

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is centered in the narrow neck of the hourglass. The text is centered within the hourglass.

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Report RL33918

*The Whistleblower Protection Act: An Overview*

L. Paige Whitaker, American Law Division

March 12, 2007

**Abstract.** This report discusses the federal statutory protections contained within the Whistleblower Protection Act (WPA) for federal employees who engage in "whistleblowing," that is, making a disclosure evidencing illegal or improper government activities. The protections of the WPA apply to most federal executive branch employees and become applicable where a "personnel action" is taken "because of" a "protected disclosure" made by a "covered employee."

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# The Whistleblower Protection Act: An Overview

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## Summary

This report discusses the federal statutory protections contained within the Whistleblower Protection Act (WPA) for federal employees who engage in “whistleblowing,” that is, making a disclosure evidencing illegal or improper government activities. The protections of the WPA apply to most federal executive branch employees and become applicable where a “personnel action” is taken “because of” a “protected disclosure” made by a “covered employee.” Generally, whistleblower protections may be raised within four forums or proceedings: (1) employee appeals to the Merit Systems Protection Board of an agency’s adverse action against an employee, known as “Chapter 77” appeals; (2) actions instituted by the Office of Special Counsel; (3) individually maintained rights of action before the Merit Systems Protection Board (known as an individual right of action, or IRA); and (4) grievances brought by the employee under negotiated grievance procedures.

On March 9, 2007, the House Committee on Oversight and Government Reform reported H.R. 985 (110<sup>th</sup> Cong.) H.Rept. 110-42, the Whistleblower Protection Enhancement Act of 2007, which would amend the WPA by providing protections for certain national security, government contractor, and science-based agency whistleblowers, and by enhancing the existing whistleblower protections for all federal employees.

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## Introduction and Background

The Whistleblower Protection Act (WPA) provides statutory protections for federal employees who engage in “whistleblowing,” that is, making a disclosure evidencing illegal or improper government activities. The protections of the WPA apply to most federal executive branch employees and become applicable when a “personnel action” is taken “because of” a “protected disclosure” made by a “covered employee.” Generally, whistleblower protections may be raised within four forums or proceedings: (1) employee appeals to the Merit Systems Protection Board of an agency’s adverse action against an employee, known as “Chapter 77” appeals; (2) actions instituted by the Office of Special Counsel; (3) individually maintained rights of action before the Merit Systems Protection Board (known as an individual right of action, or IRA); and (4) grievances brought by the employee under negotiated grievance procedures.

When Congress first enacted the Whistleblower Protection Act (WPA) in 1989, it stated that the intent of the legislation was 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>1</sup>

The operative statutory protections of the WPA are embodied in its definition of “prohibited personnel practices”:

### § 2302. Prohibited personnel practices

(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;<sup>2</sup>

<sup>1</sup> 5 U.S.C. § 1201 nt.

<sup>2</sup> 5 U.S.C. § 2302(b)(8).

## Essential Elements Triggering Application of the Whistleblower Protection Act (WPA)

In order to trigger the protections of the WPA, a case must contain the following elements: a *personnel action* that was taken *because of a protected disclosure* made by a *covered employee*.<sup>3</sup>

### 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>4</sup> However, those positions that are excepted from the competitive service because of their “confidential, policy-determining, policy-making, or policy-advocating character,”<sup>5</sup> and any positions exempted by the President based on a determination that it is necessary and warranted by conditions of good administration,<sup>6</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>7</sup> the Government Accountability Office, the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Imagery and Mapping Agency,<sup>8</sup> the National Security Agency, and any other executive entity that the President determines primarily conducts foreign intelligence or counter-intelligence activities.<sup>9</sup>

### Protected Disclosures

“[A]ny disclosure of information” that a covered 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>10</sup> Moreover, “any disclosure” made to the Special Counsel or to the

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<sup>3</sup> *Id.*

<sup>4</sup> 5 U.S.C. § 2302(a)(2)(B).

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

<sup>6</sup> 5 U.S.C. § 2302(a)(2)(B)(ii).

<sup>7</sup> 5 U.S.C. § 2105(e).

<sup>8</sup> The Central Imagery Office was exempted from coverage with the passage of the 1994 WPA 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>9</sup> 5 U.S.C. § 2302(a)(2)(C).

<sup>10</sup> 5 U.S.C. § 2302(b)(8)(A).

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 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>11</sup> Agency heads are required to inform their employees of these protections.<sup>12</sup>

## Any Disclosure of Information

The WPA expressly provides that “any disclosure of information” is protected. With enactment of the WPA, Congress amended its statutory predecessor, the Civil Service Reform Act (CSRA).<sup>13</sup> In so doing, it changed the phrase “a disclosure” to “any disclosure,” emphasizing the point that the courts, the OSC, and the MSPB should not erect barriers to disclosures that will limit the necessary flow of information from employees with information of government wrongdoing.<sup>14</sup> In the Committee Report accompanying the WPA legislation, the Senate specifically criticized a 1986 decision by the U.S. Court of Appeals for the Federal Circuit, *Fiorello v. Department of Justice*,<sup>15</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 was for personal reasons.<sup>16</sup> The court reached this conclusion despite a lack of any indication in the Civil Service Reform Act that employee motives were relevant to deciding whether a disclosure is protected.<sup>17</sup>

Following enactment of the WPA in 1989, case law did not reflect the statutory expansion of “a disclosure” to “any disclosure.” This lack of responsiveness by the courts and the MSPB was one factor prompting Congress in 1994 to amend the whistleblower statute. As the House report accompanying the 1994 amendments notes:

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>18</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>19</sup> In addition, for those

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<sup>11</sup> 5 U.S.C. § 2302(b)(8)(B).

<sup>12</sup> 5 U.S.C. § 2302(c).

<sup>13</sup> Civil Service Reform Act of 1978, P.L. 95-454, 92 Stat. 1114.

<sup>14</sup> S.Rept.100-413 (1988) at 13.

<sup>15</sup> 795 F.2d 1544 (Fed. Cir. 1986).

<sup>16</sup> S.Rept. 100-413 (1988) at 13.

<sup>17</sup> *Id.*

<sup>18</sup> H.Rept. 103-769 (1994) at 18.

<sup>19</sup> S.Rept. 100-413 (1988) at 12.

disclosures enumerated under section 2302(b)(8)(A) that 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>20</sup>

## Subject Matter of Disclosure

The statutory language of the whistleblower protections requires the disclosure to (a) 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; and (b) 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.<sup>21</sup>

The WPA limits evidence of mismanagement to only “gross” mismanagement. As explained in the accompanying 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>22</sup>

Moreover, 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 Order in the interest of national defense or the conduct of foreign affairs.<sup>23</sup> Disclosures that 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>24</sup>

## Disclosures to Members of Congress

The WPA expressly provides that the statute is “not to be construed to authorize ... the taking of any personnel action against an employee who discloses information to the Congress.”<sup>25</sup> With this provision of the law, Congress sought to protect its right to receive even “confidential” information from federal employees, without employee 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

<sup>20</sup> *Id.*

<sup>21</sup> 2 U.S.C. §2302(b)(8)(A).

<sup>22</sup> S.Rept. 100-413, *supra* at 12.

<sup>23</sup> 5 U.S.C. § 2302(b)(8).

<sup>24</sup> *Id.*

<sup>25</sup> 5 U.S.C. § 2302(b). *See also* 5 U.S.C. § 7211, providing that an employee is guaranteed the right to freely petition or furnish information to Congress, a Member of Congress, a committee, or a Member thereof.

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>26</sup>

## Personnel Actions

The WPA 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 11 areas of agency activity:

(2) For the purpose of this section—

(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>27</sup>

<sup>26</sup> H.Rept. 95-1717 (Conference Report) (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2861.

<sup>27</sup> 5 U.S.C. § 2302(a)(2)(A).

The final category, (xi), of covered personnel actions was intended to embrace significant actions or changes that, 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 accompanying WPA provided a detailed discussion of the types of actions that 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>28</sup>

## Nexus Between a Protected Disclosure and a Personnel Action

The WPA changed the CSRA's definition of prohibited reprisals against whistleblowers in such a manner that personnel actions taken "because of" protected conduct are prohibited, rather than personnel actions taken "as a reprisal for" protected conduct, as the original statute provided. The amendment was made because the phrase, "as a reprisal for" had been interpreted to require a showing of an improper, retaliatory motive on the part of the acting official.<sup>29</sup> Indeed, two disciplinary action cases decided prior to the enactment of the WPA, *Starrett v. Special Counsel*<sup>30</sup> and *Harvey v. M.S.P.B.*,<sup>31</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 whistleblowing activities, so long as the agency officials were motivated by valid management reasons and not by any intent to "punish" the employee.<sup>32</sup> With the definition of "because of," Congress intended that a showing of the official's state of mind is no longer required. As stated in the Senate report accompanying the WPA legislation, "[r]egardless of the official's motives, personnel actions against employees should quite simply not be based on protected activities such as whistleblowing."<sup>33</sup> The WPA also

<sup>28</sup> H.Rept. 95-1717 (Conference Report)(1978) at 128, 129-130, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2861.

<sup>29</sup> S.Rept. 100-13 (1988).

<sup>30</sup> 792 F.2d 1246 (4<sup>th</sup> Cir. 1986).

<sup>31</sup> 802 F.2d 537 (D.C. Cir. 1986).

<sup>32</sup> S.Rept. 100-413 (1988) at 15.

<sup>33</sup> *Id.* at 16.

expanded the CSRA definition of prohibited reprisal against whistleblowers to include “threats to take or fail to take” a personnel action against a whistleblower.<sup>34</sup>

## Other Protected Activities

The WPA also expressly protects employees from prohibited personnel practices taken because they engaged in activities that are often related to whistleblowing, including testifying for others or lawfully assisting others exercise any appeal, complaint, or grievance right;<sup>35</sup> cooperating with or disclosing information to an Inspector General or Special Counsel;<sup>36</sup> or for refusing to obey an order that would violate the law.<sup>37</sup> In addition, 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>38</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>39</sup> (B) in actions instituted by the Office of Special Counsel (OSC);<sup>40</sup> (C) in individual rights of action;<sup>41</sup> and (D) in grievances brought by the employee under negotiated grievance procedures.<sup>42</sup> As a result of the 1994 WPA amendments, an aggrieved employee affected by a prohibited personnel action is precluded from choosing more than one of the above remedies.<sup>43</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>44</sup> Types of agency actions against employees that 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 of the

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<sup>34</sup> *Id.*

<sup>35</sup> 5 U.S.C. § 2302(b)(9)(B).

<sup>36</sup> 5 U.S.C. § 2302(b)(9)(C).

<sup>37</sup> 5 U.S.C. § 2302(b)(9)(D).

<sup>38</sup> 5 U.S.C. § 2302(b)(9)(A).

<sup>39</sup> 5 U.S.C. § 7701.

<sup>40</sup> 5 U.S.C. §§ 1211-1215.

<sup>41</sup> 5 U.S.C. § 1221.

<sup>42</sup> 5 U.S.C. § 7121.

<sup>43</sup> *See* 5 U.S.C. § 7121(g)(2).

<sup>44</sup> 5 U.S.C. § 7701, 5 U.S.C. § 1205.

service” (generally referred to as conduct-based adverse actions),<sup>45</sup> and performance-based adverse actions against employees for “unacceptable performance.”<sup>46</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>47</sup> 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>48</sup> Moreover, the Special Counsel may not intervene in a “Chapter 77” appeal without the consent of the individual bringing the appeal.<sup>49</sup>

## Actions by the Office of Special Counsel (OSC)

The WPA established the OSC as an agency independent from the MSPB.<sup>50</sup> Its primary responsibilities, however, have remained essentially the same as set forth in its statutory predecessor, 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>51</sup> as well as to conduct an investigation of possible prohibited personnel practices on its own initiative, absent any allegation.<sup>52</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>53</sup> (2) seeking an order for “corrective action” by the agency before the MSPB;<sup>54</sup> (3) seeking “disciplinary action” against officers and employees who have committed prohibited personnel practices;<sup>55</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>56</sup> and (5) seeking a stay from the MSPB for any personnel action pending an investigation.<sup>57</sup>

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<sup>45</sup> 5 U.S.C. § 7513(a). *See* 5 U.S.C. § 7513(d) as to appealability under § 7701.

<sup>46</sup> 5 U.S.C. § 4303(a). *See* 5 U.S.C. § 4303(e) as to appealability to the MSPB under § 7701.

<sup>47</sup> 5 U.S.C. § 7701(c)(2)(B).

<sup>48</sup> 5 U.S.C. § 7701(b)(2)(A).

<sup>49</sup> 5 U.S.C. § 1212(c)(2).

<sup>50</sup> 5 U.S.C. § 1211(a). This section established the Office of Special Counsel (OSC), and provided that it will be headed by the Special Counsel and 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. 100-413 at 18. Moreover, the statute provides that 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. § 1211(b).

<sup>51</sup> 5 U.S.C. § 1212(a)(2).

<sup>52</sup> 5 U.S.C. § 1214(a)(5).

<sup>53</sup> 5 U.S.C. § 1213(c).

<sup>54</sup> 5 U.S.C. § 1214(b)(2).

<sup>55</sup> 5 U.S.C. § 1215(b).

<sup>56</sup> 5 U.S.C. § 1212(c).

<sup>57</sup> 5 U.S.C. § 1212(b)(1).

## Investigations<sup>58</sup>

Within 240 days of receipt of a complaint, the OSC must make a determination as to whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.<sup>59</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>60</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>61</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>62</sup> The Special Counsel then reviews the reports as to their completeness and the reasonableness of the findings<sup>63</sup> and submits the reports to Congress, the President, the Comptroller General,<sup>64</sup> and the complainant.<sup>65</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>66</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>67</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>68</sup>

Throughout its investigation, the OSC must give notice of the status of the investigation to the individual who brought the allegation. The 1994 WPA amendments changed the period of this notification from 90 to 60 days.<sup>69</sup> In addition, 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>70</sup>

## 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

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<sup>58</sup> In addition to investigating whether prohibited personnel actions have been taken because of protected whistleblowing disclosures, the WPA also charges the OSC with investigating whether there is a "substantial likelihood" that whistleblowing disclosures evidence violations of a law, rule or regulation. *See* 5 U.S.C. §1213(b).

<sup>59</sup> 5 U.S.C. § 1214(b)(2)(A)(i).

<sup>60</sup> 5 U.S.C. § 1213(c)(2).

<sup>61</sup> 5 U.S.C. § 1213(c)(1).

<sup>62</sup> 5 U.S.C. § 1213(h).

<sup>63</sup> 5 U.S.C. § 1213(e)(2).

<sup>64</sup> 5 U.S.C. § 1213(e)(3).

<sup>65</sup> 5 U.S.C. § 1213(e)(1).

<sup>66</sup> 5 U.S.C. § 1213(g)(2).

<sup>67</sup> 5 U.S.C. § 1213(g)(1).

<sup>68</sup> 5 U.S.C. § 1213(f).

<sup>69</sup> 5 U.S.C. § 1214(a)(1)(C)(ii).

<sup>70</sup> 5 U.S.C. § 1214(a)(1)(D).

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>71</sup> If the agency does not act to correct the prohibited personnel practice, the Special Counsel may petition the MSPB for corrective action.<sup>72</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 and the Office of Personnel Management, and for written comments by any individual who alleges to be the victim of the prohibited personnel practices.<sup>73</sup>

The WPA made it easier for a complainant to prove retaliation for whistleblowing in a corrective action before the MSPB. The Special Counsel need only prove by a preponderance of the evidence that the disclosure was a “contributing factor” in the personnel action, instead of a “significant factor.”<sup>74</sup> In addition, once the MSPB renders a final order or decision of corrective action, complainants have the right to judicial review in the U.S. Court of Appeals for the Federal Circuit.<sup>75</sup>

In what is probably the most significant change from its statutory predecessor, the CSRA, the WPA increased 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 such disclosure.<sup>76</sup> Under the CSRA, 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.”

## 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>77</sup> After proceedings before the MSPB or an administrative law judge,<sup>78</sup> if violations are found, the MSPB may impose any of various disciplinary actions, 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>79</sup> In addition, the agency involved may be held responsible for reasonable attorney’s fees.<sup>80</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

<sup>71</sup> 5 U.S.C. § 1214(b)(2)(B).

<sup>72</sup> 5 U.S.C. § 1214(b)(2)(C).

<sup>73</sup> 5 U.S.C. § 1214(b)(3).

<sup>74</sup> 5 U.S.C. § 1214(b)(4)(i).

<sup>75</sup> 5 U.S.C. § 1214(c).

<sup>76</sup> 5 U.S.C. § 1214(b)(4)(B).

<sup>77</sup> 5 U.S.C. § 1215(a)(1).

<sup>78</sup> 5 U.S.C. § 1215(a)(2)(C).

<sup>79</sup> 5 U.S.C. § 1215(a)(3).

<sup>80</sup> 5 U.S.C. § 1204(m)(1).

employee, are to be presented to the President for disposition in lieu of the presentation to the Board.<sup>81</sup> 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>82</sup>

## **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>83</sup>

## **Stays**

Upon application by the OSC, a member of the MSPB may “stay” or postpone, for 45 days, pending an investigation, a personnel action that 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>84</sup> If no MSPB member acts within three days of the OSC application, the stay becomes effective.<sup>85</sup> After the employing agency has had an opportunity to comment on the appropriateness of extending a stay, the MSPB may extend it.<sup>86</sup> A stay may be terminated by the MSPB at any time, except that a stay may not be terminated by the MSPB on its own motion or on the motion of an agency, unless notice and opportunity for oral or written comments are first provided to the Special Counsel and the individual on whose behalf the stay was ordered; or on a motion of the Special Counsel, unless notice and opportunity for oral or written comments are first provided to the individual on whose behalf the stay was ordered.<sup>87</sup>

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

The WPA provides that 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>88</sup> As a result of the IRA statutory provisions, a greater number of employees, including probationers, temporaries, and excepted service, have a method of appeal to the MSPB for whistleblower reprisals that was not previously available under the CSRA.<sup>89</sup> In addition, retired employees are not barred from instituting this type of appeal.<sup>90</sup> If the employee is the prevailing party before the MSPB, based

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<sup>81</sup> 5 U.S.C. § 1215(b).

<sup>82</sup> 5 U.S.C. § 1215(c)(1).

<sup>83</sup> 5 U.S.C. § 1212(c).

<sup>84</sup> 5 U.S.C. § 1214(b)(1)(A)(i),(ii).

<sup>85</sup> 5 U.S.C. § 1214(b)(1)(A)(iii).

<sup>86</sup> 5 U.S.C. § 1214(b)(1)(B),(C).

<sup>87</sup> 5 U.S.C. § 1214(b)(1)(D).

<sup>88</sup> 5 U.S.C. § 1221(a).

<sup>89</sup> *See* 5 U.S.C. § 7701.

<sup>90</sup> 5 U.S.C. § 1221(j).

on the finding of a prohibited personnel practice, or if the employee is the prevailing party in an appeal to the MSPB, regardless of the basis of the decision, the WPA provides 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, awarding back pay and related benefits, recompensing medical costs incurred, travel expenses, or any other reasonable and foreseeable consequential charges.<sup>91</sup> In all cases, corrective action includes awarding attorneys' fees.<sup>92</sup> As a result of the 1994 WPA amendments, the MSPB findings can be based on circumstantial evidence.<sup>93</sup> Moreover, the Special Counsel may not intervene in an individual right of action without the consent of the individual bringing the appeal.<sup>94</sup>

## Negotiated Grievance Procedures

Beyond the statutory provisions of the WPA, 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 that was negotiated through collective bargaining between the employee's agency and the employee union representing employees of the agency.<sup>95</sup> The federal statutory provisions for grievance procedures note that certain actions that 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>96</sup> may only be pursued in one forum or the other, but not through both.<sup>97</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>98</sup>

## Summary of the Whistleblower Protection Enhancement Act of 2007 (H.R. 985, 110<sup>th</sup> Congress)

On February 12, 2007, Representatives Waxman, Platts, Van Hollen, and T. Davis introduced H.R. 985 (110<sup>th</sup> Cong.), the Whistleblower Protection Enhancement Act of 2007, which on March 9, the House Committee on Oversight and Government Reform reported with amendments (H.Rept. 110-42), and placed on the legislative calendar.

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<sup>91</sup> 5 U.S.C. § 1221(g)(1)(A)(i),(ii).

<sup>92</sup> 5 U.S.C. § 1221(g)(1)(B).

<sup>93</sup> 5 U.S.C. § 1221(e)(1).

<sup>94</sup> 5 U.S.C. § 1212(c)(2).

<sup>95</sup> 5 U.S.C. § 7121.

<sup>96</sup> 5 U.S.C. §§ 4303 and 7512.

<sup>97</sup> 5 U.S.C. § 7121(d),(e).

<sup>98</sup> 5 U.S.C. § 7121(d).

H.R. 985 would amend the WPA to extend whistleblower protections to federal employees who specialize in national security issues. While current law expressly exempts employees of certain agencies relating to national security, Section 10 of the bill extends whistleblower protections to employees of the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, and the National Reconnaissance Office and “any other Executive agency, or element or unit thereof, determined by the President ... to have as its principal function the conduct of foreign intelligence or counterintelligence activities.” Likewise, Section 11 of the bill would extend whistleblower protections to employees of companies with government contracts.

Current law defines “disclosures” covered by the WPA to include information evidencing an abuse of authority. Section 13 of the bill would extend WPA protections to employees of science-based agencies by providing that “abuse of authority” includes “any action that compromises the validity or accuracy of federally funded research and analysis” and “the dissemination of false or misleading scientific, medical, or technical information.”

Section 3 of the bill would clarify that “any” disclosure regarding waste, fraud, or abuse means that the WPA applies to such disclosures “without restriction as to time, place, form, motive, context, or prior disclosure” and includes formal and informal communication. Section 4 of the bill would provide that an employee covered by the WPA can rebut the presumption that a federal official performed his or her duties in accordance with the law by providing substantial evidence to the contrary. In addition, Section 9 of the bill would provide that such covered employees may bring an action for *de novo* review in the appropriate U.S. district court if the Merit Systems Protection Board (MSPB) does not take action on their claims within 180 days.

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