

What are the Legal Prohibitions on Retaliation?

Congress enacted the Whistleblower Protection Act, as amended, to strengthen protections for Federal employees, former employees, and applicants for employment who claim that they have been subjected to personnel actions because they made protected disclosures or engaged in protected activity. Under 5 USC 2302(b)(8) and (b)(9), a federal employee authorized to take, direct others to take, recommend or approve any personnel action may not take, fail to take, or threaten to take or fail to take any personnel action against an employee because of protected whistleblowing or protected activity.

Federal Whistleblower Protection laws prohibit an official from retaliating against an employee or applicant who:

- makes a protected disclosure; and/or if an employee
- exercises any appeal, complaint or grievance rights to remedy retaliation for a protected disclosure, or testifies for or otherwise lawfully assists another person in such rights;
- lawfully cooperates with or discloses information to an Inspector General or the Special Counsel; or
- refuses to obey an order that would require the individual to violate the law.

What is protected disclosure?

A **protected disclosure** under 5 USC 2302(b)(8) means a formal or informal communication or transmission that the employee or applicant providing the disclosure **reasonably believes** evidences—

- any violation of any law, rule, or regulation; or
- gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

An individual is determined to have a **Reasonable Belief** if:

A disinterested person with knowledge of the essential facts known to and readily ascertainable by the discloser could reasonably conclude that the actions of the agency official evidence such violations, mismanagement, waste, abuse, or danger.

Where do you report a protected disclosure?

If you are aware of conduct that falls within one of the categories listed above, you can report to anyone including:

- Office of Inspector General (OIG)
- Office of Special Counsel (OSC)
- Your supervisor or any DOC official.
- Members of Congress or Congressional committees.
- Law enforcement officials.
- Alleged wrongdoer.

What actions could be considered retaliatory?

- A non-promotion
- A disciplinary action
- A detail, transfer, or reassignment
- An unfavorable performance evaluation
- Any decision concerning pay, benefits, or awards
- Any other significant changes in duties, responsibilities, or working conditions- including the threat of such actions.

What are your rights and remedies if you have been retaliated against because you made a protected disclosure or engaged in protected activity?

Retaliation for a protected disclosure and protected activities is prohibited, and subject to the below rights and remedies, provided the disclosure is not specifically prohibited by law or by Executive Order.*

If retaliation occurs, DOC employee whistleblowers may be entitled to the following remedies:

- job restoration;
- reversal of suspensions, and other adverse actions;
- back pay;
- reasonable and foreseeable consequential damages, and compensatory damages; and/or
- award of damages for attorney fees and expenses incurred due to retaliation.

Please note that these remedies can be sought only by OSC or through an MSPB action.

*Disclosures prohibited by law or Executive Order can still be made to OIG, OSC, or an employee designated by the agency to take such disclosures.

What can you do if you believe a DOC official retaliated against you for your protected disclosure or activity?

- File a complaint with OSC, which may seek corrective and disciplinary action;*
- File a union grievance, if applicable;*
- If you have been subject to a personnel action that is otherwise appealable to the Merit System Protection Board (MSPB), you can file an appeal with the MSPB and assert whistleblower retaliation as a defense; *
- File an Individual Right of Action (IRA) appeal with the MSPB. You can file an IRA only for an action otherwise not directly appealable to the MSPB if you **exhausted administrative remedies before OSC** and make nonfrivolous allegations that:
 - you made a protected disclosure; and
 - the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action.
- Make a complaint to the DOC OIG if you believe there is fraud, waste, or abuse involved.
 - Unlike OSC, the OIG does not have any corrective action authority. If the OIG reviews your claim of retaliation, and if the OIG finds merit to the claim, the OIG can report its findings to DOC officials, but cannot compel them to take action.
 - Reporting a claim of retaliation to the OIG will not create an opportunity to bring an IRA appeal to the MSPB.

*Note: If you believe that you were subjected to a covered personnel action in retaliation for whistleblowing or other protected activity, you may elect not more than one of 3 remedies: (1) an appeal to the MSPB; (2) a negotiated grievance; or (3) a complaint filed with the Special Counsel, which can be followed by an IRA appeal filed with the MSPB. 5 U.S.C. § 7121(g)

What will MSPB and OSC look for in the event you bring a claim of whistleblower retaliation?

You must be able to demonstrate a **nexus** between the alleged retaliation and the protected disclosure. Nexus means connection or link. You must show that your disclosure was a contributing factor, not the only or primary factor, for the alleged retaliation.

An employee may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as the **knowledge/timing test**. The test is satisfied by evidence that the official

taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude the disclosure was a contributing factor in the personnel action.

Once it has been shown that the disclosure was a contributing factor, the agency can avoid a finding of wrongdoing if it can prove that the alleged retaliatory act would have occurred even if the disclosure had not.

Role of U.S. Office of Special Counsel

OSC is an independent federal investigative and prosecutorial agency. Its mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing. As such, they take disclosures and conduct investigations into whistleblower retaliation, and other prohibited personnel practices. OSC can seek through the MSPB to compel agencies to take corrective actions in cases where OSC finds an agency has retaliated against a whistleblower.

For more information contact:

U.S. Office of Special Counsel
1730 M St, N.W., Suite 218
Washington, DC 20036-4505
Toll Free: 1-800-872-9855
Hearing and Speech Disabled: 1-800-877-8339
www.OSC.gov

Whistleblower Protection Enhancement Act of 2012 (WPEA)

The WPEA directs the IG to designate a Whistleblower Protection Ombudsman. Please note that the WPEA explicitly prohibits the Ombudsman from acting as a legal representative, agent, or advocate for employees.

If you have questions related to specific circumstances and situations, it is advisable to seek assistance or representation from a union representative, if applicable, or from outside legal counsel.

Whistleblower Protection Ombudsman Contact Information

DOC employees can make inquiries to the Whistleblower Protection Ombudsman at:

Phone: (202) 482-1099
Email: wpo@oig.doc.gov