

Whistleblower Protection

Helping civil servants and contractors feel safe when reporting agency shortcomings

Promoting legal compliance and preventing fraud, waste, abuse, and threats to public health and safety are essential to restoring trust in government and fulfilling the missions of all federal agencies. Whistleblowers—employees who report concerns about misconduct—are crucial assets to agency leaders, particularly those responsible for implementing policies and practices that depend on scientific integrity. Encouraging and defending whistleblowers also helps protect an agency’s reputation from the harm caused by the whistleblower’s disclosures and the perception that the agency might be hiding the truth from the American people.

The level of attrition of federal employees has risen in the last few years as their morale and trust in political leadership has fallen, but empowering agency employees to report wrongdoing and protecting them from retaliation could reverse that trend by improving morale, public trust, and overall agency effectiveness. Without whistleblower protections that encourage employees to report problems while they are still small, serious flaws in policies could potentially go unchallenged and small problems may fester into unnecessarily massive public scandals. Whistleblower protection laws have traditionally enjoyed nearly unanimous, bipartisan support. These recommendations have strong support from science, public health, human rights, environmental, and good-government organizations.

Background

Several laws that protect the right of federal employees and contractors to report misconduct define whistleblowing as “any disclosure of information by an employee or applicant which the employee or applicant 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,” so long as that information is not classified or otherwise prohibited by law from disclosure.

Few if any whistleblowers benefit personally from their disclosures. In almost every case, whistleblowers face personal shaming, mockery, harassment, damage to their professional careers, and health effects from the stress of the endeavor.

The mechanism most whistleblowers use to defend themselves against retaliation is an appeal to the Merit Systems Protection Board (MSPB). Currently, the MSPB has no members, and has not had a quorum in years. As a result, it has a backlog of more than 2,500 cases, and even in ordinary circumstances an appeal can take as much as a year to resolve, by which point an employee facing removal has often exhausted their resources and is forced to abandon their appeal and seek other work.

Currently there is no prohibition on anything that falls short of a “personnel action.” Agencies recently won the absolute right to launch **legally sanctioned** retaliatory investigations into employees, and whistleblowers regularly report that their agencies have orchestrated “whisper campaigns” to undermine their credibility, leak information about them to hostile media outlets, and deter future whistleblowers.

Whistleblowers report on matters that prompt agency reforms, benefiting both the functioning and the reputation of the agency *ex post*. To recognize whistleblowers’ courage and reduce barriers to disclosure, the administration should adopt policies that increase options and speed decisions for whistleblowers.

Recommendations for the Next Presidential Term

- 1. Immediately nominate and confirm qualified members to the MSPB to restore the process used by federal employees to make disclosures without fear of retaliation. (first 30 days)**

The MSPB is currently the only avenue for federal employees to enforce their rights under the Whistleblower Protection Act (WPA), but it has no members and has

been unable to issue decisions since January 2017. This has resulted in a large backlog of cases, the inability of the Office of Special Counsel to seek stays for temporary relief against retaliation, and a situation in which employees who prevail in administrative hearings are kept in limbo while agencies petition for review by a nonexistent MSPB. Further, due to a related constitutional challenge (*Lucia v. SEC*), many employees cannot even request an administrative hearing to challenge violations until the MSPB has a quorum.

2. Nominate and appoint independent, nonpartisan, experienced individuals responsible for receiving and investigating complaints made by whistleblowers, and bolster the strength of inspectors general to investigate specific as well as systemic abuses. (first 90 days)

The Inspector General Act of 1978 mandates that the head of each agency's Office of Inspector General shall be appointed "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations." Inspectors general (IGs) and their offices are one of the most important mechanisms for receiving and investigating whistleblower complaints from both federal employees and contractors and addressing concerns of retaliation. Ensuring that IGs are equipped to conduct thorough investigations is essential to restore the health of this essential agency oversight vehicle.

3. Support legislation enabling whistleblowers to oppose retaliation by appealing directly to federal courts when the MSPB does not act on an appeal within 90 days, and issuing stays on personnel actions against whistleblowers until their appeal is resolved. (first year)

The ability to appeal directly to federal court and receive a jury trial would decrease the backlog of cases, allow faster resolution, and ensure whistleblowers' rights are enforced. Allowing employees to have their termination stayed pending the resolution of their retaliation claim would ensure they are not forced to abandon their rights because of administrative delays and would deter agencies from retaliating.

4. Support legislation adding retaliatory investigations to the list of prohibited personnel practices in the Whistleblower Protection Act. (first year)

5. Ensure protection and functioning of agency IGs and the Office of Special Counsel (OSC) by advocating for legislation that increases their funding and grants IGs for-cause removal protections. (first year)

The OSC and agency IGs are the main actors charged with investigating whistleblower allegations and, for OSC, enforcing the WPA and the Whistleblower Protection Enhancement Act of 2012 (WPEA), but their chronic understaffing forces whistleblowers to endure long waits. Agency budget requests should include the necessary number of full-time-equivalent positions (as well as training funds) to ensure IGs can carry out their functions without unnecessary delay.

ENDORSED BY

Asian Pacific American Labor Alliance, AFL-CIO / Californians for Pesticide Reform / Center for Biological Diversity / Center for Reproductive Rights / Citizens for Responsibility and Ethics in Washington (CREW) / Climate Science Legal Defense Fund / Environmental Protection Network / Equity Forward / FracTracker Alliance / Friends of the Earth / Government Accountability Project / Government Information Watch / Greenpeace USA / Inland Ocean Coalition / Jacobs Institute of Women's Health / Milwaukee Riverkeeper / National Center for Health Research / National Children's Campaign / National Federation of Federal Employees / National Freedom of Information Coalition / National Parks Conservation Association / National Women's Health Network / Ocean Conservation Research / Oceana / Oceanic Preservation Society / Open the Government / Pesticide Action Network / Project on Government Oversight / Public Citizen / Public Employees for Environmental Responsibility / Revolving Door Project / Society of Professional Journalists / United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) / Union of Concerned Scientists / Virginia Association of Biological Farming