

PROHIBITED PERSONNEL PRACTICES (PPPs)

WHISTLEBLOWER PROTECTION



*RIGHTS AND REMEDIES
OF FEDERAL EMPLOYEES
UNDER 5 U.S.C., CHAPTERS 12 & 23*

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OUTREACH & TRAINING

Key Concepts



- *MERIT SYSTEM PRINCIPLES*
THE FRAMEWORK AND FOUNDATION FOR MAKING ALL PERSONNEL DECISIONS IN THE CIVIL SERVICE-DESIGNED TO ENSURE FAIR AND OPEN RECRUITMENT AND COMPETITION AND MERIT BASED EMPLOYMENT DECISIONS-NON-ENFORCABLE
- *PROHIBITED PERSONNEL PRACTICES*
ADMONITIONS AGAINST SPECIFIC PRACTICES THAT CONFLICT WITH MERIT SYSTEMS PRINCIPLES

Office Of Special Counsel (OSC)

5 U.S.C. §§ 1211-19; 5 C.F.R. PART 1800



Authorized to:

- ❑ Investigate Prohibited Personnel Practices (PPPs)
- ❑ Seek corrective action for employees
- ❑ Seek disciplinary action against officials
- ❑ Provide safe channel for whistleblower disclosures
- ❑ Advise & enforce Hatch Act provisions on political activity by federal, state, and local government employees
- ❑ Protect reemployment rights of military veterans and reservists under USERRA

Whistleblower Disclosures

5 U.S.C. § 1213



Disclosing government wrongdoing – OSC oversight process

- 1) OSC does not have the authority to investigate these allegations, and the oversight process provides employees a channel to elevate such disclosures.
- 2) If OSC makes a positive **substantial likelihood** determination, then OSC transmits the allegation to the head of the involved agency for investigation.
- 3) At the conclusion of the process, the agency report, the employee's comments, and the Special Counsel's conclusions are provided to the President and the agency's oversight committees.

Prohibited Personnel Practices: Overview



14 Prohibited Personnel Practices-4 Categories

1. Discrimination

- Based on race, color, sex, etc., but note, marital status and political affiliation 5 U.S.C. § 2302(b)(1)
- Based on conduct that does not adversely affect performance 5 U.S.C. § 2302(b)(10)
- Political Activity 5 U.S.C. § 2302(b)(3)

2. Hiring practices

- Considering improper (political) job references 5 U.S.C. § 2302(b)(2)
- Obstructing the right to compete 5 U.S.C. § 2302(b)(4)
- Influencing withdrawal from competition 5 U.S.C. § 2302(b)(5)
- Unauthorized preferences and advantages 5 U.S.C. § 2302(b)(6)
- Nepotism 5 U.S.C. § 2302(b)(7)
- Knowingly violating veterans' preference 5 U.S.C. § 2302(b)(11)

3. Retaliation

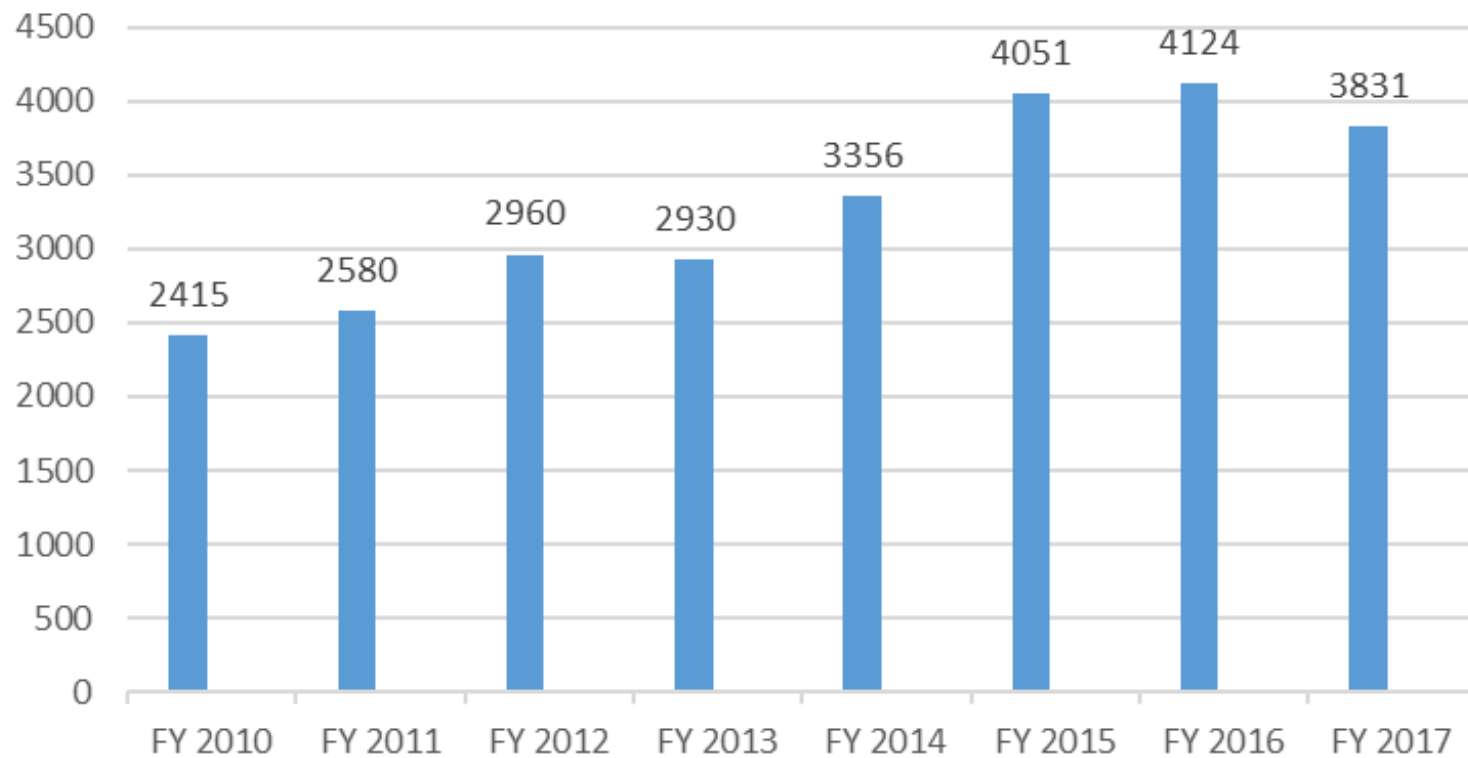
- For Protected Disclosures 5 U.S.C. § 2302(b)(8)
- For Protected Activity 5 U.S.C. § 2302(b)(9)

4. Catch-all and Non-Disclosure Agreements (NDA)

- 5 U.S.C. § 2302 (b)(12)
- 5 U.S.C. § 2302 (b)(13)
- 5 U.S.C. § 2302 (b)(14)



All Prohibited Personnel Cases Received



Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 &
NDAA (OSC Reauthorization Act) for FY 2018
P.L. 115-73 (10/26/2017); P.L. 115-91 (12/12/2017)



New statutory requirement highlights:

- PPP- 5 U.S.C. § 2302(b)(14) – improper access of medical records in furtherance of any PPP;
- Required disciplinary penalties for violations of 5 U.S.C. § 2302(b)(8), (b)(9), & (b)(14) – first violation results in proposed 3-day suspension;
- Education and training requirements – please email certification@osc.gov or call 202 804-7163 for more information;
- Inclusion of whistleblower criteria in supervisors' performance appraisals;
- OSC's access to agency records includes records protected by common law privileges.

WPA/WPEA—Remedies



- Meritorious Case—remedies for the employee:
 - Damages- primarily, placing employee back into position had retaliation not occurred
 - Compensatory damages [Applies to post-WPEA claims arising after 12/27/12 except for some Hostile Work Environment claims]
 - any other reasonable and foreseeable consequential damages, (attorneys' fees, interest, reasonable expert witness fees, and costs)

Discrimination



5 U.S.C. § 2302(b)(1) and (10) bar discrimination based on:

- race, color, nationality, religion, sex (including pregnancy and gender identity), handicapping condition, age, marital status, or political affiliation
- “conduct which does not adversely affect the performance of the employee or applicant, or the performance of others,” including sexual orientation and gender identity

Hiring Offenses



5 U.S.C. §§ 2302(b)(2), (4-7), and (11) prohibit:

- Considering improper (political) job references
- Obstructing the right to compete
- Influencing withdrawal from competition
- Nepotism
- Unauthorized preferences and advantages.* To prove, there must be:
 - The grant of an illegal advantage
 - An intentional and purposeful manipulation of the system
- Knowingly violating veterans' preference

--Evidence of Intent?

Catchall PPP – Merit System Principles & Intent



5 U.S.C. § 2302(b)(12) prohibits:

- Taking or failing to take a personnel action in violation of a law, rule, or regulation that implements or directly concerns a *merit system principle*.
- Intent is **not required** for some violations.

Nondisclosure Agreements—New Whistleblower Protection Enhancement Act (WPEA) PPP



5 U.S.C. § 2302(b)(13) requires:

- a statement clarifying that agency restrictions on disclosures are superseded by statutory whistleblower rights in any **nondisclosure agreements, policies, or forms**
- Implementing or enforcing a nondisclosure agreement that fails to provide this required notification of whistleblower rights is prohibited
- Existing nondisclosure agreements become enforceable when notice of superseding statutory rights is posted

New Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017



5 U.S.C. § 2302(b)(14) prohibits:

- accessing the medical record of another employee or an applicant for employment as a part of, or otherwise in furtherance of, any conduct described in the other 13 prohibited personnel practices

Retaliation



5 U.S.C. § 2302(b)(8) and (9) prohibit taking, failing to take, or threatening to take or fail to take any personnel action for:

- Protected whistleblower disclosures
- Protected activity

Proving Retaliation

5 U.S.C. §§ 1214(b)(4)(a)-(b), 1221(e)



All 4 elements must be met:

- A *reasonable belief* that the employee has made a protected disclosure of information under 2302(b)(8) or protected activity under 2302(b)(9)
- Personnel action taken, not taken, or threatened (broader than *adverse action*)
- Actual or constructive **knowledge** of protected disclosure or protected activity
- Protected disclosure or protected activity was **contributing factor** in personnel action--**knowledge and timing alone can be sufficient**
 - 5 U.S.C. § 2302(b)(9)(A)(ii) (exercise of appeal, complaint, or grievance right other than complaints remedying protected whistleblowing still requires a **significant factor test**)

Proving Retaliation – Protected Disclosures

5 U.S.C. §§ 2302(b)(8), 1213-ELEMENT No. 1



Includes:

- Violation of any law, rule, or regulation
- Gross mismanagement: substantial risk of significant impact on mission
- Gross waste of funds: more than debatable expenditure
- Abuse of authority
- Substantial & specific danger to public health or safety
- Censorship related to scientific research or analysis (scientific integrity)

Proving Retaliation – Protected Activity

5 U.S.C. §§ 2302(b)(9), 1213-ELEMENT No. 1



Protected Activity

- Exercise of appeal, complaint, or grievance rights
- Testimony or other assistance to person exercising such rights
- Cooperation with or disclosures to Special Counsel, Inspector General, or component responsible for internal investigation or review
- Refusal to obey an order that would require violation of law, rule, or regulation

Proving Retaliation – Protected Disclosures

5 U.S.C. §§ 2302(b)(8), 1213-ELEMENT No. 1



Generally protected when made to any person

Need not be accurate to be protected,
employee must only reasonably believe that it
is true — test is both objective and subjective

Whistleblower's personal motivation does not
negate reasonable belief

No requirement to go through chain of
command

Still protected if employer mistakenly believes
he or she is a whistleblower

Proving Retaliation – Disclosures Not Covered

5 U.S.C. §§ 2302(b)(8), 1213



Any disclosure which would normally be protected under the statute is not protected (unless made to OSC or IG), where the disclosure is:

- | Prohibited by law, or
- | Required by Executive Order to be kept secret for national security or foreign affairs

Retaliation – Elements 2, 3 & 4



2. Personnel Action

3. Knowledge/Constructive Knowledge

4. Contributing Factor

Any factor which alone or in connection with others tends to affect in any way the outcome of the personnel action at issue; per se knowledge/timing test

Agency Defense - Clear and Convincing Evidence



Agency must show **by clear and convincing evidence** that it would have taken same action absent protected whistleblower disclosure and/or protected activity

Carr Factors:

- Strength of evidence in support of personnel action
- Existence & strength of motive to retaliate
- Treatment of similar employees who did not engage in protected whistleblowing or activity
 - *Whitmore v. Dep't of Labor*

OSC's Management Advice



- Be measured in your speech and actions
- Keep the concept of the *merit system* on your radar screen
- Foster an open work environment in which employees are not reluctant to disclose wrongdoing
- Set the right tone at the top
- Be consistent in managing employees
- Seek expert advice when you are unsure

OSC phone / email contacts



Complaints Examining Unit:

(202) 804-7000
(800) 872-9855
info@osc.gov

Disclosure Unit:

(202) 804-7000
(800) 872-9855
info@osc.gov

Hatch Act Unit:

(202) 804-7002
(800) 85-hatch
hatchact@osc.gov

Website:

osc.gov [[complaint forms/e-file](#)]

Speaker Requests &
Certification Program:

(202) 804-7163
certification@osc.gov