)**

Prior to enactment of the Whistleblower Protection Act of 1989, when an individual was held subject to a prohibited personnel practice and the action was not appealable to the MSPB, the individual could request that the OSC seek corrective action from the MSPB. If the OSC did not act, however, the individual had no further administrative remedy.

Now, an employee, former employee, or applicant for employment has the independent right to seek review of whistleblower reprisal cases by the MSPB 60 days after the OSC closes an investigation or 120 days after filing a complaint with the OSC.<sup>135</sup> As a result of the IRA provisions, a greater number of employees, including probationers, temporaries, and excepted service, now have a method of appeal to the MSPB for whistleblower reprisals that was not previously available.<sup>136</sup> Retired employees are not barred from instituting this type of appeal.<sup>137</sup> If the employee is the prevailing party *before* the MSPB, based on the finding of a prohibited personnel practice, or if the employee is the prevailing party in an *appeal from* the MSPB, regardless of the basis of the decision, the 1994 whistleblower amendments provide for several remedies. These may include placing the individual, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred, back pay and related benefits, medical costs incurred, travel expenses, or any other reasonable and foreseeable consequential charges.<sup>138</sup> In all cases,

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<sup>130</sup> 5 U.S.C. § 1214(b)(1)(A)(i),(ii).

<sup>131</sup> 5 U.S.C. § 1214(b)(1)(A)(iii).

<sup>132</sup> 5 U.S.C. § 1214(b)(1)(B),(C).

<sup>133</sup> 5 U.S.C. § 1214(b)(1)(D).

<sup>134</sup> *Id.*

<sup>135</sup> 5 U.S.C. § 1221(a).

<sup>136</sup> See 5 U.S.C. § 7701.

<sup>137</sup> 5 U.S.C. § 1221(j).

<sup>138</sup> 5 U.S.C. § 1221(g)(1)(A)(i),(ii).

corrective action includes attorneys' fees.<sup>139</sup> As a result of the 1994 whistleblower amendments, the MSPB findings can be based on circumstantial evidence.<sup>140</sup> Moreover, the Special Counsel may not intervene in an individual right of action without the consent of the individual bringing the appeal.<sup>141</sup>

**Negotiated Grievance Procedures.** The fourth general forum where the defense or claim of reprisal for whistleblowing activities may be raised is a grievance proceeding initiated by an employee pursuant to a grievance procedure which was negotiated through collective bargaining between the employee's agency and the employee union representing employees of the agency.<sup>142</sup> The statutory provisions for grievance procedures note that certain actions which may be pursued either in a grievance proceeding or by other statutory means, such as discrimination complaints referenced under 5 U.S.C. § 2302(b)(1) or appeals of adverse actions for "conduct" or "performance,"<sup>143</sup> may only be pursued in one forum or the other, but not through both.<sup>144</sup> Selection of the negotiated procedure does not, however, prejudice the right of an aggrieved employee to request that the MSPB review the final decision in the case of any personnel action that could have been appealed to the Board; or, where applicable, to request that the Equal Employment Opportunity Commission (EEOC) review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the EEOC.<sup>145</sup>

## Other Protected Activities

The Whistleblower Protection Act of 1989, as amended, also expressly protects employees from prohibited personnel practices taken because they engaged in activities that are often related to whistleblowing, including testifying for or lawfully assisting others exercise any appeal, complaint, or grievance right;<sup>146</sup> cooperating with or disclosing information to an Inspector General or Special Counsel;<sup>147</sup> or for refusing to obey an order that would violate the law.<sup>148</sup> In addition, as was provided in the existing statute, employees are also protected from prohibited personnel practices taken because they exercised any appeal, complaint, or grievance right granted by any law, rule, or regulation.<sup>149</sup>

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<sup>139</sup> 5 U.S.C. § 1221(g)(1)(B).

<sup>140</sup> 5 U.S.C. § 1221(e)(1).

<sup>141</sup> 5 U.S.C. § 1212(c)(2).

<sup>142</sup> 5 U.S.C. § 7121.

<sup>143</sup> 5 U.S.C. §§ 4303 and 7512.

<sup>144</sup> 5 U.S.C. § 7121(d),(e).

<sup>145</sup> 5 U.S.C. § 7121(d).

<sup>146</sup> 5 U.S.C. § 2302(b)(9)(B).

<sup>147</sup> 5 U.S.C. § 2302(b)(9)(C).

<sup>148</sup> 5 U.S.C. § 2302(b)(9)(D).

<sup>149</sup> 5 U.S.C. § 2302(b)(9)(A).



## **General Information Regarding Filing a Complaint with the Office of Special Counsel**

An employee reporting an alleged prohibited activity to the OSC does not need the representation of an attorney and there is no time limit for filing a complaint.<sup>150</sup> Upon request, the OSC will provide complaint forms to employees. The Complaints Examining Unit (CEU) in the OSC headquarters office receives, reviews, and evaluates all complaints. All complaints, disclosures, and requests should be sent to the following address:<sup>151</sup>

Office of Special Counsel  
Complaints Examining Unit  
1730 M Street, N.W.  
Suite 300  
Washington, D.C. 20036-4505

Hotline for  
Whistleblowing Disclosures: (202) or (FTS) 653-9125 or 1 (800) 572-2249

Complaints Examining Unit: (202) or (FTS) 653-7188

Hotline for  
Prohibited Personnel Practices: (800) 872-9855

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<sup>150</sup> U.S. Office of Special Counsel, "The Role of the Office of Special Counsel" (1994).

<sup>151</sup> Id. See also Implementation of the Whistleblower Protection Act, 5 C.F.R. pts. 1800-1850.