

116TH CONGRESS  
2D SESSION

# S. 3963

To protect certain whistleblowers seeking to ensure accountability and oversight of the Nation’s COVID–19 pandemic response, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

JUNE 15, 2020

Ms. HARRIS (for herself, Ms. WARREN, Mr. MARKEY, Ms. HIRONO, Mr. WYDEN, Ms. BALDWIN, Ms. KLOBUCHAR, Mr. SANDERS, Mr. BLUMENTHAL, Mr. DURBIN, and Ms. SMITH) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

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## A BILL

To protect certain whistleblowers seeking to ensure accountability and oversight of the Nation’s COVID–19 pandemic response, and for other purposes.

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 “COVID–19 Whistle-  
5 blower Protection Act”.

6 **SEC. 2. DEFINITIONS.**

7 In this Act—

1           (1) the term “abuse of authority” means an ar-  
2           bitrary and capricious exercise of authority by a con-  
3           tracting officer or employee that adversely affects  
4           the rights of any individual, or that results in per-  
5           sonal gain or advantage to the officer or employee  
6           or to preferred other individuals;

7           (2) the term “CARES Act” means the CARES  
8           Act (Public Law 116–136);

9           (3) the term “Coronavirus pandemic-related  
10          program, project, or activity”—

11           (A) means a program, project, or activity  
12           of the executive branch of the Federal Govern-  
13           ment authorized under or carried out using  
14           amounts made available under an Act to re-  
15           spond to or to provide aid or assistance to ad-  
16           dress, relief from, or funding to address the  
17           outbreak of COVID–19 that is enacted before,  
18           on, or after the date of enactment of this Act;  
19           and

20           (B) includes any program, project, or ac-  
21           tivity of the executive branch of the Federal  
22           Government authorized under or carried out  
23           using amounts made available under—

24           (i) the Paycheck Protection Program  
25           and Health Care Enhancement Act (Public

1 Law 116–139), or an amendment made by  
2 that Act;

3 (ii) the CARES Act, or an amend-  
4 ment made by that Act;

5 (iii) the Families First Coronavirus  
6 Response Act (Public Law 116–127), or an  
7 amendment made by that Act; or

8 (iv) the Coronavirus Preparedness and  
9 Response Supplemental Appropriations  
10 Act, 2020 (Public Law 116–123), or an  
11 amendment made by that Act;

12 (4) the term “covered funds” means any con-  
13 tract, subcontract, grant, subgrant, loan, loan guar-  
14 antee, or other payment for which—

15 (A) the Federal Government provides any  
16 portion of the funds or property that is pro-  
17 vided, requested, or demanded; and

18 (B) any portion of the funds are appro-  
19 priated or otherwise made available under or to  
20 carry out a Coronavirus pandemic-related pro-  
21 gram, project, or activity;

22 (5) the term “employee”—

23 (A) except as provided under subparagraph  
24 (B), means an individual performing services on  
25 behalf of an employer, including any individual

1 working for an employer under a contract with  
2 such employer (including a contractor, subcon-  
3 tractor, or agent of an employer); and

4 (B) does not include any Federal employee  
5 or member of the uniformed services (as that  
6 term is defined in section 101(a)(5) of title 10,  
7 United States Code);

8 (6) the term “non-Federal employer”—

9 (A) means any employer—

10 (i) with respect to covered funds—

11 (I) the contractor, subcontractor,  
12 grantee, subgrantee, or recipient, as  
13 the case may be, if the contractor,  
14 subcontractor, grantee, subgrantee, or  
15 recipient is an employer; and

16 (II) any professional membership  
17 organization, certification or other  
18 professional body, any agent or li-  
19 censee of the Federal Government, or  
20 any person acting directly or indi-  
21 rectly in the interest of an employer  
22 receiving covered funds; or

23 (ii) with respect to covered funds re-  
24 ceived by a State or local government, the  
25 State or local government receiving the

1 funds and any contractor or subcontractor  
2 of the State or local government; and

3 (B) does not mean any department, agen-  
4 cy, or other entity of the Federal Government;

5 (7) the term “protected individual” means—

6 (A) an employee of, former employee of, or  
7 individual seeking employment with, any non-  
8 Federal employer receiving covered funds; or

9 (B) a Federal personal services contractor  
10 receiving covered funds, former such Federal  
11 personal services contractor, or applicant for a  
12 Federal personal services contract involving  
13 such funds;

14 (8) the term “reprisal” means an action (or, as  
15 applicable, inaction) that is discharging, demoting,  
16 blacklisting, or acting or failing to take an action in  
17 a manner prejudicial against, or otherwise discrimi-  
18 nating against in any way (including in the hiring  
19 process and including by the threat of any such ac-  
20 tion or inaction) a protected individual as described  
21 in section 3(a)(1) for a reason described in subpara-  
22 graph (A) or (B) of such section; and

23 (9) the term “State or local government”  
24 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 **SEC. 3. PROTECTING WHISTLEBLOWERS.**

11 (a) PROHIBITION OF REPRISALS.—

12 (1) IN GENERAL.—A protected individual may  
13 not be discharged, demoted, blacklisted, prejudiced  
14 by any action or lack of action, or otherwise dis-  
15 criminated against in any way (including in the hir-  
16 ing process and including by the threat of any such  
17 action or inaction) for—

18 (A) disclosing, being perceived as dis-  
19 closing, or preparing to disclose (including as-  
20 sisting in disclosing, being perceived as assist-  
21 ing in disclosing, or preparing to assist in dis-  
22 closing and including a disclosure made in the  
23 ordinary course of the duties of the protected  
24 individual) to an officer or entity described in  
25 paragraph (2) information that the protected

1 individual reasonably believes is evidence of  
2 misconduct that violates, obstructs, or under-  
3 mines any statute, rule, or regulation with re-  
4 spect to any Coronavirus pandemic-related pro-  
5 gram, project, or activity, including—

6 (i) gross mismanagement of an agency  
7 contract, subcontract, grant, or subgrant  
8 relating to covered funds;

9 (ii) a gross waste of covered funds;

10 (iii) a substantial and specific danger  
11 to public health or safety;

12 (iv) an abuse of authority related to  
13 the distribution, implementation, or use of  
14 covered funds, including conflict of interest  
15 or partiality; and

16 (v) a violation of any statute, rule, or  
17 regulation related to an agency contract,  
18 subcontract (including the competition for  
19 or negotiation of a contract or sub-  
20 contract), grant, or subgrant, awarded or  
21 issued relating to covered funds; or

22 (B) refusing to obey an order that the pro-  
23 tected individual reasonably believes would re-  
24 quire that individual to violate a statute, rule,

1 or regulation with respect to any Coronavirus  
2 pandemic-related program, project, or activity.

3 (2) OFFICERS AND ENTITIES.—The officers and  
4 entities described in this paragraph are—

5 (A) the Pandemic Response Accountability  
6 Committee;

7 (B) an inspector general, including the  
8 Special Inspector General for Pandemic Relief;

9 (C) the Congressional Oversight Commis-  
10 sion;

11 (D) the Comptroller General of the United  
12 States;

13 (E) a Member of Congress;

14 (F) a congressional committee;

15 (G) a State or Federal regulatory or law  
16 enforcement agency;

17 (H)(i) an individual with supervisory au-  
18 thority over a protected individual; or

19 (ii) another individual who—

20 (I) has authority to investigate, dis-  
21 cover, or terminate misconduct; and

22 (II) works for the non-Federal em-  
23 ployer (in the case of a protected individual  
24 described in section 2(7)(A)), or the Fed-  
25 eral Government (in the case of a pro-



1            tected individual described in section  
2            2(7)(B));

3            (I) a court or grand jury;

4            (J) an officer or representative of a labor  
5            organization; or

6            (K) the head of a Federal agency or a des-  
7            ignee of such a head.

8            (3) APPLICATION.—

9            (A) IN GENERAL.—For the purposes of  
10           paragraph (1)—

11                    (i) a protected individual who initiates  
12                    or provides evidence of misconduct by a  
13                    contractor, subcontractor, grantee, or sub-  
14                    grantee in any judicial or administrative  
15                    proceeding relating to waste, fraud, or  
16                    abuse in connection with a Federal con-  
17                    tract or grant shall be deemed to have  
18                    made a disclosure covered by such para-  
19                    graph; and

20                    (ii) any discharge, demotion, discrimi-  
21                    nation, or other reprisal described in para-  
22                    graph (1) is prohibited even if it is under-  
23                    taken at the request of an executive branch  
24                    officer or employee, unless the request  
25                    takes the form of a non-discretionary di-

1           rective and is within the authority of the  
2           executive branch official making the re-  
3           quest.

4           (B) PROTECTION OF WHISTLEBLOWER  
5           IDENTITY.—

6           (i) IN GENERAL.—Except as required  
7           by law, an officer or entity described in  
8           paragraph (2) that receives information  
9           under paragraph (1) and any individual or  
10          entity to which the officer or entity dis-  
11          closes the information may not disclose the  
12          identity or identifying information of the  
13          protected individual providing the informa-  
14          tion without explicit written consent of the  
15          protected individual.

16          (ii) NOTICE.—If disclosure of the  
17          identity or identifying information of a  
18          protected individual providing information  
19          under paragraph (1) is required by law,  
20          the recipient shall provide timely notice of  
21          the disclosure to the protected individual.

22          (b) INVESTIGATION OF COMPLAINTS.—

23                  (1) COMPLAINTS.—

24                  (A) IN GENERAL.—A protected individual  
25                  who believes that the individual has been sub-

1           jected to a reprisal prohibited under subsection  
2           (a) may, within 3 years after learning of the al-  
3           leged reprisal, submit a complaint regarding the  
4           reprisal to the Secretary of Labor in accordance  
5           with paragraph (2).

6           (B) RESPONSE.—Not later than 60 days  
7           after the submission of a complaint under sub-  
8           paragraph (A), the applicable non-Federal em-  
9           ployer (or the applicable agency head in the  
10          case of a Federal personal services contract in-  
11          volving covered funds) shall submit an answer  
12          to the complaint to the Secretary of Labor.

13          (2) REMEDY AND ENFORCEMENT AUTHOR-  
14          ITY.—

15           (A) RULES AND PROCEDURES.—Except to  
16           the extent provided otherwise in this section,  
17           any action alleging a reprisal prohibited under  
18           subsection (a) shall be governed, to the max-  
19           imum extent practicable, by the rules and pro-  
20           cedures for administrative and judicial enforce-  
21           ment, including for investigations, civil actions,  
22           appeals, and relief, set forth under section  
23           7623(d) of the Internal Revenue Code of 1986.

24           (B) BURDEN OF PROOF.—The Secretary  
25           of Labor, or the officer presiding in a judicial

1 or administrative proceeding, shall apply the  
2 legal burdens of proof specified in section  
3 1221(e) of title 5, United States Code, in deter-  
4 mining whether a reprisal prohibited under sub-  
5 section (a) has occurred in accordance with the  
6 rules and procedures under subparagraph (A).

7 (C) ACCESS TO INVESTIGATIVE FILE OF  
8 THE SECRETARY OF LABOR.—

9 (i) IN GENERAL.—A protected indi-  
10 vidual alleging a reprisal under this section  
11 shall have access to the investigation file of  
12 the Secretary of Labor in accordance with  
13 section 552a of title 5, United States Code  
14 (commonly referred to as the “Privacy  
15 Act”). The investigation of the Secretary  
16 of Labor shall be deemed closed for pur-  
17 poses of disclosure under such section  
18 when an individual files an appeal to an  
19 agency head or a court of competent juris-  
20 diction.

21 (ii) CIVIL ACTION.—In the event a  
22 protected individual alleging a reprisal  
23 under this section brings a civil action  
24 under this subsection, the protected indi-  
25 vidual and the non-Federal employer (or

1 the head of the applicable agency in the  
2 case of a Federal personal services con-  
3 tract involving covered funds), if applica-  
4 ble, shall have access to the investigative  
5 file of the Secretary of Labor in accord-  
6 ance with section 552a of title 5, United  
7 States Code.

8 (iii) EXCEPTION.—The Secretary of  
9 Labor may exclude from disclosure—

10 (I) information protected from  
11 disclosure by a provision of law; and

12 (II) any additional information  
13 the Secretary of Labor determines  
14 disclosure of which would impede a  
15 continuing investigation, if such infor-  
16 mation is disclosed once such disclo-  
17 sure would no longer impede such in-  
18 vestigation, unless the Secretary of  
19 Labor determines that disclosure of  
20 law enforcement techniques, proce-  
21 dures, or information could reasonably  
22 be expected to risk circumvention of  
23 the law or disclose the identity of a  
24 confidential source.

1                   (iv) PRIVACY OF INFORMATION.—The  
2                   Secretary of Labor investigating an alleged  
3                   reprisal under this section may not re-  
4                   spond to any inquiry or disclose any infor-  
5                   mation from or about any protected indi-  
6                   vidual alleging such reprisal, except in ac-  
7                   cordance with the provisions of section  
8                   552a of title 5, United States Code, or as  
9                   required by any other applicable Federal  
10                  law.

11               (c) GENERAL PROVISIONS.—

12                   (1) RIGHTS RETAINED BY EMPLOYEE.—Noth-  
13                  ing in this section shall diminish the rights, privi-  
14                  leges, or remedies of any protected individual under  
15                  any Federal or State law, or under any collective  
16                  bargaining agreement.

17                   (2) LIABILITY.—Notwithstanding any other  
18                  provision of law, a protected individual shall be im-  
19                  mune from civil and criminal liability with respect to  
20                  a disclosure by the individual if the individual would  
21                  be protected from reprisal under subsection (a) for  
22                  making the disclosure. The protected individual shall  
23                  bear the burden of proving that the individual would  
24                  be protected from reprisal under subsection (a) for  
25                  making the disclosure.

1           (3) NONENFORCEABILITY OF CERTAIN PROVI-  
2           SIONS WAIVING RIGHTS AND REMEDIES OR REQUIR-  
3           ING ARBITRATION OF DISPUTES.—

4           (A) WAIVER OF RIGHTS AND REMEDIES.—

5           Except as provided under subparagraph (C),  
6           the rights and remedies provided for in this sec-  
7           tion may not be waived by any public or private  
8           agreement, policy, form, or condition of employ-  
9           ment, including by any predispute arbitration  
10          agreement.

11          (B) PREDISPUTE ARBITRATION AGREE-

12          MENTS.—Except as provided under subpara-  
13          graph (C), no predispute arbitration agreement  
14          shall be valid or enforceable if it requires arbi-  
15          tration of a dispute arising under this section.

16          (C) EXCEPTION FOR COLLECTIVE BAR-

17          GAINING AGREEMENTS.—Notwithstanding sub-  
18          paragraphs (A) and (B), an arbitration provi-  
19          sion in a collective bargaining agreement shall  
20          be enforceable as to disputes arising under the  
21          collective bargaining agreement.

22          (4) REQUIREMENT TO POST NOTICE OF RIGHTS  
23          AND REMEDIES.—Any non-Federal employer receiv-  
24          ing covered funds (and the head of the applicable  
25          agency in the case of a Federal personal services

1 contract involving covered funds) shall post notice of  
2 the rights and remedies provided under this section.

3 (d) RULES OF CONSTRUCTION.—

4 (1) NO IMPLIED AUTHORITY TO RETALIATE  
5 FOR NON-PROTECTED DISCLOSURES.—Nothing in  
6 this section may be construed to—

7 (A) authorize the discharge of, demotion  
8 of, or discrimination or other reprisal against a  
9 protected individual for a disclosure other than  
10 a disclosure protected by subsection (a); or

11 (B) modify or derogate from a right or  
12 remedy otherwise available to the protected in-  
13 dividual.

14 (2) RELATIONSHIP TO STATE LAWS.—Nothing  
15 in this section may be construed to preempt, pre-  
16 clude, or limit the protections provided for public or  
17 private employees under State whistleblower laws.

18 (e) COMPLAINT PORTAL.—The Special Inspector  
19 General for Pandemic Relief, the Pandemic Relief Ac-  
20 countability Committee, and the Congressional Oversight  
21 Commission shall each establish a public website where  
22 any individual who believes that the individual has been  
23 subjected to a reprisal prohibited under subsection (a)  
24 may submit a complaint regarding the reprisal. Such com-



1  plaints shall be transmitted to the Secretary of Labor for  
2  enforcement in accordance with this section.

3       (f) FUNDING.—There is appropriated to the Sec-  
4  retary of Labor for the fiscal year ending September 30,  
5  2020, out of any money in the Treasury not otherwise ap-  
6  propriated, \$20,000,000 to carry out this Act, to remain  
7  available until expended.

○