

Whistleblower Protections Under the Whistleblower Protection Act

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This Practice Note describes the Whistleblower Protection Act of 1989 (WPA), as amended by the Whistleblower Protection Enhancement Act of 2012 (WPEA). It discusses whistleblower protections for federal employees under the WPA, including protected disclosures, covered federal employers, elements of the two classes of retaliation claims, the roles of the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB) in adjudicating whistleblower retaliation claims, and remedies available under the WPA. This Note covers federal law and applies only to federal employees.

In the wake of the Watergate scandal, well-publicized allegations of retaliation by federal agencies against employees blowing the whistle on wasteful defense spending and revelations of partisan political coercion in the federal government, the Civil Service Reform Act (CSRA) significantly reformed the federal civil service system. The CSRA's goals included providing a mechanism for reviewing agencies' adverse employment actions and protecting federal employees blowing the whistle on government wrongdoing. To achieve these goals, Congress enacted the Whistleblower Protection Act (WPA), which made the Office of Special Counsel (OSC) an independent agency within the executive branch and clarified that OSC's primary role is to protect employees, especially whistleblowers, from prohibited personnel practices (PPPs). The WPA's whistleblower protections were expanded and strengthened considerably by the Whistleblower Protection Enhancement Act (WPEA), which overhauled the WPA in many respects, from clarifying the scope of protected conduct to bolstering the available remedies.

This Note discusses the WPA's protections for federal employees blowing the whistle on government wrongdoing. In particular, it:

- Discusses conduct that is protected under the WPA.
- Explains the scope of coverage of the WPA's principal anti-retaliation provisions.
- Describes the adjudicative process for WPA claims.
- Details the remedies available to employees who have suffered retaliation.

For more information about other civil service protections for federal employees, see Practice Note, Civil Service Protections for Federal Employees: Overview ([1-576-7425](#)).

OVERVIEW OF THE WPA

The WPA prohibits retaliation against federal employees, applicants, or former employees for:

- Disclosing the following types of government wrongdoing:
 - a violation of any law, rule, or regulation;
 - gross mismanagement;
 - gross waste of funds;
 - abuse of authority; or
 - a substantial or specific danger to public health or safety. (5 U.S.C. § 2302(b)(8) and see Protected Disclosures Under Section 2302(b)(8).)
- Exercising an employee's right to blow the whistle, or to file, assist, or participate in a complaint, appeal, or grievance (5 U.S.C. § 2302(b)(9) and see Protected Activity Under Section 2302(b)(9)).

An employee who believes a federal employer has unlawfully retaliated against the employee has several options. The employee may:

- File a complaint with OSC. If OSC finds the employee suffered retaliation, it reports its findings to the Merit Systems Protection Board (MSPB or Board) and can petition the Board on behalf of the employee to correct the agency's retaliatory action (see OSC Complaints of Whistleblower or Other Retaliation).

- File an individual right of action (IRA) appeal before the MSPB, if OSC finds no wrongdoing or retaliation, within 60 days of OSC's determination. The employee can appeal the Board's decision to the Federal Circuit. The scope of protected disclosures under the WPA was broadened with the enactment of the WPEA in 2012 (see IRA Appeals).
- Appeal a retaliatory personnel action directly to the MSPB if the employee is eligible to do so and the retaliatory action is one of the personnel actions directly appealable to the MSPB (see Otherwise Appealable Actions).

SCOPE OF WPA COVERAGE

Most federal employees are covered by the WPA (5 U.S.C. § 2302(a)(2)(C)). Some governmental entities are partially covered by the WPA, while others, such as law enforcement and intelligence agencies, are statutorily exempted.

EMPLOYERS THAT ARE PARTIALLY COVERED

The WPA only partially protects employees of some federal employers. Employees of government corporations are protected from retaliation for:

- Disclosing government wrongdoing described in Section 2302(b)(8).
 - Exercising the employee's own whistleblowing rights (5 U.S.C. § 2302(b)(9)(A)(i)).
 - Testifying or assisting another individual in filing an appeal, complaint, or grievance (5 U.S.C. § 2302(b)(9)(B)).
 - Cooperating with or disclosing information to an agency Inspector General (IG) or OSC (5 U.S.C. § 2302(b)(9)(C)).
 - Refusing to obey an order that would require the individual to violate a law (5 U.S.C. § 2302(b)(9)(D)).
- (5 U.S.C. § 2302(a)(2)(C)(i).)

Government corporation employees have no right to file an IRA appeal for retaliation after exercising complaint, appeal, or grievance rights that are not related to whistleblowing (5 U.S.C. § 2302(a)(2)(C)(i)).

EMPLOYERS THAT ARE NOT COVERED

The WPA does not cover the following federal employers:

- US Postal Service (39 U.S.C. § 410). The Postal Service's Special Inquiries Division investigates claims of whistleblower reprisal under a Postal Service policy that applies standards for protected activity and establishing a violation similar to the WPA (US Postal Service, Office of Inspector General, Special Inquiries Division).
- Postal Regulatory Commission. Employees of the Postal Regulatory Commission are excluded from the definition of "employee" under 5 U.S.C. § 2105(e).
- Contract employees. Employees of contractors of the Department of Defense and NASA are protected under 10 U.S.C. § 2409. Employees of contractors of other government agencies are protected under 41 U.S.C. § 4712.
- State and local government. Most states have adopted whistleblower protection statutes that cover public sector employees.
- Non-appropriated funds (NAFs). Under 10 U.S.C. § 1587, NAF employees are protected from reprisal for whistleblowing under procedures adopted by the Secretary of Defense.

- National Guard. The MSPB lacks the authority to enforce an order against the National Guard (*Singleton v. Merit Sys. Prot. Bd.*, 244 F.3d 1331 (Fed. Cir. 2001); see also *McVay v. Ark. Nat'l Guard*, 80 M.S.P.R. 120, 124-25 (1998)).
- Government Accountability Office (GAO). The GAO is excluded from the WPA's definition of "agency" (5 U.S.C. § 2302(a)(2)(C)(iii)).
- Uniformed Military/Commissioned Corps of HHS or NOAA. Members of the armed forces are covered under the Military Whistleblower Protection Act (MWPA) (10 U.S.C. § 1034). The MWPA also covers commissioned officers of HHS's Public Health Service (42 U.S.C. § 213a(a)(18)). However, workers in the NOAA Corps remain uncovered.
- Veterans Canteen Service. The MSPB lacks jurisdiction over positions in the Veterans Canteen Service excluded from the appointment provisions of Title 5 (*Chavez v. Dep't of Veterans Affairs*, 65 M.S.P.R. 590, 593-94 (1994)).
- Intelligence agencies. Retaliation against whistleblowers in the intelligence community is prohibited and intelligence agencies must establish a review process for claims of retaliation consistent with the procedures in the WPA under an October 10, 2012 Presidential Policy Directive, but the agencies listed below are excluded from the WPA's definition of "agency":
 - the Federal Bureau of Investigation;
 - the Central Intelligence Agency;
 - the Defense Intelligence Agency;
 - the National Geospatial-Intelligence Agency;
 - the National Security Agency;
 - the Office of the Director of National Intelligence; and
 - the National Reconnaissance Office.
 (5 U.S.C. § 2302(a)(2)(C)(ii).)

The WPA applies only to federal employers. Private employers may be covered by other laws, including:

- The Sarbanes-Oxley Act and Dodd-Frank Wall Street Reform and Consumer Protection Act (see Practice Note, Whistleblower Protections Under Sarbanes-Oxley and the Dodd-Frank Act ([7-501-7799](#))).
- The Occupational Safety and Health Act (OSH Act) and other whistleblower statutes enforced by the Department of Labor (DOL) Occupational Safety and Health Administration (OSHA) (see Practice Note, Whistleblower Complaints Under the Occupational Safety and Health Act ([8-612-0573](#))).
- Applicable state whistleblower protection laws protecting private sector employees (see Practice Note, State Whistleblower Laws: Beyond Federal Protections ([5-611-7505](#))).
- State tort actions for wrongful termination in violation of public policy or other protections against retaliation (see Anti-Discrimination State Q&A Tool: Question 4).

PROVING A WHISTLEBLOWER RETALIATION CLAIM UNDER WPA SECTION 2303(B)(8)

A claim for whistleblower retaliation under Section 2303(b)(8) has four elements, which the employee must prove by a preponderance of the evidence:

- A protected disclosure (see Protected Disclosures Under Section 2302(b)(8)).
- A personnel action taken, threatened, or not taken after the protected disclosure (see Personnel Actions Under Section 2302(b)(8)).
- The accused officials knew of the protected disclosure (see Knowledge of the Protected Disclosure Under Section 2302(b)(8)).
- A causal connection between the disclosure and the personnel action (see Causation Under Section 2302(b)(8)).

PROTECTED DISCLOSURES UNDER SECTION 2302(B)(8)

A federal employee or applicant makes a protected disclosure if the individual reasonably believes the disclosed conduct constitutes any of the following:

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

(5 U.S.C. § 2302(b)(8)(A).)

An employee's general philosophical differences or disagreements with agency decisions or actions are not protected unless there is a reasonable belief that these differences or disagreements show one of the above categories of wrongdoing (*Webb v. Dep't of the Interior*, 122 M.S.P.R. 248, 252 (2015)).

Reasonable Belief

An employee need not prove that the matter disclosed actually was unlawful, gross mismanagement, or a gross waste of funds, abuse of power, or a danger to public health or safety. The employee must instead show that a person standing in the employee's shoes may reasonably believe, given the information available to the employee, that the disclosed information evidences one of the statutory types of wrongdoing (*Webb*, 122 M.S.P.R. at 251). The reasonableness inquiry focuses on the perception of the employee, not the audience.

No Specific Channel for Whistleblowing

An employee may disclose information to any person, except where the information is required by law or presidential order to be kept confidential. There is no requirement that an employee proceed incrementally through the employee's chain of command.

The WPA also protects any disclosure that meets the other statutory requirements. Overturning prior case law, the WPEA clarified that a whistleblower disclosure is protected:

- Even when it is made to the supervisor or person who participated in the disclosed wrongdoing.
- Even if it reveals information that was previously disclosed.
- No matter what the employee's motive is for making the disclosure.
- Whether the employee was on duty or off duty when making the disclosure.
- Regardless of the amount of time that has passed since the occurrence of the events described in the disclosure.

- Even if the disclosure is made during the normal course of the employee's duties.

(5 U.S.C. § 2302(f).)

Perceived Whistleblowing

The WPA protects an individual perceived as a whistleblower, regardless of whether the individual actually made a disclosure (*King v. Dep't of the Army*, 116 M.S.P.R. 689, 694 (2011)). In analyzing perceived whistleblower cases, the MSPB focuses on whether the agency officials involved in the retaliatory personnel actions believed that the employee made or intended to make a disclosure evidencing the type of wrongdoing listed under Section 2302(b)(8). Whether the employee actually made a protected disclosure is irrelevant. The employee prevails if the agency perceived the employee as a whistleblower. (*King*, 116 M.S.P.R. at 695-96.)

Exceptions to Protected Disclosures

Unless made to OSC or an agency IG, a disclosure is not protected under § 2302(b)(8) where either of the following is true:

- Disclosing the information is specifically prohibited by law.
- An executive order requires the information to be kept secret in the interest of national defense or the conduct of foreign affairs.

(5 U.S.C. § 2302(b)(8)(A).)

Only information specifically prohibited from disclosure by a statute falls within the first exception. An agency rule or regulation is not a "law" under Section 2302(b)(8)(A). (*Dep't of Homeland Sec. v. MacLean*, 135 S.Ct. 913, 921 (2015).)

For a law to specifically prohibit a disclosure, it must also do one or more of the following:

- Leave no discretion on whether the matter must not be disclosed.
- Specify particular criteria for withholding information from the public or refer to particular types of matters to withhold from the public.
- Delineate particular types of matters that must not be disclosed.

(*MacLean*, 135 S. Ct. at 918; see also Legal Update, Exception to Federal Whistleblower Statute Applies Only to Acts Prohibited by Statute, Not Regulation ([0-597-2515](#))).

However, the WPA does not protect disclosures that solely involve wrongdoing by private entities (*Aviles v. Merit Sys. Prot. Bd.*, 799 F.3d 457, 464-66 (5th Cir. 2015)). In *Aviles*, a former Internal Revenue Service (IRS) employee claimed the IRA removed him because he revealed an alleged tax fraud perpetrated by a private corporation and claimed IRS officials covered up the fraud. The MSPB dismissed his whistleblower retaliation claim because his:

- Disclosures about alleged fraud by the private entity were not protected under the WPA.
- Allegations about IRS officials' involvement were too speculative to support his retaliation claim.

(*Aviles*, 799 F.3d at 466-67.)

The Fifth Circuit affirmed the MSPB's decision.

PERSONNEL ACTIONS UNDER SECTION 2302(B)(8)

The WPA covers a broad interpretation of “personnel action,” including the following types of actions:

- An appointment.
- A promotion.
- An action under Chapter 75 of Title 5 or other disciplinary or corrective action.
- A detail, transfer, or reassignment.
- A reinstatement.
- A restoration.
- A reemployment.
- A performance evaluation under Chapter 43 of Title 5 or under Title 38.
- A decision concerning pay, benefits, or awards.
- A decision concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action.
- A decision to order psychiatric testing or examination.
- The implementation or enforcement of any nondisclosure policy, form, or agreement.
- Any other significant change in duties, responsibilities, or working conditions.

(5 U.S.C. § 2302(a)(2)(A).)

An action recorded on a Standard Form 50 Notification of Personnel Action (SF-50) is generally sufficient to prove a personnel action.

Appointments

An appointment to a federal position, whether it is intermittent, permanent, seasonal, or temporary, is a personnel action. The failure to renew an appointment or reappoint an individual to a position is also a personnel action.

There are two elements of an appointment:

- An authorized appointing officer, who takes an action that reveals awareness that the officer is making an appointment in the US civil service.
- Action by the appointee denoting acceptance.

(*Watts v. Office of Pers. Mgmt.*, 814 F.2d 1576, 1580 (Fed. Cir. 1987); *Robinson v. U.S. Postal Serv.*, 92 M.S.P.R. 37, 40 (2002); *Brock v. Dep’t of the Navy*, 49 M.S.P.R. 564, 567 (1991).)

The best evidence of an appointment is an SF-50 or SF-52 (Request for Personnel Action).

Disciplinary Actions

Disciplinary actions include:

- A demotion.
- A reduction in pay.
- A reduction in grade.
- A furlough of up to 30 days.
- Removal from federal employment.
- A suspension.

- Placement on administrative leave.
- A letter of warning.
- A reduction in force (RIF).
- A reprimand.
- An oral reprimand.

Although an oral reprimand is a personnel action, the MSPB may dismiss an appeal based on an oral reprimand because there is no meaningful corrective action available.

A constructive demotion, where an employee is effectively reduced to performing duties associated with a lower position, is also a personnel action.

Failures and Threats To Take a Personnel Action

The failure or threat to take any of the above personnel actions is also a personnel action. For example, a failure to appoint can be established by an employer’s:

- Failure to extend or renew a temporary appointment (see *O’Brien v. Office of the Indep. Counsel*, 79 M.S.P.R. 406, 410–11 (1998)).
- Failure to reinstate an employee after the employee resigns (see *Holloway v. Dep’t of the Interior*, 82 M.S.P.R. 435, 440 n.4 (1999)).
- Not selecting an individual for a position (see *Wojcicki v. Dep’t of the Air Force*, 72 M.S.P.R. 628, 635 (1996)).

A failure to promote can be established by an employer:

- Not selecting an individual for promotion (*Monasteri v. Merit Sys. Prot. Bd.*, 232 F.3d 1376, 1380 (Fed. Cir. 2000)).
- Denying an employee a promotion by cancelling the vacancy announcement and selecting no one for the promotion (*Ruggieri v. Merit Sys. Prot. Bd.*, 454 F.3d 1323, 1325 (Fed. Cir. 2006)).
- Failing to promote an individual non-competitively, such as by reclassification of the position (*Briley v. Nat’l Archives & Records Admin.*, 71 M.S.P.R. 211, 222 (1996)).

However, failing to upgrade an employee’s prior position after the employee was reassigned may not be a constructive demotion (see *Tackett v. Dep’t of Agric.*, 89 M.S.P.R. 348 (2001)).

The MSPB interprets “threats” broadly and has found that the following actions are threats to take disciplinary action:

- A memorandum of warning (see *Campo v. Dep’t of the Army*, 93 M.S.P.R. 1, 3 ¶ 5 (2002)).
- A proposal to take a Chapter 75 or other disciplinary or corrective action (see *Campo*, 93 M.S.P.R. at 3-4 ¶ 6-8).
- A performance improvement plan (PIP) (see *Czarkowski v. Dep’t of the Navy*, 87 M.S.P.R. 107 (2000)).
- A record of an agency’s investigation into an employee’s purported questionable conduct for which the employee faced potential disciplinary action (see *Gergick v. Gen. Servs. Admin.*, 43 M.S.P.R. 651 (1990)).

Employment Actions that Are Not Personnel Actions

The MSPB has determined that certain actions are not personnel actions for the purposes of whistleblower protection under the WPA. These include:

- An arrest by an agency police officer (*Weber v. Gen. Serv. Admin.*, 54 M.S.P.R. 444, 446 (1992)).
- Comments directing an employee to “find another job” (*Shivae v. Dep’t of the Navy*, 74 M.S.P.R. 383, 387 (1997)).
- Denying or revoking an employee’s security clearance (*Dep’t of the Navy v. Egan*, 484 U.S. 518, 526-32 (1988)).

Merely opening an investigation into an employee’s conduct is not a personnel action. However, employees can seek compensation for defending against retaliatory investigations. An employee may recover fees, costs, or damages reasonably incurred due to an agency investigation of the employee if the agency began, expanded, or extended the investigation to retaliate against the employee for the disclosure or protected activity. (5 U.S.C. § 1214(h).)

KNOWLEDGE OF THE PROTECTED DISCLOSURE UNDER SECTION 2302(B)(8)

An employee must prove that the agency officials accused of retaliation knew about the individual’s protected disclosures. An employee can show either actual or constructive knowledge.

Actual Knowledge

An employee may prove actual knowledge using direct or circumstantial evidence (*Bonggat v. Dep’t of the Navy*, 56 M.S.P.R. 402, 407 (1993)). However, there are no reported cases where an employee established actual knowledge from circumstantial evidence alone.

The Board has found actual knowledge from both:

- Unequivocal testimony of actual knowledge.
- Equivocal denial of actual knowledge.

(See *Jones v. Dep’t of the Interior*, 74 M.S.P.R. 666, 674 (1997).)

Constructive Knowledge

An employee can establish constructive knowledge when an official with actual knowledge influenced the deciding official (see *McClellan v. Dep’t of Defense*, 53 M.S.P.R. 139 (1994)).

CAUSATION UNDER SECTION 2302(B)(8)

An employee must show a causal connection between the protected activity and the retaliatory personnel action. The MSPB interprets causation broadly and considers any factors that tend to affect the outcome of the personnel action. An employee may show causation using either:

- The knowledge-timing test.
- Circumstantial evidence of causation.

Knowledge-Timing Test

An employee can show causation using the knowledge-timing test by proving both:

- The official taking the personnel action knew of the disclosure.
- The personnel action occurred within a period of time where a reasonable person may conclude that the disclosure was a contributing factor in the personnel action.

(5 U.S.C. § 1221(e)(1).)

Once the employee demonstrates the official’s knowledge and timing, the employee has established a prima facie case of retaliation. It is improper for the administrative judge (AJ) to consider further evidence on the issue of causation (*Carey v. Dep’t of Veterans Affairs*, 93 M.S.P.R. 676, 681–82 (2003)).

Circumstantial Evidence of Causation

If the employee fails to demonstrate both knowledge and timing, the MSPB considers available circumstantial evidence to determine whether any other factor potentially affected the outcome of the personnel action (see *Jones v. Dep’t of Interior*, 74 M.S.P.R. 666, 678 (1997) (failing to find contributing factor); see also *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1143 (Fed. Cir. 1993)).

PROVING RETALIATION FOR EXERCISING WHISTLEBLOWING, COMPLAINT, APPEAL, OR GRIEVANCE RIGHTS UNDER WPA SECTION 2302(B)(9)

To prove retaliation for exercising whistleblowing, complaint, appeal, or grievance rights under Section 2303(b)(9), an employee must prove, by a preponderance of the evidence, the following four elements:

- The employee (or someone identified with the employee) engaged in a protected activity (see Protected Activity Under Section 2302(b)(9)).
- The agency took, failed to take, or threatened to take a personnel action (see Personnel Actions Under Section 2302(b)(9)).
- The official responsible for the personnel action had knowledge of the employee’s protected activity (see Knowledge Under Section 2302(b)(9)).
- There was a causal connection (or nexus) between the employee’s protected activity and the personnel action (see Causation Under Section 2302(b)(9)).

The WPEA split Section 2302(b)(9)(A) claims into two subcategories:

- Section 2302(b)(9)(A)(i). This subsection involves the exercise of appeal, complaint, or grievance rights that deal with remedying a violation of Section 2302(b)(8).
- Section 2302(b)(9)(A)(ii). This subsection involves the exercise of appeal, complaint, or grievance rights that do not deal with remedying a violation of Section 2302(b)(8).

The elements for proving these two subcategories are the same, except that the standard for proving causation differs depending on what type of case it is (see Causation Under Section 2302(b)(9)). Appeal rights also differ between the subcategories (see IRA Appeals).

PROTECTED ACTIVITY UNDER SECTION 2302(B)(9)

The WPA Section (b)(9)(A) protects an employee’s exercise of “any appeal, complaint, or grievance right granted by law, rule, or regulation,” including complaints filed in a formal adjudicative proceeding (*Owen v. Dep’t of the Air Force*, 63 M.S.P.R. 621, 627 (1994)). The MSPB has interpreted “any appeal right” to include:

- Filing EEO complaints and appeals (see, for example, *Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679 (Fed. Cir. 1992)).
- Filing grievances (see, for example, *Serrao v. Merit Sys. Prot. Bd.*, 95 F.3d 1569, 1574-75 (Fed. Cir. 1996)).

- MSPB appeals (see, for example, *Luecht v. Dep't of the Navy*, 87 M.S.P.R. 297, 302 (2000)).
- Unfair labor practice (ULP) charges (see, for example, *Grant v. Dep't of the Air Force*, 61 M.S.P.R. 370, 377 (1994)).
- Requests under the Privacy Act to correct allegedly false information in personnel records (*Santillan v. Dep't of the Air Force*, 53 M.S.P.R. 487, 491 (1992)).
- PPP complaints to OSC (*Booker v. U.S. Postal Serv.*, 53 M.S.P.R. 507, 509 (1992)).
- Civil lawsuits (*Creer v. U.S. Postal Serv.*, 62 M.S.P.R. 656, 660 (1994)).
- Preparatory activity, including:
 - union-related activities, such as attempting to organize and establish a union (see *Ireland v. Dep't of Health and Human Serv.*, 34 M.S.P.R. 614, 620 (1987)) or helping union members to file grievances (see *Page v. Dep't of the Navy*, 101 M.S.P.R. 513, 516 (2006));
 - the announced intention to file an EEO complaint (*Special Counsel v. Zimmerman*, 36 M.S.P.R. 274, 291 (1988));
 - contacting an EEO counselor for advice (*Johnson v. Dep't of the Army*, 37 M.S.P.R. 95, 97 (1988)); and
 - writing a letter to OSC, even if the letter had not been sent (*Special Counsel v. Harvey*, 28 M.S.P.R. 595, 603–04 (1984) (holding official's awareness of complainant's intent to file a complaint with OSC was protected)).
- Classification appeals (see, for example, *Lacross v. Dep't of Homeland Sec.*, MSPB No. DC-3443-16-0613-1-1, 2016 WL 3386716 (June 16, 2016); *Sanders v. Dep't of Treasury*, MSPB No. SF-1221-10-0187-W-1, 2010 WL 5820680 (July 8, 2010); *Cook v. Dep't of the Army*, MSPB No. CH-0752-05-0830-S-1, 2005 WL 2932525 (Sept. 19, 2005)).
- Filing claims under the Veterans Employment Opportunities Act ("VEOA") (*Shaver v. Dep't of the Air Force*, 106 M.S.P.R. 601, 605 n. 3 (2007)).
- Executing an affidavit during an EEO investigation (*Adair v. U.S. Postal Serv.*, 66 M.S.P.R. 159, 165 (1995)).
- Providing information during an EEO investigation (*Peterson v. Dep't of Transp.*, 54 M.S.P.R. 178, 183 (1992)).
- Allegedly refusing to cover up an EEO violation (*Marable v. Dep't of the Army*, 52 M.S.P.R. 622, 630 (1992)).
- Testifying at an EEO hearing (*Cloonan v. U.S. Postal Serv.*, 65 M.S.P.R. 1, 4 (1994)).
- Union officials acting on behalf of members in connection with ULP charges and EEO complaints (*Wooten v. Dep't of Health and Human Serv.*, 54 M.S.P.R. 143, 146 (1992)).

Cooperating with or Disclosing Information to Inspector General or OSC

The WPA protects cooperating with or disclosing information to an agency IG or OSC (5 U.S.C. § 2302(b)(9)(C)). Section 2302(b)(9)(C) covers disclosures made to an IG or OSC that do not meet the precise terms of a protected disclosure under Section 2302(b)(8).

For example, in *Special Counsel v. Nielson*, a temporary employee cooperated with an agency IG investigation of his supervisor. The supervisor then issued the employee a lower performance rating in a manner that violated the agency's policies on conducting performance reviews. The employee complained to the agency's personnel office about the way his performance review was conducted and the supervisor terminated him. The MSPB held that the employee engaged in protected activity under Section 2302(b)(9)(C) when he cooperated with the IG's investigation and announced his intent to complain to the personnel office. (71 M.S.P.R. 161, 169-70 (1996)).

In another case, the Board construed Section 2302(b)(9) to protect an individual who drafted a letter to OSC alleging abuse of authority and mismanagement but had not yet sent the letter (*Special Counsel v. Harvey*, 28 M.S.P.R. 595, 604 (1984), rev'd on other grounds, 802 F.2d 537, 547 (D.C. Cir. 1986)).

Refusing to Obey an Order Requiring a Violation of Law

The WPA prohibits an employer from taking a personnel action against an employee for refusing an order that would require the employee violate a law (5 U.S.C. § 2302(b)(9)(D)). A "law" in this section means a statute, not a rule or regulation (*Rainey v. Merit Sys. Prot. Bd.*, 2016 WL 3165617, at *5 (Fed. Cir. June 7, 2016)).

In *Rainey*, the employee argued that the WPA protected his refusal of an order because carrying out the order would have violated the Federal Acquisition Regulation (FAR). The MSPB looked to the Supreme Court's decision in *Dep't of Homeland Sec. v. MacLean*, in which the Court held that an employee's right to disclose wrongdoing under Section 2302(b)(8) does not apply when disclosure is specifically prohibited by law and that "law" means a statute, not a rule or regulation. (*Rainey*, 2016 WL 3165617, at *1-2.)

Similarly, Section 2302(b)(9) protects an employee's refusal to obey an order that would require the employee to violate a statute, but does not protect an employee's refusal to obey an order requiring the employee to violate a rule or regulation (*Rainey*, 2016 WL 3165617, at *5).

Activity Not Protected as Exercising Any Appeal, Complaint, or Grievance Right

The MSPB has found that the following activities are not protected as the exercise of "any appeal right":

- Filing a workers' compensation claim (*Von Kelsch v. Dep't of Labor*, 59 M.S.P.R. 503, 508–09 (1993)).
- Informal complaints (*Garst v. Dep't of the Army*, 56 M.S.P.R. 371, 386–87 (1993)).
- Informal advocacy (*Stover v. Dep't of Interior*, 63 M.S.P.R. 46 (1994)).
- OSHA disclosures (*Owen v. Dep't of the Air Force*, 63 M.S.P.R. 621, 628 (1994)).
- Disclosing information obtained while acting as an EEO counselor, although these disclosures are protected under Section 2302(b)(8) (*Gonzalez v. Dep't of Housing and Urban Dev.*, 64 M.S.P.R. 314, 318 (1994)).

Testifying for or Lawfully Assisting the Exercise of Any Appeal, Complaint, or Grievance Right

Under Section 2302(b)(9)(B), the MSPB has found that the following activities constitute "testifying for or otherwise lawfully assisting" an individual's exercise of an appeal, complaint, or grievance right:

PERSONNEL ACTIONS UNDER SECTION 2302(B)(9)

The definition of personnel action under Section 2302(b)(9) is the same as under Section 2302(b)(8) (see Personnel Actions Under Section 2302(b)(8)).

KNOWLEDGE UNDER SECTION 2302(B)(9)

The methods for proving knowledge of the employee's protected activity under Section 2302(b)(9) are the same as under Section 2302(b)(8) (see Knowledge of the Protected Disclosure Under Section 2302(b)(8)).

CAUSATION UNDER SECTION 2302(B)(9)

The MSPB evaluates the causation element differently depending on whether the case is:

- A corrective action case brought by OSC under Section 2302(b)(9) on behalf of an employee who suffered retaliation for the employee's protected activity (see Causation in OSC Corrective Action Cases).
- A disciplinary action case brought by OSC under Section 2302(b)(9), where OSC seeks disciplinary action against the agency official responsible for taking a personnel action against an individual in retaliation for the individual's protected activity (see Causation in OSC Disciplinary Action Cases).
- A matter appealed by an employee facing disciplinary action under 5 U.S.C. § 7701, who alleges Section 2302(b)(9) as an affirmative defense (see Causation in Employee Appeals Alleging Section 2302(b)(9) as an Affirmative Defense).

Causation in OSC Corrective Action Cases

The WPEA adopted the "contributing factor" causation standard used in Section 2302(b)(8) cases for cases that involve:

- Exercising appeal, complaint, or grievance rights related to whistleblowing activity under Section 2302(b)(8) (5 U.S.C. § 2302(b)(9)(A)(i)).
- Testifying for or otherwise lawfully assisting any individual in filing an appeal, complaint, or grievance right granted by law, rule, or regulation (5 U.S.C. § 2302(b)(9)(B)).
- Cooperating with or disclosing information to an agency IG or OSC (5 U.S.C. § 2302(b)(9)(C)).
- Refusing to obey an order that would require the individual to violate a law (5 U.S.C. § 2302(b)(9)(D)).

(5 U.S.C. § 1214(b)(4)(B)(i); see Causation Under Section 2302(b)(8).)

However, for cases brought under Section 2302(b)(9)(A)(ii) (exercising appeal, complaint, or grievance rights not related to whistleblowing under Section 2302(b)(8)), the pre-WPEA causation standard still applies. Under the pre-WPEA standard:

- OSC must show by a preponderance of the evidence that the protected activity was a substantial or motivating factor in the personnel action.
- The burden then shifts to the agency to prove, by preponderant (not clear and convincing) evidence, that it would have taken the same action in the absence of the protected activity.

(See *Savage v. Dep't of the Army*, 122 M.S.P.R. 612, 638 n.12 (2015).)

Causation in OSC Disciplinary Action Cases

For disciplinary action claims brought under Section 2302(b)(8) and (b)(9)(A)(i), (B), (C), and (D), the WPEA codified the significant-motivating-factor test originally articulated in *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274 (1977). The Board may discipline an agency official if it determines that an employee's protected activity was a "significant motivating factor" in that official's decision to take or threaten to take a personnel action, even if other factors also motivated the decision. The Board does not discipline the agency official, however, if the agency official demonstrates by preponderant evidence that the official would have taken or threatened to take the same personnel action had the protected activity not occurred (5 U.S.C. § 1215(a)(3)(B)).

The statutory language describing the causation test in OSC disciplinary action cases excludes Section 2302(b)(9)(A)(ii) (exercising appeal, complaint, or grievance rights not related to whistleblowing under Section 2302(b)(8)) (see 5 U.S.C. § 1215(a)(3)(B)). Therefore, the significant-factor test in *Special Counsel v. Nielson*, a pre-WPEA case that articulated the causation for OSC disciplinary actions, may still apply to OSC disciplinary action cases brought under Section 2302(b)(9)(A)(ii) (71 M.S.P.R. 161, 171 (1996)). Under *Nielson*, OSC must show that the protected activity was a significant factor in the adverse personnel action, where a "significant factor" is one that "played an important role in the allegedly retaliatory action," as opposed to one that was "tangentially related" to the protected activity (*Nielson*, 71 M.S.P.R. at 171).

Practically speaking, the statutory "significant motivating factor" and *Nielson's* "significant factor" tests are likely very similar (see *Nielson*, 71 M.S.P.R. at 171). However, if the *Nielson* test applies, OSC must prove that the personnel action would not have occurred absent the protected activity (as opposed to the agency bearing the burden that it would have taken the adverse action anyway). Therefore, applying the *Nielson* test sets a slightly higher bar for OSC to bring disciplinary action cases under Section 2302(b)(9)(A)(ii). In any event, OSC brings very few disciplinary action cases before the MSPB, so the Board has not had an opportunity to articulate the causation standard in Section 2302(b)(9)(A)(ii) OSC disciplinary action cases since the WPEA's enactment.

Causation in Employee Appeals Alleging Section 2302(b)(9) as an Affirmative Defense

An employee may assert as an affirmative defense that the employee's protected activity was the reason behind an agency's adverse personnel action. To show causation using Section 2302(b)(9) as an affirmative defense, an employee must show that there was a genuine nexus between the protected activity and the adverse action. (*Warren v. Dep't of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986).) The MSPB's analysis here depends on whether the evidentiary record is complete.

When the evidentiary record is incomplete, the MSPB uses a burden-shifting analysis:

- The employee may make a prima facie case by establishing a genuine nexus between the protected activity and the adverse action. If the agency took the adverse action because of the employee's misconduct, the MSPB weighs the intensity of

the motive to retaliate against the gravity of the employee's misconduct (*Redschlag v. Dep't of the Army*, 89 M.S.P.R. 589, 624-26 (2001)).

- If the employee establishes that the intensity of the agency's motive to retaliate outweighs the gravity or seriousness of the misconduct, then the agency may introduce evidence that it would have taken the same personnel action, even in the absence of protected activity. (*Jefferson v. U.S. Postal Serv.*, 81 M.S.P.R. 607, 612 (1999); *Thornhill v. Dep't of the Army*, 50 M.S.P.R. 480, 490 (1991); *Westmoreland v. Dep't of Transp.*, 49 M.S.P.R. 574, 577 (1991)).

When the evidentiary record is complete, the MSPB does not inquire whether the employee established a prima facie case or put forward sufficient proof to shift the burden to the agency. Instead, the MSPB proceeds to the ultimate question of whether the employee met the overall burden of proving retaliation based on weighing the evidence presented by both parties. (*Simien v. U.S. Postal Serv.*, 99 M.S.P.R. 237, 249 (2005).)

AGENCY AFFIRMATIVE DEFENSE

An agency can defeat a claim under the WPA only by showing, by clear and convincing evidence, that it would have taken the challenged action in the absence of the protected disclosure (5 U.S.C. § 1214(b)(4)(B)(ii)). This is an intentionally high burden of proof (*Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012)). The agency's clear and convincing burden applies to employee claims under Section 2302(b)(8) and Section 2302(b)(9). However, the agency's burden to defeat claims under Section 2302(b)(9)(A)(ii) is only preponderance of the evidence.

The MSPB considers three factors in determining whether an agency meets this burden:

- The strength of the agency's evidence in support of its action.
- The existence and strength of any motive to retaliate on the part of the agency officials involved in the decision.
- Any evidence that the agency takes similar actions against employees who are not whistleblowers but are otherwise similarly situated.

(*Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).)

WHISTLEBLOWER ADJUDICATION UNDER THE WPA: PROCEDURAL CONSIDERATIONS

The procedures for enforcing a federal employee's rights under the WPA differ for:

- Otherwise appealable actions (see Otherwise Appealable Actions).
 - Complaints filed with OSC (see OSC Complaints of Whistleblower or Other Retaliation).
 - IRA appeals (see IRA Appeals).
- (5 C.F.R. § 1209.2(d).)

OTHERWISE APPEALABLE ACTIONS

An otherwise appealable action is a personnel action that is directly appealable to the MSPB by an employee eligible to appeal (see 5 C.F.R. § 1201.3). An individual can pursue a remedy of an otherwise appealable action using one of three processes:

- An MSPB appeal under 5 U.S.C. § 7701 (see MSPB Appeals).

- A grievance under a collective bargaining agreement under 5 U.S.C. § 7121(d).
 - A complaint filed with OSC (5 U.S.C. § 1214), which can be followed by an IRA appeal filed with the MSPB (5 U.S.C. § 1221) (see OSC Complaints of Whistleblower or Other Retaliation and IRA Appeals).
- (5 C.F.R. § 1209.2(d).)

Once an individual seeks a remedy using one of these processes, the individual may not seek a remedy through another process (5 U.S.C. § 7121(g)). An individual may not circumvent this election of remedies requirement by challenging the same action on different theories in different forums (*Sherman v. Dep't of Homeland Sec.*, 122 M.S.P.R. 644, 652-53 (2015)). For more information about electing a remedy, see Federal Sector Availability and Election of Remedies Chart ([w-002-4859](#)).

MSPB Appeals

Federal employees generally have the right to appeal certain adverse employment actions to the MSPB (5 U.S.C. §§ 7512, 7513). In most actions appealed directly to the MSPB, the agency bears the primary burden of proof (see 5 U.S.C. § 7701(c)). In whistleblower retaliation claims, personnel actions that may be directly appealed to the MSPB are referred to as otherwise appealable actions.

An individual subjected to an otherwise appealable action may appeal the personnel action directly while adding a claim that the adverse action was motivated in retaliation for the individual's whistleblowing. The MSPB reviews these claims under the standards applicable to direct appeals and analyzes the whistleblower retaliation claim under the WPA's affirmative defense standard. Numerous civil service laws, rules, and regulations give federal employees appeal rights to the MSPB. These appeal rights vary depending on the appointment the employee holds, length of employment, the agency the employee works at, and any special status the employee may have.

Personnel actions appealable to the MSPB include:

- Adverse actions listed in Chapter 75 of Title 5, specifically:
 - removal (termination from federal employment after completing a probationary period);
 - reduction in grade or pay;
 - suspension for more than 14 days;
 - furlough for 30 days or less "for cause that will promote the efficiency of the service"; and
 - involuntary resignation or retirement (considered a removal).

(5 C.F.R. § 1201.3(a)(1).)
- Retirement appeals, which are determinations affecting an individual's rights or interests under the federal retirement laws (5 C.F.R. § 1201.3(a)(2)).
- Termination of probationary employment (for employees in the competitive service only) when the termination:
 - is alleged to be motivated by partisan political reasons or marital status; or
 - was based on a pre-appointment reason and the agency failed to comply with the procedures required to terminate an employee during a probationary period.

(5 C.F.R. § 1201.3(a)(3).)

- Restoration to employment following recovery from a work-related injury. These appeals cover:
 - an agency's failure to restore an employee to employment;
 - improper restoration; or
 - an employee's failure to return following a leave of absence. (5 C.F.R. § 1201.3(a)(4).)
- Performance-based actions under 5 U.S.C. § 4303, which includes reduction in grade or removal for unacceptable performance (5 C.F.R. § 1201.3(a)(5)).
- Appeals of a reduction in force that led to an employee's:
 - separation;
 - demotion; or
 - furlough for more than 30 days and effected because of a reduction in force. (5 C.F.R. § 1201.3(a)(6).)
- Appeals of OPM employment practices that relate to examining and evaluating qualifications for competitive service appointment (5 C.F.R. § 1201.3(a)(7)).
- Denial of a within-grade pay increase for an employee paid on the General Schedule (GS) pay scale (5 C.F.R. § 1201.3(a)(8)).
- Actions based on suitability determinations that relate to an individual's character or conduct that "may have an impact on the integrity or efficiency of the service." Suitability actions include:
 - canceling an employee's eligibility for a position;
 - removing an employee for being unsuitable;
 - canceling an employee's eligibility for reinstatement; and
 - barring an employee from future federal service. (5 C.F.R. § 1201.3(a)(9).)
- Actions involving SES employees, including:
 - removal or suspension for more than 14 days;
 - reduction in force actions that affect career SES appointees;
 - furloughing a career SES appointee; and
 - removing or transferring an SES employee of the Department of Veterans Affairs. (5 C.F.R. § 1201.3(a)(10).)
- Other restoration and reemployment matters listed in 5 C.F.R. § 1201.3(a)(11).
- Appeals under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and VEOA (5 C.F.R. § 1201.3(b)(1)). For more information about USERRA and VEOA, see Practice Note, Civil Service Protections for Federal Employees: Overview: USERRA ([1-576-7425](#)) and Civil Service Protections for Federal Employees: Overview: VEOA ([1-576-7425](#)).

For an overview on the MSPB appeal process, see Practice Note, MSPB Appeals Process: Overview ([1-619-0319](#)) and MSPB Appeals Process Flowchart ([6-618-3180](#)).

For more information on MSPB appeals of Chapter 75 adverse actions, see Practice Note, Adverse Action Appeals Before the Merit Systems Protection Board ([w-002-7541](#)).

OSC COMPLAINTS OF WHISTLEBLOWER OR OTHER RETALIATION

Federal employees may file complaints of retaliation with OSC using OSC Form 11 or OSC's e-filing system. An employee wishing to report violations of law, rule, regulation, or other misconduct may also do so using OSC Form 12. However, making a disclosure does not automatically file a PPP complaint. An employee seeking personal relief from retaliation must separately file a PPP complaint.

Once filed, OSC's Complaints Examining Unit (CEU) reviews the complaint to determine whether OSC has jurisdiction over the complaint. If OSC has jurisdiction, the CEU determines whether to:

- Attempt mediation with the parties to resolve the complaint.
- Refer the complaint to the Investigation and Prosecution Division (IPD) to conduct a full investigation of the complaint.
- Dismiss the complaint and close the case.

In fiscal year 2015, OSC screened more than 4,000 prohibited personnel complaints (OSC Annual Report to Congress for Fiscal Year 2015, at 16).

If IPD determines a violation has occurred, it decides whether to seek corrective action for the employee, disciplinary action against the retaliators, or both. IPD attempts to negotiate a resolution of meritorious complaints with the applicable agency. If negotiations are unsuccessful, IPD may bring an enforcement action on behalf of the employee before the MSPB. If IPD determines insufficient evidence exists to establish a violation, the matter is closed.

When preparing a complaint to the OSC, employees should consider:

- Whether they should request a stay of the challenged personnel action.
- What facts, evidence, and other information are available to establish each element of the claim.
- Providing detailed allegations of fact that OSC can investigate and confirm.
- What remedy they are seeking and what evidence is available to support that remedy.
- Whether all information requested from the OSC has been provided.

OSC Deferral to EEO Process and MSPB Proceedings

Whistleblower retaliation claims are probably the most frequent PPP claim filed by federal employees. OSC also investigates other PPP violations and discrimination based on race, color, religion, sex, disabling condition, national origin, or age is also a PPP (5 U.S.C. § 2302(b)(1)). However, the OSC complaint procedure is not intended to duplicate or sidestep the procedures established in the agencies and the Equal Employment Opportunity Commission (EEOC) for redressing discrimination complaints (5 C.F.R. § 1810.1).

When an individual files a discrimination complaint with OSC, OSC typically defers to the equal employment opportunity (EEO) complaint process. For more information, see Practice Note, Discrimination in Federal Public Employment: Federal Sector EEO Program ([8-580-5645](#)) and Federal Sector EEO Process Flowchart ([3-592-9785](#)).

If OSC is investigating a PPP other than discrimination under Section 2302(b)(1) and the complainant also alleges a strong discrimination claim, OSC has discretion to investigate the discrimination claim and seek corrective action to remedy the discrimination and any other PPPs. OSC and the EEOC have signed a Memorandum of Understanding that outlines the coordination between the agencies for enforcing the anti-discrimination statutes applicable to federal employment. Under this agreement, when the EEOC finds unlawful discrimination or when an agency fails to comply with an EEOC order, the EEOC may refer the case to OSC for potential OSC disciplinary action against the agency official who failed to comply or engaged in the discrimination.

Seeking a Stay of a Personnel Action

Where OSC determines that reasonable grounds exist to believe a personnel action was taken or will be taken as a result of a PPP, OSC can request that any member of the MSPB order a stay of any personnel action for 45 days (5 U.S.C. § 1214(b)(1)(A)(i)).

OSC considers whether to grant a stay under the following circumstances:

- When there are reasonable grounds to believe that the personnel action that was taken or is about to be taken constitutes a PPP and, absent a stay, the employee will be subjected to:
 - a removal;
 - a suspension for more than 14 days;
 - a reduction in grade;
 - a significant reduction in pay;
 - a geographic reassignment;
 - the non-renewal of an appointment; or
 - any other personnel action which the complainant demonstrates by compelling evidence will result in serious immediate hardship.
- In any other case when:
 - based on available information, there exists a substantial likelihood that the personnel action that was taken, or is about to be taken, was the result of a PPP; or
 - the Special Counsel, in the Special Counsel's sole discretion, determines that a stay is appropriate and consistent with OSC's statutory mission.

(OSC Policy Statement: Stays.)

Before petitioning the MSPB for a formal stay, OSC usually attempts to negotiate an informal stay with the agency. The agency has the discretion to grant an informal stay. An informal stay is generally a verbal commitment not to take action for a specified period of time while OSC investigates and determines the merits of the claim.

If the agency refuses to grant an informal stay, OSC may file a formal petition for a stay (5 U.S.C. § 1214(b)(1)(A)). In evaluating a stay request, the MSPB views the facts in the record in the light most favorable to finding that there are reasonable grounds to believe the personnel action is the result of a PPP (*Special Counsel v. Dep't of*

Treasury, 70 M.S.P.R. 578, 580 (1996).) The MSPB can extend stays for any period it considers appropriate (5 U.S.C. § 1214(b)(1)(B)).

IRA APPEALS

After filing an OSC complaint, an employee can bring an IRA appeal at the MSPB either:

- After OSC closes its investigation of the complaint, within:
 - 65 days from the date of OSC's written notice of closure; or
 - 60 days from the date the employee receives the notice.
- After waiting 120 days from the date the employee filed the complaint, if OSC has not sought corrective action.

(5 U.S.C. § 1214(a)(3).)

IRA appeals are available for claims of retaliation for:

- Whistleblowing under Section 2302(b)(8).
- Exercising an appeal, complaint, or grievance right under Section 2302(b)(9)(A)(i) that deals with remedying a violation of Section 2302(b)(8).
- Testifying for or otherwise lawfully assisting any individual in filing an appeal, complaint, or grievance right granted by law, rule, or regulation (5 U.S.C. § 2302(b)(9)(B)).
- Cooperating with or disclosing information to an agency IG or OSC (5 U.S.C. § 2302(b)(9)(C)).
- Refusing to obey an order that requires the individual to violate a law (5 U.S.C. § 2302(b)(9)(D)).

(5 U.S.C. § 1214(a)(3).)

IRA appeals are not available for claims under Section 2302(b)(9)(A)(ii) (retaliation for appeal, complaint, or grievance rights that do not deal with remedying a violation of Section 2302(b)(8)).

Exhaustion of Administrative Remedies

In an IRA appeal, the MSPB considers only those whistleblowing retaliation charges that the employee raised before OSC. The employee proves this exhaustion of administrative remedies requirement by showing that the employee gave OSC sufficient information to pursue an investigation that may have led to corrective action (*Ward v. Merit Sys. Prot. Bd.*, 981 F.2d 521, 526 (Fed. Cir. 1992) (citing *Knollenberg v. Merit Sys. Prot. Bd.*, 953 F.2d 623, 626 (Fed. Cir. 1992))).

The MSPB administrative judge limits the inquiry into whether an employee exhausted the administrative remedies to identifying the whistleblowing disclosures and personnel actions the employee raised before OSC.

De Novo Review

The MSPB reviews IRA appeals *de novo*. That is, the MSPB evaluates the IRA appeal independently from OSC's decision to close the complaint (5 U.S.C. §§ 1221(f), 1214(a)(3)). The MSPB may order an employee to produce OSC's determination letter only if the administrative judge explains why the letter is necessary and provides the employee an opportunity to consent (see 5 U.S.C. § 1214(a)(2)(B); *Bloom v. Dep't of the Army*, 101 M.S.P.R. 79, 84 (2006)).

REMEDIES

Corrective action for a PPP violation consists of “make whole” remedies, including:

- Reinstatement.
- Back pay (lost wages).
- Medical costs.
- Compensatory damages.
- Any other reasonable and foreseeable consequential charges.
- Attorneys’ fees and costs.

The WPEA added uncapped compensatory damages as a remedy for PPP violations, although this provision does not apply retroactively to PPP cases pending before the WPEA was passed (*King v. Dep’t of Air Force*, 119 M.S.P.R. 663, ¶¶ 15-18 (2013)).

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