The Whistleblower Protection Act:

Empowering Federal Employees to Root Out Waste, Fraud and Abuse

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by

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Information contained in this guide should not be relied on as legal advice. You should consult an attorney for advice on your specific situation.

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Introduction

In enacting civil service reform in the late 1970s, Congress prohibited retaliation against whistleblowers in the federal government. The Senate report accompanying the Civil Service Reform Act states:

> In the vast federal bureaucracy, it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a federal agency, there are employees who know that it has occurred, and who are outraged by it.
>
> What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants.
>
> These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.

S. Rep. No. 95–969, at 8 (1978). Congress subsequently strengthened protections for whistleblowers several times, including the Whistleblower Protection Act (WPA) and then most recently by enacting the Whistleblower Protection Enhancement Act of 2012 (WPEA). But whistleblowers continue to encounter retaliation. A 2011 MSPB study titled "Blowing the Whistle: Barriers to Federal Employees Making Disclosures" reports that in 2010, approximately one-third of the individuals who felt they had been identified as a source of a report of wrongdoing perceived that they had been subjected to threats or acts of reprisal, or both.

This guide provides an overview of the WPA and offers practical tips for navigating some of the challenging issues that often arise in whistleblower cases. The guide should not, however, be relied on as legal advice.

The Legal Framework for Proving Whistleblower Retaliation Under the WPA

To prove whistleblower retaliation under the WPA, 5 U.S.C. § 2302(b)(8), a whistleblower must establish the following by preponderant evidence:

- A protected disclosure (aka the whistleblowing)
- A personnel action is taken, threatened, or not taken after the protected disclosure;
- The relevant officials knew of the protected disclosure; and
- A causal connection (contributing factor) exists between the disclosure and the personnel action

If the whistleblower meets this test, then the burden shifts to the employer to prove by clear and convincing evidence—which is significantly more onerous than the preponderance standard—that it would have taken the same action against the employee even if they had never blown the whistle.

What Disclosures are Protected Under the Whistleblower Protection Act?

The first step in proving a prima facie case of whistleblower retaliation is showing that the employee made a protected disclosure.

The WPA protects federal employees against retaliation for making any disclosure that the employee reasonably believes evidences:

- a violation of any law, rule, or regulation;
- gross mismanagement;
- a gross waste of funds;
- an abuse of authority;

- a substantial and specific danger to public health or safety; or
- censorship related to research, analysis, or technical information that cause, or will cause, one of the above harms

Passed in 2012, the WPEA clarifies that a disclosure is protected even if the disclosure:

- is made to a person, including a supervisor, who participated in the wrongdoing disclosed;
- revealed previously disclosed information;
- is made by an employee who may have other motives for making the disclosure;
- is made while the employee was off duty;
- is about events that occurred a long time ago; or
- is made during the employee's normal course of duties, provided the employee can show that the personnel action was taken "in reprisal for" the disclosure

What is Gross Mismanagement?

- Gross mismanagement is "a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission." *Kavanagh v. M.S.P.B.*, 176 F. App'x 133, 135 (Fed. Cir. Apr. 10, 2006).

What is a Gross Waste of Funds?

- A "gross waste of funds" is defined as a "more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government." *Van Ee v. EPA*, 64 M.S.P.R. 693, 698 (1994).

What is an Abuse of Authority?

- An abuse of authority is an "arbitrary or capricious exercise of power by a federal official or employee" that harms the rights of any person or that personally benefits the official/employee or their preferred associates. *See Elkassir v. Gen. Servs. Admin.*, 257 F. App'x 326, 329 (Fed. Cir. Dec. 10, 2007).

What is a Substantial and Specific Danger to Public Health or Safety?

- Courts apply several factors to assess whether a matter disclosed constitutes a "substantial" and "specific" danger to public health or safety.
- To evaluate whether the danger disclosed is "substantial," courts look to the nature of the potential harm— "the potential consequences." *Chambers v. Dep't of the Interior,* 515 F.3d 1362, 1369 (Fed. Cir. 2008).
- To determine whether the disclosed harm was "specific," courts look to the likelihood that harm will result, as well as when the harm may occur. *Id*.

What are Disclosures About Scientific Integrity/Research Censorship?

- The WPEA prohibits retaliation against government scientists who challenge censorship or make disclosures related to the integrity of the scientific process. "Censorship" is broadly defined to include "any effort to distort, misrepresent, or suppress research, analysis, or technical information." Pub. L. No. 112-199, § 110(a)(3), 126 Stat. 1465, 1471 (2012).
- The WPEA protects a disclosure of information that an employee reasonably believes is evidence of censorship related to research, analysis, or technical information that is, or will cause, gross government waste or mismanagement, an abuse of authority, a substantial and specific danger to public health or safety, or any violation of law.
- The legislative history of the WPEA explains the purpose of protecting disclosures about censorship of scientific research. "The Committee has heard concerns that federal employees may be discouraged from, or retaliated against" for disclosures about unlawful or improper censorship of "research, analysis, and other technical information related to scientific research." The Committee reiterated that, "[i]t is essential that Congress and the public receive accurate data and findings from federal researchers and analysts to inform lawmaking and other public policy decisions."

Is a Whistleblower Protected Only for Disclosing an Actual Violation of Law?

- No. An employee need not prove that the matter disclosed was unlawful or constituted gross mismanagement, a gross waste of funds, an abuse of power, or a danger to public health or safety.
- Rather, it is enough to show that a person standing in the employee's shoes would reasonably believe, given the information available to the employee, that the disclosure evidences one of these types of wrongdoing. *See Webb v. Dep't of the Interior*, 122 M.S.P.R. 248, 251 (2015).
- The reasonableness inquiry focuses on the employee's perception.

Are disclosures to an agency's Office of Inspector General (IG) protected?

- Yes. The WPA protects cooperating with or disclosing information to an agency IG or OSC. 5 U.S.C. § 2302(b)(9)(C).

Are Disclosures to Congress Protected?

- Yes, the WPA protects disclosures to Congress. And the Lloyd-La Follette Act prohibits agencies from barring disclosures to Congress: "The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." 5 U.S.C. § 7211.

Disclosures That are NOT Protected Under the WPA

Disclosures that involve classified information or information that is otherwise statutorily protected are permitted only if made through appropriate, lawful channels.

Unless made to OSC or an agency Inspector General, a disclosure is not protected under § 2302(b)(8) where:

- disclosing the information is specifically prohibited by law; or
- 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).
    - To be "specifically prohibited by law" the information disclosed must be explicitly barred by a statute, as opposed to merely an agency rule or regulation. *See Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 921 (2015).

Do the Standards of Conduct Constrain Whistleblower Rights?

The Standards of Conduct that apply to federal employees do not specifically constrain whistleblower rights. But whistleblowers should take the ethics rules into account when engaging in public advocacy. Issues to consider include:

- When authoring an article or column in a personal capacity, avoid using the title of your government position and avoid suggesting that the agency endorses the position you are advocating.
- Do not accept compensation from a source other than the government for teaching, speaking, or writing that is undertaken as part of your official duties unless the payment is permissible under the ethics rules and is approved by the agency's designated ethics official.

KEY TIP:

Leaking classified documents to the press is not a protected disclosure and could result in criminal prosecution

Does the Whistleblower Protection Act Protect Employees Who Exercise an Appeal or Grievance Right?

Yes. Under 5 U.S.C. 2302(b)(9), agency officials may not take, fail to take, threaten to take a personnel action because an employee:

- Filed a complaint, grievance, or appeal;
- Testified or helped some else with one of these activities;
- Cooperated with or disclosed information to OSC or an Inspector General; or
- Refused to obey an order that would require the employee to violate a law, rule, or regulation.
    - After carrying out the order on an interim basis, the employee can then blow the whistle to agency officials, an OIG, OSC, the media, or Congress. Or the employee can address the concern through an agency grievance procedure.

To establish a prima facie case of retaliation for exercising whistleblowing, complaint, appeal, or grievance rights under Section 2302(b)(9), an employee must prove the following four elements by preponderant evidence:

- the employee, or someone identified with the employee, engaged in a protected activity;
- the agency took, failed to take, or threatened to take a personnel action;
- the official responsible for the personnel action knew about the employee's protected activity; and
- A causal connection existed between the protected activity and the personnel action.

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, but the standard for proving causation differs depending on the type of case. Appeal rights also differ between these subcategories.

KEY TIP:

Whistleblowers should generally follow the doctrine of "obey now, grieve later"— unless carrying out an order would violate a statute, place the employee in clear physical danger, or result in irreparable harm

Prohibited Forms of Whistleblower Retaliation

The next step in establishing a prima facie case of whistleblower retaliation under the WPA is showing that the employee suffered a personnel action.

The WPA covers a broad range of personnel actions (5 U.S.C. § 2302(a)(2)(A)), including:

- an appointment;
- a promotion;
- an action under Chapter 75 of Title 5 of the U.S. Code 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 of the U.S. Code;
- 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; and
- any other significant change in duties, responsibilities, or working conditions.

An action recorded on a Standard Form 50 Notification of Personnel Action (SF-50) is generally sufficient proof of 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 reappoint an individual to a position is also a personnel action.
- The best evidence of an appointment is an SF-50 or SF-52 (Request for Personnel Action)

Disciplinary Actions

Under the WPA, disciplinary actions include:

- a demotion;
- a reduction in pay or 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; and
- 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.

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;
  - failure to reinstate an employee after the employee resigns;
  - not selecting an individual for a position
- The MSPB interprets "threats" broadly and has found that the following actions are threats to take disciplinary action:
  - a memorandum of warning;
  - a proposal to take a Chapter 75 of the U.S. Code or other disciplinary or corrective action;
  - a performance improvement plan ("PIP"); and
  - a record of an agency's investigation into an employee's purported questionable conduct for which the employee faced potential disciplinary action

Employment Actions that are NOT Personnel Actions

- Certain actions are not personnel actions under the WPA. These include:
  - an arrest by an agency police officer;
  - comments directing an employee to "find another job;" and
  - denying or revoking an employee's security clearance
- Merely opening an investigation into an employee's conduct is not a personnel action.
  - However, employees may 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. See 5 U.S.C. § 1214(h).

Are Retaliatory Investigations Prohibited?

- Yes, where "an investigation is so closely related to the personnel action" that the investigation "could have been a pretext for gathering evidence to retaliate," then the agency must show by clear and convincing evidence "that the evidence would have been gathered absent the protected disclosure." If the agency cannot make this clear and convincing showing, "then the [whistleblower] will prevail on his affirmative defense" of whistleblower retaliation. *Russell v. Dep't of Justice*, 76 M.S.P.R. 317, 324 (1997).
- Retaliatory investigations can take many forms, such as unwarranted referrals for criminal or civil investigations or atypical reviews of time and attendance records.

Proving Knowledge of Protected Whistleblowing

The third step in the prima facie case for whistleblower retaliation under the WPA is proving that the agency official who took the personnel action against the employee knew of the protected disclosure/conduct.

How Does a Whistleblower Prove the Employer's Knowledge of Protected Whistleblowing?

- Under the WPA, the whistleblower 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. *See 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; and
  - equivocal denial of actual knowledge.

KEY TIP:

Under current law, if an employee is subjected to an investigation that does not result in a personnel action (for example, a suspension), it may be very difficult to prove that this investigation was a violation of the Whistleblower Protection Act

Constructive Knowledge

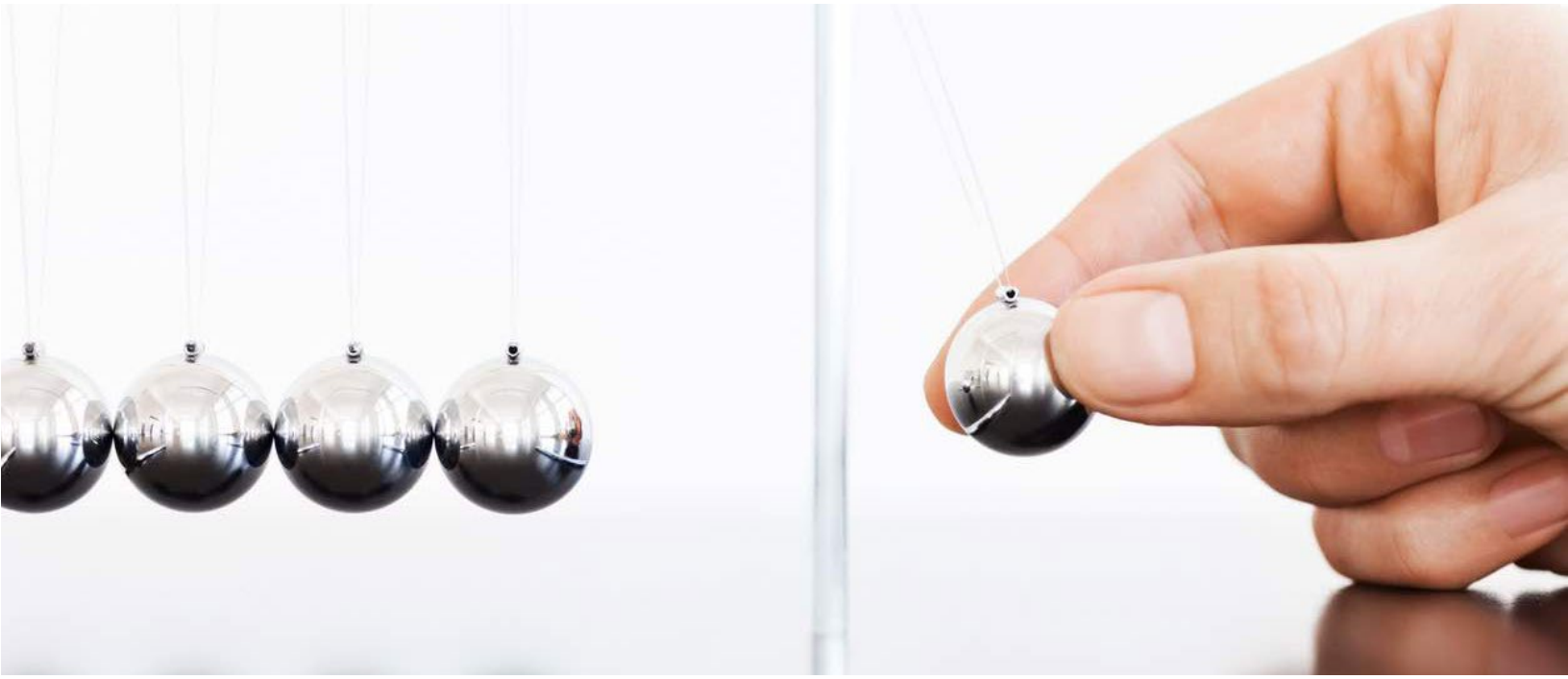
- An employee can establish constructive knowledge where an official with actual knowledge influenced the deciding official. *See McClellan v. Dep't of Def.*, 53 M.S.P.R. 139 (1994).

Proving Causation

The last step in meeting the prima facie case for whistleblower retaliation under the WPA is demonstrating that a causal connection (nexus) exists between the protected disclosure/conduct and the personnel action.

What is the Burden of Proof for a Whistleblower to Establish a Violation of the Whistleblower Protection Act?

- 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; or
  - circumstantial evidence of causation.



Knowledge–Timing Test (5 U.S.C. § 1221(e)(1))

- An employee can show causation using the knowledge–timing test by proving both that:
  - the official who took the personnel action knew of the disclosure; and
  - 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.
- If the personnel action is imposed within about 1 to 1.5 years of when the employee made the protected disclosure, the "knowledge-timing" test may be satisfied. *See Inman v. Dep't of Veterans Affairs*, 112 M.S.P.R. 280, 283-4 (2009) (reassignment 15 months after disclosure)
- Once the employee demonstrates the official's knowledge and the timing of the personnel action, the employee has established a prima facie case of retaliation.

Circumstantial Evidence of Causation

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

What is an Agency's Burden to Avoid Liability Once the Whistleblower Has Proved Causation?

If an employee meets the prima facie case of whistleblower retaliation, then the agency must prove by clear and convincing evidence that it would have taken the same action against the employee even in the employee had never blown the whistle. 5 U.S.C. 1214(b)(4)(B)(ii).

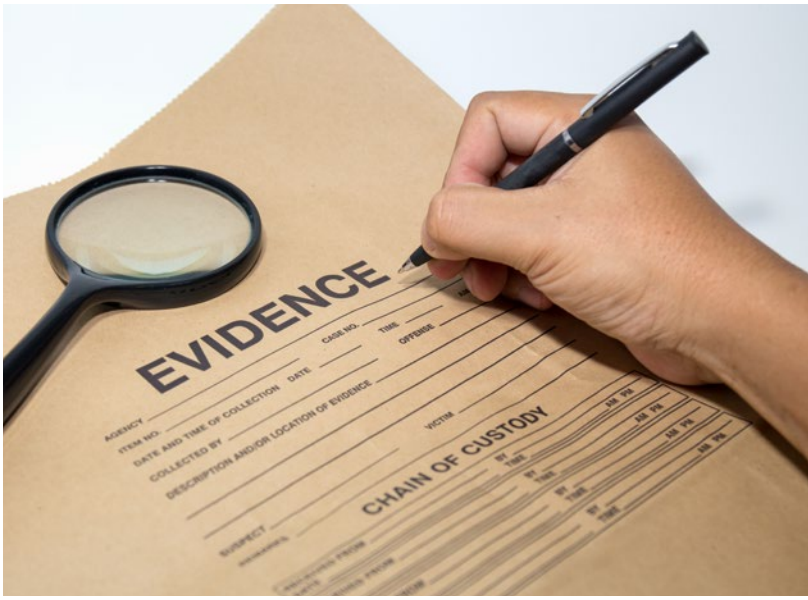
Congress set this as an intentionally high burden of proof. *Whitmore v. Dep't of Labor,* 680 F.3d 1353, 1367 (Fed. Cir. 2012).

The clear and convincing standard applies to claims under both 5 U.S.C. 2302(b)(8) and 2302(b)(9).

- Under Section 2302(b)(9)(A)(ii), the agency may prove its defense by preponderant evidence only.

To determine whether an agency has met its burden via clear and convincing evidence, judges evaluate the following criteria (*Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999):

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



Seeking Relief from Retaliation

Federal employee whistleblowers often seek relief from retaliation from the U.S. Office of Special Counsel (OSC) and/or the Merit System Protection Board (MSPB).

The OSC is an independent, federal investigative and prosecutorial agency. Its primary mission is to safeguard employee rights and hold government accountable, primarily by protecting employees from whistleblower retaliation.

The MSPB is a quasi-judicial agency that adjudicates employee appeals and provides independent review and due process for employees and agencies.

An employee who believes a federal employer has unlawfully retaliated against him or her has several options:

- The employee may file a complaint with OSC. If OSC finds that the employee suffered retaliation, then it reports its findings to the MSPB and can petition the Board, on behalf of the employee, to correct the agency's retaliatory action.
- If OSC finds no wrongdoing or retaliation, then the employee may file an individual right of action ("IRA") appeal before the MSPB within 60 days of OSC's determination. The employee can appeal the Board's decision to the relevant federal Court of Appeals.

- The employee may 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.

Election of Remedies

It is important for employees to know that they may choose only one of the following options when they want to challenge an adverse action that:

- An appeal to the MSPB under 5 U.S.C. § 7701;
- A grievance filed under a collective bargaining agreement (for union employees); or
- A complaint filed with OSC, which can be followed by an Individual Right of Action (IRA) to the MSPB

Whichever option is chosen first is deemed an "election of remedies," which means that the other two options can no longer be used.

This election of remedies does not, however, affect the right to pursue an EEO complaint (an EEO and OSC complaint may be pursued at the same time).

Can OSC Seek a Stay of a Personnel Action?

Where OSC determines that reasonable grounds exist to believe a personnel action was or will be taken as a result of a prohibited personnel practice ("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 that the complainant demonstrates by compelling evidence will result in serious immediate hardship.

- In any other case where:
  - 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.

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, then OSC may file a formal petition for a stay. See 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. The MSPB may extend stays for any period it considers appropriate. 5 U.S.C. § 1214(b)(1)(B).

Note: if the MSPB lacks a quorum (meaning that only one Board member is in place), then OSC may still request and be granted an initial stay of the personnel action for 45 days. It is unclear, however, whether a one-member Board can or will grant any extension of the 45 day stay period.

KEY TIP:

OSC generally does not investigate EEO complaints and instead defers to the agency's EEO process. Filing an EEO complaint with OSC does NOT toll the applicable EEO deadline

Damages or Remedies for Retaliation

What Damages are Available Under the WPA?

A prevailing whistleblower can recover:

- lost wages,
- attorney's fees,
- equitable relief (for example, reinstatement, rescinding a suspension, or modifying a performance evaluation), and
- uncapped compensatory damages (emotional-distress damages).

In addition, a whistleblower can recover fees, costs, or damages reasonably incurred due to a retaliatory investigation. Retaliatory investigations can take many forms, such as unwarranted referrals for criminal or civil investigations or extraordinary reviews of time and attendance records.

KEY TIP:

If you are seeking a stay on behalf of your client, make this clear—as well as the best evidence supporting a stay—early on in your complaint to OSC

Gag Orders and Non-Disclosure Agreements

Can My Agency Require Me to Sign a Non-Disclosure Agreement?

- Yes, but the agency must follow the specific requirements laid out in the Whistleblower Protection Enhancement Act (WPEA).

The WPEA dictates that an agency may not use a non-disclosure agreement or policy unless the agreement explicitly informs the employee that they may still blow the whistle to, for example, an Inspector General, Congress, etc. 5 U.S.C. § 2302(b)(13).

Non-disclosure agreements and gag orders often have a chilling effect on employees' willingness to come forward with disclosures about government wrongdoing. In passing the WPEA, Congress made clear that, even if an employee has signed a non-disclosure agreement, they are still allowed—indeed, encouraged—to blow the whistle as otherwise permitted by law.

Thinking About Blowing the Whistle?

ZUCKERMAN LAW CAN HELP

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To learn more about your rights, call Zuckerman Law 202-262-8959
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