



## **Whistleblower Protections Informational Handout**

Under the Whistleblower Protection Act, as amended, most executive branch employees, former employees, and applicants are protected from employer retaliation when they make disclosures with a reasonable belief of:

- (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. (5 U.S.C. §2302(b)(8))

Note that this law applies to career executive branch employees; judicial and legislative branch employees lack statutory whistleblower retaliation protections.

### Role of Federal Inspectors General

Offices of the Inspector General (OIGs) independently examine the actions of their respective federal agency or entity to uncover waste, fraud, and abuse and to ensure effectiveness and compliance with government policy. This mission is accomplished through objective audits, evaluations, and investigations. Any Federal employee can file a complaint with their respective OIG. While IGs issue recommendations and not orders, IG reports can play a role in Congressional hearings and appropriations.

IGs vary greatly in the level of aid and communication that they offer whistleblowers.

### Role of the Office of Special Counsel (OSC)

The OSC is an independent investigative and prosecutorial agency authorized to receive disclosures of wrongdoing within the government and allegations of whistleblower retaliation. Following a report of wrongdoing, the OSC decides whether the complaint meets a “substantial likelihood requirement” and if so, reports the complaint to the agency head, who is required to investigate. In addition to initial disclosures of wrongdoing, the OSC can also investigate whistleblower retaliation as a “prohibited personnel practice” (PPP). With regard to alleged PPPs, if a whistleblower’s retaliation complaint is found to warrant action, an investigation may

lead to prosecution before the Merit System Protection Board (MSPB). In some cases, a mediator is brought in as an alternative. The OSC can also request that the MSPB issue “stays” in retaliation cases, pending adjudication. In the case of prosecution, the OSC decides whether corrective action, disciplinary action, both or neither is appropriate. Due to limited resources, the OSC prosecutes very few cases before the MSPB.

### Role of the Merit System Protection Board (MSPB)

The MSPB consists of a three-member board that can review decisions of MSPB administrative judges, among other functions. These judges may hold hearings on a wide-range of issues, including whistleblower complaints, brought by employees of most executive branch agencies. Initial adjudicatory decisions can either become final or can be appealed to the board. Once the MSPB decision becomes final, whistleblowers may appeal their case to a federal appeals court of jurisdiction. Note that this does not include a jury trial and that the federal circuit court rarely rules in favor of whistleblowers.

Also note that the MSPB has lacked the necessary 2-member quorum since January of 2017 and lost its sole member earlier this year. As a result, there is a 2,000+ case backlog, waiting for the Board’s review. Further, without quorum the Board can no longer issue formal stays in whistleblower retaliation cases.

### Role of the Coordinator

Practically every government agency has a whistleblower coordinator, housed in each Office of Inspector General. This individual serves in an educational role, and does not provide representation or legal advocacy for whistleblowers. They serve as consultants and may be able to help resolve issues informally.

### Role of Occupational Safety & Health Administration

OSHA’s Whistleblower Protection Program enforces whistleblower protections from over 20 whistleblower statutes if the reprisal is reported within the time limit afforded to complainants under the relevant statute. Following a complaint, an investigation will be conducted if deemed necessary. If the complaint is ruled to have merit, OSHA asks the employer to restore the employee’s former job, pay, and benefits.

## Department of Labor Courts

The Office of Administrative Law Judges within the Department of Labor is a trial court that presides over many types of alleged unfair labor matters, including whistleblower complaints. Cases may be appealed to the Administrative Review Board for a final agency decision. Cases may be further appealed to the federal court system.

## General Information

a. Whistleblowers must usually prove:

- They made a protected communication
- A personnel action was taken, withheld, or threatened
- The manager knew about communication before reprisal
- That the communication contributed to the reprisal action (for this reason, there are certain benefits to not remaining anonymous)

\*\*Some laws impose a higher standard of proof for the final point than others. Sometimes an employer's defense must meet "clear and convincing" standard, other times by "preponderance of the evidence." Protected Communications/Activities vary by law.

b. For most whistleblowers, disclosures can be made to:

- Inspectors General: can only make recommendations; sometimes lack independence; sometimes actively hostile to whistleblowers; substantiation can boost morale, vindicate whistleblowers, and assist in OSC or Congressional investigations
- Audit/investigative/law enforcement members
- Chain of Command
- Members of Congress and Congressional committees
- The Office of Special Counsel
- The Press
- Advocacy groups like POGO
- Others as designated

\*\*Note, however, that where the underlying disclosures involves classified or other legally-restricted information, protected audiences are limited.

c. Common forms of retaliation:

- Transfers
- Termination
- Shunning
- Demotion/denied promotions
- Dramatic change in work duties
- Security clearance revocation
- Retaliatory criminal investigation
- Blacklisting

d. Note that whistleblowers may still be found guilty of breaking laws if they access information or records that they are not authorized to, even if for a noble cause.

\*\*Whistleblowing through the Media\*\*

Disclosing information to the media can be incredibly risky. Anonymity is generally a whistleblower's best friend because of the prevalence of retaliation. In many cases, sending information to the media can also be prosecuted (in addition to other retaliation) due to intellectual property laws and very broad interpretations of "national defense information."

*POGO's Congressional Oversight Initiative supports and enhances Congress's ability to conduct effective oversight. We offer trainings, an expert network of veteran former investigators, and hundreds of informational resources for congressional oversight staff. This nonpartisan initiative uses POGO's unique expertise to bring Democratic and Republican staff together for trainings and other events with experts from both parties.*

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