New Whistleblower Protections for Federal Contract Employees

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Although a gap still exists between the number of employees who report wrongdoings and those that do not, the federal government has strived to create an atmosphere which encourages reporting wrongdoing and protects those that do report.

I: RATIONALE BEHIND PROTECTION FOR WHISTLEBLOWERS

The Whistleblower Protection Act of 1989 ("WPA")

- the WPA is a useful benchmark with a 25-year history
- "(b) Purpose – The purpose of this Act is to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government…."

Employees do not report all incidents of wrongdoing, and often face reprisal when they do report incidents.

Ethics Resource Center [ERC], 2010

- 63% of private employees reported wrongdoing when they saw them; 40% went unreported.
- One of the critical issues is thus convincing employees to step forward when misconduct occurs.

Office of Personnel Management [OPM], 2013

- Nearly 40% of federal employees fear retaliation for reporting wrongdoing.

ERC, 2013

- One in three private employees who observe misconduct do not report it.
- 21% of those who reported wrongdoing responded that they had suffered retaliation.

Merit System Protection Board, 2013

- Nearly 30% of federal employees fear retaliation for reporting wrongdoing.

According to the ERC, the most common forms of retaliation experienced by whistleblowers are . . .

- 62%: A supervisor/manager excluding the whistleblower from decisions and work activity
- 60%: Other employees giving the whistleblower the cold shoulder
- 55%: A supervisor or member of management verbally abusing the whistleblower
- 48%: The whistleblower almost losing his or her job
- 43%: The whistleblower not receiving promotions or raises
- 42%: Other employees verbally abusing the whistleblower

The consequences of an internal environment that does not encourage necessary whistle-blowing is illustrated by the Veteran's Administration scandal.

- The scandal centers on deliberate false reporting of delays in treating Veterans. These delays resulted in deaths of Veterans across the U.S.
- In Phoenix, VA alone there have been at least seven associated deaths.
- Pauline DeWenter, who spoke to the press after the reports of wrongdoing surfaced, claims that she attempted to make internal reports, but that these were ignored.
- The press interviews with DeWenter are not covered by the protections of the WPA because her disclosures did not meet the requirements described therein.

Organizations and the Federal government are striving to create environments that promote reports of wrong-doing.

- ERC: Organizations who implement tip lines hope that more employees will report incidents if they can do so anonymously; only 3% of employees who see wrongdoing utilize these tip lines.
- Park et al. recommend tip lines alongside a strong internal organizational environment emphasizing legal and moral principles.
- National Whistleblower Center (NWC): The existence of the federal False Claims Act and monetary rewards for whistle-blowers help deter attempts to defraud the government, but 40% of observed wrong-doing still goes unreported.

Much federal whistle-blower protection is already available to non-Federal employees and contract employees.

II: FEDERAL WHISTLE-BLOWER PROTECTION FOR NON-FEDERAL EMPLOYEES AND CONTRACT EMPLOYEES

Employment Laws that provide Federal Whistle-blower protection for non-federal employees and contract employees

National Labor Relations Act (NLRA), 1935	• protects employees who are acting to form a union or acting in concert for the benefit of other employees • vigorously enforced; unions and union organizers file many complaints during organizing campaigns against certain unionized employers
Fair Labor Standard Act (FLSA), 1938	• protects employees who complain about pay issues, ranging from failure to pay the minimum wage or overtime to child labor complaints
Family and Medical Leave Act (FMLA), 1993	• protects employees who are pregnant, ill, or have to take care of an ill family member • Employees allowed up to 12 weeks of unpaid leave, and their health insurance is continued during this time • Employees must be returned to the same or an equivalent position upon return to work and may not be penalized in any way for taking the leave time

Other Employment Laws that provide Federal Whistle-blower protection for non-federal employees and contract employees

- Federal Mine Safety and Health Act
- Longshore and Harbor Workers Compensation Act
- Migrant and Seasonal Agricultural Worker Protection Act
- Employee Polygraph Protection Act
- Federal Railway Safety Act
- Occupational Safety and Health Act
- Employee Retirement Income Security Act
- Seaman's Protection Act
- Commercial Motor Vehicles Protection Act
- Uniformed Services Employment and Reemployment Rights Act

Civil Rights Acts that provide Federal Whistle-blower protection for non-federal employees and contract employees: The Civil Rights Act of 1964

Civil Rights Act of 1964 (CRA-64)	• This law did not specifically protect whistleblowers from retaliation, but protecting those who come forward has been developed via case law since its implementation.
CRA-64: Robinson v. Shell Oil	• Former employees are protected from retaliation.
CRA-64: Thompson v. North American Stainless, L.P.	• Employees who have no relation to the charge, but have a relationship with the charging party, are protected from retaliation. • Employees who bring charges on behalf of another employee are protected from retaliation.

Other Civil Rights Acts that provide Federal Whistle-blower protection for non-federal employees and contract employees

Age Discrimination in Employment Act (ADEA), 1967	• Protects workers age 40 and older
Americans with Disabilities Act (ADA), 1990	• Applies broadly to workers with disabilities, but also applies to employees who are perceived to have disabilities

Environmental Laws that provide Federal Whistle-blower protection for non-federal employees and contract employees

- Federal Water Pollution Control Act (a/k/a “The Clean Water Act”)
- Toxic Substances Control Act
- Clean Air Act
- Comprehensive Environmental Response Compensation and Liability Act (a/k/a “The Superfund Act)
- Pipeline Safety Improvement Act
- National Transit Systems Security Act
- Safe Water Drinking Act
- Energy Reorganization Act of 1974
- Solid Waste Disposal Act
- Surface Mining Control and Reclamation Act
- Asbestos Hazard Emergency Response Act
- Wendell H. Ford Aviation Investment and Reform Act of the 21st Century
- International Container Safety Act

Financial Industry Laws that provide Federal Whistle-blower protection for non-federal employees and contract employees: The Sarbanes-Oxley Act (2002)

- The Sarbanes-Oxley Act (SARBOX) protects only employees of public companies who discover and report financial fraud.
- SARBOX provides a make-whole remedy that includes: reinstatement, back pay for lost wages, front pay for future lost wages, compensatory damages, and litigation costs (including attorney's fees).
- To receive protection, the whistleblower must:
  - provide information or assist in an investigation of conduct the employee reasonably believes to be in violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission (SEC), or any provision of Federal law relating to fraud against shareholders. The information or assistance must be provided to, or the investigation conducted by:
    - a Federal regulatory or law enforcement agency;
    - any Member of Congress or any committee of Congress; or
    - a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct);
  - file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders.

Other Financial Industry Laws that provide Federal Whistle-blower protection for non-federal employees and contract employees

The American Recovery and Reinvestment Act of 2009	• The Act protects employees of any non-federal employer who observes waste of funds distributed under the Act • the employee must present their claim to the appropriate Inspector General in order to begin their claim and preserve their rights under the Act
The Dodd-Frank Wall Street Reform and Consumer Protection Act	• The SEC must reward whistleblowers who voluntarily provide original information regarding violations of securities laws that lead to a sanction exceeding $1 million. Rewards range from 10% - 30% of the amount recovered as a result of the information. • Any additional industries that the Consumer Financial Protection Bureau (CFPB) decides to regulate are covered by the provisions of this Act.
The Patient Protection and Affordable Care Act	• The Act provides protection for employees who become aware of tax credit or other abuses under the statute. An individual right of action is also available.

Consumer Protection Laws that provide Federal Whistle-blower protection for non-federal employees and contract employees

Consumer Product Safety Improvement Act, 2008

- The act provides significant whistleblower protection for employees who observe violations of consumer protective statutes through the U.S. Department of Labor.
- Concerns about the manufacture or importation of unsafe consumer products can be protected under this Act.

F.D.A. Food Safety and Modernization Act

- The Act protects employees of companies engaged in manufacturing, processing, packing, transporting, distribution, reception, holding, or importing food who report violations of the F.D.A.
- In the absence of an action by the U.S. Department of Labor, an individual right of action is available.

Moving Ahead for Progress in the 21st Century Act

- The Act was designed to encourage employees of vehicle manufacturers to come forward if they observed vehicle defects.
- In the absence of a timely action by the U.S. Department of Labor, an individual right of action is available.

Several extant laws exist to protect Federal employees, including the Whistleblower Protection Act of 1989 and the Whistleblower Protection Enhancement Act of 2012.

III: WHISTLEBLOWER PROTECTION FOR ONLY FEDERAL EMPLOYEES

Laws that provide Federal Whistle-blower protection for Federal employees

FBI Federal Whistleblower Protections, 1978

- designed to encourage employees of the FBI to report to the US Attorney General if they observe specified forms of misconduct
- Does not specify an individual right of action

Atomic Defense Provision (War and Natural Defense)

- unusual in that it applies to both federal employees of the Department of Energy and contractors to that agency
- under certain circumstances, an individual right of action may be available

Whistleblower Protection Act of 1989

- A Federal employee or applicant who discloses wrongdoing, and believes he or she has been retaliated against for said disclosure, may be entitled to relief if he or she:
  - Discloses conduct that meets a specific category of wrongdoing set forth in the law.
  - Makes the disclosure to the "right" type of party. The employee may be limited regarding to whom the report can be made.
  - Makes a report that is either: (a) outside of the employee's course of duties; or (b) communicated outside of normal channels.
  - Makes the report to someone other than the wrongdoer.
  - Has a reasonable belief of wrongdoing.
  - Suffers a personnel action, the agency's failure to take a personnel action, or the threat to take or not take a personnel action.
  - Demonstrates a connection between the disclosure and the personnel action, failure to take a personnel action, or the threat to take or not take a personnel action.
  - Seeks redress through the proper channels.
- The relief will not be ordered if the agency can establish that it would have taken the same action in the absence of the whistle-blowing.
- A protected whistleblower is an employee or applicant who discloses information that he or she "reasonably believes evidences:
  - A 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

Whistleblower Protection Act of 1989: Court Interpretations

- The “violation of any law, rule, or regulation” has been interpreted broadly, and the violation can be minor.
- Reports of trivial violations, however, are not protected.
- As long as the employee provides sufficient information to indicate a law, rule, or regulation was broken, the employee need not cite (or in some cases, specify) which law, rule or regulation or the specific type of fraud, waste, or abuse conducted by the company.

Whistleblower Protection Act of 1989: Court Interpretations

- Reports of minor violations of laws, rules, or regulations are protected, but reports of trivial violations are not.
- As long as the employee provides sufficient information to indicate a law, rule, or regulation was broken, the employee need not cite (or in some cases, specify) which law, rule or regulation or the specific type of fraud, waste, or abuse conducted by the company.
- Reports of actions which are merely debatable, or which constitute simple negligence or wrongdoing, are not protected.
- Reports of abuse of authority may be protected even if the abuse is not substantial as there is no “de minimus standard.”
- Whether or not an action represents a substantial and specific danger to public health or safety depends on a variety of factors, including the likelihood of harm resulting from the action and when the alleged harm may occur.
- Reporting wrong-doing to the wrong-doer does not qualify as whistle-blowing.

Whistleblower Protection Act of 1989: Court Interpretations

- A regulation can prohibit a disclosure under section 2302(b)(8), provided that:
  - the regulation is a substantive rule
  - Congress granted the agency authority to create such a regulation
  - the regulation is promulgated in a manner that meets any procedural requirements imposed by Congress
- A protected disclosure may fall into one of two categories:
  - disclosures as part of normal duties outside of normal channels
  - disclosures outside of assigned duties
- If the disclosure in question is made as part of the employee's normal duties, and is made through the channels normally used by the employee for such disclosures, then the disclosure is not protected.
- Public service employees who have a professional obligation to report wrong-doing will not be protected unless there is a circumstance-specific law that provides protection.

Whistleblower Protection Act of 1989: Court Interpretations

- Unlawful retaliation is when an authorized employee takes, fails to take, or threatens to take or not take, a personnel action as a result of whistle-blowing.
- To establish that unlawful retaliation has occurred, an employee must show that he or she both made a protected disclosure and that the protected disclosure was a contributing factor in the personnel decision.
- Personnel actions include: appointments; promotions; actions under Chapter 75 of Title 5 (or other disciplinary corrective action); details; transfers; reassignments; reinstatements; restorations; reemployments; performance evaluations under Chapter 43 of Title 5; decisions concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action; placing an employee in a leave without pay or absent without leave status; denials of annual leave or the opportunity to earn overtime pay; and decisions to order psychiatric testing or any significant change in an employee's duties, responsibilities, or working environment.
- Revocation of security clearance is not a protected personnel action in this sense.

Whistleblower Protection Act of 1989: Court Interpretations

- A potential whistleblower can establish that a disclosure was a contributing factor in two basic ways:
  - through the use of the knowledge/timing test
  - through the use of any other evidence demonstrating that the disclosure was a contributing factor
- A whistle-blower only need show that the decision-maker knew of the disclosure and that the action occurred within a reasonable time of the disclosure. A “reasonable time” has not been defined, but can sometimes include more than a year between the disclosure and the action.
- If an employee cannot satisfy the knowledge/timing test, the adjudicator will consider other evidence, such as:
  - whether the agency had legitimate reasons for the action
  - the existence and strength of any motive to retaliate
  - evidence that the agency takes similar action in cases where the employees are not whistle-blowers, but are otherwise similarly situated.

Whistleblower Protection Enhancement Act of 2012

- Whistleblower protection is no longer limited to the first federal employee to make a disclosure.
- It protects employees who disclose evidence that technical or scientific data has been censored.
- Transportation Security Administration ("TSA") employees are now provided whistleblower protection.
- The MSPB is expressly allowed to impose any combination of previously available penalties.
- It is now easier to discipline supervisors who retaliate against employees.
- The requirement that all whistleblower appeals proceed to the U.S. Court of Appeals for the Federal Circuit, a court, which some critics contend is unfriendly to whistleblowers, is suspended for two years, thus, allowing such appeals to be heard in the regional circuits.

10 U.S. Code § 2409 exists to protect contract and grantee employees of the Department of Defense, NASA, and the federal intelligence community. § 4712 establishes a four-year pilot whistleblower protection program to protect other federal contract and grantee employees.

IV: WHISTLEBLOWER PROTECTION FOR FEDERAL CONTRACT AND GRANTEE EMPLOYEES

10 U.S. Code § 2409

- This statute protects employees of defense contractors who reasonably believe they have information that evidences:
  - Gross mismanagement of a Department of Defense contract or grant, a gross waste of Department funds, an abuse of authority relating to a Department contract or grant, or a violation of law, rule, or regulation related to a Department contract (including the competition for or negotiation of a contract) or grant;
  - Gross mismanagement of a National Aeronautics and Space Administration contract or grant, a gross waste of Administration funds, an abuse of authority relating to an Administration contract or grant, or a violation of law, rule, or regulation related to an Administration contract (including the competition for or negotiation of a contract) or grant; or
  - A substantial and specific danger to public health or safety.
- In 2013, § 827 of the National Defense Authorization Act amended the whistleblower protections presently available to employees of non-intelligence community DOD contractors found in *§ 2409* by:
  - Now fully covering NASA contractors and their employees;
  - Expanding such protections to DOD and NASA subcontractor and grantee employees;
  - Enlarging the individuals or entities to which a protected disclosure can be made to include a grand jury, court, or management official or other contractor/ subcontractor employee with responsibility to discover, investigate, or address misconduct; and
  - Providing for attorneys' fees and costs when the Government, and possibly the whistleblower, successfully files a law suit to enforce such protections.

41 U.S.C. § 4712

- § 4712 establishes a four-year pilot whistleblower protection program for employees of contractors, subcontractors, and grantees of executive agencies.
- The Department of Defense, NASA, and the federal intelligence community are not covered by § 4712 as they are already covered by § 2409.
- An employee of a contractor, subcontractor, or grantee may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body disclosures containing information that the employee reasonably believes is evidence of:
  - Gross mismanagement of a Federal contract or grant,
  - Gross waste of Federal funds,
  - An abuse of authority relating to a Federal contract or grant,
  - A substantial and specific danger to public health or safety,
  - A violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.
- § 4712 does not provide any right to disclose classified information not otherwise provided by law.
- A complaint by the employee may not be brought under the section more than three years after the date on which the alleged reprisal took place.

Looking to other whistleblower statutory enforcement by the courts provides a likely path for the courts to take when confronting some of the first cases under § 4712. § 4705 is the predecessor law to § 4712 and was formerly called § 265 before it was renumbered. § 2409, as described in the previous section, is a parallel law to § 4712 which covers other groups of federal employees.

V: PROJECTED ENFORCEMENT APPROACH REGARDING § 4712

Projected Enforcement Approach Regarding § 4712: Analysis of case law for § 265

Hammack v. Automated Information Management, Inc.; Prime Lending, Inc. v. Sandra Moyer; Williams v. Basic Contracting Services

- In each of these, the Court found that § 265 does not provide a private right of action.
- Under § 4712 a private right of action is possible if the Inspector General does not take action within the prescribed time period. Thus, the private right of action would not be a barrier to similar cases.

•The private right of action in §4712 appears to be a clear dividing line between §4705 and the new §4712.

•Under §4712, contractors are now required to notify their employees in writing of the provisions of §4712. If employees know in advance that they have the rights delineated in §4712, they may be more likely to come forward in a timely fashion. More importantly, informed employees may be more likely to make their claims in compliance with the statute.

Projected Enforcement Approach Regarding § 4712: Analysis of case law for § 2409

Grost v. USA	• The court dismissed Grost's claim under § 2409 because she failed to file her administrative complaint with the correct authority, and because she sued the U.S. directly, rather than her contract employer.
Manion v. Nitelines Kuhana JV LLC	• The court found that Nitelines terminated Manion's employment for a non-retaliatory reason and therefore he did not have a sustainable claim under §2409

•Both of the §2409 cases discussed herein provide similar precedent for consideration by other justices of §4712 claims.

•While the objective in passing §4712 was to broaden the availability of whistleblower protection for federal contract employees, the courts will still hold the supposed whistleblowers to fairly strict compliance with the protective statute involved.

- §4712 may present an opportunity for employees of various federal government contractors to report wrongdoing with less risk of reprisal.
- The opportunity to bring a private action presents a tangible benefit for the whistleblower.
- This is turn may produce the most favorable outcome as contractors will be more careful in their administration of federal government contracts and resources.

CONCLUSION