



**March 27, 2013**

# **Whistleblower Protection Enhancement Act**

# Whistleblower Protection Enhancement Act

- P.L. 112-199
- Effective December 27, 2012
- S. Rep. 112-155
- Sections of the Code amended by the WPEA are available at <http://www.mspb.gov/appeals/uscode.htm>

# Purpose

- Close loopholes and restore original intent of WPA
  - Fed. Cir. and MSPB decisions denied coverage to individuals Congress intended to protect
  - Focus of WPA cases shifted to protected conduct
- Increase awareness of whistleblower rights
- Strengthen ability of OSC to pursue disciplinary action

# Purpose

- “S. 743 makes clear, once and for all, that Congress intends to protect ‘any disclosure’ of certain types of wrongdoing in order to encourage such disclosures. It is critical that employees know that the protection for disclosing wrongdoing is extremely broad . . . Without that assurance, whistleblowers will hesitate to come forward.” S. Rep. 112-155.
- Nov. 2011 MSPB study “*Blowing the Whistle: Barriers to Federal Employees Making Disclosures*” found that approximately one-third of the individuals who felt they had been identified as a source of a report of wrongdoing perceived either threats or acts of reprisal, or both.

# Clarifying Scope of Protected Conduct

- Clarification of Protected Disclosures
  - 2302(b)(8) protects:
    - Disclosure to wrongdoer
    - Disclosure revealing information previously disclosed
    - Disclosure made in normal course of duties
    - Oral disclosures
    - Off-duty disclosures

# Clarifying Scope of Protected Conduct

- Protected Disclosures
  - Motive and delay in making disclosure irrelevant
  - Disagreements over lawful policy decisions not protected
    - Section 102: “(D) ‘disclosure’ means a formal or informal communication or transmission, **but does not include a communication concerning policy decisions that lawfully exercise discretionary authority** unless the employee or applicant providing the disclosure reasonably believes that the disclosure 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.”

# Clarifying Scope of Protected Conduct

- “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. The 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.” S. Rep. 112-155.

# Protecting Disclosures About Censorship

- Protects disclosures about censorship related to research, analysis, or technical information
  - Censorship “means any effort to distort, misrepresent, or suppress research, analysis, or technical information.”
- Promotes scientific integrity

# Remedies

- Remedies
  - Uncapped compensatory damages
    - “any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs)”
  - Does not apply to claims arising prior to 12/27/12, except for some HWE claims

# Remedies

- Fees and costs incurred due to a retaliatory investigation
- *Russell v. DOJ*, 76 M.S.P.R. 317 (1997)
  - “[w]hen . . . an investigation is so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliate, and the agency does not show by clear and convincing evidence that the evidence would have been gathered absent the protected disclosure, then the appellant [whistleblower] will prevail on his affirmative defense of retaliation for whistleblowing.”

# Expanded Coverage

- Coverage
  - Grants TSA employees rights under 2302(b)(1), (8) and (9), effective 11/27/12.

# Whistleblower Protection for Intelligence Community Employees

- 10/10/12 Presidential Policy Directive 19 prohibits retaliation against whistleblowers in the intelligence community
- Requires intelligence agencies to establish by July 2013 a review process for claims of retaliation consistent with the procedures in the WPA.



# Procedural Enhancements

- Procedural Changes
  - 2-year all-circuit review pilot
  - Authorizes IRA appeal in 2302(b)(9)(A)(i)-(D) cases
    - retaliation for filing (b)(8) complaint (but not for exercising other appeal, complaint or grievance rights);
    - testifying for or otherwise lawfully assisting any individual in the exercise of an appeal, complaint or grievance right;
    - cooperating with or disclosing information to an IG or OSC; or
    - refusing to obey an order that would require the individual to violate a law.

# Procedural Enhancements

- AJ must permit IRA appellant to present her case before permitting the agency to present its defense
- 2302(b)(9) Burden of Proof
- OSC authority to file amicus briefs

# Disciplinary Action

- Disciplinary Action
  - Lowers OSC burden in disciplinary action cases
    - In (b)(8) and (b)(9) cases, “but for” causation → significant motivating factor
  - OSC would not be responsible to pay fees to a prevailing party in a disciplinary action case

# Nondisclosure Provisions

- New PPP
  - Implementing or enforcing a nondisclosure policy, form or agreement lacking required statement about whistleblower rights.
  - “These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.”

# Nondisclosure Provisions

- Agencies can enforce agreements or policies in effect prior to December 27, 2012 if they provide the statement to employees (modifying the agreement).
- Agencies must post the statement on their websites, accompanied by list of controlling Executive orders and statutory provisions.

# Nondisclosure Provisions

- Provisions that control in the case of a conflict with nondisclosure policy, form or agreement
  - Executive Order No. 13526;
  - section 7211 of title 5, United States Code (governing disclosures to Congress);
  - section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military);
  - section 2302(b)(8) of title 5, United States Code, as amended by the Whistleblower Protection Act of 1989 (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats);
  - the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents);
  - and the statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C. 783(b)).

# IG Whistleblower Protection Ombudsman

- PAS IGs must designate an ombudsman to educate employees about whistleblower rights and remedies.
- Ombudsman shall not act as a legal representative, agent, or advocate of the employee.
- Agency heads have a similar duty under 2302(c)

# OSC Outreach

- 2302(c) Certification
- Enhanced Outreach
  - “Know Your Rights When Reporting Wrongs,” posted in the outreach section of OSC’s website
  - 2302(c) slide presentation, posted at <http://www.osc.gov/outreach.htm>
  - Online training



# Whitmore

- *Whitmore v. Dep't of Labor*, No. 2011-3084  
(Fed. Cir. May 30, 2012)
- Landmark ruling about agency burden of proof
- Critical holding on the scope of discovery and scope of hearing

# Whitmore

- “‘Clear and convincing evidence’ **is a high burden of proof for the Government to bear.** It is intended as such for two reasons. First, this burden of proof comes into play only if the employee has established by a preponderance of the evidence that the whistleblowing was a contributing factor in the action—in other words, that the agency action was “tainted.” Second, this heightened burden of proof required of the agency also recognizes that when it comes to proving the basis for an agency’s decision, **the agency controls most of the cards—the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases.** In these circumstances, it is entirely appropriate that the agency bear a heavy burden to justify its actions.” (citing WPA legislative history)

# Whitmore

- Critical holding about scope of discovery and hearing.
  - “Evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion.”
  - Error to conclude no retaliatory motive where proposing and deciding officials were outside chain of command and not directly implicated in Whitmore’s whistleblowing.
    - Where disclosures cast an agency into a critical light, there can still be retaliatory motive imputed to an official who may not personally know the whistleblower, was not named in the disclosures, and not directly involved in the retaliation.