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Memorandum for Chief Human Capital Officers, Managers and Supervisors

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Subject: Protections Against Retaliation for Employees Who Report Misconduct or Participate in Performance, Conduct, and Suitability Processes

The Merit System Principles require all employees “maintain high standards of integrity, conduct, and concern for the public interest.” As a result, inadequate performance requires correction, employees who cannot or will not improve should be separated, and employees should be protected against reprisal for lawfully disclosing inadequate performance or misconduct.¹ Merit principles cannot be honored unless employees at every level who observe misconduct or unacceptable performance report it and participate candidly when it is investigated and adjudicated.

The Standards of Ethical Conduct for Employees of the Executive Branch make reporting misconduct an affirmative obligation. Every employee “shall disclose waste, fraud, abuse, and corruption to appropriate authorities.”² For supervisors, holding employees accountable is now a critical element of their own performance plans.³ OPM’s suitability regulations require agencies to evaluate post-appointment conduct that bears on an employee’s continued suitability and permit agencies to refer serious misconduct to OPM for a potential suitability action.⁴

¹ 5 U.S.C. § 2301(b)(4), (b)(6), (b)(9); *see also* Civil Service Reform Act of 1978, Pub. L. 95-454, Statement of Purpose.

² 5 CFR § 2635.101(b)(11).

³ *See* 5 CFR 430.206(b)(9); U.S. Office of Personnel Management, [Performance Management for Federal Employees](#), at pp. 4-5 (June 17, 2025) (introducing government-wide critical element for all supervisors, “Holding Employees Accountable”).

⁴ 5 CFR §§ 731.103(b), 731.106(d), as amended by [Suitability and Fitness, 91 FR 39361 \(June 30, 2026\) \(effective July 30, 2026\)](#). Under the amended rule, OPM retains sole jurisdiction to take a suitability action against an employee for post-appointment conduct, but only upon a proper and sufficient referral from the employing agency. 5 CFR §§ 731.103(g), 731.105.

OPM has received reports from some agencies that employees are reluctant to report a colleague's misconduct or to serve as a witness — and supervisors and managers are reluctant to recommend or propose discipline — because they fear the subject of the report will respond with an equal employment opportunity (EEO) complaint, a grievance, an Inspector General (IG) complaint, or some other proceeding naming them personally.⁵

This memorandum explains that:

- Federal law protects employees who report inadequate performance or misconduct and who participate in performance, conduct, suitability, and EEO processes;
- a complaint filed in response to an agency official's action is a proceeding against the agency, not the official, and creates no personal liability when the employee acts within the scope of the employee's employment;⁶ and
- agencies have affirmative obligations to protect those who come forward, including protection from retaliation by supervisors, managers, and fellow employees.

Reporting misconduct is protected activity

Title 5 makes it a prohibited personnel practice for any official with personnel authority to take, fail to take, or threaten to take a personnel action because an employee disclosed information the employee reasonably believes evidences a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.⁷ Title 5 also protects employees who cooperate with or disclose information to an IG, the Office of Special Counsel (OSC), or any other agency component responsible for internal investigation or review.⁸ Additionally, the Inspector General Act independently prohibits reprisal against employees who complain or disclose information to an IG.⁹

These protections are not limited to a whistleblower who goes outside the chain of command. A disclosure is protected if it is made to a supervisor, if it concerns information that was

⁵ Indeed, serving as a witness is, in many circumstances, not merely protected but required: Federal employees already have an obligation to furnish information and testimony to OPM, the MSPB, and OSC when called upon, and to cooperate with lawful investigations by their agencies and IGs. *See* 5 CFR § 5.4 (employees “shall give” OPM, the MSPB, and OSC “all information, testimony, documents, and material” regarding matters within their jurisdiction, and are in an official duty status when doing so); *see also* 5 U.S.C. § 1212(b)(2)(A) (OSC subpoena authority); 5 U.S.C. § 406(a)(4) (IG subpoena authority); 5 CFR § 2635.101(b)(11).

⁶ Note that an individual agency official may be subject to discipline if he or she is found to have committed a discriminatory act, but does not thereby incur personal monetary liability to the complainant. *See* Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), Pub. L. 107-174, § 404, as added by the Elijah E. Cummings Federal Employee Antidiscrimination Act of 2020, Pub. L. 116-283, div. A, title XI, subtitle D (5 U.S.C. 2301 note); 5 U.S.C. § 7515.

⁷ 5 U.S.C. § 2302(b)(8); *see* 5 U.S.C. § 2302(a)(2)(A) (listing personnel actions).

⁸ 5 U.S.C. § 2302(b)(9)(C).

⁹ 5 U.S.C. § 407(c) (formerly Inspector General Act of 1978, § 7(c)).

already known, if it is oral rather than written, and without regard for the employee's motive for making it.¹⁰

Nor does an employee forfeit protection because reporting misconduct is part of that employee's job.¹¹ The Merit Systems Protection Board (MSPB) has held that, for all employees other than those whose principal job function is to investigate and disclose wrongdoing, such disclosures are covered by the general protection of 5 U.S.C. § 2302(b)(8) without any additional showing.¹²

Accordingly, a supervisor who reports a subordinate's misconduct, a manager who recommends discipline to a deciding official, a human resources specialist who flags a falsified record, a Chief Human Capital Officer who reviews personnel files and urges corrective action, or an employee of any rank who reports a supervisor's abuse of authority is engaged in protected activity whenever the report reflects a reasonable belief that an employee violated a law, rule, or regulation — including the agency's standards of conduct — or engaged in other wrongdoing described in section 2302(b)(8). The protection turns on the reasonableness of the belief, not on whether the report is ultimately sustained; an honest report that proves mistaken remains protected, while a retaliatory report or a report the employee knows to be false does not.¹³

The remedies are robust. An employee who believes a personnel action was taken because of a protected disclosure or protected activity may seek corrective action from OSC and, if OSC does not obtain relief, may file an individual right of action appeal with the MSPB.¹⁴ Corrective action may include reversal of the action, back pay, attorney fees, and compensatory damages.¹⁵ Corrective action may also include fees, costs, or damages

¹⁰ 5 U.S.C. § 2302(f)(1).

¹¹ 5 U.S.C. § 2302(f)(2). Congress amended the statute in 2012 and again in 2017 to address disclosures made in the normal course of an employee's duties. See Whistleblower Protection Enhancement Act of 2012, Pub. L. 112-199, § 101(b)(2)(C), 126 Stat. 1465 (Nov. 27, 2012) (adding subsection (f)); National Defense Authorization Act for Fiscal Year 2018, Pub. L. 115-91, § 1097(c)(1)(B)(ii) (Dec. 12, 2017) (striking and replacing subsection (f)(2)).

¹² *Salazar v. Department of Veterans Affairs*, 2022 MSPB 42 (explaining that, as amended by section 1097 of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. 115-91, section 2302(f)(2) applies only to employees whose principal job function is to regularly investigate and disclose wrongdoing, and that normal-course-of-duties disclosures by other employees are governed by section 2302(b)(8) itself).

¹³ See 5 U.S.C. § 2302(a)(2)(D) (defining "disclosure" by reference to what the employee "reasonably believes"); 5 U.S.C. § 7515 (requiring agencies to propose discipline for whistleblower retaliation); 5 U.S.C. § 1215(a)(3)(B) (allowing the MSPB to impose discipline if whistleblower-protected activity was a significant motivating factor for taking, not taking, or threatening a personnel action); 5 U.S.C. § 407(c) (excluding complaints "made with the knowledge that [they were] false or with willful disregard for [their] truth or falsity"). A knowingly false report is itself misconduct and may bear on the reporting employee's own suitability. See 5 CFR § 731.202(b)(2), (b)(3).

¹⁴ 5 U.S.C. §§ 1214, 1221.

¹⁵ 5 U.S.C. §§ 1214(g), 1221(g).

reasonably incurred due to an agency investigation of the employee that was commenced, expanded, or extended in retaliation for the disclosure or protected activity.¹⁶

Participating in performance, conduct, suitability, and EEO proceedings is protected activity

The law protects not only the employee who makes the initial report but all employees who participate in the investigation, analysis, or adjudication of that report. Most executive branch employees are within OSC's jurisdiction for prohibited personnel practices, but some are not (e.g., certain intelligence community components, the FBI, and others).¹⁷ Under Title 5, it is a prohibited personnel practice to take a personnel action against an employee for "testifying for or otherwise lawfully assisting any individual" in the exercise of an appeal, complaint, or grievance right, or for cooperating with an IG or, in general, with other internal investigative components.¹⁸ A covered employee at any level of a covered agency is protected under Title 5 when testifying during the course of an investigation or a hearing, for example, about the employee's observations concerning misconduct in the workplace. Title 5 also protects the supervisor who testifies at a hearing about a decision to impose discipline or rate an employee's performance.

Separately, under Title VII of the Civil Rights Act of 1964 as applied to the federal sector, and under the Equal Employment Opportunity Commission's (EEOC) regulations, no person may be subjected to retaliation "for participating in any stage of administrative or judicial proceedings" under the federal EEO statutes, or for opposing a practice made unlawful by them.¹⁹ The Supreme Court has likewise held that an employee who answers questions in an employer's internal investigation of alleged harassment is engaged in protected opposition.²⁰ Together, these authorities cover situations such as the supervisor who submits an affidavit in an EEO investigation, the proposing or deciding official who is examined during an EEOC hearing about the basis for an action, and the employee who provides testimony and evidence about the events underlying a disciplinary or performance action.

Information furnished in the suitability and personnel vetting process is protected in the same way. A report to an agency's personnel security, suitability, or human resources office about a colleague's conduct may constitute a disclosure to a component responsible for internal investigation or review; when it reflects a reasonable belief of wrongdoing, it also is a protected disclosure under section 2302(b)(8). OPM's amended suitability regulations now expressly state that suitability determinations and actions must be applied consistently with the Merit System Principles and the prohibited personnel practices, so an agency may not use

¹⁶ 5 U.S.C. § 1214(h).

¹⁷ Exclusions are listed on [OSC's website](#).

¹⁸ 5 U.S.C. § 2302(b)(9)(A)-(C).

¹⁹ 42 U.S.C. §§ 2000e-3(a), 2000e-16; 29 CFR § 1614.101(b).

²⁰ *Crawford v. Metropolitan Government of Nashville & Davidson County*, 555 U.S. 271, 276-77 (2009).

a suitability referral, or the threat of one, to punish an employee for protected activity.²¹ Moreover, agencies, supervisors, and co-workers are expected to bring serious post-appointment misconduct forward so that it can be evaluated against the suitability factors and, where warranted, referred to OPM.²² Attempting to intimidate a witness in an agency proceeding is itself serious misconduct and, in some circumstances, a federal crime.²³

Being named in a complaint is neither retaliation nor personal liability

Some of the reluctance reported to OPM rests on an understandable but mistaken premise: that an EEO complaint, grievance, or appeal filed by the subject of a report is a proceeding against the official who made it. It is not. A federal-sector EEO complaint is filed against the agency and remedies run against the agency. Similarly, an MSPB appeal is a request for review of an “agency action.”²⁴ The supervisor or manager who proposed or recommended the action is a witness — typically identified as a “responsible management official” — not a party. As OPM explained in its November 21, 2025 memorandum on personal liability, an official who acts within the scope of federal employment is not personally liable for a personnel action. In the rare case of a suit naming the official individually, the Department of Justice ordinarily certifies that the official acted within the scope of employment and the United States is substituted as the defendant.²⁵ Providing a truthful affidavit or testimony in such a proceeding is part of the official’s duties, is performed in a duty status, and is itself protected activity.²⁶

Nor does a complaint change the merits of the underlying action giving rise to the complaint. While employees who file EEO complaints, grievances, or appeals are protected from retaliation, that protected activity does not insulate an employee from the consequences of his or her own misconduct or unacceptable performance. The Supreme Court has made clear that an employer that proceeds with an action it was already contemplating before it learned of protected activity has not retaliated.²⁷ The EEOC and the MSPB routinely reject retaliation claims where the record shows that the action rested on documented, legitimate reasons applied consistently. Supervisors protect themselves and their agencies by documenting

²¹ 5 CFR § 731.102(c), as added by *Suitability and Fitness*, 91 FR ____ (June 30, 2026).

²² See 5 CFR §§ 731.103(b), 731.106(d), 731.202(b); U.S. Office of Personnel Management, [Final Rule on Suitability and Fitness—5 CFR Part 731: Implementation Guide](#) (July 2026).

²³ See 18 U.S.C. § 1512(b) (prohibiting the use of intimidation, threats, or corrupt persuasion to influence, delay, or prevent testimony in an official proceeding); 18 U.S.C. § 1515(a)(1)(C) (defining “official proceeding” to include “a proceeding before a Federal Government agency which is authorized by law”).

²⁴ 29 CFR §§ 1614.106(a), 1614.501; 5 CFR § 1201.4(f).

²⁵ U.S. Office of Personnel Management, [Personal Liability for Managers and Supervisors Conducting Personnel Management Functions](#) (Nov. 21, 2025); see 28 U.S.C. § 2679(d)(1).

²⁶ See 29 CFR § 1614.605(f) (federal employees serving as witnesses “shall be in a duty status when their presence is authorized or required” by agency or EEOC officials); 5 U.S.C. § 2302(b)(9)(B).

²⁷ *Clark County School District v. Breeden*, 532 U.S. 268, 272 (2001) (per curiam) (“Employers need not suspend previously planned [actions] upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality.”).

conduct contemporaneously, applying the agency's standards evenhandedly, following the required procedures, and consulting human resources and legal counsel before acting. A supervisor who does those things is well positioned to defend the action, and the agency has every reason to stand behind it on the merits.

Retaliation against those who report is misconduct

Prohibited personnel practices can be committed only by officials with authority over personnel actions, but retaliation against an employee who reports misconduct or serves as a witness is not limited to personnel actions. A subordinate or co-worker who harasses, threatens, or ostracizes a colleague for making a report, who spreads knowingly false accusations in response, or who attempts to influence a witness's testimony is engaged in misconduct that the agency should address through its ordinary disciplinary tools and, where the conduct is serious, through a suitability referral.²⁸

Retaliation by a supervisor or manager is no less serious. A supervisor who takes or threatens a personnel action for protected activity commits a prohibited personnel practice, is subject to discipline under 5 U.S.C. §§ 1215 and 7515 and fails the supervisor's own critical element. *See* 5 CFR 430.206(b)(9). Agency heads are responsible for preventing these practices and for informing employees of their rights and remedies. *See* 5 U.S.C. § 2302(c).

Nothing in this memorandum suggests that an employee may be disciplined for filing an EEO complaint, grievance, or appeal, or for making a good-faith report that turns out to be wrong; those are protected activities. But the right to file a complaint is not a license to intimidate, to retaliate, or to make statements the employee knows to be false, and the protections described in this memorandum run in both directions.

What agencies should do

OPM asks agencies to take the following steps to ensure that employees who report misconduct and participate in accountability processes are protected in practice as well as in law:

- **Communicate these protections.** Remind the workforce, and supervisors in particular, that reporting misconduct and participating in personnel processes are protected activities and that retaliation against those who engage in them is misconduct the agency also will address. Agencies should incorporate this guidance into mandatory supervisory training.²⁹ Agencies may consult OSC materials or contact OSC at info@osc.gov for technical assistance on prohibited personnel practice training.

²⁸ *See* 5 CFR § 731.202(b)(1)-(3) (misconduct or negligence in employment; criminal or dishonest conduct; material, intentional false statement or deception).

²⁹ *See* 5 CFR § 412.202 (requiring supervisory training within one year of appointment and refresher training at least every three years).

- **Support officials who act.** Ensure that human resources, EEO, and legal offices treat a supervisor named the responsible management official as the agency's witness by providing guidance on preparing affidavits and testimony, keeping the official informed of the status of the matter, and making clear that the agency, not the individual, is defending the action.
- **Do not penalize accountability.** A supervisor should not receive a lower rating, be passed over, or be counseled because a subordinate filed a complaint about a well-founded action. Treating the filing of a complaint, without more, as a mark against the official who took the action reinforces inaction. Where a complaint is substantiated through the appropriate process, however, agencies should address accountability at that time and through that separate process.
- **Address retaliation promptly.** Investigate reports that an employee who made a disclosure, filed or supported a complaint, or served as a witness has been harassed, threatened, or subjected to knowingly false counter-accusations by a co-worker; has been subjected to or threatened with a personnel action by a supervisor or manager; and take appropriate disciplinary or suitability action when the allegations are substantiated.
- **Make reporting safe.** Ensure that employees know how to report suspected retaliation — including by a supervisor — outside their own chain of command (including, for example, to the EEO office, IG, or OSC).
- **Use the suitability process where appropriate.** When post-appointment conduct appears to warrant an unfavorable suitability determination, refer the matter to OPM's Suitability Executive Agent Programs (5 CFR part 731) and OPM's implementation guidance, rather than allowing serious misconduct to go unaddressed because the agency's own processes seem burdensome.³⁰

Managers, supervisors, and employees with questions about the topics discussed in this memorandum should consult their agency's offices of the Chief Human Capital Officer or the General Counsel. Agencies may direct questions about this memorandum to OPM's Workforce Policy and Innovation at employeeaccountability@opm.gov and questions about suitability referrals or suitability action appeals to OPM's Suitability Executive Agent Programs at SuitEA@opm.gov.

cc: Deputy Chief Human Capital Officers and Human Resources Directors

³⁰ See U.S. Office of Personnel Management, *Implementation Guide*, *supra* note 22; U.S. Office of Personnel Management, [Implementation Resources for New OPM Appeals Programs](#) (Aug. 3, 2026) (describing the transfer of suitability action appeals from the MSPB to OPM effective September 2, 2026).