



Whistleblower Rights and Protections for DOL Employees

Alisa Reff
Whistleblower Protection Coordinator
U.S. Department of Labor
Office of Inspector General



BEGINNINGS OF WHISTLEBLOWER RIGHTS

- Congress initially addressed whistleblower rights and protections for Federal employees as part of the Civil Service Reform Act of 1978.
- These protections were updated and strengthened in the Whistleblower Protection Act of 1989 (WPA), which provides Federal employees with very specific rights and protections if they “blow the whistle” on waste, fraud, and abuse in the Federal government and negative or adverse actions are taken against them for doing so.



CREATION OF THE WHISTLEBLOWER PROTECTION COORDINATOR

- Congress wanted Federal employees to speak up, without fear of retaliation, if they saw or were otherwise aware of fraud, misconduct, or other wrongdoing by Federal officials, employees, contractors, or grantees.
- The Whistleblower Protection Enhancement Act of 2012 broadened the scope of some of these rights and protections, and included the requirement that Inspector Generals appoint a Whistleblower Protection Ombudsman later changed to a Whistleblower Protection Coordinator in 2018.



PROTECTED DISCLOSURES

In order to fall within the scope of these protections, you must make a “protected disclosure.” There are 5 main categories of “protected disclosures” that are applicable to DOL.

- 1. A disclosure which reflects a violation of any law, rule, or regulation.** You do not have to refer to a specific law, rule, or regulation as part of the disclosure, but the information which you provide must be sufficient to link it to a specific law, rule, or regulation.
- 2. A disclosure which reflects “gross agency mismanagement.”** This normally requires mismanagement that rises to the level that it creates a substantial risk of significant adverse impact upon the agency’s ability to accomplish its mission.



3. **A disclosure which reflects a “gross waste of funds.”** This is more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government.
4. **A disclosure which reflects an abuse of authority by DOL employees.** Arbitrary and capricious exercise of power adversely affecting rights of any person or results in personal gain or advantage.
5. **A disclosure which reflects a substantial and specific danger to public health or safety.**



WHAT IS NOT A PROTECTED DISCLOSURE

A protected disclosure is not about misconduct that does not rise to the level of that referenced above.

1. It is not a minor or inadvertent violation of law, rule, or regulation.
2. It is not a disagreement with an agency's lawful policy decision that is rooted in opinion.
3. It is not a minimal or debatable expenditure or one subject to different opinions.
4. It is not a complaint about mismanagement which may be characterized as minimal or trivial.



PROTECTED DISCLOSURES – WHERE TO REPORT

- Directly to your supervisor, or to any DOL official who has authority or responsibility with respect to the alleged wrongdoing.
- Members of Congress or to Congressional committees.
- Officials from the Department of Justice or other law enforcement officials outside DOL.
- Members of the media.
- The Whistleblower Protection Enhancement Act of 2012 specifically states that a Federal employee can make a “protected disclosure” to the alleged wrongdoer.

OTHER AVENUES FOR MAKING PROTECTED DISCLOSURES



- A “protected disclosure” can be made to the DOL Office of Inspector General. In fact, DLMS 8-200 states that all DOL employees have a responsibility to report certain types of fraud, waste, abuse, misconduct, or wrongdoing to the OIG, either directly or through an appropriate management official.
- The best way to do this is to contact the OIG Hotline by completing the online form or another method provided on the OIG's Hotline Webpage at: <https://www.oig.dol.gov/hotlinecontact.htm>
The OIG will then determine whether an investigation or other review of the allegations should be conducted.



MAKING A PROTECTED DISCLOSURE TO OSC

- A “protected disclosure” can also be made to the Office of Special Counsel (OSC). OSC is an independent Federal agency specifically authorized to review allegations of fraud, waste, and abuse made by Federal Employees.
- If you wish to file an allegation of wrongdoing with OSC, you should do so on OSC's website at <http://www.osc.gov/> or by submitting a completed OSC Form 14. OSC will evaluate your allegations to determine if there is a “substantial likelihood” that it falls within one of the five categories and appears to have merit.
- OSC looks for credible, first-hand knowledge, as opposed to unsupported speculation.

OSC'S RESPONSE TO A PROTECTED DISCLOSURE



- If a finding of “substantial likelihood” is made by OSC, they will refer the matter to DOL, and the Department is required to conduct an investigation of the allegations and submit a report back to OSC.
- In some cases, DOL will ask the OIG to conduct the investigation.
- OSC will provide a copy of the report to the whistleblower to get their comments.
- OSC must send the completed agency report, along with the whistleblower’s comments, to the President and to Congressional oversight committees.
- If OSC does not make a finding of “substantial likelihood,” they will notify you and direct you to other offices available for receiving and reviewing allegations of alleged waste and fraud, including the OIG.

SENSITIVE DISCLOSURES



- The WPA also recognizes that, in some instances, information related to a “protected disclosure” may be particularly sensitive or confidential.
- Accordingly, under the WPA, “protected disclosures” involving information subject to specific non-disclosure statutes or orders, for example, trade secrets, or national security and classified information, can only be made to OSC or to the OIG in order to be covered by the WPA protections and remedies.

REASONABLE BELIEF REQUIRED



- In order to qualify as a “protected disclosure,” you must have a reasonable, good faith belief that the allegations in your disclosure are truthful. If they turn out not to be truthful or otherwise turn out to be unsubstantiated, this does not take them out of the “protected disclosure” category if you had this “reasonable belief” when you made the disclosure, regardless of your motive in making the disclosure.
- However, if you know that your allegation is not truthful, and this can be shown, you will not have the protection of the WPA even if an adverse action is taken against you.
- You do not have to state that you are “seeking” or “asserting” whistleblower status. If you make a “protected disclosure” to an appropriate entity, you are entitled to whistleblower protections if you are retaliated against for blowing the whistle.

CONFIDENTIALITY



- The WPA guarantees confidentiality if you make a “protected disclosure” to OSC. Similarly, the Inspector General Act prohibits the DOL OIG from disclosing the identity of an employee who reports alleged wrongdoing without the consent of the employee unless it is unavoidable.
- However, it is always possible that your identity will be ascertainable by others if an investigation takes place, due to the nature of the allegations, or for other reasons.
- Further, there may be circumstances, usually related to litigation, where agencies are compelled to identify whistleblowers, or circumstances where identities must be disclosed for health or safety reasons.



PROTECTED ACTIVITY

- Under the WPA, you are also protected if you engage in certain types of “protected activity,” for example, exercising appeal, complaint, or grievance rights; assisting another employee, as a witness or otherwise, who has alleged whistleblower retaliation; cooperating with OSC or the OIG; or refusing to obey an order from a supervisor which would require you to violate a law.



RETALIATION – COVERED ACTIONS

The WPA specifically refers to potential retaliatory actions.

- “Retaliation” includes almost any personnel action, failure to take a personnel action, or threatening to take a personnel action, which adversely affects you.
 - A non-promotion;
 - A disciplinary action;
 - A detail, transfer, or reassignment;
 - An unfavorable performance evaluation;
 - Any decision concerning pay, benefits, or awards; and
 - Any other significant change in duties, responsibilities, or working conditions.



MAKING A CLAIM OF RETALIATION

There are four basic ways
to make a claim of
retaliation.

1. File a retaliation complaint with the Office of Special Counsel.
2. Claim whistleblowing retaliation as a defense to a disciplinary action which is appealable to the Merit Systems Protection Board (MSPB), which would include removals, demotions, and suspensions longer than 14 days.
3. Use a union grievance procedure, if available.
4. File a retaliation complaint with the OIG.



RETALIATION – MAKING A COMPLAINT TO OSC

- As with disclosures themselves, the Office of Special Counsel has a responsibility to receive allegations of whistleblower retaliation.
- If you believe you have been retaliated against for blowing the whistle, you can file a complaint with OSC, and you can access their website at <http://www.osc.gov/> for instructions on how to do this. It is necessary that you submit a signed OSC Form 14.



RETALIATION-OSC PROCESS/APPEAL TO MSPB

- OSC will review and analyze your retaliation complaint. Complaints that warrant a full investigation are investigated. There are times that OSC will request an agency to stay a personnel action or take other interim relief while its completes its investigation.
- If OSC decides not to investigate the retaliation claim or decides not to seek corrective action on behalf of the employee after an investigation, the employee can file an appeal with the MSPB. That appeal is referred to as an "Individual Right of Action."



RETALIATION OSC-CORRECTIVE ACTION

- OSC has the authority to seek corrective action from DOL if it finds that you have, in fact, been retaliated against for blowing the whistle.
- This corrective action can include ordering a promotion, cancelling a disciplinary action, and/or the payment of back pay, compensatory damages, and attorney's fees to you.
- If DOL does not agree to provide corrective action, OSC can file with the MSPB, a complaint against the Department seeking corrective action.



RETALIATION-OSC CORRECTIVE ACTION

- In addition, OSC can initiate disciplinary action against a DOL official if it finds that the official intentionally retaliated against you for blowing the whistle.
- Possible penalties –
 - Removal, reduction in grade, suspension, or reprimand
 - Required disciplinary penalties for violations of 5 U.S.C. § 2302 (b)(8), (9), and (14) - First violation results in proposed 3-day suspension at a minimum
 - Debarment from federal employment (up to five years)
 - Civil penalty (up to \$1,000)



RETALIATION – CHOICE OF FORUM

- If the alleged retaliatory action is appealable to the MSPB, an employee must choose one of the three options for claiming retaliation - OSC complaint, defense to appealable disciplinary action, or union grievance - to ensure that a claim of retaliation is not under consideration in multiple forums at the same time. If the alleged retaliatory action is not appealable to the MSPB, an employee must choose between filing an OSC complaint or a union grievance.

RETALIATION – NOTIFYING THE OIG



- As noted above, in addition to filing a complaint with OSC, as an affirmative defense in a MSPB appeal, or filing a union grievance, an employee can also file a complaint with the OIG directly, especially if the protected disclosure was originally made to the OIG.
- However, the OIG is not required to review your claim. Further, unlike OSC, the OIG does not have any corrective action or disciplinary action authority. If the OIG investigates your claim of retaliation, it will provide a report of its findings to DOL officials for appropriate action.
- Finally, reporting a claim of retaliation to the OIG, as opposed to OSC, will not create an opportunity to bring a direct appeal to the MSPB.



RETALIATION - NEXUS

- It is important to keep in mind that, regardless of the option used to assert a claim of retaliation, you must be able to demonstrate a “nexus” between the agency’s alleged retaliatory action and the “protected disclosure” or “protected activity”.
- For example, if a supervisor gives you an unfavorable performance evaluation without any knowledge whatsoever that you made a “protected disclosure” several weeks earlier, there would be no nexus and no retaliation.



- You are not required to show that the unfavorable evaluation was based solely or primarily on your whistleblowing. In most cases, you only have to show that your whistleblowing was a “contributing factor” in the personnel action or that it prompted the personnel action.
- However, even if a supervisor was aware that you made a “protected disclosure,” there may not be a finding of retaliation if the supervisor can show, by “clear and convincing evidence,” that he/she would have given you an unfavorable evaluation regardless of any knowledge of the “protected disclosure” as described in more detail on the next few slides.



ESTABLISHING A *PRIMA FACIE* CASE OF RETALIATION

- In order to prove retaliation, there must be a preponderance of evidence showing:
 - There was a protected disclosure of information or a protected activity;
 - There was a personnel action taken, not taken, or threatened;
 - That the agency/official had actual or constructive knowledge of the protected disclosure or protected activity; and
 - That the protected disclosure or protected activity was a contributing factor in the personnel action .
- These are referred to as the elements of a *Prima Facie* case.

PROVING RETALIATION



- If the elements of the Prima Facie case are met:
- Agency must show — by clear and convincing evidence — that it would have taken the same action without the disclosure or protected activity.
- Factors to be considered:
 - Strength of evidence in support of personnel action.
 - Existence & strength of motive to retaliate.
 - Treatment of similar employees who are not whistleblowers.



WHISTLEBLOWER PROTECTION COORDINATOR

- The Whistleblower Protection Enhancement Act of 2012 directed Inspectors General to designate a “Whistleblower Protection Ombudsman” within their respective entities. The 2018 Whistleblower Protection Coordination Act amendments changed the Whistleblower Protection Ombudsman’s title to “Whistleblower Protection Coordinator.”
- The WBP Coordinator is responsible for educating DOL employees about prohibitions against retaliation for “blowing the whistle,” and their specific rights and remedies against such retaliation.



WBP COORDINATOR

Educating Employees:
Information that may be
provided by the WBP
Coordinator

- The means by which employees may seek review of any allegation of reprisal, including the roles of the OIG, OSC, and the MSPB, and
- General information about the timeliness of such allegations, the availability of any alternative dispute mechanisms, and avenues for potential relief.
- This slide presentation is intended to provide basic information to DOL employees about their whistleblower rights and remedies. The specific rules, procedures, and standards can be confusing at times.

WBP COORDINATOR



- As the OIG's WBP Coordinator, I am available to respond to questions which you may have regarding your rights and remedies against retaliation for protected disclosures/activities.
- The OIG has established a special email address for questions: OIGWhistleblower@oig.dol.gov
- By law, the WBP Coordinator is not able to act as a "legal representative, agent, or advocate" for DOL employees.
- Therefore, if you have questions related to specific circumstances and situations, you should seek assistance or representation from a union representative, if applicable, or from outside legal counsel.
- Many state bar associations have referral services to assist individuals in locating or obtaining legal counsel for specific types of issues, including whistleblower-related issues.



OSC CONTACT INFORMATION

- If you have specific questions, you are also encouraged to contact the Office of Special Counsel via their website at <http://www.osc.gov/>.
- The OSC Whistleblower Disclosure Hotline and the Prohibited Personnel Practices Unit can both be contacted at (202)804-7000, (800)872-9855, or info@osc.gov.

OIG CONTACT INFORMATION



- The OIG Hotline may be reached by:
 - Via their online form at <https://www.oig.dol.gov/hotlineform.htm>.
 - Phone at 1-800-347-3756 or (202)693-6999
 - Fax at (202)693-7020
- Mail: Attention Hotline
Department of Labor Office of Inspector
General
200 Constitution Avenue, NW
Washington DC 20210
- The OIG Whistleblower Protection Coordinator may be reached at: OIGWhistleblower@oig.dol.gov