

Calendar No. 569

112TH CONGRESS
2D SESSION**S. 241**

To expand whistleblower protections to non-Federal employees whose disclosures involve misuse of Federal funds.

IN THE SENATE OF THE UNITED STATES

JANUARY 31, 2011

Mrs. McCASKILL (for herself, Mr. WEBB, and Mr. TESTER) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

DECEMBER 19, 2012

Reported by Mr. LIEBERMAN, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To expand whistleblower protections to non-Federal employees whose disclosures involve misuse of Federal funds.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Non-Federal Employee
5 Whistleblower Protection Act of 2011”.

1 **SEC. 2. PROTECTING STATE AND LOCAL GOVERNMENT AND**
 2 **CONTRACTOR WHISTLEBLOWERS.**

3 (a) ~~REPEAL.~~—Section 4705 of title 41, United States
 4 Code, is hereby repealed.

5 (b) ~~ENHANCED PROTECTION FOR STATE AND LOCAL~~
 6 ~~GOVERNMENT AND CONTRACTOR WHISTLEBLOWERS.~~—
 7 Chapter 47 of division C of title 41, United States Code,
 8 is amended by inserting after section 4704 the following
 9 new section:

10 **“§ 4705. Whistleblower protection for State and local**
 11 **government and contractor whistle-**
 12 **blowers**

13 “(a) ~~PROHIBITION OF REPRISALS.~~—An employee of
 14 any non-Federal employer receiving covered funds may not
 15 be discharged, demoted, or otherwise discriminated
 16 against as a reprisal for initiating or participating in any
 17 proceeding related to the misuse of any Federal funds,
 18 reasonably opposing the misuse of any Federal funds, or
 19 disclosing, including a disclosure made in the ordinary
 20 course of an employee’s duties, to an inspector general,
 21 the Comptroller General of the United States, the Attor-
 22 ney General, a member of Congress, a State or Federal
 23 regulatory or law enforcement agency, a person with su-
 24 pervisory authority over the employee (or such other per-
 25 son working for the employer who has the authority to
 26 investigate, discover, or terminate misconduct), a court or

1 grand jury, the head of a Federal agency, or their rep-
 2 resentatives information that the employee reasonably be-
 3 lieves is evidence of—

4 “(1) gross mismanagement of an agency con-
 5 tract or grant relating to covered funds;

6 “(2) a gross waste of covered funds;

7 “(3) a substantial and specific danger to public
 8 health or safety related to the implementation or use
 9 of covered funds;

10 “(4) an abuse of authority related to the imple-
 11 mentation or use of covered funds; or

12 “(5) a violation of law, rule, or regulation re-
 13 lated to an agency contract (including the competi-
 14 tion for or negotiation of a contract), subcontract, or
 15 grant, awarded or issued relating to covered funds.

16 “(b) INVESTIGATION OF COMPLAINTS.—

17 “(1) IN GENERAL.—A person who believes that
 18 the person has been subjected to a reprisal prohib-
 19 ited by subsection (a) may submit a complaint re-
 20 garding the reprisal to the appropriate inspector
 21 general. Except as provided under paragraph (3),
 22 unless the inspector general determines that the
 23 complaint is frivolous, does not relate to covered
 24 funds, or another Federal or State judicial or ad-
 25 ministrative proceeding has previously been invoked

1 to resolve such complaint, the inspector general shall
 2 investigate the complaint and, upon completion of
 3 such investigation, submit a report of the findings of
 4 the investigation to the person, the person's em-
 5 ployer, and the head of the appropriate agency.

6 ~~“(2) TIME LIMITATIONS FOR ACTIONS.—~~

7 ~~“(A) IN GENERAL.—~~Except as provided
 8 under subparagraph (B), the inspector general
 9 shall, not later than 180 days after receiving a
 10 complaint under paragraph (1)—

11 ~~“(i) make a determination that the~~
 12 ~~complaint is frivolous, does not relate to~~
 13 ~~covered funds, or another Federal or State~~
 14 ~~judicial or administrative proceeding has~~
 15 ~~previously been invoked to resolve such~~
 16 ~~complaint; or~~

17 ~~“(ii) submit a report under paragraph~~
 18 ~~(1).~~

19 ~~“(B) EXTENSIONS.—~~

20 ~~“(i) VOLUNTARY EXTENSION AGREED~~
 21 ~~TO BETWEEN INSPECTOR GENERAL AND~~
 22 ~~COMPLAINANT.—~~If the inspector general is
 23 unable to complete an investigation under
 24 this section in time to submit a report
 25 within the 180-day period specified under

1 subparagraph (A) and the person submit-
2 ting the complaint agrees to an extension
3 of time, the inspector general shall submit
4 a report under paragraph (1) within such
5 additional period of time as shall be agreed
6 upon between the inspector general and
7 the person submitting the complaint.

8 “(ii) EXTENSION GRANTED BY IN-
9 SPECTOR GENERAL.—If the inspector gen-
10 eral is unable to complete an investigation
11 under this section in time to submit a re-
12 port within the 180-day period specified
13 under subparagraph (A), the inspector
14 general may extend the period for not
15 more than 180 days without agreeing with
16 the person submitting the complaint to
17 such extension, provided that the inspector
18 general provides a written explanation
19 (subject to the authority to exclude infor-
20 mation under paragraph (4)(C)) for the
21 decision, which shall be provided to both
22 the person submitting the complaint and
23 the non-Federal employer.

24 “(iii) SEMI-ANNUAL REPORT ON EX-
25 TENSIONS.—The inspector general shall in-

1 clude in semi-annual reports to Congress a
 2 list of those investigations for which the in-
 3 specter general received an extension.

4 “(3) DISCRETION NOT TO INVESTIGATE COM-
 5 PLAINTS.—

6 “(A) IN GENERAL.—The inspector general
 7 may decide not to conduct or continue an inves-
 8 tigation under this section upon providing to
 9 the person submitting the complaint and the
 10 non-Federal employer a written explanation
 11 (subject to the authority to exclude information
 12 under paragraph (4)(C)) for such decision.

13 “(B) ASSUMPTION OF RIGHTS TO CIVIL
 14 REMEDY.—Upon receipt of an explanation of a
 15 decision not to conduct or continue an inves-
 16 tigation under subparagraph (A), the person
 17 submitting a complaint shall immediately as-
 18 sume the right to a civil remedy under sub-
 19 section (c)(3) as if the 210-day period specified
 20 under such subsection has already passed.

21 “(C) SEMI-ANNUAL REPORT.—The inspec-
 22 tor general shall include in semi-annual reports
 23 to Congress a list of those investigations the in-
 24 specter general decided not to conduct or con-
 25 tinue under this paragraph.

1 “(4) ACCESS TO INVESTIGATIVE FILE OF IN-
2 SPECTOR GENERAL.—

3 “(A) IN GENERAL.—The person alleging a
4 reprisal under this section shall have access to
5 the investigation file of the appropriate inspec-
6 tor general in accordance with section 552a of
7 title 5 (commonly referred to as the ‘Privacy
8 Act’). The investigation of the inspector general
9 shall be deemed closed for purposes of disclo-
10 sure under such section when an employee files
11 an appeal to an agency head or a court of com-
12 petent jurisdiction.

13 “(B) CIVIL ACTION.—In the event the per-
14 son alleging the reprisal brings suit under sub-
15 section (c)(3), the person alleging the reprisal
16 and the non-Federal employer shall have access
17 to the investigative file of the inspector general
18 in accordance with the Privacy Act.

19 “(C) EXCEPTION.—

20 “(i) IN GENERAL.—The inspector gen-
21 eral may exclude from disclosure—

22 “(I) information protected from
23 disclosure by a provision of law; and

24 “(II) any additional information
25 the inspector general determines dis-

1 closure of which would impede a con-
 2 tinuing investigation, provided that
 3 such information is disclosed once
 4 such disclosure would no longer im-
 5 pede such investigation, unless the in-
 6 spector general determines that disclo-
 7 sure of law enforcement techniques,
 8 procedures, or information could rea-
 9 sonably be expected to risk circumven-
 10 tion of the law or disclose the identity
 11 of a confidential source.

12 “(ii) LIMITATION.—Notwithstanding
 13 clause (i)(II), the inspector general may
 14 not withhold information from the em-
 15 ployee which would otherwise be subject to
 16 disclosure under section 552 of title 5
 17 (commonly referred to as the Freedom of
 18 Information Act) or the Privacy Act.

19 “(5) PRIVACY OF INFORMATION.—An inspector
 20 general investigating an alleged reprisal under this
 21 section may not respond to any inquiry or disclose
 22 any information from or about any person alleging
 23 such reprisal, except in accordance with the provi-
 24 sions of section 552a of title 5 or as required by any
 25 other applicable Federal law.

1 “(c) REMEDY AND ENFORCEMENT AUTHORITY.—

2 “(1) BURDEN OF PROOF.—

3 “(A) DISCLOSURE AS CONTRIBUTING FAC-
4 TOR IN REPRISAL.—

5 “(i) IN GENERAL.—A person alleging
6 a reprisal under this section shall be
7 deemed to have affirmatively established
8 the occurrence of the reprisal if the person
9 demonstrates that a disclosure described in
10 subsection (a) was a contributing factor in
11 the reprisal.

12 “(ii) USE OF CIRCUMSTANTIAL EVI-
13 DENCE.—A disclosure may be dem-
14 onstrated as a contributing factor in a re-
15 prisal for purposes of this paragraph by
16 circumstantial evidence, including—

17 “(I) evidence that the official un-
18 dertaking the reprisal knew of the dis-
19 closure;

20 “(II) evidence that the reprisal
21 occurred within a period of time after
22 the disclosure such that a reasonable
23 person could conclude that the disclo-
24 sure was a contributing factor in the
25 reprisal; or

1 “(III) evidence that the protected
2 disclosure was well founded in fact or
3 law.

4 “(B) OPPORTUNITY FOR REBUTTAL.—The
5 head of an agency may not find the occurrence
6 of a reprisal with respect to a reprisal that is
7 affirmatively established under subparagraph
8 (A) if the non-Federal employer demonstrates
9 by clear and convincing evidence that the non-
10 Federal employer would have taken the action
11 constituting the reprisal in the absence of the
12 disclosure. An employee may rebut this affirma-
13 tive defense by direct or circumstantial evi-
14 dence, including the evidence described in sub-
15 paragraph (A).

16 “(2) AGENCY ACTION.—Not later than 30 days
17 after receiving an inspector general report under
18 subsection (b), the head of the agency concerned
19 shall determine whether there is sufficient basis to
20 conclude that the non-Federal employer has sub-
21 jected the complainant to a reprisal prohibited by
22 subsection (a) and shall either issue an order deny-
23 ing relief in whole or in part or shall take 1 or more
24 of the following actions:

1 “(A) Order the employer to take affirma-
2 tive action to abate the reprisal.

3 “(B) Order the employer to reinstate the
4 person to the position that the person held be-
5 fore the reprisal, together with the compensa-
6 tion (including back pay), compensatory dam-
7 ages, employment benefits, and other terms and
8 conditions of employment that would apply to
9 the person in that position if the reprisal had
10 not been taken.

11 “(C) Order the employer to pay the com-
12 plainant an amount equal to the aggregate
13 amount of all costs and expenses (including at-
14 torneys’ fees and expert witnesses’ fees) that
15 were reasonably incurred by the complainant
16 for, or in connection with, bringing the com-
17 plaint regarding the reprisal, as determined by
18 the head of the agency or a court of competent
19 jurisdiction.

20 “(D) Where appropriate, order the posting
21 of the decision of the inspector general in a
22 manner in which every employee of the em-
23 ployer will have notice of the decision and oth-
24 erwise require a reasonable compliance program

1 to ensure that no further retaliation is com-
2 mitted by the employer.

3 “(E) In the case of a finding that the re-
4 prisal was willful, wanton, or malicious, pay the
5 employee no more than 10 times the amount of
6 all lost wages and other compensatory damages.

7 “(3) CIVIL ACTION.—If the head of an agency
8 issues an order denying relief in whole or in part
9 under paragraph (1), has not issued an order within
10 210 days after the submission of a complaint under
11 subsection (b), or in the case of an extension of time
12 under subsection (b)(2)(B)(i), within 30 days after
13 the expiration of the extension of time, or decides
14 under subsection (b)(3) not to investigate or to dis-
15 continue an investigation, and there is no showing
16 that such delay or decision is due to the bad faith
17 of the complainant, the complainant shall be deemed
18 to have exhausted all administrative remedies with
19 respect to the complaint, and the complainant may
20 bring a de novo action at law or equity against the
21 employer to seek compensatory damages and all
22 other relief available under this section in the appro-
23 priate district court of the United States, which
24 shall have jurisdiction over such an action without
25 regard to the amount in controversy. Such an action

1 shall, at the request of either party to the action, be
 2 tried by the court with a jury.

3 “(4) JUDICIAL ENFORCEMENT OF ORDER.—

4 Whenever a person fails to comply with an order
 5 issued under paragraph (2), the head of the agency
 6 shall file an action for enforcement of such order in
 7 the United States district court for a district in
 8 which the reprisal was found to have occurred. In
 9 any action brought under this paragraph, the court
 10 may grant appropriate relief, including injunctive re-
 11 lief, compensatory and exemplary damages, and at-
 12 torneys’ fees and costs. The person upon whose be-
 13 half an order was issued may also file such an action
 14 or join in an action filed by the head of the agency.

15 “(5) JUDICIAL REVIEW.—Any person adversely

16 affected or aggrieved by an order issued under para-
 17 graph (2) may obtain review of the order’s conform-
 18 ance with this subsection, and any regulations issued
 19 to carry out this section, in the United States court
 20 of appeals for a circuit in which the reprisal is al-
 21 leged in the order to have occurred. No petition
 22 seeking such review may be filed more than 60 days
 23 after issuance of the order by the head of the agen-
 24 cy. Review shall conform to chapter 7 of title 5. Fil-
 25 ing such an appeal shall not act to stay the enforce-

1 ment of the order of a head of an agency or the
2 judgment of a district court.

3 ~~“(6) EXHAUSTION OF ADMINISTRATIVE REM-~~
4 ~~EDIES.—~~Regardless of any other time limit set forth
5 in this section, after 360 days an employee shall be
6 deemed to have exhausted his or her administrative
7 remedies and may file a civil action or amend a
8 claim under this section to any other pending civil
9 action filed by the employee.

10 ~~“(d) NONENFORCEABILITY OF CERTAIN PROVISIONS~~
11 ~~WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBI-~~
12 ~~TRATION OF DISPUTES.—~~

13 ~~“(1) WAIVER OF RIGHTS AND REMEDIES.—~~Ex-
14 cept as provided under paragraph (3), the rights and
15 remedies provided for in this section may not be
16 waived by any agreement, policy, form, or condition
17 of employment, including by any predispute arbitra-
18 tion agreement.

19 ~~“(2) PREDISPUTE ARBITRATION AGREE-~~
20 ~~MENTS.—~~Except as provided under paragraph (3),
21 no predispute arbitration agreement shall be valid or
22 enforceable if it requires arbitration of a dispute
23 arising under this section.

24 ~~“(3) EXCEPTION FOR COLLECTIVE BARGAINING~~
25 ~~AGREEMENTS.—~~Notwithstanding paragraphs (1)

1 and (2), an arbitration provision in a collective bar-
 2 gaining agreement shall be enforceable as to dis-
 3 putes arising under the collective bargaining agree-
 4 ment.

5 “(e) REQUIREMENT TO POST NOTICE OF RIGHTS
 6 AND REMEDIES.—Any employer receiving covered funds
 7 shall post notice of the rights and remedies provided under
 8 this section.

9 “(f) RULES OF CONSTRUCTION.—

10 “(1) NO IMPLIED AUTHORITY TO RETALIATE
 11 FOR NON-PROTECTED DISCLOSURES.—Nothing in
 12 this section may be construed to authorize the dis-
 13 charge of, demotion of, or discrimination against an
 14 employee for a disclosure other than a disclosure
 15 protected by subsection (a) or to modify or derogate
 16 from a right or remedy otherwise available to the
 17 employee.

18 “(2) RELATIONSHIP TO STATE LAWS.—Nothing
 19 in this section may be construed to preempt, pre-
 20 clude, or limit the protections provided for public or
 21 private employees under State whistleblower laws.

22 “(g) DEFINITIONS.—In this section:

23 “(1) ABUSE OF AUTHORITY.—The term ‘abuse
 24 of authority’ means an arbitrary and capricious ex-
 25 ercise of authority by a contracting official or em-

1 ployee that adversely affects the rights of any per-
 2 son; or that results in personal gain or advantage to
 3 the official or employee or to preferred other per-
 4 sons.

5 “(2) COVERED FUNDS.—The term ‘covered
 6 funds’ means any contract, grant, or other payment
 7 received by any non-Federal employer if the Federal
 8 Government provides any portion of the money or
 9 property that is provided, requested, or demanded.

10 “(3) EMPLOYEE.—The term ‘employee’—

11 “(A) except as provided under subpara-
 12 graph (B), means an individual performing
 13 services on behalf of an employer or a con-
 14 tractor, subcontractor, or agent of an employer;
 15 and

16 “(B) does not include any Federal em-
 17 ployee or member of the uniformed services (as
 18 that term is defined in section 101(a)(5) of title
 19 10).

20 “(4) NON-FEDERAL EMPLOYER.—The term
 21 ‘non-Federal employer’—

22 “(A) means—

23 “(i) any employer—

24 “(I) with respect to covered
 25 funds—

1 “(aa) the contractor, sub-
 2 contractor, grantee, or recipient,
 3 as the case may be, if the con-
 4 tractor, grantee, or recipient is
 5 an employer; and

6 “(bb) any professional mem-
 7 bership organization, certification
 8 or other professional body, any
 9 agent or licensee of the Federal
 10 government, or any person acting
 11 directly or indirectly in the inter-
 12 est of an employer receiving cov-
 13 ered funds; or

14 “(H) with respect to covered
 15 funds received by a State or local gov-
 16 ernment, the State or local govern-
 17 ment receiving the funds and any con-
 18 tractor or subcontractor of the State
 19 or local government; and

20 “(ii) any corporation or person who
 21 receives any Federal funds; and

22 “(B) does not mean any department, agen-
 23 cy, or other entity of the Federal Government.

24 “(5) STATE OR LOCAL GOVERNMENT.—The
 25 term ‘State or local government’ means—

1 “(A) the government of each of the several
 2 States, the District of Columbia, the Common-
 3 wealth of Puerto Rico, Guam, American Samoa,
 4 the Virgin Islands, the Commonwealth of the
 5 Northern Mariana Islands, or any other terri-
 6 tory or possession of the United States; or

7 “(B) the government of any political sub-
 8 division of a government listed in subparagraph
 9 (A).”.

10 ~~(c) APPLICABILITY.—~~

11 ~~(1) PENDING CLAIMS.—~~Section 4705 of title
 12 41, United States Code, as added by subsection (b),
 13 shall apply to complaints submitted pursuant to
 14 such section on or after the date of the enactment
 15 of this Act.

16 ~~(2) NEW CLAIMS.—~~Section 4705 of title 41,
 17 United States Code, as in effect on the day before
 18 the date of the enactment of this Act shall apply to
 19 claims submitted pursuant to such section before
 20 such date of enactment.

21 **SECTION 1. SHORT TITLE.**

22 *This Act may be cited as the “Non-Federal Employee*
 23 *Whistleblower Protection Act of 2012”.*

1 **SEC. 2. PROTECTING STATE AND LOCAL GOVERNMENT AND**
 2 **CONTRACTOR WHISTLEBLOWERS.**

3 (a) *REPEALS.*—

4 (1) *CIVILIAN CONTRACTS.*—Title 41, United
 5 States Code, is amended as follows:

6 (A) Section 4705 is repealed.

7 (B) The table of sections at the beginning of
 8 chapter 47 is amended by striking the item relat-
 9 ing to section 4705.

10 (2) *DEFENSE CONTRACTS.*—Title 10, United
 11 States Code, is amended as follows:

12 (A) Section 2409 is repealed.

13 (B) The table of sections at the beginning of
 14 chapter 141 is amended by striking the item re-
 15 lating to section 2409.

16 (b) *ENHANCED PROTECTION FOR STATE AND LOCAL*
 17 *GOVERNMENT AND CONTRACTOR WHISTLEBLOWERS.*—

18 (1) *IN GENERAL.*—Chapter 23 of division B of
 19 title 41, United States Code, is amended by adding
 20 at the end the following new section:

21 **“§2314. Protection for State and local government**
 22 **and contractor whistleblowers**

23 “(a) *PROHIBITION OF REPRISALS.*—An employee of
 24 any non-Federal employer receiving covered funds may not
 25 be discharged, demoted, or otherwise discriminated against
 26 as a reprisal for initiating or participating in any pro-

1 *ceeding related to the misuse of any Federal funds, reason-*
 2 *ably opposing the misuse of any Federal funds, or dis-*
 3 *closing, including a disclosure made in the ordinary course*
 4 *of an employee's duties, to an inspector general, the Comp-*
 5 *troller General of the United States, the Attorney General,*
 6 *a member of Congress, a State or Federal regulatory or law*
 7 *enforcement agency, a person with supervisory authority*
 8 *over the employee (or such other person working for the em-*
 9 *ployer who has the authority to investigate, discover, or ter-*
 10 *minate misconduct), a court or grand jury, the head of a*
 11 *Federal agency, or their representatives information that*
 12 *the employee reasonably believes is evidence of—*

13 “(1) gross mismanagement of an agency contract
 14 or grant relating to covered funds;

15 “(2) a gross waste of covered funds;

16 “(3) a substantial and specific danger to public
 17 health or safety related to the implementation or use
 18 of covered funds;

19 “(4) an abuse of authority related to the imple-
 20 mentation or use of covered funds; or

21 “(5) a violation of law, rule, or regulation re-
 22 lated to an agency contract (including the competi-
 23 tion for or negotiation of a contract), subcontract, or
 24 grant, awarded or issued relating to covered funds.

1 “(b) *INVESTIGATION OF COMPLAINTS BY INSPECTOR*
 2 *GENERAL.*—

3 “(1) *IN GENERAL.*—*A person who believes that*
 4 *the person has been subjected to a reprisal prohibited*
 5 *by subsection (a) may submit a complaint regarding*
 6 *the reprisal to the appropriate inspector general. Ex-*
 7 *cept as provided under paragraph (3), unless the in-*
 8 *pector general determines that the complaint is frivo-*
 9 *lous, does not relate to covered funds, or another Fed-*
 10 *eral or State judicial or administrative proceeding*
 11 *has previously been invoked to resolve such complaint,*
 12 *the inspector general shall investigate the complaint*
 13 *and, upon completion of such investigation, submit a*
 14 *report of the findings of the investigation to the per-*
 15 *son, the person’s employer, and the head of the appro-*
 16 *priate agency.*

17 “(2) *TIME LIMITATIONS FOR ACTIONS IN RE-*
 18 *SPONSE TO COMPLAINTS.*—

19 “(A) *IN GENERAL.*—*Except as provided*
 20 *under subparagraph (B), the inspector general*
 21 *shall, not later than 180 days after receiving a*
 22 *complaint under paragraph (1)—*

23 “(i) *make a determination that the*
 24 *complaint is frivolous, does not relate to*
 25 *covered funds, or another Federal or State*

1 *judicial or administrative proceeding has*
 2 *previously been invoked to resolve such com-*
 3 *plaint; or*

4 “(ii) *submit a report under paragraph*
 5 *(1).*

6 “(B) *EXTENSIONS.—*

7 “(i) *VOLUNTARY EXTENSION AGREED*
 8 *TO BETWEEN INSPECTOR GENERAL AND*
 9 *COMPLAINANT.—If the inspector general is*
 10 *unable to complete an investigation under*
 11 *this section in time to submit a report with-*
 12 *in the 180-day period specified under sub-*
 13 *paragraph (A) and the person submitting*
 14 *the complaint agrees to an extension of*
 15 *time, the inspector general shall submit a*
 16 *report under paragraph (1) within such ad-*
 17 *ditional period of time, up to 180 days, as*
 18 *shall be agreed upon between the inspector*
 19 *general and the person submitting the com-*
 20 *plaint.*

21 “(ii) *EXTENSION GRANTED BY INSPEC-*
 22 *TOR GENERAL.—If the inspector general is*
 23 *unable to complete an investigation under*
 24 *this section in time to submit a report with-*
 25 *in the 180-day period specified under sub-*

1 *paragraph (A), the inspector general may*
 2 *extend the period for not more than 90 days*
 3 *without agreeing with the person submitting*
 4 *the complaint to such extension, provided*
 5 *that the inspector general provides to the*
 6 *person submitting the complaint a written*
 7 *explanation (subject to the authority to ex-*
 8 *clude information under paragraph (4)(C))*
 9 *for the decision.*

10 “(iii) *SEMI-ANNUAL REPORT ON EX-*
 11 *TENSIONS.—The inspector general shall in-*
 12 *clude in semi-annual reports to Congress a*
 13 *list of those investigations for which the in-*
 14 *spector general received an extension.*

15 “(3) *DISCRETION NOT TO INVESTIGATE COM-*
 16 *PLAINTS.—*

17 “(A) *IN GENERAL.—The inspector general*
 18 *may decide not to conduct or continue an inves-*
 19 *tigation under this section upon providing to the*
 20 *person submitting the complaint a written expla-*
 21 *nation (subject to the authority to exclude infor-*
 22 *mation under paragraph (4)(C)) for such deci-*
 23 *sion.*

24 “(B) *SEMI-ANNUAL REPORT.—The inspector*
 25 *general shall include in semi-annual reports to*

1 *Congress a list of those investigations the inspec-*
 2 *tor general decided not to conduct or continue*
 3 *under this paragraph.*

4 “(4) *ACCESS TO INVESTIGATIVE FILE.*—

5 “(A) *IN GENERAL.*—*The person alleging a*
 6 *reprisal under this section shall have access to*
 7 *the investigation file of the appropriate inspector*
 8 *general in accordance with section 552a of title*
 9 *5 (commonly referred to as the ‘Privacy Act’).*
 10 *The investigation of the inspector general shall*
 11 *be deemed closed for purposes of disclosure under*
 12 *such section when an employee files an appeal to*
 13 *an agency head or a court of competent jurisdic-*
 14 *tion.*

15 “(B) *CIVIL ACTION.*—*In the event the per-*
 16 *son alleging the reprisal brings suit under sub-*
 17 *section (d)(1), the person alleging the reprisal*
 18 *and the non-Federal employer shall have access*
 19 *to the investigative file of the inspector general*
 20 *in accordance with the Privacy Act.*

21 “(C) *EXCEPTION.*—

22 “(i) *IN GENERAL.*—*The inspector gen-*
 23 *eral may exclude from disclosure—*

24 “(I) *information protected from*
 25 *disclosure by a provision of law; and*

1 “(II) *any additional information*
 2 *the inspector general determines disclo-*
 3 *sure of which would impede a con-*
 4 *tinuing investigation, provided that*
 5 *such information is disclosed once such*
 6 *disclosure would no longer impede such*
 7 *investigation, unless the inspector gen-*
 8 *eral determines that disclosure of law*
 9 *enforcement techniques, procedures, or*
 10 *information could reasonably be ex-*
 11 *pected to risk circumvention of the law*
 12 *or disclose the identity of a confiden-*
 13 *tial source.*

14 “(ii) *LIMITATION.—Notwithstanding*
 15 *clause (i)(II), the inspector general may not*
 16 *withhold information from the employee*
 17 *which would otherwise be subject to disclo-*
 18 *sure under section 552 of title 5 (commonly*
 19 *referred to as the Freedom of Information*
 20 *Act) or the Privacy Act.*

21 “(5) *PRIVACY OF INFORMATION.—An inspector*
 22 *general investigating an alleged reprisal under this*
 23 *section may not respond to any inquiry or disclose*
 24 *any information from or about any person alleging*
 25 *such reprisal, except in accordance with the provi-*

sions of section 552a of title 5 or as required by any other applicable Federal law.

“(6) *LIMITATION ON SUBMITTING COMPLAINT.*—
A complaint under this subsection may not be brought more than 3 years after the date on which the alleged reprisal prohibited under subsection (a) occurred.

“(c) *ADMINISTRATIVE REMEDY AND ENFORCEMENT AUTHORITY.*—

“(1) *AGENCY ACTION.*—Not later than 30 days after receiving an inspector general report under subsection (b), the head of the agency concerned shall determine whether there is sufficient basis to conclude that the non-Federal employer has, directly, or indirectly on behalf of the Federal agency providing the employer covered funds, subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief in whole or in part or shall take 1 or more of the following actions:

“(A) Order the employer to take affirmative action to abate the reprisal.

“(B) Order the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and condi-

1 *tions of employment that would apply to the per-*
2 *son in that position if the reprisal had not been*
3 *taken.*

4 *“(C) Order the employer to pay the com-*
5 *plainant an amount equal to the aggregate*
6 *amount of all costs and expenses (including at-*
7 *torneys’ fees and expert witnesses’ fees) that were*
8 *reasonably incurred by the complainant for, or*
9 *in connection with, bringing the complaint re-*
10 *garding the reprisal, as determined by the head*
11 *of the agency or a court of competent jurisdic-*
12 *tion.*

13 *“(D) Where appropriate, order the posting*
14 *of the decision of the inspector general in a man-*
15 *ner in which every employee of the employer will*
16 *have notice of the decision and otherwise require*
17 *a reasonable compliance program to ensure that*
18 *no further retaliation is committed by the em-*
19 *ployer.*

20 *“(E) In the case of a finding that the re-*
21 *prisal was willful, wanton, or malicious, order*
22 *the employer to pay the employee no more than*
23 *10 times the amount of all lost wages and other*
24 *compensatory damages.*

25 *“(2) BURDEN OF PROOF.—*

1 “(A) *DISCLOSURE AS CONTRIBUTING FAC-*
 2 *TOR IN REPRISAL.*—

3 “(i) *IN GENERAL.*—*A person alleging a*
 4 *reprisal under this section shall be deemed*
 5 *to have affirmatively established the occur-*
 6 *rence of the reprisal if the person dem-*
 7 *onstrates that a disclosure described in sub-*
 8 *section (a) was a contributing factor in the*
 9 *reprisal.*

10 “(ii) *USE OF CIRCUMSTANTIAL EVI-*
 11 *DENCE.*—*A disclosure may be demonstrated*
 12 *as a contributing factor in a reprisal for*
 13 *purposes of this paragraph by circumstan-*
 14 *tial evidence, including—*

15 “(I) *evidence that the official un-*
 16 *dertaking the reprisal knew of the dis-*
 17 *closure;*

18 “(II) *evidence that the reprisal oc-*
 19 *curred within a period of time after*
 20 *the disclosure such that a reasonable*
 21 *person could conclude that the disclo-*
 22 *sure was a contributing factor in the*
 23 *reprisal; or*

1 “(III) evidence that the protected
2 disclosure was well founded in fact or
3 law.

4 “(B) OPPORTUNITY FOR REBUTTAL.—The
5 head of an agency may not find the occurrence
6 of a reprisal with respect to a reprisal that is af-
7 firmatively established under subparagraph (A)
8 if the non-Federal employer demonstrates by
9 clear and convincing evidence that the non-Fed-
10 eral employer would have taken the action con-
11 stituting the reprisal in the absence of the disclo-
12 sure. An employee may rebut this affirmative de-
13 fense by direct or circumstantial evidence, in-
14 cluding the evidence described in subparagraph
15 (A).

16 “(3) JUDICIAL ENFORCEMENT OF ORDER.—
17 Whenever a person fails to comply with an order
18 issued under paragraph (1), the head of the agency
19 shall file an action for enforcement of such order in
20 the United States district court for a district in which
21 the reprisal was found to have occurred. In any ac-
22 tion brought under this paragraph, the court may
23 grant appropriate relief, including injunctive relief,
24 compensatory and exemplary damages, and attorneys’
25 fees and costs. The person upon whose behalf an order

1 *was issued may also file such an action or join in an*
 2 *action filed by the head of the agency.*

3 “(d) *CIVIL ACTION AND JUDICIAL REVIEW.*—

4 “(1) *CIVIL ACTION.*—*A person who has submitted*
 5 *a complaint under subsection (b) shall be deemed to*
 6 *have exhausted all administrative remedies with re-*
 7 *spect to the complaint and may bring a de novo ac-*
 8 *tion at law or equity against the employer to seek*
 9 *compensatory damages and all other relief available*
 10 *under this section in the appropriate district court of*
 11 *the United States, which shall have jurisdiction over*
 12 *such an action without regard to the amount in con-*
 13 *troversy, if—*

14 “(A)(i) *the head of an agency—*

15 “(I) *issues an order denying relief in*
 16 *whole or in part under subsection (c)(1); or*

17 “(II) *has not issued an order—*

18 “(aa) *within 210 days after the*
 19 *submission of a complaint under sub-*
 20 *section (b); or*

21 “(bb) *in the case of an extension*
 22 *of time under subsection (b)(2)(B),*
 23 *within 30 days after the expiration of*
 24 *the extension of time; or*

1 “(ii) the inspector general decides under
2 subsection (b)(3) not to investigate or to dis-
3 continue an investigation; and

4 “(B) there is no showing that such delay or
5 decision is due to the bad faith of the complain-
6 ant.

7 “(2) *TRIAL BY JURY.*—An action brought under
8 paragraph (1) shall, at the request of either party to
9 the action, be tried by the court with a jury.

10 “(3) *LIMITATION ON BRINGING CIVIL ACTION.*—
11 An action brought under paragraph (1) may not be
12 brought more than 2 years after the date on which
13 remedies are deemed exhausted under subparagraph
14 (A) of such paragraph.

15 “(4) *JUDICIAL REVIEW.*—Any person adversely
16 affected or aggrieved by an order issued under sub-
17 section (c)(1) may obtain review of the order’s con-
18 formance with this subsection, and any regulations
19 issued to carry out this section, in the United States
20 court of appeals for a circuit in which the reprisal is
21 alleged in the order to have occurred. No petition seek-
22 ing such review may be filed more than 60 days after
23 issuance of the order by the head of the agency. Re-
24 view shall conform to chapter 7 of title 5. Filing such
25 an appeal shall not act to stay the enforcement of the

1 *order of a head of an agency or the judgment of a dis-*
 2 *trict court.*

3 “(e) *NONENFORCEABILITY OF CERTAIN PROVISIONS*
 4 *WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBITRA-*
 5 *TION OF DISPUTES.—*

6 “(1) *WAIVER OF RIGHTS AND REMEDIES.—Ex-*
 7 *cept as provided under paragraph (3), the rights and*
 8 *remedies provided for in this section may not be*
 9 *waived by any agreement, policy, form, or condition*
 10 *of employment, including by any predispute arbitra-*
 11 *tion agreement.*

12 “(2) *PREDISPUTE ARBITRATION AGREEMENTS.—*
 13 *Except as provided under paragraph (3), no*
 14 *predispute arbitration agreement shall be valid or en-*
 15 *forceable if it requires arbitration of a dispute arising*
 16 *under this section.*

17 “(3) *EXCEPTION FOR COLLECTIVE BARGAINING*
 18 *AGREEMENTS.—Notwithstanding paragraphs (1) and*
 19 *(2), an arbitration provision in a collective bar-*
 20 *gaining agreement shall be enforceable as to disputes*
 21 *arising under the collective bargaining agreement.*

22 “(f) *REQUIREMENT TO NOTIFY EMPLOYEES OF*
 23 *RIGHTS AND REMEDIES.—Any non-Federal employer re-*
 24 *ceiving covered funds shall notify all employees of the rights*

1 *and remedies provided under this section in the predomi-*
 2 *nant native language of the workforce.*

3 “(g) *RULES OF CONSTRUCTION.*—

4 “(1) *NO IMPLIED AUTHORITY TO RETALIATE FOR*
 5 *NON-PROTECTED DISCLOSURES.*—*Nothing in this sec-*
 6 *tion may be construed to authorize the discharge of,*
 7 *demotion of, or discrimination against an employee*
 8 *for a disclosure other than a disclosure protected by*
 9 *subsection (a) or to modify or derogate from a right*
 10 *or remedy otherwise available to the employee.*

11 “(2) *RELATIONSHIP TO STATE LAWS.*—*Nothing*
 12 *in this section may be construed to preempt, preclude,*
 13 *or limit the protections provided for public or private*
 14 *employees under State whistleblower laws.*

15 “(h) *DEFINITIONS.*—*In this section:*

16 “(1) *ABUSE OF AUTHORITY.*—*The term ‘abuse of*
 17 *authority’ means an arbitrary and capricious exercise*
 18 *of authority that adversely affects the rights of any*
 19 *person, or that results in personal gain or advantage*
 20 *to the official or employee or to preferred other per-*
 21 *sons.*

22 “(2) *COVERED FUNDS.*—*The term ‘covered funds’*
 23 *means any contract, grant, or other payment received*
 24 *by any non-Federal employer if the Federal Govern-*

1 *ment provides any portion of the money or property*
 2 *that is provided, requested, or demanded.*

3 “(3) *EMPLOYEE.*—*The term ‘employee’—*

4 “(A) *except as provided under subpara-*
 5 *graph (B), means an individual performing*
 6 *services on behalf of an employer or a contractor,*
 7 *subcontractor, or agent of an employer; and*

8 “(B) *does not include any Federal employee*
 9 *or member of the uniformed services (as that*
 10 *term is defined in section 101(a)(5) of title 10).*

11 “(4) *NON-FEDERAL EMPLOYER.*—*The term ‘non-*
 12 *Federal employer’—*

13 “(A) *means—*

14 “(i) *any employer—*

15 “(I) *with respect to covered*
 16 *funds—*

17 “(aa) *the contractor, subcon-*
 18 *tractor, grantee, or recipient, as*
 19 *the case may be, if the contractor,*
 20 *grantee, or recipient is an em-*
 21 *ployer; and*

22 “(bb) *any professional mem-*
 23 *bership organization, certification*
 24 *or other professional body, any*
 25 *agent or licensee of the Federal*

1 government, or any person acting
 2 directly or indirectly in the inter-
 3 est of an employer receiving cov-
 4 ered funds; or

5 “(II) with respect to covered funds
 6 received by a State or local govern-
 7 ment, the State or local government re-
 8 ceiving the funds and any contractor
 9 or subcontractor of the State or local
 10 government; and

11 “(ii) any corporation or person who
 12 receives any Federal funds; and

13 “(B) does not mean any department, agen-
 14 cy, or other entity of the Federal Government.

15 “(5) STATE OR LOCAL GOVERNMENT.—The term
 16 ‘State or local government’ means—

17 “(A) the government of each of the several
 18 States, the District of Columbia, the Common-
 19 wealth of Puerto Rico, Guam, American Samoa,
 20 the Virgin Islands, the Commonwealth of the
 21 Northern Mariana Islands, or any other terri-
 22 tory or possession of the United States; or

23 “(B) the government of any political sub-
 24 division of a government listed in subparagraph
 25 (A).”.

1 (2) *CONFORMING AMENDMENT.*—*The table of sec-*
 2 *tions at the beginning of chapter 23 of title 41,*
 3 *United States Code, is amended by inserting after the*
 4 *item relating to section 2313 the following new item:*

 “2314. *Protection for State and local government and contractor whistleblowers.*”.

5 (c) *APPLICABILITY.*—

6 (1) *REPRISALS AFTER DATE OF ENACTMENT.*—
 7 *Section 2314 of title 41, United States Code, as added*
 8 *by subsection (b), shall apply to alleged reprisals de-*
 9 *scribed under subsection (a) of such section that occur*
 10 *on or after the date of the enactment of this Act, re-*
 11 *gardless of the date on which the contract, grant, co-*
 12 *operative agreement, or other arrangement involving*
 13 *covered funds is entered into.*

14 (2) *REPRISALS BEFORE DATE OF ENACTMENT.*—

15 (A) *CIVILIAN CONTRACTS.*—*Section 4705 of*
 16 *title 41, United States Code, as in effect on the*
 17 *day before the date of the enactment of this Act,*
 18 *shall apply to alleged reprisals described under*
 19 *such section that occurred on or after the date of*
 20 *the enactment of such section and before the date*
 21 *of the enactment of this Act, regardless of the*
 22 *date on which the contract, grant, cooperative*
 23 *agreement, or other arrangement involving cov-*
 24 *ered funds was entered into.*

1 (B) *DEFENSE CONTRACTS.*—Section 2409 of
 2 *title 10, United States Code, as in effect on the*
 3 *day before the date of the enactment of this Act,*
 4 *shall apply to alleged reprisals described under*
 5 *such section that occurred on or after the date of*
 6 *the enactment of such section and before the date*
 7 *of the enactment of this Act, regardless of the*
 8 *date on which the contract, grant, cooperative*
 9 *agreement, or other arrangement involving cov-*
 10 *ered funds was entered into.*

11 (d) *REGULATIONS.*—

12 (1) *LIMITED ALLOWABILITY OF LEGAL FEES AS*
 13 *COSTS UNDER CONTRACTS.*—Not later than 180 days
 14 *after the date of the enactment of this Act, the Federal*
 15 *Acquisition Regulatory Council shall amend the Fed-*
 16 *eral Acquisition Regulation to provide that legal fees*
 17 *and other expenses related to a claim arising under*
 18 *a whistleblower protection law are not allowable costs*
 19 *under a contract unless and until the contractor has*
 20 *been found in an administrative or judicial pro-*
 21 *ceeding not to be liable for such claim.*

22 (2) *NOTIFICATION OF EMPLOYEES OF RIGHTS*
 23 *AND REMEDIES.*—Not later than 180 days after the
 24 *date of the enactment of this Act, the Federal Acquisi-*
 25 *tion Regulatory Council shall amend the Federal Ac-*

1 *quisition Regulation to require inclusion of a contract*
2 *clause notifying contractors of the requirement under*
3 *section 2314(f) of title 41, United States Code, as*
4 *added by subsection (b)(1), for non-Federal employers*
5 *to notify employees of their rights and remedies under*
6 *such section.*

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112TH CONGRESS
2D Session

S. 241

A BILL

To expand whistleblower protections to non-Federal employees whose disclosures involve misuse of Federal funds.

DECEMBER 19, 2012

Reported with an amendment