

**Calendar No. 57**

115TH CONGRESS }  
*1st Session* }

SENATE

{ REPORT  
115-44

**DR. CHRIS KIRKPATRICK WHISTLEBLOWER  
PROTECTION ACT OF 2017**

**R E P O R T**

OF THE

**COMMITTEE ON HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE**

TO ACCOMPANY

**S. 585**

TO PROVIDE GREATER WHISTLEBLOWER PROTECTIONS FOR  
FEDERAL EMPLOYEES, INCREASED AWARENESS OF FEDERAL  
WHISTLEBLOWER PROTECTIONS, AND INCREASED  
ACCOUNTABILITY AND REQUIRED DISCIPLINE FOR FEDERAL  
SUPERVISORS WHO RETALIATE AGAINST WHISTLEBLOWERS, AND  
FOR OTHER PURPOSES



MAY 4, 2017.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE

69-010

WASHINGTON : 2017

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

RON JOHNSON, Wisconsin, *Chairman*

JOHN McCAIN, Arizona

ROB PORTMAN, Ohio

RAND PAUL, Kentucky

JAMES LANKFORD, Oklahoma

MICHAEL B. ENZI, Wyoming

JOHN HOEVEN, North Dakota

STEVE DAINES, Montana

CLAIRE McCASKILL, Missouri

THOMAS R. CARPER, Delaware

JON TESTER, Montana

HEIDI HEITKAMP, North Dakota

GARY C. PETERS, Michigan

MAGGIE HASSAN, New Hampshire

KAMALA D. HARRIS, California

CHRISTOPHER R. HIXON, *Staff Director*

GABRIELLE D'ADAMO SINGER, *Chief Counsel*

KYLE P. BROSNAN, *Counsel*

COURTNEY J. ALLEN, *Counsel*

MARGARET E. DAUM, *Minority Staff Director*

STACIA M. CARDILE, *Minority Chief Counsel*

KATHERINE C. SYBENGA, *Minority Counsel*

LAURA W. KILBRIDE, *Chief Clerk*

# Calendar No. 57

115TH CONGRESS }  
*1st Session* }

SENATE

{ REPORT  
115-44

---

---

## DR. CHRIS KIRKPATRICK WHISTLEBLOWER PROTECTION ACT OF 2017

---

MAY 4, 2017.—Ordered to be printed

---

Mr. JOHNSON, from the Committee on Homeland Security and  
Governmental Affairs, submitted the following

### R E P O R T

[To accompany S. 585]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 585) to provide greater whistleblower protections for Federal employees, increased awareness of Federal whistleblower protections, and increased accountability and required discipline for Federal supervisors who retaliate against whistleblowers, and for other purposes, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

#### CONTENTS

	Page
I. Purpose and Summary .....	1
II. Background and Need for the Legislation .....	2
III. Legislative History .....	10
IV. Section-by-Section Analysis .....	10
V. Evaluation of Regulatory Impact .....	12
VI. Congressional Budget Office Cost Estimate .....	12
VII. Changes in Existing Law Made by the Bill, as Reported .....	13

#### I. PURPOSE AND SUMMARY

S. 585, the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, provides additional protections to Federal employees who are retaliated against for disclosing waste, fraud, or abuse in the Federal Government. Additionally, the bill directs the Department of Veterans Affairs (VA) to address agency-specific gaps in its protec-

tion of VA employees, including VA employees' privacy interest in their medical records and their personal safety.

The legislation is named in honor of Dr. Chris Kirkpatrick, a whistleblower who questioned excessive prescription practices at the VA Medical Center in Tomah, Wisconsin (Tomah VAMC). Dr. Kirkpatrick took his own life after being fired from the Tomah VAMC.<sup>1</sup>

## II. BACKGROUND AND THE NEED FOR LEGISLATION

The Committee has a history of working on a bipartisan basis to protect Federal whistleblowers that come forward to report waste, fraud, and abuse, who seek the protections of the Whistleblower Protection Act. This work has led to legislation to address gaps or weaknesses in current law.<sup>2</sup> In 2012, for example, the Committee unanimously reported out, Congress passed, and President Obama signed, the Whistleblower Protection Enhancement Act of 2012 (WPEA).<sup>3</sup> The WPEA bolstered whistleblower rights by broadening the scope of what constitutes a "disclosure" of waste, fraud, and abuse by civilian government employees to any relevant entity, including Congress.<sup>4</sup>

Despite the progress Congress and this Committee have made in the years since the Whistleblower Protection Act was first passed in 1989, whistleblowers too often face retaliation for disclosing waste, fraud and abuse. As the legal director for the Government Accountability Project put it in testimony before the Committee in June 2015: "retaliation for challenging abuses of power always has and always will occur . . . . Further, the imperative is permanent to make a negative example out of every whistleblower's life, to scare others into silence."<sup>5</sup>

It is a priority of this Committee to examine the root and contributing causes of whistleblower retaliation through investigations, hearings, and other oversight, and to identify ways in which gaps or weaknesses in current law can be addressed through legislation. In the 114th Congress, this Committee held multiple hearings where members heard the first-hand accounts of the hardships whistleblowers across the federal government face when they report wrongdoing.<sup>6</sup> These hearings and additional oversight work in the 114th Congress helped inform the Committee's legislative efforts. Because of this work, the Committee was able to report favorably multiple pieces of legislation that provided additional whistle-

<sup>1</sup> On December 9, 2015, the Committee approved S. 2127, the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2015. That bill is substantially similar to S. 585, and has been modified only slightly. Accordingly, this committee report is in large part a reproduction of Chairman Johnson's committee report for S. 2127, S. Rep. No. 114-262 (2016).

<sup>2</sup> *Blowing the Whistle on Retaliation: Accounts of Current and Former Federal Agency Whistleblowers: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2015) (statement of Thomas M. Devine, Legal Director, Government Accountability Project) ("This committee long has played a leadership role in enacting legislation to protect whistleblowers."), available at <http://www.hsgac.senate.gov/hearings/blowing-the-whistle-on-retaliation-accounts-of-current-and-former-federal-agency-whistleblowers> [hereinafter "*Blowing the Whistle*"].

<sup>3</sup> Pub. L. No. 112-199 (112th Cong.) (2012).

<sup>4</sup> *Id.*

<sup>5</sup> *Blowing the Whistle* at 3 (statement of Thomas M. Devine, Legal Director, Government Accountability Project).

<sup>6</sup> See, e.g., *Blowing the Whistle on Retaliation: Accounts of Current and Former Federal Agency Whistleblowers: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2015); see also *Improving VA Accountability: Examining First-Hand Accounts of Department of Veterans Affairs Whistleblowers: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2015).

blower protections for federal employees,<sup>7</sup> one of which was signed into law.<sup>8</sup>

*Increased cases alleging retaliation against whistleblowers*

Retaliation against whistleblowers has been particularly concerning in recent years at the VA. The Office of Special Counsel (OSC), the Federal agency charged with investigating and redressing whistleblower retaliation, “has seen a sharp increase in the number of whistleblower cases from VA employees.”<sup>9</sup> Special Counsel Carolyn Lerner has publicly questioned the VA’s handling of whistleblower complaints, stating that “it is clear that the workplace culture in many VA facilities is hostile to whistleblowers and actively discourages them from coming forward with what is often critical information.”<sup>10</sup> VA cases averaged only 20 percent of all OSC cases in 2009, 2010, and 2011.<sup>11</sup> As of September 2015, the proportion of prohibited personnel practice complaints made to OSC by VA employees was approximately 35 percent of all the complaints received by OSC across the Federal Government.<sup>12</sup> To put this number in context, 2014 was the first year on record that cases filed with OSC by VA employees surpassed those by Department of Defense (DoD) employees, despite the fact that the DoD has two times more civilian employees than the VA.<sup>13</sup> The recent increase of whistleblower complaints coming from the VA has forced OSC to reallocate staff and resources and prioritize VA cases through an expedited review process.<sup>14</sup>

The most troubling sign of the VA’s treatment of whistleblowers comes from the way it has reacted to damaging information in some situations—by first questioning the individual who made the disclosure rather than investigating the allegation the individual raised.<sup>15</sup> According to Special Counsel Lerner, there are two problems with this approach: the VA problems are glossed over, and the VA employees fear that “their own actions will come under intense scrutiny” if they speak up.<sup>16</sup>

In a September 2015 Committee hearing titled *Improving VA Accountability: Examining First-Hand Accounts of Department of Veterans Affairs Whistleblowers*, the Committee invited several VA whistleblowers to come in and tell their stories to “illustrate the wide variety of challenges and hardships whistleblowers face when

<sup>7</sup>See, e.g., S. 2127, Dr. Chris Kirkpatrick Whistleblower Protection Act of 2015, 114th Cong. (2015); S. 2968, Office of Special Counsel Reauthorization Act of 2016, 114th Cong. (2016).

<sup>8</sup>A bill to enhance whistleblower protection for contractor and grantee employees, Pub. L. No. 114–261 (114th Cong.) (2015).

<sup>9</sup>*Improving VA Accountability: Examining First-Hand Accounts of Department of Veterans Affairs Whistleblowers: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2015) (statement of Carolyn Lerner, Special Counsel, Office of Special Counsel), available at <http://www.hsgac.senate.gov/hearings/improving-va-accountability-examining-first-hand-accounts-of-department-of-veterans-affairs-whistleblowers> [hereinafter “*Improving VA Accountability*”].

<sup>10</sup>*Id.*

<sup>11</sup>*Addressing Continued Whistleblower Retaliation Within VA: Hearing Before Comm. on Veterans’ Affairs, Subcomm. On Oversight & Investigations 1*, 114th Cong. (2015) (statement of Carolyn Lerner, Special Counsel, Office of Special Counsel), available at <http://veterans.house.gov/hearing/addressing-continued-whistleblower-retaliation-within-va> [hereinafter “*Addressing Continued Whistleblower Retaliation Within VA*”].

<sup>12</sup>*Improving VA Accountability at 2* (statement of Carolyn Lerner, Special Counsel, Office of Special Counsel).

<sup>13</sup>*Id.* at 1.

<sup>14</sup>*Id.* at 2.

<sup>15</sup>*Id.* at 6–7; *Addressing Continued Whistleblower Retaliation Within VA 7* (statement of Carolyn Lerner, Special Counsel, Office of Special Counsel).

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

they come forward to report wrongdoing.”<sup>17</sup> The hearing followed a March 2015 Committee hearing revealing the tragic events at the Tomah VAMC, where two separate whistleblowers—Dr. Noelle Johnson and Ryan Honl—testified about how they blew the whistle on over-medication at the facility, and how their warnings were received by the VA with punishment, rather than reform.<sup>18</sup>

One of the individuals who testified at the September 2015 hearing was Sean Kirkpatrick on behalf of his deceased brother, Dr. Chris Kirkpatrick. Dr. Kirkpatrick was a clinical psychologist at the Tomah VAMC who came forward to his union representative about his concerns that the Tomah VAMC was overprescribing medication.<sup>19</sup> A majority staff report issued on May 31, 2016, found that in 2009—and perhaps as far back as 2004—employees at the Tomah VAMC “referred to the facility as ‘Candy Land’ and to one doctor in particular, Dr. David Houlihan, as the ‘Candy Man.’”<sup>20</sup> Employees at the facility reported that patients used these terms because Dr. Houlihan prescribed large quantities of narcotics.<sup>21</sup> So large, in fact, that some Tomah VAMC pharmacists refused to prescribe or fill large quantities of narcotic prescriptions for Dr. Houlihan’s patients.<sup>22</sup> In the spring of 2009, a Tomah VAMC pharmacist and the local union grew concerned about a possible connection between Dr. Houlihan’s proclivity to give out such large quantities of narcotics and the fact that several of his patients had “unexplained” deaths at this Medical Center.<sup>23</sup>

According to documents obtained by the Committee, around the same time of rising concerns with Dr. Houlihan’s prescribing methods, Dr. Kirkpatrick reported to his supervisors and his union representative that he believed some of his patients were overmedicated.<sup>24</sup> At the Committee’s hearing on September 22, 2015, Dr. Kirkpatrick’s brother provided further information. He testified that Dr. Kirkpatrick also complained that he was “very afraid of Dr. Houlihan” and was facing an “ethical dilemma” because he had discussed with a physician assistant the fact that he had concerns about medication being prescribed, and that the physician assistant had accused him of inappropriate behavior.<sup>25</sup> Sean Kirkpatrick testified that shortly thereafter, Dr. Kirkpatrick received a written counseling admonishing him for “‘educating’ patients about what medications they are on” and advising him to “focus on his own work.”<sup>26</sup> On July 14, 2009, the Tomah VAMC terminated Dr. Kirkpatrick for “performance issues.”<sup>27</sup> Tragically, Dr. Kirkpatrick took

<sup>17</sup> *Improving VA Accountability* at 1 (opening statement of Senator Ron Johnson).

<sup>18</sup> *Tomah VAMC: Examining Quality, Access, and a Culture of Overreliance on High-Risk Medications: Joint Field Hearing Before the Comm. of Homeland Security & Governmental Affairs and the H. Comm. on Veterans’ Affairs*, 114th Cong. (2015), available at <http://www.hsgac.senate.gov/hearings/joint-field-hearing-tomah-vamc-examining-quality-access-and-a-culture-of-overreliance-on-high-risk-medications> [hereinafter, *Tomah VAMC Hearing*].

<sup>19</sup> *Improving VA Accountability* at 1–2 (statement of Sean Kirkpatrick).

<sup>20</sup> Maj. Staff of S. Comm. on Homeland Security and Gov’t. Affairs, *The Systemic Failures and Preventable Tragedies at the Tomah VA Medical Center*, vi, 114th Cong. (2016) [hereinafter “Tomah Report”].

<sup>21</sup> *Id.* at i.

<sup>22</sup> *Id.* at 116.

<sup>23</sup> *See id.* at 29; *see also id.* at 22–24.

<sup>24</sup> E-mail from Chris Kirkpatrick, Tomah VAMC, to Dianne Streeter and Linda Ellinghuysen (Apr. 23, 2009), in Juneau Co. Sherriff’s Dept., *Chris Kirkpatrick Death Investigation Report* 40, 43 (2009) (on file with Comm.) [hereinafter “Chris Kirkpatrick Death Investigation Report”].

<sup>25</sup> *Improving VA Accountability* at 2 (statement of Sean Kirkpatrick).

<sup>26</sup> *Id.*

<sup>27</sup> Letter from Wayne Davis, Manager, Great Lakes Human Resources Management Service, to Chris Kirkpatrick (July 14, 2009) (on file with Comm.).

his own life later that evening.<sup>28</sup> The VA never investigated Dr. Kirkpatrick's suicide.<sup>29</sup>

In his testimony before the Committee, Sean Kirkpatrick detailed the retaliation he believes his brother experienced in the wake of his questioning veteran care at the Tomah VAMC. Sean Kirkpatrick also explained the emotional stress that Dr. Kirkpatrick had been under at the facility due to “taking on so many cases” without additional help, receiving threats of violence from one of his patients, and feeling as if he had no outlet to discuss the emotional stresses of treating veterans with Post Traumatic Stress Disorder.<sup>30</sup> Sean Kirkpatrick suggested nine recommendations for Congress to consider to reform the way that whistleblowers, and in particular, VA employees, are treated.<sup>31</sup> Many of those recommendations are addressed in this legislation and discussed in further detail below.

While retaliation at the VA has captured the public's attention most recently, retaliation against whistleblowers is not confined to any one agency. To better understand these issues across the Federal Government, the Committee held a hearing in June 2015, titled *Blowing the Whistle on Retaliation: Accounts of Current and Former Federal Agency Whistleblowers*.<sup>32</sup> Witnesses at the hearing were employees from the United States Army, Homeland Security Investigations, the Social Security Administration, and the United States Customs and Border Protection who testified that they made a disclosure and believed they experienced retaliation from the agencies in response, including loss of their job, suspension of pay, and termination proceedings against them.<sup>33</sup>

#### *Probationary period employees*

Some Federal employees serving initial appointments or being promoted to management in the civil service are required to serve a period of probation, or temporary appointment, typically for one year.<sup>34</sup> This time period allows the agency to evaluate the employee before the appointment becomes final.<sup>35</sup> If the agency decides not to finalize the appointment, the individual has limited appeal rights and the agency does not have to go through the same formal procedures to terminate the employee as it would if the employee's appointment was finalized, after which dismissing an employee becomes “more difficult and time consuming.”<sup>36</sup>

While probationary periods serve a very important function in the civil service, they have the potential to be used as a tool by

<sup>28</sup> Chris Kirkpatrick Death Investigation Report.

<sup>29</sup> Letter from Sloan Gibson, Deputy Sec'y, U.S. Dep't of Veterans Affairs, to Sen. Ron Johnson, Chairman, S. Comm. on Homeland Sec. & Governmental Affairs (May 29, 2015) (on file with Comm.).

<sup>30</sup> *Improving VA Accountability* at 3 (statement of Sean Kirkpatrick)

<sup>31</sup> *Id.* at 6–7.

<sup>32</sup> *Blowing the Whistle on Retaliation: Accounts of Current and Former Federal Agency Whistleblowers: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2015), available at <http://www.hsgac.senate.gov/hearings/blowing-the-whistle-on-retaliation-accounts-of-current-and-former-federal-agency-whistleblowers> [hereinafter “*Blowing the Whistle on Retaliation*”].

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

<sup>34</sup> 5 U.S.C. § 3321(a). See also 5 C.F.R. § 315.801–04. Gov't Accountability Office, GAO–15–191, *Federal Workforce: Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance 10* (2015).

<sup>35</sup> *Id.*

<sup>36</sup> Gov't Accountability Office, GAO–15–191, *Federal Workforce: Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance 11* (2015). See also 5 C.F.R. § 315.806.

managers to retaliate against whistleblowers, since during this time an employee may feel less free to speak up about abuses. Accordingly, the Committee believes it is useful to have an independent review of claims of retaliation against employees serving in a probationary status to ensure such abuse is not occurring.

Probationary period employees should feel safe to make a protected disclosure to their agency, agency Inspector General, or OSC, despite the fact that they are just starting out in Federal service. One way to encourage employees to speak up is to ensure that, if they are retaliated against for a disclosure, they have the right to request a transfer to another position while their investigation is underway and the agency should prioritize that request. Getting an employee out of their immediate management structure while their demotion, termination, or other personnel action is stayed can give the employee the time and peace of mind to fight the action.

#### *Lack of accountability*

“Every academic or government study has concluded that the primary motivating, or chilling factor for would-be whistleblowers is whether they can make a difference by bearing witness.”<sup>37</sup> Unfortunately, in 2016 only sixty-two percent of Federal employees that responded to an Office of Personnel Management survey seeking Federal employee viewpoints on a variety of topics reported that they believed they could blow the whistle on a potential violation of any law, rule, or regulation without facing reprisal.<sup>38</sup>

OSC has also raised concerns about the inconsistent use of discipline against those whose wrongdoing is exposed by whistleblowers at the VA. In testimony before this Committee, Special Counsel Lerner noted numerous examples of the VA failing to discipline officials found responsible for posing significant risks to public health and safety or engaging in other misconduct.<sup>39</sup> Special Counsel Lerner added that this lack of discipline “stand[s] in stark contrast to disciplinary actions taken against VA whistleblowers . . . for minor indiscretions or for activity directly related to the employee’s whistleblowing.”<sup>40</sup>

The Veterans Access, Choice and Accountability Act of 2014,<sup>41</sup> as amended by the Department of Veterans Affairs Expiring Authorities Act of 2014,<sup>42</sup> commissioned an “independent assessment of 12 areas of VA’s health care delivery systems and management processes.”<sup>43</sup> The study found, in part, that the Veterans Health Administration (VHA) has been “plagued by many problems: growing bureaucracy, leadership and staffing challenges, and unsustainable trajectory of capital costs.”<sup>44</sup> In addition, the study found “a mis-

<sup>37</sup> *Blowing the Whistle on Retaliation* (statement of Thomas M. Devine, Legal Director, Government Accountability Project).

<sup>38</sup> Office of Personnel Mgmt., Federal Employee Viewpoint Survey Results, Governmentwide Management Report 38 (2016) available at <https://www.fedview.opm.gov/2016FILES/2016 FEVS Gwide Final Report.PDF>.

<sup>39</sup> *Improving VA Accountability* 5–6 (statement of Carolyn Lerner, Special Counsel, Office of Special Counsel).

<sup>40</sup> *Id.* at 6.

<sup>41</sup> Pub. L. No. 113–146 (113th Cong.).

<sup>42</sup> Pub. L. No. 113–175 (113th Cong.).

<sup>43</sup> Independent Assessment of the Health Care Delivery Systems and Management Processes of the Department of Veterans Affairs, Volume I: Integrated Report iii (2015), available at [http://www.va.gov/opa/choiceact/documents/assessments/Integrated\\_Report.pdf](http://www.va.gov/opa/choiceact/documents/assessments/Integrated_Report.pdf).

<sup>44</sup> *Id.* at xii.

alignment of accountability and authority exists within a broader VHA culture characterized by risk aversion and lack of trust.”<sup>45</sup> To ensure accountability throughout the Federal Government, S. 585 outlines mandatory disciplinary procedures for managers that are found to have retaliated against whistleblowers.

This “misalignment” was all the more visible in the aftermath of the VA manipulated-wait-time scandal. Following the wait-time scandal, Congress passed the Veterans Access, Choice and Accountability Act of 2014 (Choice Act).<sup>46</sup> The Choice Act authorized the Secretary of the VA to seek the removal or transfer of Senior Executives based on poor performance or misconduct. To date, the VA has used its authority to remove only six senior executives.<sup>47</sup> On May 31, 2016, Attorney General Lynch informed the Senate Legal Counsel that the Justice Department would no longer enforce the removal provisions of the Choice Act, arguing that they are “inconsistent with the Appointments Clause” of the Constitution.<sup>48</sup> In addition, previous VA leadership vigorously opposed congressional efforts to enact additional accountability measures on non-senior executive VA employees.<sup>49</sup>

In addition to ensuring consistent discipline, it is crucial that employees know their rights and that supervisors and managers have training on how to address protected disclosures and allegations of retaliation. Current law requires that agencies keep their workforce informed about the rights and remedies available to them to prevent prohibited personnel practices, including how to make a disclosure.<sup>50</sup> To help agencies meet this obligation, OSC provides a certification program that walks the agency through simple steps such as placing informational posters at agency facilities, providing information to new hires, and training supervisors about prohibited personnel practices.<sup>51</sup> The certification program is not statutorily required, but is mandated under the Administration’s National Action Plan on Open Government.<sup>52</sup>

To ensure all agencies are providing this crucial information to their employees, S. 585 sets a deadline for agencies to provide their employees with the required information, and also provides more detail on what type of information the agency needs to include when it informs its employees of their general whistleblower rights:

<sup>45</sup>*Id.* at xvi.

<sup>46</sup>Veterans Access, Choice, and Accountability Act of 2014, Pub. L. No. 113–146, 128 Stat. 1754 (2014).

<sup>47</sup>*Tomah VAMC: Examining Patient Care and Abuse of Authority: Hearing Before the S. Comm. on Homeland Sec. and Gov’t Affairs*, 114th Cong. (2016) (statements of Hon. Sloan Gibson, Deputy Sec’y, Veterans Health Admin., Dep’t of Veterans Affairs, post-hearing questions for the record), on file with Comm.

<sup>48</sup>Letter from Loretta Lynch, Attorney General, U.S. Dep’t of Justice, to Patricia Bryan, Senate Legal Counsel, U.S. Senate (May 31, 2016), *available at* [http://lyxsm73j7aop3quc9y5ifaw3.wpengine.netdna-cdn.com/wp-content/uploads/2016/06/helman\\_v\\_VA.pdf](http://lyxsm73j7aop3quc9y5ifaw3.wpengine.netdna-cdn.com/wp-content/uploads/2016/06/helman_v_VA.pdf); *see also* Nicole Ogrysko, *DoJ Says Key VA Choice Provisions for SES Appeals is Unconstitutional*, Federal News Radio (June 3, 2016, 10:25 AM), <http://federalnewsradio.com/workforce-rights/governance/2016/06/doj-says-key-va-choice-provision-ses-appeals-unconstitutional/>

<sup>49</sup>*Pending Health Care and Benefits Legislation Before S. Comm. on Veterans’ Affairs*, 114th Cong. (2015) (statements of Dr. Rajiv Jain, Assistant Deputy Under Sec’y for Health for Patient Care Sers., Veterans Health Admin.), *available at* <http://www.veterans.senate.gov/imo/media/doc/VHA%20Jain%20Testimony%206.24.15.pdf>.

<sup>50</sup>5 U.S.C. § 2302(c).

<sup>51</sup>*Examining the Administration’s Treatment of Whistleblowers: Hearing Before the Oversight & Gov. Reform Comm.* 7, 113th Cong. (2014) (statement of Carolyn Lerner, Special Counsel, Office of Special Counsel), *available at* <https://oversight.house.gov/hearing/examining-administrations-treatment-whistleblowers/>.

<sup>52</sup>*Id.*

(1) information regarding whistleblower protections available to new employees during the probationary period; (2) information about the role of OSC and the MSPB in protecting whistleblowers; and (3) information about how to make a lawful disclosure that must be kept classified in the interest of national security. Additionally, S. 585 requires that information about employee's whistleblower protections must be made publicly available through the agency's own website, and on the agency's internal online portal, if one exists.

*Other improvements needed at the VA*

The original Whistleblower Protection Act contained twelve prohibited personnel practices listed in statute that serve to protect Federal employees, including protection from hiring violations, discrimination, and retaliation against whistleblowers.<sup>53</sup> In the years since the law was passed, however, changes in agency action have required Congress to further protect employees by supplementing the list. Through the WPEA, Congress added a thirteenth prohibited personnel practice: prohibiting agencies from imposing non-disclosure agreements on Federal employees that do not explicitly permit whistleblowing.<sup>54</sup>

Similarly, some agency employees are now skirting the law and retaliating against whistleblowers in other "creative" ways.<sup>55</sup> One significant concern to this Committee is the abuse of accessing a whistleblower's medical records. In 2015, Special Counsel Lerner testified that "[i]n several cases, the medical records of whistleblowers have been accessed and information in those records has apparently been used to attempt to discredit the whistleblowers."<sup>56</sup> At the Committee's March 2015 field hearing in Tomah, Wisconsin, whistleblower and Army veteran Ryan Honl testified that Tomah VAMC employees accessed his medical records despite the fact that Mr. Honl had never received care at the Tomah VAMC.<sup>57</sup> In addition, Brandon Coleman and Shea Wilkes, both veteran VA employees, testified at the Committee's September 2015 hearing that their medical records were improperly accessed by VA officials after they began raising concerns about patient care at the VA facilities where they worked.<sup>58</sup> Mr. Wilkes testified that he has talked with more than 50 whistleblowers across the country who have had their medical records accessed.<sup>59</sup>

The VA may lack proper technological safeguards to ensure that employees' medical records are shielded from the view of other employees. According to OSC, non-medical personnel within the VA have at times accessed the medical files of their veteran coworkers.<sup>60</sup> In discussions with OSC staff, OSC has reported that in some instances, VA employees have claimed that they accessed another employee's medical record simply to obtain their address for

<sup>53</sup> Pub. L. No. 101-12 (101st Cong.) (1989).

<sup>54</sup> Pub. L. No. 112-199 (112th Cong.) (2012).

<sup>55</sup> *Blowing the Whistle on Retaliation* (statement of Thomas M. Devine, Legal Director, Government Accountability Office).

<sup>56</sup> *Improving VA Accountability* at 7 (statement of Carolyn Lerner, Special Counsel, Office of Special Counsel).

<sup>57</sup> *Tomah VAMC Hearing* at 2 (statement of Ryan Honl).

<sup>58</sup> See generally, *Improving VA Accountability* (statements of Brandon Coleman, Ph.D. and Shea Wilkes).

<sup>59</sup> *Id.* (testimony of Shea Wilkes, Licensed Clinical Social Worker, Overton VA Medical Center).

<sup>60</sup> Comm. staff discussions with the Office of Special Counsel (Nov. 2015).

a valid work-related reason.<sup>61</sup> There does not seem to be a valid reason for a VA employee to access to the medical records of another employee unless they are treating the individual. It is the Committee's view that in all other circumstances, if the VA employee is in need of personal information, such as an address, he or she should obtain that information through the agency's personnel records system.

In addition to improper access of medical records, the Committee has heard testimony of other employee concerns at the VA, including employee mental health and safety. As stated above, Dr. Chris Kirkpatrick was a clinical psychologist at the Tomah VAMC. Dr. Kirkpatrick's brother provided to the Committee information about Dr. Kirkpatrick's work at Tomah VAMC. According to Dr. Kirkpatrick's brother, Sean, in his job, Dr. Kirkpatrick treated veterans dealing with complex, sometimes combat-related mental illness including post-traumatic stress disorder (PTSD) and acute stress disorder (ASD).<sup>62</sup> These veterans would recount their horrific experiences on the battlefield to Dr. Kirkpatrick and he would devise treatment methods to assist those veterans in their recovery.<sup>63</sup> Sean Kirkpatrick testified that Dr. Kirkpatrick sometimes felt overwhelmed by his caseload and the stories he heard and believed that there should be some sort of support structure in place for VA professionals to seek mental health services of their own.<sup>64</sup> This bill would require the VA to conduct outreach to its employees to make them more aware of any available mental health services, including telemedicine options.

Sean Kirkpatrick also testified that a veteran had threatened Dr. Kirkpatrick at the Tomah VAMC. According to Sean Kirkpatrick's testimony, Dr. Kirkpatrick reached out to his union stating that he was concerned for his safety after this veteran threatened to commit bodily harm to Dr. Kirkpatrick and his dog.<sup>65</sup> In an April 20, 2015 letter, Chairman Johnson inquired about VA protocols for handling threats from patients to staff and what actions, if any, were taken regarding any patient that may have threatened Dr. Kirkpatrick.<sup>66</sup> In response, the VA stated to Chairman Johnson that the VA Police Service addresses patient threats and that the Tomah VAMC has a "Flags Committee to consider risk factors and recommendations on flagging patients consistent with VHA Directive 2010-053, *Patient Record Flags*."<sup>67</sup> Specifically regarding the alleged threat against Dr. Kirkpatrick, the VA stated that Tomah VAMC was "not aware of an investigation into threats being made against Dr. Kirkpatrick by a patient. A review of Dr. Kirkpatrick's records identified one Veteran as possibly being the Veteran who may have threatened Dr. Kirkpatrick. However the Tomah VAMC is not aware of any action taken against this patient regarding threats against Dr. Kirkpatrick."<sup>68</sup> This bill would require the VA

<sup>61</sup> *Id.*

<sup>62</sup> *Improving VA Accountability* (statement of Sean Kirkpatrick).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Letter from Ron Johnson, Chairman S. Comm. on Homeland Security and Governmental Affairs, to Robert McDonald, Secretary, Dep't. of Veterans Affairs, Apr. 20, 2015.

<sup>67</sup> Letter from Sloan D. Gibson, Deputy Secretary, Dep't of Veterans Affairs, to Ron Johnson, Chairman, S. Comm. on Homeland Security and Governmental Affairs, May 29, 2015.

<sup>68</sup> *Id.*

to ensure protocols are in place to address threats from VA patients against VA employees.

The Committee’s investigation of the Tomah VAMC has discovered other areas for improvement within the VA. In particular, the investigation has identified potential problems with the reporting structure of the VA Police Department of the Tomah VAMC. Sean Kirkpatrick testified that the reporting structure of the Tomah VA Police Department may have led to potential conflicts of interest with hospital leadership and possibly inhibited the Tomah VA Police Department’s law enforcement functions at the facility.<sup>69</sup> There is potential that the chain of command structure for police departments at other VA facilities poses similar concerns about conflicts of interest with facility management. Accordingly, S. 585 would require that GAO study the reporting, staffing, accountability, and chain of command structure of the VA police officers at their own medical centers.

S. 585 is a culmination of the work this Committee has done to examine the gaps and weaknesses in current whistleblower protection laws.<sup>70</sup> The bill addresses a wide array of the most pressing problems at the VA and across the Federal Government relating to retaliation against whistleblowers, and directs the VA to put in place plans to limit its employees’ unauthorized access to medical records.

### III. LEGISLATIVE HISTORY

Chairman Ron Johnson (R–WI) introduced S. 585, the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, on March 8, 2017, with Senator Joni Ernst (R–IA). The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 585 at a business meeting on March 15, 2017. No amendments were offered. The bill was passed by voice vote *en bloc* with Senators Johnson, Portman, Lankford, Daines, McCaskill, Carper, Tester, Heitkamp, Peters, Hassan, and Harris present.

### IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

#### *Sec. 1. Short title; table of contents*

This section establishes the short title of the bill as the “Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017.”

#### *Title I: Employees Generally*

#### *Sec. 101. Definitions*

This section includes definitions of the term “agency” “employee”, and “personnel action”.

<sup>69</sup> *Improving VA Accountability* (statement of Sean Kirkpatrick).

<sup>70</sup> The version of this bill that the Committee reported favorably in the 114th Congress (S. 2127, 114th Cong.) contained a provision that gave the OSC statutory authority for access to documents from Executive Branch agencies. This bill does not include that provision because the Committee believes that the Office of Special Counsel Reauthorization Act of 2017 is the best legislative vehicle to address that issue. See Office of Special Counsel Reauthorization Act of 2017, S. 582, 115th Cong. (2017).

*Sec. 102. Stays; probationary employees*

Subsections (a) and (b) ensure that if MSPB grants a stay to an employee under Title 5, Section 1214 or 1221, the employee can request from their employing agency a transfer, and that request shall receive priority. Subsection (c) requires GAO to study federal agency retaliation against probationary period employees.

*Sec. 103. Prohibited personnel practices*

This section makes accessing an employees's medical record in retaliation of an employee engaging in a protected activity a prohibited personnel practice.

*Sec. 104. Discipline of supervisors based on retaliation against whistleblowers*

This section requires the head of each agency to propose prescribed adverse actions against supervisory employees who are determined to have committed a prohibited personnel action against a whistleblower or accessed a medical record in retaliation for the employee engaging in a protected activity as described in title 5, Section 2302(b)(8), (9), and the new (14). The adverse actions that shall be proposed are: for the first offense, not less than a 3-day suspension plus any additional supplemental discipline the head of the agency (or his designee) deems appropriate; and for a second offense, removal. A determination of the commitment of a prohibited personnel action must be made by the head of the agency, an administrative judge, the MSPB, the OSC, an adjudicating body provided under a union contract, a Federal judge, or the agency Inspector General. Employees against whom these adverse actions are proposed would have notice and opportunity to respond and retain due process rights to appeal the decision to the Merit System Protections Board.

*Sec. 105. Suicide by employees*

Subsections (a) and (b) ensure that OSC has the information it needs to investigate prohibited personnel practices if an employee commits suicide. OSC would know if someone filed a complaint with OSC, but not necessarily if they made disclosures to the agency. These provisions require the agency to share information with the OSC about a Federal employee who committed suicide if that employee had, prior to his or her death, (1) made any protected disclosure, and (2) had a personnel action taken against him or her by the agency. In such circumstances, OSC is required to examine whether the personnel action was taken because of the disclosure and take appropriate action.

*Sec. 106. Training for supervisors*

This section requires agencies to provide supervisors training on responding to complaints alleging a violation of whistleblower protections available to agency employees.

*Sec. 107. Information on whistleblower protections*

This section requires agencies to keep their employees apprised of the rights and remedies available to them if the agency commits a prohibited personnel practice, including requiring agencies to post such information on their public and internal websites.

*Title II: Department of Veterans Affairs Employees*

*Sec. 201. Prevention of unauthorized access to medical records of employees of the Department of Veterans Affairs*

This section requires the VA to formulate a plan for protecting employees from having their medical records accessed without authorization. The plan must include how the agency will use technology to block computer access to records for those employees who have no need to access such information. This section will also require Department employees to cease accessing medical files for demographic information where another non-medical database is available, which OSC believes has been an unnecessary invasion of privacy and could be a pretext for accessing unauthorized files.

*Sec. 202. Outreach on availability of mental health services available to employees of the Department of Veterans Affairs*

This section requires the VA to conduct outreach to its employees to make them more aware of any mental health services, including telemedicine, that are available to them.

*Sec. 203. Protocols to address threats against employees of the Department of Veterans Affairs*

This section requires the VA to ensure protocols are in place to address threats from VA patients against VA employees.

*Sec. 204. Comptroller General of the United States study on accountability of chiefs of police of Department of Veterans Affairs medical centers*

This section requires GAO to study the reporting, staffing, accountability, and chain of command structure of the VA police officers at their own medical centers.

### III. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

### IV. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

MAY 1, 2017.

Hon. RON JOHNSON,  
*Chairman, Committee on Homeland Security and Governmental Affairs, United States Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 585, the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Dwayne M. Wright.

Sincerely,

KEITH HALL.

Enclosure.

*S. 585—Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017*

S. 585 would require the Government Accountability Office (GAO) to prepare two reports and would modify several personnel and administrative procedures at federal agencies—some of which would be specific to the Department of Veterans Affairs (VA). CBO estimates that implementing S. 585 would cost \$3 million over the 2018–2022 period; that spending would be subject to the availability of appropriated funds. Enacting S. 585 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

The two reports by GAO would discuss retaliation against employees on probationary status and assess management and staffing levels of police officers at VA medical centers. On the basis of costs for similar reports, CBO estimates that completing those reports would cost \$2 million over the 2018–2022 period.

Additionally, on the basis of information from VA and the Office of Special Counsel, CBO expects that individually, provisions modifying procedures at VA and other federal agencies would have an insignificant budgetary effect because they would either largely codify current practice or affect few people. In total, however, CBO estimates that implementing those provisions would, in total, cost \$1 million over the 2018–2022 period.

CBO estimates that enacting S. 585 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

S. 585 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Dwayne M. Wright. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

V. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows: (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

**UNITED STATES CODE**

\* \* \* \* \*

**TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES**

\* \* \* \* \*

**PART II—CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES**

\* \* \* \* \*

**CHAPTER 12—MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION**

\* \* \* \* \*

**Subchapter II—Office of Special Counsel**

\* \* \* \* \*

**SEC. 1214. INVESTIGATION OF PROHIBITED PERSONNEL PRACTICES; CORRECTIVE ACTION**

(a) \* \* \*

(b) \* \* \*

(1) \* \* \*

(A) \* \* \*

\* \* \* \* \*

*(E) If the Merit Systems Protections Board grants a stay under this subsection, the head of the agency employing the employee shall give priority to a request for a transfer submitted by the employee.*

\* \* \* \* \*

**Subchapter III—Individual Right of Action in Certain Reprisal Cases**

\* \* \* \* \*

**SEC. 1221. INDIVIDUAL RIGHT OF ACTION IN CERTAIN REPRISAL CASES**

(a) \* \* \*

\* \* \* \* \*

*(k) If the Merit Systems Protection Board grants a stay to an employee in probationary status under subsection (c), the head of the agency employing the employee shall give priority to a request for a transfer submitted by the employee.*

\* \* \* \* \*

**PART III—EMPLOYEES**

\* \* \* \* \*

**Subpart A—General Provisions**

\* \* \* \* \*

**CHAPTER 23—MERIT SYSTEM PRINCIPLES**

\* \* \* \* \*

**Table of sections**

- Sec.
- 2301. Merit systems principles.
- 2302. Prohibited personnel practices.
- 2303. Prohibited personnel practices in the Federal Bureau of Investigation.
- 2304. Prohibited personnel practices affecting the Transportation Security Administration.
- 2305. Responsibilities of the Government Accountability Office.
- 2306. Coordination with certain other provisions of law.
- 2307. *Information on whistleblower protections.*

\* \* \* \* \*

**SEC. 2302. PROHIBITED PERSONNEL PRACTICES.**

- (a) \* \* \*
- (b) \* \* \*

(1) \* \* \*

\* \* \* \* \*

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title; **[or]**

(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling."**[.]**; *or*

(14) *access the medical record of another employee or an applicant for employment as a part of, or otherwise in furtherance of, any conduct described in paragraphs (1) through (13).*

**[(c)]** The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title, including how to make a lawful disclosure of information that is specifically required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs to the Special Counsel, the Inspector General of an agency, Congress, or other agency employee designated to receive such disclosures. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

**[(d)]** (c) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through af-

firmative action or any right or remedy available to any employee or applicant for employment in the civil service under—

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

(2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;

(4) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

**[(e)] (d)**

(1) For the purpose of this section, the term “veterans” preference requirement” means any of the following provisions of law:

(A) Sections 2108, 3305(b), 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317(b), 3318, 3320, 3351, 3352, 3363, 3501, 3502(b), 3504, and 4303(e) and (with respect to a preference eligible referred to in section 7511(a)(1)(B)) subchapter II of chapter 75 and section 7701.

(B) Sections 943(c)(2) and 1784(c) of title 10.

(C) Section 1308(b) of the Alaska National Interest Lands Conservation Act.

(D) Section 301(c) of the Foreign Service Act of 1980.

(E) Sections 106(f), 7281(e), and 7802(5) of title 38.

(F) Section 1005(a) of title 39.

(G) Any other provision of law that the Director of the Office of Personnel Management designates in regulations as being a veterans’ preference requirement for the purposes of this subsection.

(H) Any regulation prescribed under subsection (b) or (c) of section 1302 and any other regulation that implements a provision of law referred to in any of the preceding subparagraphs.

(2) Notwithstanding any other provision of this title, no authority to order corrective action shall be available in connection with a prohibited personnel practice described in subsection (b)(11). Nothing in this paragraph shall be considered to affect any authority under section 1215 (relating to disciplinary action).

**[(f)] (e)**

(1) A disclosure shall not be excluded from subsection (b)(8) because—

(A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);

(B) the disclosure revealed information that had been previously disclosed;

(C) of the employee's or applicant's motive for making the disclosure;

(D) the disclosure was not made in writing;

(E) the disclosure was made while the employee was off duty; or

(F) of the amount of time which has passed since the occurrence of the events described in the disclosure.

(2) If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8) if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure.

\* \* \* \* \*

**SEC. 2307. INFORMATION ON WHISTLEBLOWER PROTECTIONS.**

(a) *DEFINITIONS.—In this section—*

(1) *the term 'agency'—*

(A) *except as provided in subparagraph (B), has the meaning given that term in section 2302;*

(B) *does not include any entity that is an element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 3003(4));*

(2) *the term 'new employee' means an individual—*

(A) *appointed to a position as an employee of an agency on or after the date of enactment of the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017; and*

(B) *who has not previously served as an employee; and*

(3) *the term "whistleblower protections" means the protections against and remedies for a prohibited personnel practice described in paragraph (8), subparagraph (A)(i), (B), (C), or (D) of paragraph (9), or paragraph (14) of section 2302(b).*

(b) *RESPONSIBILITIES OF HEAD OF AGENCY.—The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Special Counsel and the Inspector General of the agency) that employees of the agency are informed of the rights and remedies available to them under this chapter and chapter 12, including—*

(1) *information regarding whistleblower protections available to new employees during the probationary period;*

(2) *the role of the Office of Special Counsel and the Merit Systems Protection Board with regard to whistleblower protections; and*

(3) *how to make a lawful disclosure of information that is specifically required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs to the Special Counsel, the Inspector General of an agency, Congress, or other agency employee designated to receive such disclosures.*

(c) *TIMING.—The head of each agency shall ensure that the information required to be provided under subsection (b) is provided to*

each new employee of the agency not later than 6 months after the date the new employee begins performing as an employee.

(d) *INFORMATION ONLINE.*—The head of each agency shall make available information regarding whistleblower protections applicable to employees of the agency on the public website of the agency, and on any online portal that is made available only to employees of the agency if one exists.

(e) *DELEGEES.*—Any employee to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall, within the limits of the scope of the delegation, be responsible for the activities described in subsection (b).

\* \* \* \* \*

**Subpart C—Employee Performance**

\* \* \* \* \*

**CHAPTER 45—INCENTIVE AWARDS**

\* \* \* \* \*

**Subchapter I—Awards for Superior Accomplishments**

\* \* \* \* \*

**SEC. 4505a. PERFORMANCE-BASED CASH AWARDS.**

(a) \* \* \*

(b)

(1) \* \* \*

(2) The failure to pay a cash award under this section, or the amount of such an award, may not be appealed. The preceding sentence shall not be construed to extinguish or lessen any right or remedy under subchapter II of chapter 12, chapter 71, or any of the laws referred to in section [2302(d)] section 2302(c).

\* \* \* \* \*

**Subpart D—Pay and Allowances**

\* \* \* \* \*

**CHAPTER 57—TRAVEL, TRANSPORTATION, AND SUBSISTENCE**

\* \* \* \* \*

**Subchapter IV—Miscellaneous Provisions**

\* \* \* \* \*

**SEC. 5755. SUPERVISORY DIFFERENTIALS.**

(a) \* \* \*

(b)

(1) \* \* \*

(2) A supervisory differential may not be considered to be part of the basic pay of an employee, and the reduction or elimination of a supervisory differential may not be appealed.

The preceding sentence shall not be construed to extinguish or lessen any right or remedy under subchapter II of chapter 12 or under any of the laws referred to in section [2302(d)] section 2302(c).

\* \* \* \* \*

**Subpart F—Labor-Management and Employee Relations**

\* \* \* \* \*

**CHAPTER 75—ADVERSE ACTIONS**

\* \* \* \* \*

**Subchapter II—Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less**

\* \* \* \* \*

**Table of sections**

- Sec.
- 7511. Definitions; application.
- 7512. Actions covered.
- 7513. Cause and procedure.
- 7514. Regulations.
- 7515. *Discipline of supervisors based on retaliation against whistleblowers.*

\* \* \* \* \*

**SEC. 7515. DISCIPLINE OF SUPERVISORS BASED ON RETALIATION AGAINST WHISTLEBLOWERS.**

- (a) **DEFINITIONS.**—*In this section—*
  - (1) *the term ‘agency’—*
    - (A) *except as provided in subparagraph (B), means an entity that is an agency, as defined under section 2302, without regard to whether any other provision of this chapter is applicable to the entity; and*
    - (B) *does not include any entity that is an element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 3003(4));*
  - (2) *the term ‘prohibited personnel action’ means taking or failing to take an action in violation of paragraph (8), (9), or (14) of section 2302(b) against an employee of an agency; and*
  - (3) *the term ‘supervisor’ means an employee who would be a supervisor, as defined under section 7103(a), if the entity employing the employee was an agency.*
- (b) **PROPOSED DISCIPLINARY ACTIONS.**—
  - (1) **IN GENERAL.**—*If the head of the agency employing a supervisor, an administrative law judge, the Merit Systems Protection Board, the Special Counsel, a judge of the United States, or the Inspector General of the agency employing a supervisor determines that the supervisor committed a prohibited personnel action, the head of the agency employing the supervisor, in accordance with the procedures under paragraph (2)—*
    - (A) *for the first prohibited personnel action committed by a supervisor—*

(i) shall propose suspending the supervisor for a period of not less than 3 days; and

(ii) may, in addition to a suspension described in clause (i), propose any other action, including reduction in grade or pay, that the head of the agency determines appropriate; and

(B) for the second prohibited personnel action committed by a supervisor, shall propose removing the supervisor.

(2) PROCEDURES.—

(A) NOTICE.—A supervisor against whom an adverse action is proposed is entitled to written notice

(i) stating the specific reasons for the proposed action; and

(ii) informing the supervisor of the right of the supervisor to review the material which is relied on to support the reasons for the proposed action.

(B) ANSWER AND EVIDENCE.—

(i) IN GENERAL.—A supervisor who is notified under subparagraph (A) that the supervisor is the subject of a proposed adverse action under paragraph (1) is entitled to 14 days following such notification to answer and furnish evidence in support of the answer.

(ii) NO EVIDENCE FURNISHED; INSUFFICIENT EVIDENCE.—After the end of the 14-day period described in clause (i), if a supervisor does not furnish evidence as described in clause (i) or if the head of the agency determines that such evidence is not sufficient to reverse the proposed adverse action, the head of the agency shall carry out the adverse action.

(C) SCOPE OF PROCEDURES.—An action carried out under this section—

(i) except as provided in clause (ii), shall be subject to the same requirements and procedures (including regarding appeals) as an action under section 7503, 7513, or 7543; and—

(ii) shall not be subject to—

(I) paragraphs (1) and (2) of subsection section 7503(b);

(II) paragraphs (1) and (2) of subsection b and subsection (c) of section 7513; or

(III) paragraphs (1) and (2) of subsection (b) and subsection (c) of section 7543.

(3) DELEGATION.—

(A) IN GENERAL.—Except as provided in paragraph (B), the head of an agency may delegate any authority or responsibility under this subsection.

(B) Nondelegability of Determination Regarding Prohibited Personnel Action.—If the head of an agency is responsible for determining whether a supervisor has committed a prohibited personnel action for purpose of paragraph (1), the head of the agency may not delegate that responsibility

## WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2012

\* \* \* \* \*

### SEC. 110. DISCLOSURE OF CENSORSHIP RELATED TO RESEARCH, ANALYSIS, OR TECHNICAL INFORMATION.

(a) \* \* \*

(b) PROTECTED DISCLOSURE.—

(1) \* \* \*

(2) DISCLOSURES NOT EXCLUDED.—A disclosure shall not be excluded from paragraph (1) for any reason described under [section 2302(f)(1) or (2)] *section 2303(e)(1) or (2)* of title 5, United States Code.

\* \* \* \* \*

## HOMELAND SECURITY ACT OF 2002

\* \* \* \* \*

### SEC. 704. CHIEF HUMAN CAPITAL OFFICER.

The Chief Human Capital Officer shall report to the Secretary, or to another official of the Department, as the Secretary may direct and shall ensure that all employees of the Department are informed of their rights and remedies under chapters 12 and 23 of title 5 by

(1) participating in the [2302(c)] 2307 Certification Program of the Office of Special Counsel;

(2) achieving certification from the Office of Special Counsel of the Department's compliance with section [2302(c)] 2307 of title 5; and

(3) informing Congress of such certification not later than 24 months after November 25, 2002.

\* \* \* \* \*

## PANAMA CANAL ACT OF 1979

\* \* \* \* \*

### SEC. 1217. RECRUITMENT AND RETENTION REMUNERATION.

(a) \* \* \*

(b) \* \* \*

(c) \* \* \*

(d) \* \* \*

(1) \* \* \*

(2) \* \* \*

(3) A decision by the Commission to exercise or to not exercise the authority to pay a bonus under this subsection shall not be subject to review under any statutory procedure or any agency or negotiated grievance procedure except under any of the laws referred to in [section 2302(d)] *section 2303(c)* of title 5.

\* \* \* \* \*

**SEC. 1233. TRANSITION SEPARATION INCENTIVE PAYMENTS.**

(a) \* \* \*

(b) A decision by the Commission to exercise or to not exercise the authority to pay a transition separation incentive under this section shall not be subject to review under any statutory procedure or any agency or negotiated grievance procedure except under any of the laws referred to in **[section 2302(d)]** *section 2302(d)* of title 5.

\* \* \* \* \*

○