Congressional Research Service
Informing the legislative debate since 1914

The Whistleblower Protection Act (WPA): A Legal Overview

December 30, 2024

Congressional Research Service
https://crsreports.congress.gov
R48318

CRS REPORT
Prepared for Members and Committees of Congress

Congressional Research Service
Informing the legislative debate since 1914

The Whistleblower Protection Act (WPA): A Legal Overview

R48318

December 30, 2024

Jimmy Balser
Legislative Attorney

SUMMARY

The Whistleblower Protection Act of 1989 (WPA or the Act) protects most federal civil service employees who disclose government illegality, waste, and corruption from adverse personnel actions. The WPA, which amended the Civil Service Reform Act of 1978, prohibits retaliation against federal employees who act as whistleblowers. The WPA was amended by the Whistleblower Protection Enhancement Act in 2012.

The employment retaliation protections of the WPA are available only when certain elements are satisfied. To trigger the application of the protections, an individual must be a covered employee under the Act, the covered employee must make a protected disclosure, and a personnel action must have been taken because of that protected disclosure.

In general, the WPA covers current employees, former employees, and applicants for employment to positions in the executive branch of the government. The WPA protects a disclosure of information that a covered employee reasonably believes evidences behavior of "a violation of any law, rule, or regulation" or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." The WPA prohibits employees with authority over government personnel from retaliating against a whistleblower by taking, failing to take, or threatening to take a personnel action, including a decision regarding a promotion, pay or benefits, removal, suspension, or any other significant change in duties, responsibilities, or working conditions, among other actions.

Whistleblower retaliation is a prohibited personnel practice that is investigated by the U.S. Office of Special Counsel (OSC or Special Counsel). Individuals may bring an allegation that a personnel action has been taken in retaliation for whistleblowing to OSC for investigation. If the Special Counsel finds evidence of whistleblower retaliation prohibited by the WPA, the findings of the investigation and recommendations are reported to the Merit Systems Protection Board (MSPB or the Board) and to the agency that engaged in the prohibited personnel practice. OSC may further petition the MSPB for corrective action if the agency fails to correct it on its own. A covered employee has the right to file an appeal with the MSPB if OSC terminates the investigation or fails to respond to the complaint ("individual right of action") or as an affirmative defense to certain personnel actions, such as termination, which are appealable to the MSPB ("otherwise appealable actions"). If the covered employee or OSC proves to the Board that a protected disclosure was a contributing factor in the personnel action, the Board has the authority to order corrective action for the whistleblower and to discipline retaliating personnel. Appeals of final decisions or orders by the MSPB regarding claims under the WPA can be brought in federal court.

This report provides a legal overview of the WPA, including discussions of the federal agencies and government employees covered by the WPA, the types of disclosures that are protected under the WPA, the personnel actions prohibited by the WPA, the investigation and adjudication procedures of the Special Counsel and the MSPB, and selected considerations for Congress.

Contents

Contacts

History

The Whistleblower Protection Act of 1989 (WPA or the Act) provides protections for most federal employees who disclose government illegality, waste, corruption, and other misconduct; specifically, the WPA protects these employees from adverse personnel actions taken in retaliation for their whistleblowing activity.[1] Although some whistleblower protections for federal employees existed in federal law prior to the enactment of the WPA, congressional supporters of the WPA recognized that these laws "did not go far enough in [their] protection for whistleblowers."[2]

Whistleblower protections for federal government employees in America date back as early as the Revolutionary War. The Second Continental Congress enacted the first whistleblower protection legislation in the United States in 1778.[3] After this initial passage, and for many years thereafter, whistleblower legislation provided little more than a limited recognition of a right without any dedicated procedures for enforcement.

Prior to the enactment of the Pendleton Civil Service Reform Act (The Pendleton Act)[4] in 1883, generally, "federal employment was regarded as an item of patronage, which could be granted, withheld, or withdrawn for whatever reasons might appeal to the responsible executive hiring officer."[5] However, the assassination of President Garfield in 1881 by a dissatisfied office-seeker—who believed that the President had played a significant role in refusing his appointment—triggered a shift in federal government employment from a patronage to a merit-based civil service through the Pendleton Act of 1883.[6]

According to the Office of Personnel Management (OPM), the Pendleton Act's establishment of a merit-based civil service "ushered in a new era and created a competitive civil service, which emphasized an applicant's relative level of qualifications for the position being sought, after fair and open competition."[7] Compared with today's federal personnel laws, the Pendleton Act was limited in its application—focusing almost exclusively on entry into the service, without covering other personnel actions, such as promotion and removal.[8]

---

[1] Whistleblower Protection Act of 1989, P.L. 101-12, 103 Stat. 16. The requirements for a protected disclosure under the Act are primarily codified at 5 U.S.C. §§ 2302(b)(8), (9).

[2] 135 Cong. Rec. 564 (1989) (statement of Sen. Carl Levin, citing "two separate surveys in 1980 and 1983 [that] found that an astonishing 70 percent of the Federal employees with knowledge of fraud, waste, and abuse did not report it and that the percentage of employees who did not report government wrongdoing because of fear of reprisal rose dramatically from 20 percent in 1980 to 37 percent in 1983").

[3] 11 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1778, at 732 (Worthington Chauncey Ford ed. 1908) ("*Resolved*, That it is the duty of all persons in the service of the United States, as well as all other inhabitants thereof, to give the earliest information to Congress or other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the service of these states, which may come to their knowledge."); *see also* S.Res. 202 (113th Congress (2013-2014)): A Resolution Designating July 30, 2013, as "National Whistleblower Appreciation Day."

[4] Pendleton Act of 1883, ch. 27, 22 Stat. 403 (amended 1978).

[5] Arnett v. Kennedy, 416 U.S. 134, 148 (1974).

[6] *Id.* at 148–49.

[7] Office of Personnel Management, Annual Performance Report: Fiscal Year 2020, January 2021, https://www.opm.gov/about-us/reports-publications/agency-archive/2021-annual-performance-report.pdf#page=7 (last visited Dec. 6, 2024).

[8] *Arnett*, 416 U.S. at 149 ("While the Pendleton Act is regarded as the keystone in the present arch of Civil Service legislation, by present-day standards it was quite limited in its application. It dealt almost exclusively with entry into the federal service, and hardly at all with tenure, promotion, removal, veterans' preference, pensions, and other subjects addressed by subsequent Civil Service legislation. The Pendleton Act provided for the creation of a classified Civil (continued...)

In 1896, the McKinley Administration promulgated a rule under the Pendleton Act prohibiting the removal of a federal employee from the competitive service without "just cause" and written rationale.[9] However, as the Supreme Court later observed, "while job tenure [in the federal civil service] was [] accorded protection [by the rule], there were no administrative appeal rights for action taken in violation of this rule, and the courts declined to judicially enforce it."[10] In 1912, Congress passed the Lloyd-La Follette Act, amended and codified at Title 5, Section 7211, of the *U.S. Code*, which guaranteed the right of federal employees to communicate with members of Congress.[11]

Subsequent laws expanded and reformed the civil service system, but the modern framework governing the rights of most federal workers comes from the Civil Service Reform Act of 1978 (CSRA).[12] The CSRA "was designed to replace an 'outdated patchwork of statutes and rules' that afforded employees the right to challenge employing agency actions in district courts across the country."[13] This patchwork had resulted in "wide variations in the kinds of decisions ... issued on the same or similar matters" within different federal courts regarding the rights of federal employees.[14] Against this backdrop, the CSRA created "a comprehensive system for reviewing personnel action taken against federal employees."[15] The CSRA created the Merit Systems Protection Board (MSPB or the Board), an independent agency, to review challenges of certain agency decisions regarding federal employees. The CSRA also created the Office of Special Counsel (OSC or Special Counsel), which investigates and prosecutes allegations of prohibited personnel practices.[16] The CRSA included protections for government whistleblowers, including employment protections for disclosing illegal conduct, gross mismanagement, gross wasting of funds, or actions presenting substantial dangers to health and safety.[17]

The CSRA was deemed by some legal observers to be insufficient in protecting whistleblowers.[18] Later, in passing the WPA, Congress observed that reforms to the CSRA were needed "to

---

Service, and required competitive examination for entry into that service. Its only provision with respect to separation was to prohibit removal for the failure of an employee in the classified service to contribute to a political fund or to render any political service. For 16 years following the effective date of the Pendleton Act, this last-mentioned provision of that Act appears to have been the only statutory or regulatory limitation on the right of the Government to discharge classified employees.").

[9] *Id.* at 149 n.19 ("No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the Department or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense.") (citing Fifteenth Report of the Civil Service Commission, at 70 (1897–1898)).

[10] *Id.* at 150.

[11] Pub. L. No. 62-336, § 6, 37 Stat. 539, 555 (1912); 5 U.S.C. § 7211 ("The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.").

[12] *See* Civil Service Reform Act of 1978, P.L. 95-454, 92 Stat. 1111. For further background on the CSRA, consult CRS Report R44803, *The Civil Service Reform Act: Due Process and Misconduct-Related Adverse Actions*, by Jared P. Cole (2017).

[13] Elgin v. Dep't of the Treasury, 567 U.S. 1, 13–14 (2012) (quoting United States v. Fausto, 484 U.S. 439, 444–45 (1988)).

[14] *Fausto*, 484 U.S. at 445 (internal citations omitted).

[15] *Id.* at 455.

[16] *See* 5 U.S.C. § 1212. Federal regulations implementing the OSC authorities in the WPA can be found in 5 C.F.R. §§ 1800–1899 (2022).

[17] *See* 92 Stat. 1111.

[18] *See* Patricia Price, *An Overview of the Whistleblower Protection Act*, 2 Fed. Circuit B.J. 69–70 (1992) ("Even though the [CSRA] included protections for whistleblowers, it was primarily enacted as a relief measure for Federal agencies (continued...)

strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government[.]"[19]

Enacted in 1989, the WPA expanded existing whistleblower provisions from the CSRA and created new protections in Title 5 of the *U.S. Code*, which includes the federal civil service statutes. The WPA's sponsor, Senator Carl Levin, stated at the time that "[p]rotecting whistleblowers is one of the simplest and one of the most effective means available to us to reduce the cost and improve the functioning of our Federal Government."[20] Among its reforms, the WPA enhanced the independence, authorities, and responsibility of the Special Counsel in investigating retaliation against whistleblowers; provided whistleblowers with a private right of action before the MSPB; and eased the burden on employees to prove retaliation for whistleblowing.[21]

In 2012, Congress amended the WPA through the Whistleblower Protection Enhancement Act (WPEA).[22] The WPEA broadened the WPA in several ways, including providing protections for employees exercising "any appeal, complaint, or grievance right" with regard to a prohibited personnel action,[23] clarifying that certain actions by employees in making a disclosure shall not remove the protections of the WPA[24] and requiring that agency nondisclosure agreements include a specific statement informing employees of their rights.[25]

Although, as discussed further herein, the WPA excludes some particular categories of federal employees, other whistleblower protection statutes provide protection in various contexts.[26] For example, whistleblower protections for intelligence community employees may be found in the

to enable them to hire and fire employees more easily.") (citing Lisiecki v. Federal Home Loan Bank Board, 769 F.2d 1558, 1563 (Fed. Cir. 1985) ("The stated purpose of the Reform Act, however, was to give agencies greater ability and more flexibility to remove or to discipline employees who engage in misconduct ... or whose work performance is unacceptable."), cert. denied, 106 S.Ct. 1514 (1986)); *See also* 2 MANUAL ON EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS, MEDCRA § 10:3 (Charles R. Richey, 2023) ("When it became apparent that the procedures under the CSRA were not systematically effective, Congress changed them by enacting the Whistleblower Protection Act[.]").

[19] 5 U.S.C. § 1201 note (Whistleblower Protection; Congressional Statement of Findings and Purpose).

[20] 135 Cong. Rec. 565 (1989).

[21] *Supra* note 1.

[22] Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112–199, 126 Stat. 1465–1476.

[23] *See* 5 U.S.C. § 2302(b)(9).

[24] *See id.* § 2302(f)(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; (F) the disclosure was made before the date on which the individual was appointed or applied for appointment to a position; or (G) of the amount of time which has passed since the occurrence of the events described in the disclosure.

An amendment in 2017 added Subparagraph (F) and redesignated former Subparagraph (F) as (G). *See* National Defense Authorization for Fiscal Year 2018, Pub. L. No. 115–91, § 1097(c)(1)(B)(i), 131 Stat. 1283 (2017).

[25] *See* 5 U.S.C. § 2302(b)(13).

[26] For a detailed compilation of whistleblower protection statutes involving public- and private-sector employees, *see* CRS Report R46979, *Compilation of Federal Whistleblower Protection Statutes*, by Andrea M. Muto (2024).

Congressional staff may obtain additional guidance for working with whistleblowers and sector-specific fact sheets, among other resources, from the Whistleblower Ombuds. *See* Office of Whistleblower Ombuds, Resource Library, https://whistleblower.house.gov/resources/all-resources (last visited Nov. 8, 2024).

Intelligence Community Whistleblower Protection Act, among other authorities.[27] Members of the armed forces are covered by the Military Whistleblower Protection Act.[28] Additionally, some legislative branch employees, such as congressional staff, have disclosure protections under the Congressional Accountability Act, which prohibits intimidation of or reprisal against a covered employee for reporting certain misconduct, such as an unsafe workplace or discrimination.[29]

Overview of the WPA

Congress's stated purpose in enacting the WPA was to strengthen and improve whistleblower protections for federal employees by "mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices[.]"[30] In practical terms, the WPA's protections from retaliation are available only when certain elements are satisfied. To trigger the application of the WPA, an employee must be in a *covered position* and a prohibited *personnel action* must have been taken against the federal employee because of the individual's *protected disclosure*.[31]

OSC receives and investigates complaints of prohibited personnel actions arising under the WPA. It has the authority to take such actions as it deems appropriate, such as petitioning the MSPB to stay proceedings or to take corrective actions, and seeking disciplinary action against employees who have allegedly engaged in retaliation.[32] In accordance with the procedures described in this report, the MSPB may order such corrective action as it considers appropriate if the Special Counsel or the employee demonstrates that the disclosure was a contributing factor in the personnel action.[33] Additionally, the WPA provides an individual right of action for individuals to seek review of a whistleblower reprisal case by the MSPB if OSC terminates its related investigation or if 120 days have elapsed since the individual first sought corrective action from OSC.[34] An employee or applicant for employment may also include allegations of a prohibited personnel practice as an affirmative defense in an appeal to the MSPB of adverse agency actions made appealable under any law, rule, or regulation.[35]

Section 2302(b) of Title 5 of the *U.S. Code* contains the primary elements of a protected disclosure and a prohibited personnel practice under the WPA.[36] Section 2302(b) prohibits a federal employee "who has authority to take, direct others to take, recommend, or approve any

[27] *See* Title VII of the Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105–272, §§ 701–702, 112 Stat. 2396, codified in 5 U.S.C. App. § 3 § 8H, 50 U.S.C. § 3033, and 50 U.S.C. § 3517. *See also* CRS Report R45345, *Intelligence Community Whistleblower Provisions: A Legislative History*, by Michael E. DeVine (2024).

[28] *See* 10 U.S.C. § 1034.

[29] *See* 2 U.S.C. § 1317; *see also* Office of Whistleblower Ombuds, Legislative Branch Whistleblowing Fact Sheet, https://whistleblower.house.gov/sites/evo-subsites/whistleblower-evo.house.gov/files/Legislative_Branch_Whistleblower_Fact_Sheet.pdf (last visited Nov. 8, 2024).

[30] 5 U.S.C. § 1201 note (Whistleblower Protection; Congressional Statement of Findings and Purpose).

[31] *See, e.g.*, Briley v. Nat'l Archives & Recs. Admin., 236 F.3d 1373, 1378 (Fed. Cir. 2001) ("To establish a prima facie case of retaliation for whistleblowing activity, an employee must show both that she engaged in whistleblowing activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8) and that the protected disclosure was a contributing factor in a personnel action."). *See also* Mikhaylov v. Dep't of Homeland Sec., 62 F.4th 862, 867 (4th Cir. 2023).

[32] 5 U.S.C. §§ 1211–1215.

[33] *Id.* § 1214(b)(4), 1221(e). *See also Mikhaylov*, 62 F.4th at 864.

[34] 5 U.S.C. §§ 1214(a)(3), 1221. *See also* Cahill v. Merit Sys. Prot. Bd., 821 F.3d 1370 (Fed. Cir. 2016).

[35] 5 U.S.C. § 7701(c)(2)(B). *See also* Whitmore v. Dep't of Labor, 680 F.3d 1353 (Fed. Cir. 2012).

[36] *See* 5 U.S.C. § 2302(b).

personnel action" from engaging in specified "prohibited personnel practices."[37] Section 2302(b)(8) states that an employee with such authority shall not

> take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—
>
> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—
>
> (i) any violation of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,
>
> if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs[.][38]

Additionally, Sections 2302(b)(8)(B) and (C), respectively, provide protections from retaliation for any such disclosures to OSC or to the Inspector General (IG) of an agency (or other employee designated by the agency head to receive disclosures) or to Congress or a committee.[39]

In addition to the prohibitions in Paragraph 8, Paragraph 9 of Section 2302(b) prohibits retaliation against an employee or applicant for exercising his or her legal rights in relation to a protected disclosure.[40] In other words, while Paragraph 8 provides protection for disclosures, Paragraph 9 protects activities related to making disclosures, such as filing complaints, testifying, or cooperating with investigators.[41] For example, Section 2302(b)(9)(A) states that an employee with authority over personnel shall not retaliate against an employee or applicant for employment because of his or her "exercise of any appeal, complaint, or grievance right granted by any law, rule or regulation" for either remedying a violation of Section 2302(b)(8) or otherwise.[42]

Covered Positions Under the WPA

The protections afforded by the WPA are available only to individuals who are employed in or are applicants for federal civil service positions in agencies not exempted by the Act.[43] In general, a

---

[37] *Id*. In addition to retaliation against government whistleblowers, 5 U.S.C. § 2302 proscribes other activities known collectively as "prohibited personnel practices" or PPPs. "Prohibited personnel practices (PPPs) are employment-related activities that are banned in the federal workforce because they violate the merit system through some form of employment discrimination, retaliation, improper hiring practices, or failure to adhere to laws, rules, or regulations that directly concern the merit system principles." *See* U.S. Office of Special Counsel, *Prohibited Personnel Practices Overview*, https://osc.gov/Services/Pages/PPP.aspx#tabGroup16 (last visited Nov. 8, 2024).

[38] 5 U.S.C. § 2302(b)(8)(A). *See also Mikhaylov*, 62 F.4th at 864.

[39] 5 U.S.C. § 2302(b)(8)(B). *See also* Ayers v. Dep't of Army, 123 M.S.P.R. 11, 17 (M.S.P.B. Nov. 2, 2015).

The WPA provides protections from employment retaliation if such a disclosure to Congress is not classified or, "if classified—(I) [it] has been classified by the head of an agency that is not an element of the intelligence community (as defined by section 3 of the National Security Act of 1947 (50 U.S.C. 3003)); and (II) [it] does not reveal intelligence sources and methods." *See* 5 U.S.C. § 2302(b)(8)(C).

[40] 5 U.S.C. § 2302(b)(9). *See also Whitmore*, 680 F.3d at 1364.

[41] *See* 5 U.S.C. § 2302(b)(9).

[42] *Id*. Also, Section 2302(b)(9)(B)–(D) provides protection from retaliation for testifying for or otherwise lawfully assisting any individual in the exercise of whistleblower rights, cooperating with or disclosing information to OSC or an IG, or refusing to obey an order that would require the individual to violate a law, rule, or regulation.

[43] 5 U.S.C. § 2302(a)(2)(A) (Prohibited personnel actions may not be taken "with respect to an employee in, or applicant for, a covered position in an agency and in the case of an alleged prohibited personnel practice described in (continued...)

"covered position"[44] means (1) any position in the competitive service,[45] (2) a career appointee position in the Senior Executive Service,[46] or (3) a position in the excepted service.[47] Coverage is not extended to any position "excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character" or any position excluded by the President based on a determination that it is "necessary and warranted by conditions of good administration."[48]

Agencies Covered by the WPA

An "agency" for purposes of the WPA is defined as an "executive agency and the Government Publishing Office."[49] An "executive agency" under Title 5 means "an Executive department, a Government corporation, and an independent establishment."[50] Accordingly, the WPA does not cover employees of or applicants to the judicial and legislative branches with the exception of the Government Publishing Office, which is specifically listed.[51] Similarly, the WPA does not cover employees of or applicants to government contractors.[52]

---

subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31").

[44] 5 U.S.C. § 2302(a)(2)(B).

[45] The "competitive service," sometimes referred to as the "classified civil service" or "classified service," consists of all civil service positions in the executive branch, except (1) positions that are specifically excepted from the competitive service by or under statute; (2) positions to which appointments are made by nomination for confirmation by the Senate, unless the Senate otherwise directs; and (3) positions in the Senior Executive Service. The competitive service also includes civil service positions not in the executive branch that are specifically included by statute and positions in the District of Columbia government that are specifically included by statute. *See generally* 5 U.S.C. § 2102.

[46] The "Senior Executive Service" consists generally of agency positions that are classified above GS-15 pursuant to 5 U.S.C. § 5108 or in level IV or V of the Executive Schedule in which an employee engages in specified activities, such as directing the work of an organizational unit or exercising important policymaking or executive functions. *See* 5 U.S.C. § 3132(a)(2). *See also* CRS In Focus IF11743, *The Senior Executive Service: An Overview*, by Maeve P. Carey (2021).

[47] The "excepted service," sometimes referred to as the "unclassified civil service" or "unclassified service," consists of those civil service positions that do not confer competitive status. 5 U.S.C. § 2103(a). *See also* OFF. OF PERSONNEL MGMT., Types of Hires, https://www.opm.gov/policy-data-oversight/hiring-information/types-of-hires/ (last visited Nov. 12, 2024).

[48] 5 U.S.C. § 2302(a)(2)(B). *See also Stanley v. Gonzales*, 476 F.3d 653, 655 (9th 2007) (referring to the Attorney General's reclassification of the United States Trustee position due to its "confidential, policy-determining, policy-making, or policy-advocating character" and exempting such employees from administrative review of adverse employment decisions under 5 U.S.C. § 7511).

[49] 5 U.S.C. § 2302(a)(2)(C).

[50] 5 U.S.C. § 105. "Government corporation" is defined as "a mixed-ownership Government corporation and a wholly owned Government corporation." *See* 31 U.S.C. § 9101.

[51] *See* Hartman v. Merit Sys. Prot. Bd., 77 F.3d 1378, 1381 (Fed. Cir. 1996) ("Federal courts are not 'an Executive agency' under Title 5"). *See also* Semper v. United States, 100 Fed. Cl. 621, 628–29 (2011).

OSC provides a list of entities and agencies for which OSC cannot generally obtain corrective action, including private-sector employers, federal contractors, state or local government employers, federal legislative or judicial branch employers, and various excepted executive branch agencies. *See* U.S. Office of Special Counsel, *Who Can File a Prohibited Personnel Practices Complaint?*, https://osc.gov/Services/Pages/PPP-WhoCanFile.aspx (last visited Nov. 4, 2024).

[52] *But see* Abernathy v. Dep't of the Army, 2022 MSPB 37, at *2–3 (M.S.P.B. Nov. 15, 2022) (holding that the Board had jurisdiction to consider a contractor employee's whistleblower reprisal claim even though he was not a federal employee, because he was an applicant denied employment with a federal agency).

Whistleblower rights for employees of federal contractors and grantees are generally codified at 41 U.S.C. § 4712. (continued...)

Additionally, the WPA carves out specific government entities from the definition of "agency" in Title 5, Section 2302, of the *U.S. Code*.[53] The Act explicitly does not apply to individuals employed by (1) the Federal Bureau of Investigation,[54] the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office; (2) any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, as determined by the President, provided that the determination be made prior to a personnel action; or (3) the Government Accountability Office.[55]

The Board has made several decisions interpreting the WPA's definitions of agencies and employees in Title 5, Section 2302, of the *U.S. Code*. For example, the Board has found that the Smithsonian Institution is an "independent establishment" of the federal government and therefore is a covered agency for purposes of the WPA.[56] The Board has found that the United States Postal Service does not fall under the definition of "agency" in the WPA due to the agency's exclusion from the definition of "independent establishment" in Title 5, Section 104, of the *U.S. Code*.[57] While uniformed members of the military are in positions outside of the federal civil service defined by Title 5 and are therefore excluded from the WPA,[58] Department of Defense civilian employees of agencies may be covered if the agencies have not been explicitly exempted by the President or a lawful delegate as principally conducting "foreign intelligence or counterintelligence activities."[59] National Guard technicians, as employees for both state national guards and employees of the federal government, have been deemed as employed "in an agency," but their coverage under the WPA is restricted by the National Guard Technicians Act.[60]

Section 4712(a)(1) provides that an employee of a contractor or grantee "may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing" information that the employee reasonably believes is evidence of gross mismanagement, a gross waste of funds, an abuse of authority, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract. Similar whistleblower rights and procedures for Department of Defense and National Aeronautics and Space Administration contractors and grantees are codified at 10 U.S.C. § 4701.

[53] 5 U.S.C. § 2302(a)(2)(C)(i)–(iii).

[54] *See id.* § 2303 (providing "[a]ny employee of the Federal Bureau of Investigation who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to an employee in, or applicant for, a position in the Bureau as a reprisal for a disclosure of information ... ").

[55] The definition of "agency" in 5 U.S.C. § 2302(a)(2)(C) also excludes government corporations with regard to other prohibited personnel actions; however, the exclusion does not apply in cases involving prohibited personnel practices against whistleblowers. *See id.* § 2302(a)(2)(C)(i).

[56] *See* Pessa v. Smithsonian Inst., 60 M.S.P.R. 421 (M.S.P.B. Jan. 4, 1994).

[57] *See* Booker v. Merit Sys. Prot. Bd., 982 F.2d 517, 519 (Fed. Cir. 1992).

[58] *See* 5 U.S.C. § 101 ("the 'civil service' consists of all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services").

[59] *See* Czarkowski v. Merit Sys. Prot. Bd., 390 F.3d 1347 (Fed. Cir. 2004) (holding that the exemption determination in 5 U.S.C. § 2302(a)(2)(C)(ii)(II) can be made only by the President or his lawful delegate and "therefore the Board cannot impute determinations of exempted units to the President, or his delegate, by interpreting documentary evidence that may tend to show that an agency principally functions as an intelligence unit" with regard to Department of the Navy Office of Special Projects employee).

[60] *See* Ockerhausen v. State of N.J. Dept. of Military Veterans Affairs, 52 M.S.P.R. 484, 488–89 (M.S.P.B. Jan. 24, 1992); *see also* Singleton v. Merit Sys. Prot. Bd., 244 F.3d 1331, 1334 (Fed. Cir. 2001). For additional information regarding the dual status of National Guard technicians, s*ee* CRS Legal Sidebar LSB11005, *Supreme Court Holds That Federal Labor Relations Authority Has Jurisdiction to Regulate State National Guards*, by Jimmy Balser (2023).

Applicants for Employment and Former Employees

As previously described, the WPA does not apply only to current employees at a covered agency. The statute specifically refers to protected disclosures as those made "by an employee or applicant."[61] Mere nonselection for a position may be retaliation under the WPA because the statute prohibits a federal agency from "tak[ing] or *fail[ing] to take*" a personnel action.[62] Courts have found that nonselection of an applicant for a position for which a job posting is ultimately taken down may qualify as retaliation under the statute.[63]

Former employees can also invoke the WPA.[64] While Title 5, Section 2302, of the *U.S. Code* refers only to employees and applicants for employment, provisions regarding the authority of the Special Counsel to investigate whistleblower claims and the WPA's individual right of action refer to "former employees."[65] The Board has held that an individual need not be an employee or applicant for a covered position at the time a protected disclosure was made in order to qualify for WPA protection.[66]

Protected Disclosures

The WPA generally protects disclosures of information that a covered employee "reasonably believes" evidence behavior of "a violation of law, rule, or regulation" or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."[67] Whether an individual had such a reasonable belief is determined by an objective test.[68] A belief that wrongdoing has occurred is a "reasonable belief" when "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude" that the agency's actions evidence wrongdoing as defined by the WPA.[69]

A protected "disclosure" under the WPA is defined as "a formal or informal communication or transmission[.]"[70] A disclosure does not include "a communication concerning policy decisions that lawfully exercise discretionary authority" unless the disclosing employee reasonably believes that the disclosure evidences "a violation of law, rule, regulation" or "gross mismanagement, a

[61] 5 U.S.C. § 2302(b)(8), (9).

[62] *See* Ruggieri v. Merit Sys. Prot. Bd., 454 F.3d. 1323 (Fed. Cir. 2006); *see also* King v. Dep't of the Army, 570 Fed. Appx. 863, 865 (11th Cir. 2014) (applying the WPA to an applicant).

[63] *See Ruggieri*, 454 F.3d. 1323.

[64] *See* 5 U.S.C. § 1221(a); *see also* 5 U.S.C. § 1213.

[65] For example, 5 U.S.C. § 1221(a) states that "an employee, former employee, or applicant for employment may ... as a result of a prohibited personnel practice described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), seek corrective action from the Merit Systems Protection Board."

[66] *See Abernathy*, 2022 MSPB 37 at *3 (citing Board precedent that, at the time of making a disclosure, an individual need not be an employee or applicant for employment at the agency that eventually took the alleged retaliatory employment action in order to qualify for protection under the WPA); *see also* Guzman v. Off. of Pers. Mgmt., 53 F. App'x 927, 929 (Fed. Cir. 2002) (holding that an individual was not an employee or applicant for employment both when she made the disclosure and when OPM allegedly took, or failed to take, a personnel action with respect to her, and thus the administrative judge correctly held that she had no cause of action under the WPA).

[67] 5 U.S.C. § 2302(b)(8)(A).

[68] Young v. Merit Sys. Prot. Bd., 961 F.3d 1323, 1328 (Fed. Cir. 2020).

[69] 5 C.F.R. § 1209.4(f) (1990); *see also* Edenfield v. Dep't of Veterans Affs., 54 F.4th 1357, 1359 (Fed. Cir. 2022).

[70] 5 U.S.C. § 2302(a)(2)(D).

gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."[71]

Recognizing that "it is critical that employees know that the protection for disclosing wrongdoing is extremely broad," in passing the WPEA in 2012, Congress broadened and clarified the circumstances in which disclosures would still be protected despite variations in the methods of disclosure.[72] For example, the WPEA amended Section 2302(b)(8) by broadening protections to any disclosures of information an employee reasonably believes evidences "*any* violation of any law, rule, or regulation" or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."[73] The WPEA also clarifies that, so long as a disclosure is otherwise covered by the Act, the WPA's protections continue to apply even when

- the disclosure was made to a supervisor or individual who participated in the activity that is the subject of the disclosure;
- the disclosure reveals information that has been previously disclosed;
- the employee's motive for making the disclosure is questionable;
- the disclosure was not made in writing;
- the disclosure was made while the employee was off duty;
- the disclosure was made before the date on which the individual was appointed or applied for appointment to a position; or
- time has passed since the occurrence of the events described in the disclosure.[74]

Some of these statutory clarifications in the WPEA were specifically aimed at altering the legal outcomes of prior case holdings regarding the scope of protected disclosures. For example, the clarification found in Title 5, Section 2302(f)(1)(A), of the *U.S. Code*—that the disclosure may be made to a supervisor or to a person who participated in the activity at issue—reacted to the U.S. Court of Appeals for the Federal Circuit's holding in *Huffman v. Office of Personnel Management*.[75] In *Huffman*, the court had held that "[w]hen an employee reports or states that there has been misconduct by a wrongdoer to the wrongdoer, the employee is not making a 'disclosure' of misconduct."[76] Subsequent to the WPEA, courts have recognized the holding in *Huffman* as superseded by statute.[77]

In another example of a clarification made by the WPEA in response to caselaw, Title 5, Section 2302(f)(1)(B), of the *U.S. Code* states that a disclosure shall not be excluded from

[71] *Id.*

[72] P.L. 112-199, 126 Stat. 1465–1476 (2012). *See also* S. REP. NO. 112–155, at 4–5 (2012), *as reprinted in* 2012 U.S.C.C.A.N. 589 ("Despite the clear legislative history and the plain language of the 1994 amendments, the Federal Circuit and the MSPB have continued to undermine the WPA's intended meaning by imposing limitations on the kinds of disclosures by whistleblowers that are protected under the WPA. [The Whistleblower Protection Enhancement Act of 2012] makes clear, once and for all, that Congress intends to protect 'any disclosure' of certain types of wrongdoing in order to encourage such disclosures.").

[73] *See* Mudd v. Dep't of Veterans Affs., 120 M.S.P.R. 365, 369 n.3 (M.S.P.B. Nov. 19, 2013) (emphasis added).

[74] 5 U.S.C. § 2302(f)(1). A disclosure that evidences "censorship related to research, analysis, or technical information" is also protected to the same extent as other disclosures under the Act. *See id.* § 2302 note (P.L. 112-199, § 110(a)(3), 126 Stat. 1465, 1471 (2012)) (defining the phrase "censorship related to research, analysis, or technical information" to mean "any effort to distort, misrepresent, or suppress research, analysis, or technical information.").

[75] Huffman v. Off. of Pers. Mgmt., 263 F.3d 1341 (Fed. Cir. 2001).

[76] *Id.* at 1350.

[77] *See, e.g.*, Nasuti v. Merit Sys. Prot. Bd., 504 Fed. App'x. 894, 896 (Fed. Cir. 2013).

protection because "the disclosure revealed information that had been previously disclosed."[78] The Senate report for the WPEA declared that Congress's intent in enacting this amendment was to correct a Federal Circuit decision, *Meuwissen v. Department of Interior*, which held that disclosures of information already known are not protected by the WPA.[79] According to the report, the amendment was necessary because the holding in *Meuwissen* was "contrary to congressional intent" and the court "wrongly focused on whether or not disclosures of wrongdoing were protected, instead of applying the very broad protection required by the plain language of the WPA."[80] The report stated that "[t]he merits of these cases, instead, should have turned on the factual question of whether personnel action at issue in the case occurred 'because of' the protected disclosure."[81] Courts have acknowledged that the WPEA superseded the holding in *Meuwissen* specific to disclosures of information already known.[82]

Content of Disclosures

The WPA generally protects employees from retaliation for disclosures of information that an employee reasonably believes evidences behavior falling into one of two categories: (1) a violation of any law, rule, or regulation or (2) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.[83] With regard to the first category of disclosures—a violation of any law, rule, or regulation—an employee must have a reasonable belief that any law, rule, or regulation was violated.[84] This requirement does not mean that a law, rule, or regulation must have *actually* been violated,[85] nor does a whistleblower have to show definitive proof of a violation.[86] Moreover, an employee need disclose only what he or she reasonably believes is a potential—not necessarily completed—violation to be protected by the WPA.[87] According to the Board, the potential wrongdoing must only be "real and immediate."[88] The Board reasoned that requiring a violation of law, rule, or regulation to occur before the employee could make a protected disclosure under the WPA would force employees either to disclose imminent violations without the WPA's protection or to wait for a violation to occur and risk being held responsible.[89]

On the other hand, disclosures of "trivial violations" or "minor or inadvertent miscues occurring in the conscientious carrying out of a federal official or employee's assigned duties" do not constitute protected disclosures.[90] Furthermore, an employee who discloses only "general

[78] 5 U.S.C. § 2302(f)(1)(B).

[79] *See* Meuwissen v. Dep't of the Interior, 234 F.3d 9, 14 (Fed. Cir. 2000).

[80] *See* S. REP. NO. 112–155, at 5 (2012), *as reprinted in* 2012 U.S.C.C.A.N. 589.

[81] *Id.*

[82] *See, e.g.*, Daniels v. Merit Sys. Prot. Bd., 832 F.3d. 1949, 1055 (9th Cir. 2016).

[83] 5 U.S.C. § 2302(b)(8)(A).

[84] *See* Langer v. Dep't of the Treasury, 265 F.3d 1259, 1266 (Fed. Cir. 2001).

[85] *Edenfield*, 54 F.4th at 1361.

[86] *See* Delgado v. United States Dep't of Just., 979 F.3d 550, 555 (7th Cir. 2020) ("[A] whistleblower need not assert that he has definitive proof of a violation of law, such that he is confident that all innocent explanations can be refuted.").

[87] *See* Reid v. Merit Sys. Prot. Bd., 508 F.3d 674, 678 (Fed. Cir. 2007) (stating that "[t]he government is far better served by having the opportunity to prevent illegal, wasteful, and abusive conduct than by notice that it may only act to reduce the adverse consequences from such conduct that has already occurred").

[88] *Id.* (citing Ward v. Dep't of the Army, 67 M.S.P.R. 482, 488–89 (M.S.P.B. May 10, 1995)).

[89] *See id.* (stating that such a result would undermine congressional intent to encourage whistleblowing).

[90] *See Langer*, 265 F.3d at 1266 (citing Herman v. Dep't of Justice, 193 F.3d 1375 (Fed. Cir. 1999), in determining that (continued...)

philosophical or policy disagreements with agency decisions or actions" is not protected by the WPA.[91]

The second category of protected disclosures involves information a covered employee reasonably believes constitutes "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."[92] Each of these four concepts may be distinct but may also overlap.[93] Similar to the first category, a disclosure of gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety must amount to more than just a mere difference of opinion on policy between an employee and an agency.[94]

Disclosures of "gross mismanagement" (as distinguished from disclosures of violations of law) are related to policies that may be lawful but problematic.[95] The Board has described gross management as "a management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission."[96] Prior to the 2012 amendments in the WPEA, courts described situations of gross mismanagement as occurring when policies are technically lawful but "when reasonable people could not debate the error in the policy."[97] However, Congress indicated a concern that such an interpretation could cause confusion because it "could be read to require proof that the alleged misconduct actually occurred."[98] Therefore, the Board has clarified that a disclosure is protected as long as an employee has a reasonable belief that the disclosed information evidences gross mismanagement (or one of the other kinds of misconduct listed in the WPA) and does not simply reflect a policy disagreement.[99]

The Board has explained that a disclosure of a "gross waste of public funds" is a "more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to

---

a disagreement relating to IRS handling of pink envelopes to designate mails that are intended only for the addressee to open did not constitute a protected disclosure).

[91] *See* O'Donnell v. Merit Sys. Prot. Bd., 561 F. App'x. 926, 930 (Fed. Cir. 2014) (citing S. REP. NO. 112–155, at 7 (2012), *as reprinted in* 2012 U.S.C.C.A.N. 589).

[92] 5 U.S.C. § 2302(b)(8)(A)(ii). *See also* Hessami v. Merit Sys. Prot. Bd., 979 F.3d 1362, 1370 (Fed. Cir. 2020)

[93] *See* Chambers v. Dep't of the Interior, 515 F.3d 1362, 1362–68 (Fed. Cir. 2008) (stating that the Board, in assessing whether an employee disclosure reasonably evidenced a substantial and specific danger to public health or safety, improperly blended concepts of gross mismanagement and risk to public safety).

[94] *See* Fisher v. Env't Prot. Agency, 108 M.S.P.R. 296, 303 (M.S.P.B. Mar. 6, 2008).

[95] *Chambers*, 515 F.3d at 1368. *See also Hessami*, 979 F.3d at 1370.

[96] *Fisher*, 108 M.S.P.R. at 303.

[97] *See* White v. Dep't of the Air Force, 391 F.3d 1377, 1382 (Fed. Cir. 2004).

[98] *See* Webb v. Dep't of Interior, 122 M.S.P.R. 248 (M.S.P.B. Jan. 13, 2015); *see also* S. REP. NO. 112–155, at 10 n.37 (2012), *as reprinted in* 2012 U.S.C.C.A.N. 589. The Senate committee report for the WPEA also stated that

> there should be no additional burdens imposed on the employee beyond those provided by the statute, and that this test—that the disclosure is protected if the employee had a reasonable belief it evidenced misconduct—must be applied consistently to each kind of misconduct and each kind of speech covered under section 2302(b)(8).

The Committee notes that the requirement that the employee need show only reasonable belief applies, as well, in determining whether the narrow exception for policy disputes, added by S. 743, applies. In other words, if an employee has a reasonable belief that the disclosed information evidences the kinds of misconduct listed in section 2302(b)(8), rather than a policy disagreement, the disclosure is protected.

Id. at 10–11.

[99] *See Webb*, 122 M.S.P.R. at 252–53 ("Based on the foregoing, consistent with congressional intent, we clarify [Board precedent] to emphasize that if an employee has a reasonable belief that the disclosed information evidences the kinds of misconduct listed in section 2302(b)(8), rather than a policy disagreement, it is protected.")

accrue to the government."[100] The Board has also defined an "abuse of authority" as an "arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons."[101]

To determine whether an individual has disclosed a danger to public health and safety that is sufficiently "substantial and specific," the Board is guided by several factors, including (1) the likelihood that harm will result from the danger; (2) when the alleged harm may occur; and (3) the nature of the harm (i.e., the potential consequences).[102] The Federal Circuit has stated that the first two factors "affect the specificity of the alleged danger, while the nature of the harm—the potential consequences—affects the substantiality of the danger."[103] As the court observed, other forms of misconduct (e.g., gross mismanagement) may also constitute dangers to public safety, such as in the context of federal law enforcement policy, but the factors above apply only to assessing the danger.[104] Additionally, the Board has not narrowly interpreted the term "public" in the statute to limit the coverage of this provision to the public at large and has included disclosures that apply to a specific class of individuals, even within the government.[105]

Disclosure Audiences and Exceptions

The WPA protects disclosures made to *any* audience, as long as disclosure of the underlying information is not "specifically prohibited by law" or the information disclosed is not "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs."[106] As such, the WPA protects those non-excepted disclosures made not only to traditional government whistleblower audiences, but also to audiences outside of the government, such as the news media.[107]

Additionally, the statutory exceptions to the WPA's broad disclosure protections have been interpreted narrowly. In *Department of Homeland Security v. MacLean*, the Supreme Court addressed whether "Sensitive Security Information" prohibited from disclosure by agency regulation was "specifically prohibited by law."[108] In determining that these disclosures were not excepted by the WPA, the Court held that, "when Congress used the phrase 'specifically prohibited by law' instead of 'specifically prohibited by law, rule, or regulation,' it meant to exclude rules and regulations."[109] In addition, the Court held that even where there is a statutory prohibition to disclosure, to qualify for an exception under the WPA, such a prohibition must be specific so as not to leave any discretion to the agency.[110]

---

[100] Stevens v. Merit Sys. Prot. Bd., 678 F. App'x 1014, 1017 (Fed. Cir. 2017) (citing Van Ee v. E.P.A., 64 M.S.P.R. 693, 698 (M.S.P.B. Oct. 24, 1994)).

[101] *Id.* (citing Ramos v. Dep't of the Treasury, 72 M.S.P.R. 235, 241 (M.S.P.B. Nov. 7, 1996)).

[102] Chambers v. Dep't of Interior, 602 F.3d 1370, 1376 (Fed. Cir. 2010).

[103] *Chambers*, 515 F.3d at 1369. *See also Hessami*, 979 F.3d at 1370.

[104] *Chambers*, 515 F.3d at 1368–69.

[105] *See* Woodworth v. Dep't of the Navy, 105 M.S.P.R. 456, 463–64 (M.S.P.B. Apr. 10, 2007).

[106] 5 U.S.C. § 2302(b)(8)(A).

[107] *See, e.g.*, *Chambers*, 602 F.3d at 1379 (affirming prior decision in part that disclosures to the *Washington Post* by former chief of U.S. Park Police were covered by the WPA).

[108] Dep't of Homeland Sec. v. MacLean, 574 U.S. 383 (2015).

[109] *See id.* at 394–95.

[110] *Id.* at 397 (rejecting the government's contention that information "specifically prohibited" from disclosure in Section 2302(b)(8)(A) was analogous to information "specifically exempted" from disclosure by statute under the (continued...)

Even when the narrow statutory exceptions apply, the WPA provides protections for whistleblowing disclosures to appropriate audiences. The WPA specifically protects any disclosure to the Special Counsel or to the IG of an agency or another employee designated by the head of the agency to receive such disclosures, regardless of whether the disclosures are prohibited by law or the information is required to be kept secret by Executive Order.[111]

Finally, Section 2302(b)(8)(C) protects "any disclosure to Congress (including any committee of Congress) by any employee of an agency or applicant for employment at an agency of information" that is not classified. If the information is classified, the section protects disclosures to Congress if the information "has been classified by the head of an agency that is not an element of the intelligence community"[112] and "does not reveal intelligence sources and methods."[113] In addition to the WPA, several other statutory provisions address the disclosure or furnishing of information by federal employees to Congress. The Lloyd-La Follette Act, recodified at Section 7211 of the *U.S. Code*, explicitly states that agencies cannot prevent or prohibit employees from communicating with Congress.[114] Congress also regularly includes whistleblower provisions in the annual federal government appropriations law.[115] Entities and personnel exempted from coverage under the WPA may have a dedicated statutory right to make a disclosure to a member of Congress or congressional committee.[116]

Freedom of Information Act in Title 5, Section 552(B)(3), of the *U.S. Code*, because an agency may still retain discretion to release information exempt under FOIA).

[111] 5 U.S.C. § 2302(b)(8)(B). For additional information on IGs in the federal government, including their structure, functions, and related issues for Congress, consult CRS Report R45450, *Statutory Inspectors General in the Federal Government: A Primer*, by Ben Wilhelm (2023).

[112] "Intelligence Community," as defined by Section 3 of the National Security Act of 1947, includes the Office of the Director of National Intelligence; the Central Intelligence Agency; the National Security Agency; the Defense Intelligence Agency; the National Geospatial-Intelligence Agency; the National Reconnaissance Office; other offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs; the intelligence elements of the Army, the Navy, the Air Force, the Marine Corps, the Space Force, the Coast Guard, the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Department of Energy; the Bureau of Intelligence and Research of the Department of State; the Office of Intelligence and Analysis of the Department of the Treasury; the Office of Intelligence and Analysis of the Department of Homeland Security; and "such other elements of any department or agency as may be designated by the President, or designated jointly by the Director of National Intelligence and the head of the department or agency concerned, as an element of the intelligence community." *See* 50 U.S.C. § 3003.

[113] 5 U.S.C. § 2302(b)(8)(C).

[114] Pub. L. No. 62-336, § 6, 37 Stat. 539, 555 (1912) ("The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with."). For more information on the history of the Lloyd-La Follette Act, *see* Louis Fisher, *Invoking Executive Privilege: Navigating Ticklish Political Waters*, 8 WM. & MARY BILL OF RIGHTS J. 583, 623–25 (2000).

[115] *See, e.g.*, Further Consolidated Appropriations Act, 2024, P.L. 118-47, div. B, tit. VII, §§ 713 (2024) ("No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress ... "). *See also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-303SO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW: ANNUAL UPDATE OF THE THIRD EDITION, at 4-39 (3d ed., March 2015) ("Since 1998, annual appropriations acts each year have contained a government-wide prohibition on the use of appropriated funds to pay the salary of any federal official who prohibits or prevents another federal employee from communicating with Congress.").

[116] *See, e.g.*, 41 U.S.C. § 4712 (providing whistleblower protections for most federal contractors, subcontractors, and grantees, prohibits reprisal for disclosing to "[a] Member of Congress or a representative of a committee of Congress.").

Notwithstanding the existence of these statutory provisions, the executive branch has long taken the view that agency officials have the authority to control rank-and-file employees' ability to disclose information directly to Congress.[117] The courts have at times been reluctant to resolve the tension between the presidential interest in control of executive branch employees and communications and Congress's authority to obtain information.[118] To further clarify Congress's intent in protecting disclosures even where they may be in conflict with agency policies, the WPEA prohibits an agency from implementing or enforcing a nondisclosure agreement that 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 IG 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."[119]

The Supreme Court has recognized First Amendment protections for disclosures by government employees that must be balanced with the federal government's interest in regulating employees' words and actions.[120] When employees speak in the course of their official duties, they are generally speaking on behalf of the government, and the government can accordingly control their speech.[121] However, in *Pickering v. Board of Education*, the Supreme Court emphasized that when public employees speak as citizens, they do not completely "relinquish the First Amendment rights they would otherwise enjoy" to discuss public issues, including matters related to the offices where they work.[122] The Court said that to analyze the constitutionality of a restriction on an employee's speech, a reviewing court should balance the interests of the employee, "as a citizen, in commenting upon matters of public concern," against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[123] Therefore, in some cases, the First Amendment may protect whistleblowers against retaliation when they speak about government misconduct.[124] However, when a government employee exposing governmental inefficiency and misconduct does so in furtherance of his or her official duties, the Court has held that restricting employee speech under such circumstances does not infringe the First Amendment.[125] As such, the First Amendment will not always cover a federal employee's speech, even when the employee perceives the speech to be a

[117] *See* Authority of Agency Officials to Prohibit Employees from Providing Information to Congress, 28 Op. O.L.C. 79 (2004), *available at* https://www.justice.gov/sites/default/files/olc/opinions/2004/05/31/op-olc-v028-p0079.pdf.

[118] For a discussion of the tension between executive privilege and congressional oversight authority and relevant caselaw, refer to CRS Report RL30240, *Congressional Oversight Manual*, coordinated by Ben Wilhelm, Todd Garvey, and Christopher M. Davis (2022).

[119] *See* 5 U.S.C. § 2302(b)(13).

[120] Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

[121] Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) ("When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services.")

[122] *See Pickering*, 391 U.S. at 568.

[123] *Id.*

[124] *See, e.g.*, Hufford v. McEnaney, 249 F.3d 1142, 1150 (9th Cir. 2001) ("[A]n employer who discharges an employee in retaliation for legitimate whistleblowing does so in violation of the employee's clearly established First Amendment rights.")

[125] *See Garcetti*, 547 U.S. at 421–22 (distinguishing a federal employee expressing his views in a memorandum to his supervisor pursuant to his official duties from the expressions made by the speaker in *Pickering*, "whose letter to the newspaper had no official significance.").

protected whistleblower disclosure, leaving whistleblowers who do not meet the parameters of the WPA limited legal recourse against retaliation.

Disclosures to OSC

In addition to investigating retaliation claims, OSC also serves as a secure channel to directly receive disclosures of wrongdoing. Congress stated in its passage of the WPA that the primary role of OSC is to protect employees, especially whistleblowers, from prohibited personnel practices; that OSC shall act in the interests of employees who seek assistance; and that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.[126] To accomplish this purpose, the WPA made OSC an independent agency from the MSPB and established new authorities and responsibilities, including procedures for disclosures of information about violations of laws and regulations, gross mismanagement, wastes of funds, abuses of authority, and specific dangers to the public health and safety.[127]

The WPA requires that whenever the Special Counsel receives information describing a disclosure,[128] within 45 days the Special Counsel shall determine whether there is a substantial likelihood that the information discloses either (1) a violation of any law, rule, or regulation or (2) gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety.[129] If the Special Counsel makes a positive determination, the Special Counsel must promptly transmit the information with respect to which the determination was made to the appropriate agency head and require that the agency head conduct an investigation and submit a written report of the results to the Special Counsel within 60 days (or a longer period agreed to by the Special Counsel).[130] These reports, reviewed and signed by the agency head, must include

> (1) a summary of the information with respect to which the investigation was initiated; (2) a description of the conduct of the investigation; (3) a summary of any evidence obtained from the investigation; (4) a listing of any violation or apparent violation of any law, rule, or regulation; and (5) a description of any action taken or planned as a result of the investigation, such as changes in agency rules, regulations, or practices; the restoration of any aggrieved employee; disciplinary action against any employee; and referral to the Attorney General of any evidence of a criminal violation.[131]

The Special Counsel is required to review the agency's report and submit it to the President and the congressional committees with jurisdiction over the agency involved with the disclosure.[132] The identity of the complaining employee may not be disclosed without the employee's consent, unless the Special Counsel determines that disclosure is necessary to avoid imminent danger to

---

[126] *Supra* note 1.

[127] *Id*.

[128] This includes whistleblower information described in *U.S. Code*, Title 5, Section 2302(b)(8), Subparagraphs (A) and (B), but not Subparagraph (C), relating to other disclosures to Congress. *See* 5 U.S.C. § 1213(a).

[129] *Id.* § 1213.

[130] *Id.* § 1213(c)(1). The Special Counsel may require an agency head to conduct an investigation and submit a written report only if the information was transmitted to the Special Counsel by (1) an employee, former employee, or applicant for employment in the agency which the information concerns; or (2) an employee who obtained the information in connection with the performance of the employee's duties and responsibilities. *See id.* § 1213(c)(2).

[131] *Id.* § 1213(d).

[132] *Id.* § 1213(e)(3).

health and safety or an imminent criminal violation.[133] If the Special Counsel does not make a positive determination that there is substantial likelihood of a violation, the Special Counsel may transmit the information to the agency head only with the consent of the individual who disclosed the information.[134] In addition, if the Special Counsel receives the information from an individual other than an employee, a former employee, an applicant for employment in the agency that the information concerns, or an employee who obtained the information acting within the scope of employment, the Special Counsel has discretion over the decision to transmit the information to the appropriate agency head.[135]

The Special Counsel is required to publish records of its investigations—subject to confidentiality requirements and other provisions of law requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs.[136]

Personnel Actions

The WPA prohibits a government employee with authority over personnel from taking or failing to take a "personnel action" because of a protected disclosure made by a covered employee.[137] The term "personnel action" encompasses a wide range of actions by an agency, including

> (1) an appointment; (2) a promotion; (3) an action under chapter 75 of title 5, U.S. Code, or other disciplinary or corrective action; (4) a detail, transfer, or reassignment; (5) a reinstatement; (6) a restoration; (7) a reemployment; (8) a performance evaluation under chapter 43 of title 5, U.S. Code; (9) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; (10) a decision to order psychiatric testing or examination; (11) the implementation or enforcement of any nondisclosure policy, form, or agreement; and (12) any other significant change in duties, responsibilities, or working conditions.[138]

The list covers a broad range of personnel-related activity and includes the catch-all provision of "any other significant change in duties, responsibilities, or working conditions," as distinguished from routine changes.[139] However, courts have repeatedly held that a denial or revocation of a security clearance is not a covered "personnel action" and is therefore outside of the Board's jurisdiction.[140] The Federal Circuit has also held that personnel investigations are outside the scope of personnel actions authorized for relief under the WPA, since Congress intentionally excluded them from the list of qualifying personnel actions specified in Section 2302(a)(2)(A).[141]

---

[133] *Id.* § 1213(h).

[134] *Id.* § 1213(g)(2).

[135] *Id.* § 1213(g)(1).

[136] *Id.* § 1219. The Office of Special Counsel publishes "Public Files" online at https://osc.gov/PublicFiles (last visited Nov. 11, 2024).

[137] 5 U.S.C. § 2302(a)(2)(A).

[138] *Id.* § 2302(a)(2)(A).

[139] *See* Jones v. Merit Sys. Prot. Bd., 103 F.4th 984, 1005 (4th Cir. 2024).

[140] *See, e.g.*, Hesse v. Dep't of State, 217 F.3d 1372 (Fed Cir. 2000) (citing Dep't of the Navy v. Egan, 484 U.S. 818 (1988)). *See also* Campbell v. McCarthy, 952 F.3d 193, 204–05 (4th Cir. 2020).

Adverse actions under Chapter 75 of Title 5 of the *U.S. Code* include removals, suspensions, reductions in grade or pay, and furloughs. *See* 5 U.S.C. §§ 7501–7543.

[141] *See* Sistek v. Dep't of Veterans Affs., 955 F.3d 948, 955–56 (Fed. Cir. 2020) (holding employee failed to establish that an allegedly retaliatory investigation for whistleblowing activities created a hostile work environment so as to (continued...)

An employee may receive fees and costs incurred due to an agency investigation "if such investigation was commenced, expanded, or extended in retaliation for the disclosure ... that formed the basis of the corrective action."[142]

Establishment of a WPA Retaliation Claim

As discussed above, to bring a successful claim for retaliation under the WPA, a covered employee must have made a qualifying protected disclosure that subjected the individual to a personnel action. For such a claim to prevail before the Board, in addition to establishing the previously discussed elements, the employee must establish by a preponderance of the evidence that a protected disclosure was also a contributing factor in an adverse personnel action.[143] A "contributing factor" is defined as one that "affects an agency's decision to threaten, propose, take, or not take a personnel action with respect to the individual making the disclosure."[144] Furthermore, courts have stated that a "contributing factor" means "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[145] In other words, to prevail on the merits of a WPA retaliation claim before the MSPB, a proponent must show by a preponderance of the evidence that the acting official took the personnel action because of the protected disclosure in part or in whole.[146]

The employee may prove to the Board that a protected disclosure was a contributing factor in a personnel action by means of circumstantial evidence, "such as evidence that—(A) the official taking the personnel action knew of the disclosure or protected activity; and (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action."[147] This

qualify as a personnel action under the catch-all provision for significant changes to working conditions); *but see* Manivannan v. Dep't of Energy, 42 F.4th 163, 173 (3d Cir. 2022) (holding that "extreme circumstances," such as placing an employee on leave and beginning removal proceedings, resulting from an internal investigation constituted a significant change in working conditions, thus qualifying as a personnel action under the statute).

[142] 5 U.S.C. § 1214.

[143] 5 U.S.C. § 1214(b)(4)(B); *see also* Flynn v. Sec. & Exch. Comm'n, 877 F.3d 200, 204 (4th Cir. 2017) ("When a whistleblower claims an agency took an impermissible personnel action, the Merit Systems Protection Board evaluates the case using a burden-shifting framework. First, the employee must establish a prima facie case by demonstrating four facts: '(1) the acting official has the authority to take, recommend, or approve any personnel action; (2) the aggrieved employee made a protected disclosure; (3) the acting official used his authority to take, or refuse to take, a personnel action against the aggrieved employee; and (4) the protected disclosure was a contributing factor in the agency's personnel action.' The petitioner bears the burden of proof by a preponderance of the evidence. If the petitioner establishes a prima facie case, the burden shifts to the agency to show 'by clear and convincing evidence that it would have ... taken ... the same personnel action in the absence of the disclosure.' ") (internal citations omitted) (citing Chambers v. Dep't of Interior, 602 F.3d 1370, 1376 (Fed. Cir. 2010)).

[144] 5 C.F.R. § 1209.4(d).

[145] *See* Marano v. Dep't of Just., 2 F.3d 1137, 1140 (Fed. Cir. 1993) (quoting the legislative history of the WPA).

[146] *See* Murray v. UBS Securities, LLC, 601 U.S. 23, 28 (2024) (holding that a Sarbanes-Oxley Act provision based on the WPA framework requires an employee must prove that their disclosure was a contributing factor in the personnel action, but need not prove that the employer acted with "retaliatory intent."). In *Murray*, the Court cited the congressional record for the proposition that in passage of the WPA's contributing factor requirement, "[t]he framework was meant to relieve whistleblowing employees of the 'excessively heavy' burden' under then-existing law of showing that their protected activity was a '"significant", "motivating", "substantial", or "predominant"' factor in the adverse personnel action, and it reflected a determination that '[w]histleblowing should never be a factor that contributes in any way to an adverse personnel action.'" *Id.* (citing 135 Cong. Rec. 5032, 5033 (1989) (Explanatory Statement on S. 20, 101st Cong., 1st Sess. (1989))).

[147] 5 U.S.C. § 1221(e)(1).

provision, sometimes known as the "knowledge/timing test," amended the WPA to clarify the circumstances by which such evidence can establish that a disclosure was a contributing factor.[148]

Once a whistleblower has established by a preponderance of the evidence that a disclosure was a contributing factor in the personnel action taken against them, the burden then shifts to the agency to demonstrate by clear and convincing evidence that it would have taken the same personnel action against the whistleblower even in the absence of the protected disclosure.[149] "Clear and convincing evidence," a higher burden than a preponderance of evidence, is the "measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established."[150]

In determining whether an employing agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, relevant factors may include the strength of the agency's evidence in support of its personnel action, the existence and strength of any motive to retaliate on the part of agency officials who were involved in the personnel action, and evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.[151] The Board does not view these factors as discrete elements, but instead weighs the factors together to determine if the evidence is clear and convincing as a whole.[152] As further discussed below, if the agency cannot carry its burden of proof by clear and convincing evidence, the Board "shall order such corrective action as the Board considers appropriate."[153]

Investigations and Corrective Action

One federal court has described the WPA as a "procedural obstacle course" for employees who invoke its protections.[154] Covered employees have different options for bringing retaliation claims depending on the nature of the personnel action underlying the claim. For most personnel actions, the procedures to claim retaliation under the WPA are divided into two stages: an investigatory stage conducted by the Special Counsel and an adjudicatory stage before the MSPB. First, an individual brings a claim to the Special Counsel that a personnel action has been taken, or is to be taken, in retaliation for whistleblowing.. The Special Counsel then conducts an investigation of the complaint.[155] If the Special Counsel finds a prohibited personnel practice, then the Special Counsel must report the determination—along with any findings or recommendations for corrective action to be taken—to the MSPB, the agency involved, and OPM.[156] After a reasonable

[148] *See* Kewley v. Dep't of Health & Hum. Servs., 153 F.3d 1357, 1361 (Fed. Cir. 1998) (discussing the legislative history of the "knowledge/timing" test).

[149] 5 U.S.C. § 1214(b)(4)(B)(ii); *See also* 5 C.F.R. § 1209.7 (2013).

[150] 5 C.F.R. § 1209.4(e).

[151] *See* Carr v. Soc. Sec. Admin., 185 F.3d 1318, 1323 (Fed. Cir. 1999). *See also Mikhaylov*, 62 F.4th at 869 (examining the factors from *Carr* having been adopted by the MSPB and several circuits).

[152] *See* Elder v. Department of the Air Force, 124 M.S.P.R. 12, 42 (M.S.P.B. 2016). *See also* Siler v. Env't Prot. Agency, 908 F.3d 1291, 1299 (Fed. Cir. 2018) (citing Miller v. Dep't of Just., 842 F.3d 1252 (Fed. Cir. 2016) ("Though an agency need not introduce evidence of every *Carr* factor to prove its case, the 'risk associated with having no evidence on the record' for a particular factor falls on the government")).

[153] 5 U.S.C. § 1221(e)(1).

[154] *See Delgado*, 979 F.3d at 553.

[155] 5 U.S.C. § 1214(a)(1)(A).

[156] *Id.* § 1214(b)(2)(B). The Special Counsel may also report such determinations, findings, and recommendations to the President.

period of time, if the agency does not act to correct the prohibited personnel practice, OSC may petition the Board for corrective action on the employee's behalf.[157]

In addition to this procedure initiated by the Special Counsel, the WPA provides for two other avenues to bring an action as an appeal to the MSPB. First, if the Special Counsel does not find a prohibited personnel practice, or if the Special Counsel fails to respond to the complaint in a timely manner, the whistleblower is considered to have exhausted his or her administrative remedy and can bring an "individual right of action" appeal before the MSPB.[158] Second, without first filing a claim with OSC, a covered employee who has been subjected to "an otherwise appealable action,"[159] such as termination of employment, may file an appeal directly with the MSPB and is entitled to include a whistleblower retaliation claim as an affirmative defense to the adverse personnel action.[160]

Once a case is with the MSPB (as a result of a Special Counsel petition, an individual right of action, or an otherwise appealable action), if the MSPB finds evidence of retaliation, it may then order such corrective action as it considers appropriate.[161] Appeals of final decisions or orders by the MSPB regarding claims under the WPA[162] can be brought in the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.[163]

Actions by OSC on Whistleblower Retaliation Claims

If a covered employee believes that he or she has been subject to a prohibited personnel practice in retaliation for a whistleblowing activity as described above, he or she may file a complaint with OSC.[164] When an individual submits a complaint, the Special Counsel has authority to respond in several ways, including (1) requiring agency investigations and reports;[165] (2) requesting a stay from the MSPB for any personnel action pending an investigation;[166] (3)

---

[157] *Id.* § 1214(b)(2)(C).

[158] *Id.* § 1221.

[159] 5 C.F.R. § 1201.3(a) (1989).

[160] 5 U.S.C. § 7701. Alternatively, a member of a collective bargaining unit subjected to a covered personnel action in retaliation for protected whistleblowing may instead elect to pursue a remedy through a grievance under the agreement. *See* Agoranos v. Dep't of Justice, 119 M.S.P.R. 498 (M.S.P.B. June 7, 2013). The grievance procedures in 5 U.S.C. § 7121(g) provide such employees the option to pursue a negotiated grievance remedy, elect an appeal to the MSPB under 5 U.S.C. § 7701, or seek corrective action from OSC. *See also* 5 C.F.R. § 1209.2(d) (2013).

[161] The MSPB will order corrective action if it finds that the Special Counsel has demonstrated that a disclosure was a contributing factor in the personnel action which was taken or is to be taken against the individual. *See* 5 U.S.C. § 1214(b)(4)(B)(i).

[162] The WPEA temporarily extended judicial review of final MSPB decisions in whistleblower cases to "any court of appeals of competent jurisdiction." *See* P.L. 112-199, 126 Stat. 1469 (2012). The expansion was permanently authorized by the All Circuit Review Act. *See* P.L. 115-195, 132 Stat. 1510 (2018).

[163] 5 U.S.C. § 7703(b)(1)(B); see also Baca v. Dep't of the Army, 983 F.3d 1131, 1137 (10th Cir. 2020) ("The Court of Appeals for the Federal Circuit generally has jurisdiction over final decisions by the MSPB, 5 U.S.C. § 7703(b)(1)(A), with two exceptions. First, an appeal that also challenges an adverse employment action based upon a claim of prohibited discrimination (termed a 'mixed case') must be appealed to the appropriate federal district court. Second, a petition for judicial review of: [A] final order or final decision of the [MSPB] that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in [5 U.S.C.] section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C) or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.") (internal citations omitted).

[164] 5 C.F.R. §§ 1800.1–1800.4 (2022). *See also* Sabbagh v. Dep't of Army, 110 M.S.P.R. 13 (M.S.P.B. Sept. 9, 2008) (discussing aspects of OSC filing and investigation process).

[165] 5 U.S.C. § 1213(c).

[166] *Id.* § 1214(b)(1).

seeking "corrective action" by the agency;[167] (4) petitioning the Board for corrective action if, after a reasonable period of time, the agency does not act to correct the prohibited personnel practice;[168] and (5) seeking "disciplinary action" against officers and employees who have committed prohibited personnel practices.[169]

Investigations

The WPA requires that the Special Counsel shall receive any allegation of a prohibited personnel practice and investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.[170] Within 15 days of receiving an allegation of a prohibited personnel practice, the Special Counsel must provide written notice to the person who made the allegation that the allegation has been received.[171]

At least every 60 days throughout its investigation, OSC must give notice of the status of the investigation to the individual who brought the allegation.[172] Within 240 days of receiving the allegation, the Special Counsel must make a determination regarding whether there are reasonable grounds to believe that the prohibited personnel practice has occurred, exists, or is to be taken.[173] If the Special Counsel determines that such reasonable grounds exist and require corrective action, the Special Counsel shall report the determination, together with any findings and recommendations, to the MSPB, the agency involved, and to OPM.[174] OSC also refers select cases to OSC's Alternative Dispute Resolution (ADR) Unit, which may conduct voluntary mediation between OSC, the employing agency, and the employee.[175]

---

[167] *Id.* § 1214(b)(2)(B). *See also* Special Couns. v. Dep't of Interior, 68 M.S.P.R. 537, 538 (M.S.P.B. Sept. 7, 1995) (discussing OSC process recommending corrective action to the agency and then petitioning the Board).

[168] 5 U.S.C. § 1214(b)(2)(C).

[169] *Id.* § 1215.

[170] *Id.* § 1214(a)(1)(A). *See also Sabbagh*, 110 M.S.P.R. at 18.

In addition to the authority to investigate an allegation, the Special Counsel may, in the absence of an allegation, conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a prohibited personnel practice (or a pattern of prohibited personnel practices) has occurred, exists, or is to be taken. *See* 5 U.S.C. § 1214(a)(5).

[171] 5 U.S.C. § 1214(a)(1)(B)(i). Additionally, the notice shall include the name of a person at the Office of Special Counsel who shall serve as a contact with the person making the allegation. *Id.* § 1214(a)(1)(B)(ii).

[172] *Id.* § 1214(a)(1)(C)(ii). The Special Counsel shall also, within 90 days after providing initial notice of receipt of the allegations if the investigation has not been terminated, notify the person who made the allegation of the status of the investigation and any action taken.

[173] *Id.* § 1214(b)(2)(A)(i). If the Special Counsel is unable to make the required determination within the 240-day period and the person submitting the allegation of a prohibited personnel practice agrees to an extension of time, the determination shall be made within such additional period of time as shall be agreed upon between the Special Counsel and the person submitting the allegation. *See id.* § 1214(b)(2)(A)(ii). *See also* Krape v. Dep't of Def., 87 M.S.P.R. 126, 131 (M.S.P.B. Oct. 18, 2000) ("The agency contends on review that it has been informed by OSC that the appellants had 'agreed to allow the OSC to indefinitely extend the OSC investigation past the 240-day statutory deadline imposed on OSC for completion of its investigations.' ")

[174] 5 U.S.C. § 1214(b)(2)(B).

[175] *See Alternative Dispute Resolution Process*, OFF. OF SPECIAL COUNS., https://osc.gov/Services/Pages/ADR-OurProcess.aspx (last visited Nov. 11, 2024) ("If the ADR Unit determines that a case is a good candidate for mediation, an OSC ADR Specialist contacts the complainant and the employing agency to invite them to participate in the mediation program. If both parties agree, OSC will assign mediators who will work with the parties to prepare for and schedule a mediation. If a party chooses not to mediate, the case will be returned to the appropriate OSC investigation unit for further action.").

If the Special Counsel decides to terminate an investigation, a written status report—including the proposed findings and legal conclusions—must be provided to the individual who made the allegation.[176] As explained below, such a termination, or a failure to meet the 240-day deadline, can be appealed to the MSPB in an individual right of action appeal.[177]

Recommendations for Corrective and Disciplinary Action

As discussed above, if in any investigation the Special Counsel determines that there are reasonable grounds to believe a prohibited personnel practice exists or has occurred, the Special Counsel must report findings and recommendations to the MSPB, the agency involved, and OPM.[178] If the agency does not act to correct the prohibited personnel practice within a reasonable period, the Special Counsel may petition the MSPB for corrective action.[179] When OSC brings cases before the MSPB, the cases are sometimes referred to as OSC "original jurisdiction" cases.[180] Corrective action ordered by the MSPB may include the individual being placed as nearly as possible in the position the individual would have been in had the prohibited personnel practice not occurred; reimbursement for attorney's fees; back pay and related benefits; medical costs incurred; travel expenses; any other reasonable and foreseeable consequential damages; and compensatory damages (including interest, reasonable expert witness fees, and costs).[181]

Additionally, any employee who has committed a prohibited personnel practice; violated the provisions of any law, rule, or regulation; engaged in other misconduct within the jurisdiction of the Special Counsel; or knowingly and willfully refused or failed to comply with an order of the MSPB can be subject to disciplinary action under the WPA.[182] Proceedings for disciplinary action

[176] If the Special Counsel terminates an investigation, the Special Counsel shall provide a written statement notifying the person who made the allegation, which includes a summary of relevant facts ascertained by the Special Counsel; the reasons for terminating the investigation; and a response to any comments submitted by the person who made the allegation. *See* 5 U.S.C. § 1214(a)(2)(A). OSC guidance states that the Special Counsel will generally issue a preliminary determination letter before closing the complaint, with a 10-day period for the complainant to respond. *See Fact Sheet: How Complaints Are Received and Processed*, OFF. OF SPECIAL COUNS., https://osc.gov/documents/ppp/processing%20complaints%20of%20ppps/how%20complaints%20are%20received%20and%20processed.pdf (last visited Nov. 11, 2023).

Additionally, OSC can terminate an investigation within the first 30 days of receiving a complaint and without further inquiry if (1) the same allegation, based on the same set of facts and circumstances, had previously been made by the individual and investigated by the Special Counsel, or had previously been filed by the individual with the Merit Systems Protection Board; (2) the Special Counsel does not have jurisdiction to investigate the allegation; or (3) the individual knew or should have known of the alleged prohibited personnel practice on or before the date that is three years before the date on which the Special Counsel received the allegation. *See* 5 U.S.C. § 1214(a)(6).

[177] *See* Ellison v. Merit Sys. Prot. Bd., 7 F.3d 1031, 1036 (Fed. Cir. 1993).

[178] 5 U.S.C. § 1214(b)(2)(B). A report by the MSPB in 2008 stated that "[t]ypically, OSC obtains corrective action through negotiation between the complainant and the agency." *See* MERIT SYS. PROT. BD., WHISTLEBLOWER PROTECTIONS FOR FEDERAL EMPLOYEES: A REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES BY THE U.S. MERIT SYSTEMS PROTECTION BOARD 43 (2008).

[179] 5 U.S.C. § 1214(b)(2)(C).

[180] Procedures for original jurisdiction cases, which will first be heard by an administrative judge and may be appealed by either party to the Board, may be found in 5 C.F.R. §§ 1201.121–1201.148 (1989).

[181] 5 U.S.C. § 1214(g). *See also* King v. Dep't of Air Force, 119 M.S.P.R. 663 (M.S.P.B. Aug. 14, 2013).

Additionally, any corrective action ordered to resolve a prohibited personnel practice may include fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action. *See* 5 U.S.C. § 1214(h). Procedures for Special Counsel complaints requesting corrective actions by the Board may be found in 5 C.F.R. §§ 1201.128–1201.133.

[182] 5 U.S.C. § 1215(a)(1).

against an officer or employee who commits a prohibited personnel practice may be instituted by the Special Counsel by filing a written complaint with the MSPB.[183] If a violation is found, the Board may impose disciplinary actions such as removal, reduction in grade, debarment from federal employment for a period not to exceed five years, suspension, reprimand, an assessment of a civil penalty, or any combination of these actions.[184]

Upon application by the Special Counsel, a member of the MSPB may stay or postpone for 45 days, pending an investigation, a personnel action that the Special Counsel has reasonable grounds to believe constitutes a prohibited personnel practice.[185] Unless the member determines that a stay would be inappropriate under the facts and circumstances involved, it will be ordered within three days of the application.[186] The MSPB may extend the stay after the employing agency has had an opportunity to comment on the appropriateness of such an extension.[187] A stay may be terminated by the MSPB at any time, except that it may not be terminated if notice and an opportunity for oral or written comments are not provided to the Special Counsel and the individual on whose behalf the stay was ordered.[188]

Judicial review of any final order or decision by the MSPB may be obtained by an employee, former employee, or applicant for employment adversely affected by the order or decision.[189] Previously, appellate jurisdiction for federal whistleblower claims lay exclusively with the Federal Circuit, unless the case was a " 'mixed case' ... alleging both a prohibited personnel action and discrimination."[190] In 2012, Congress in the WPEA created the option of seeking review for whistleblower appeals before the Federal Circuit or any court of appeals of competent jurisdiction.[191]

Whistleblower Appeals to the MSPB

In addition to the process whereby OSC seeks action by the MSPB, the WPA provides two additional routes for employees to appeal to the Board.[192] First, the WPA created an individual

[183] *Id.*

[184] *Id.* § 1215(a)(3). The Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, P.L. 115-73, 131 Stat. 1235, enacted several reforms to the WPA, including disciplinary procedures for supervisors based on retaliation against whistleblowers and responsibilities for agency heads to inform new hires of whistleblower rights and procedures. Procedures for disciplinary actions sought by the Special Counsel may be found in 5 C.F.R. §§ 1201.122–1201.127. An employee subject to a final Board decision imposing disciplinary action under 5 U.S.C. § 1215 may generally obtain judicial review of the decision in the United States Court of Appeals for the Federal Circuit. 5 C.F.R. § 1201.127.

[185] 5 U.S.C. § 1214(b)(1)(A). *See also Special Couns.*, 68 M.S.P.R. at 537–38.

[186] 5 U.S.C. § 1214(b)(1)(A).

[187] *Id.* §§ 1214(b)(1)(B), (C). *See also Special Couns.*, 68 M.S.P.R. at 538.

[188] *Id.* § 1214(b)(1)(D). Procedures for Special Counsel requests for stays may be found in 5 C.F.R. §§ 1201.134–1201.136.

[189] 5 U.S.C. § 1214(c). A federal court will affirm a Board decision unless the petitioner establishes under 5 U.S.C. § 7703(c) that it is (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without adherence to procedures required by law, rule, or regulation; or (3) unsupported by substantial evidence. *See* Koyen v. Office of Personnel Management, 973 F.2d 919, 922 (Fed. Cir. 1992).

[190] *Supra* note 163. *See also Mikhaylov*, 62 F.4th at 870 n.5.

[191] *See* 5 U.S.C. § 7703(b)(1)(B). *See also Flynn*, 877 F.3d at 203 ("Congress made this change, in part, due to displeasure with how the Federal Circuit handled whistleblower cases") (citing S. REP. NO. 112-155, at 1–2 (2012) ("Unfortunately, federal whistleblowers have seen their protections diminish in recent years, largely as a result of a series of decisions by the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over many cases brought under the Whistleblower Protection Act (WPA). Specifically, the Federal Circuit has wrongly accorded a narrow definition to the type of disclosure that qualifies for whistleblower protection.")).

[192] *See Baca*, 983 F.3d at 1137. *See also* Zachariasiewicz v. Dep't of Just., 48 F.4th 237, 242–43 (4th Cir. 2022).

right of action to appeal to the MSPB after an individual has exhausted his or her claim before OSC.[193] Second, individuals subject to certain adverse employment actions have the option to appeal directly to the MSPB, where an employee may raise whistleblowing as a defense to agency action.[194]

Individual Rights of Action (IRA)

Individuals may seek review of a whistleblower reprisal case by the MSPB if the Special Counsel notifies the individual that it has terminated its related investigation or if 120 days have elapsed since the individual first sought corrective action from the Special Counsel.[195] For an individual filing a whistleblower appeal after first filing a complaint with OSC, the appeal must be filed within 65 days of the date of the OSC notice advising that the Special Counsel will not seek corrective action, or within 60 days after the date the individual receives the OSC notice, whichever is later.[196]

In an IRA appeal, in addition to the elements that must be proven in a whistleblower claim generally, the employee must also prove that claims of whistleblower retaliation with OSC have been exhausted by a preponderance of the evidence.[197] After exhausting remedies before OSC, an individual alleging a violation of the WPA in an IRA must demonstrate to the Board that he or she made a protected disclosure and that the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action.[198] To merely establish the Board's jurisdiction over a claim for individual right of action appeal, the employee's burden is not a preponderance of the evidence, but only to make nonfrivolous allegations that the employee made a protected disclosure that was a contributing factor to the personnel action taken or proposed.[199] The Board

[193] 5 U.S.C. § 1221.

[194] *Id.* at § 7701(a). OSC has stated in guidance that, "in deciding whether to appeal an adverse action to the MSPB or instead to file a PPP complaint [with OSC] arising from an adverse action, it is important to consider that in an IRA appeal [arising out of the OSC complaint], the only issues before the Board are those listed in 5 U.S.C. § 1221(e), i.e., whether the appellant has demonstrated that whistleblowing or other protected activity was a contributing factor in one or more covered personnel actions." *See The U.S. Office of Special Counsel's Role in Protecting Whistleblowers and Serving as a Safe Channel for Government Employees to Disclose Wrongdoing*, OFF. OF SPECIAL COUNS., https://osc.gov/Documents/PPP/OSC%27s%20Role/OSC%E2%80%99s%20Role%20in%20Protecting%20Whistleblowers%20and%20Serving%20as%20a%20Safe%20Channel%20for%20Government%20Employees%20to%20Disclose%20Wrongdoing.pdf (last visited Dec. 17, 2024).

[195] 5 U.S.C. §§ 1221, 1214(a)(3).

[196] *See* 5 C.F.R. § 1209.5 (1990). This filing deadline for an IRA differs from deadlines for most appeals to the MSPB, requiring in most types of cases that an appeal must be filed within 30 calendar days of the effective date of the action, if any, or within 30 calendar days after the date of receipt of the agency's decision, whichever is later. *See* 5 C.F.R. § 1201.22(b)(1) (1989).

[197] *See* Knollenberg v. Merit Sys. Prot. Bd., 953 F.2d 623, 625 (1992) (summarizing requirements in 5 U.S.C. § 1214(a)(3)(A) and 5 C.F.R. § 1209.5(a): "[O]nly if the Office of Special Counsel terminates its investigation without action or does not commit to pursuing corrective action within 120 days, may one appeal to the board under section 1221(a)"). *See also* Delgado v. Merit Sys. Prot. Bd., 880 F.3d 913, 926 (7th Cir. 2018) (interpreting the employee's burden of exhausting the claim before OSC in § 1214(a)(3) to require only that an employee sought corrective action "by presenting the OSC with sufficient information to permit a legally sophisticated reader to understand his charge of retaliation and to investigate it further.").

[198] *See Cahill*, 821 F.3d 1370. The individual right of action in Section 1221 applies to employees who have alleged a prohibited personnel practice described in Section 2302(b)(8) or Section 2302(b)(9)(A)(i), (B), (C), or (D). The provision does not cover prohibited personnel actions described in Title 5, Section 2302(b)(9)(A)(ii), of the *U.S. Code*, describing prohibited personnel actions taken because of the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation not dealing with whistleblower disclosures. *See* Young v. Merit Sys. Prot. Bd., 961 F.3d 1323, 1329 (Fed. Cir. 2020).

[199] *See Johnston*, 518 F.3d at 909 (quoting Stoyanov v. Dep't of the Navy, 474 F.3d 1377, 1382 (Fed. Cir. 2007) (citing (continued...)

may consider only issues brought before OSC,[200] but the Board may not rely on OSC's termination of an investigation or other determination in its decision.[201]

The WPA provides several remedies for individuals who prevail in an IRA.[202] An individual may be reinstated to the position he or she would have occupied had the prohibited personnel practice not occurred.[203] Back pay and related benefits, medical costs, travel expenses, and any other reasonable and foreseeable consequential damages may also be awarded.[204] In all cases, corrective action includes awarding attorneys' fees.[205]

"Otherwise Appealable Actions": Appeals to the MSPB Under Chapter 77 of Title 5

Chapter 77 of Title 5 deals, in part, with the appellate procedures of the MSPB, including rights of employees, and applicants for employment, to appeal to the Board.[206] Title 5, Section 7701, of the *U.S. Code* states that "an employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation."[207] Therefore, an individual subject to certain adverse employment actions (including removals, suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or less)[208] may directly submit an appeal to the MSPB without first going before OSC.[209]

During an appeal, an appellant may raise whistleblowing as an affirmative defense or as an assertion by the appellant that, if proven, constitutes a defense to the agency action.[210] Analysis of a whistleblower defense follows the burden-shifting scheme previously discussed.[211] If the employee establishes by a preponderance of evidence that a protected disclosure was a contributing factor to an adverse personnel action, the agency must refute the allegations by a showing of clear and convincing evidence that it would have taken the same action in the absence of the disclosure.[212] As previously discussed, an employee aggrieved by a final order or decision by the MSPB may obtain judicial review.[213]

Garcia v. Dep't of Homeland Sec., 437 F.3d 1322, 1325 (Fed. Cir. 2006) (en banc))). *See also* 5 C.F.R. § 1201.57 (2015).

[200] *See* Ward v. Merit Sys. Prot. Bd., 981 F.2d 521, 526 (Fed. Cir. 1992). Furthermore, Board regulations state that "in an individual right of action appeal ... the appellant may not raise affirmative defenses, such as claims of discrimination or harmful procedural error. In an IRA appeal that concerns an adverse action under 5 U.S.C. § 7512, the agency need not prove its charges, nexus, or the reasonableness of the penalty, as a requirement under 5 U.S.C. § 7513(a), i.e., that its action is taken 'only for such cause as will promote the efficiency of the service.'" 5 C.F.R. § 1290.2(c) (1995).

[201] *See Delgado*, 880 F.3d at 924 (citing 5 U.S.C. §§ 1221(f), 1214(b)(2)(E)).

[202] 5 U.S.C. § 1221(g)(1)(A).

[203] *Id.* § 1221(g)(1)(A)(i).

[204] *Id.* § 1221(g)(1)(A)(ii).

[205] *Id.* § 1221(g)(1)(B).

[206] *See id.* § 7701(a).

[207] *Id.*

[208] *Id.* § 7512.

[209] *Id.* § 7701. *See also Baca*, 983 F.3d at 1137.

[210] *See, e.g.*, *Carr*, 185 F.3d at 1322.

[211] *See id.*

[212] *Id.*

[213] 5 U.S.C. § 7703(a)(1); *see also Judicial Review*, U.S. MERIT SYS. PROT. BD., https://www.mspb.gov/appeals/review.htm (last visited Dec. 9, 2024).

Considerations for Congress

In passing the WPEA in 2012, Congress stated that the amendments to the WPA would strengthen the rights of and protections for federal whistleblowers in part by overturning narrow interpretations of the protections afforded in the Act.[214] However, not all personnel actions—even if they are taken in response to whistleblowing activity—are covered by the Act. For example, a revocation of a security clearance is not a personnel action within the jurisdiction of the MSPB.[215] Additionally, while an employee may recover "fees, costs, or damages reasonably incurred due to an agency investigation of the employee," a retaliatory internal investigation into an employee's conduct is not itself a personnel action prohibited by the Act.[216] If Congress wishes to provide additional protections for federal whistleblowers, Congress may add to the list of personnel actions prohibited in retaliation against employees.[217] Congress may also extend the protections of the WPA to executive branch employees not covered by the WPA, or to employees outside of the executive branch. Alternatively, Congress may narrow the investigatory or enforcement jurisdiction over personnel actions or employees by OSC or the MSPB.

Congress may also consider alternative remedies under the Act. For example, prior to the enactment of the WPEA, the Board was not authorized to award compensatory damages for violations.[218] In other whistleblower statutes, Congress has enacted reward or "bounty" provisions to encourage whistleblowers to come forward.[219] Congress may also consider punitive, or exemplary, damages, to further punish whistleblower retaliation and deter such conduct.[220]

The protections of the WPA are primarily enforced by the MSPB. Typically, the MSPB consists of three Board members, each appointed by the President with the advice and consent of the Senate.[221] Between January 7, 2017, and March 3, 2022, the Board did not have a quorum of two members.[222] Due to the lack of a quorum, the Board was unable to perform its review functions, including issuing final decisions in cases when an initial decision issued by an administrative judge has been appealed to the full Board.[223] In addition to the thousands of pending appeals, the Board was unable to promulgate new regulations in response to any legislative changes involving the MSPB. In September, the MSPB issued an interim final rule updating its adjudicatory and operational regulations, including modifying the authority of a lone Board member to take certain actions, when the Board is unable to act, and additional responsibilities for administrative

[214] *See* S. REP. NO. 112–155 (2012), *as reprinted in* 2012 U.S.C.C.A.N. 589.

[215] Hesse v. Dep't of State, 217 F.3d 1372, 1380 (Fed. Cir. 2000) (citing *Egan*, 484 U.S. at 530–31, for proposition that "unless Congress specifically provides otherwise, the Merit Systems Protection Board is not authorized to review security clearance determinations or agency actions based on security clearance determinations").

[216] 5 U.S.C. § 1214(h).

[217] *Id.* § 2302(a).

[218] *See King*, 119 M.S.P.R. 663.

[219] The Dodd-Frank Wall Street Reform and Protection Act requires the SEC to pay awards to whistleblowers who voluntarily provide the SEC with information about securities law violations. *See* 15 U.S.C. § 78u-6; 17 C.F.R. § 240.21F-3 (2011).

[220] *See, e.g.*, 42 U.S.C. § 300j–9(i)(2)(B)(ii).

[221] 5 U.S.C. § 1201.

[222] *Frequently Asked Questions About the Lack of Quorum Period and Restoration of the Full Board*, U.S. MERIT SYS. PROT. BD., https://www.mspb.gov/New_FAQ_Lack_of_Quorum_Period_and_Restoration_of_the_full_board.pdf (last visited Nov. 26, 2024).

[223] *Id.*

judges.[224] To address a potential lack of quorum in the future, Congress could choose to reform the MSPB in various ways, such as by codifying the reforms in the Board's interim final rule, increasing the number of appointees to the Board, or lengthening appointments.

Author Information

Jimmy Balser
Legislative Attorney

Disclaimer

[224] Organization and Procedures, 89 Fed. Reg. 72957 (Sept. 9, 2024) (amended 5 C.F.R. Parts 1200, 1201, 1203, and 1209). The constitutionality of the MSPB's structure of administrative judges ratified by the Board was upheld by the Federal Circuit in 2022. *See* McIntosh v. Dep't of Def., 53 F.4th 630 (Fed. Cir. 2022).