Whistleblower Rights and Protections for DOL Employees

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Background

The Whistleblower Protection Enhancement Act of 2012 directs the DOL Inspector General to designate a "Whistleblower Protection Ombudsman."

- The Act states that the Ombudsman shall educate DOL employees about prohibitions on retaliation for "blowing the whistle," and their specific rights and remedies against such retaliation.
- This role overlaps with the existing responsibility of the Secretary to ensure that DOL employees are informed of their whistleblower rights and remedies.
- The DOL Deputy Inspector General has designated Howard Shapiro, as part of his duties as the Counsel to the Inspector General, to serve as the Whistleblower Protection Ombudsman for DOL.

Background

- 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.
- 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 Ombudsman position for most of the larger federal agencies.

Protected Disclosures – Categories

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

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. However, minor or inadvertent violations may not meet this definition, and disagreements over lawful agency policy decisions are not considered to be "protected disclosures."

Protected Disclosures – Categories

2. A disclosure which reflects “gross agency mismanagement.” This normally requires mismanagement which creates a real risk of an adverse impact on the agency’s mission. Mismanagement which may be characterized as minimal or trivial generally does not meet this definition.

3. A disclosure which reflects a “gross waste of funds.” A minimal expenditure, or one which is debatable and/or subject to different opinions, even if it appears to be wasteful, may not meet this definition.

4. A disclosure which reflects an abuse of authority by DOL employees.

5. A disclosure which reflects a substantial and specific danger to public health or safety.

Protected Disclosures – Where to Report?

- If you are aware of conduct that falls within one of these five categories, where should you go to report it?
  - A "protected disclosure" can be made to the DOL Office of Inspector General. In fact, DLMS 8-700 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 phone, email, or fax. The OIG will then determine whether an investigation or other review of the allegations should be conducted.

Protected Disclosures – Where to Report?

- 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 which are made by Federal Employees.
- If you wish to file an allegation of wrongdoing with OSC, you should contact their "Disclosure Unit," which 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 reliable, first-hand knowledge, as opposed to unsupported speculation.

Protected Disclosures – Where to Report?

- 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 asks the OIG to conduct this investigation.

- 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.

Protected Disclosures – Where to Report?

- A “protected disclosure” can also be made to almost any person who is in a position to take some action with respect to the disclosure.
- A “protected disclosure” can be made directly to your supervisor, or to any DOL official who has authority or responsibility with respect to the alleged wrongdoing.
- A “protected disclosure” can be made to members of Congress or to Congressional committees.
- A “protected disclosure” can be made to officials from the Department of Justice or other law enforcement officials outside DOL.
- A “protected disclosure” can be made to 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.

Protected Disclosures – Other Requirements

- The WPA also recognizes that, in some instances, information related to a "protected disclosure" may be particularly sensitive or confidential.

- Accordingly, "protected disclosures" involving information subject to specific non-disclosure statutes or orders, for example, trade secrets, or national security and classified information, can <u>only</u> be made to OSC or to the OIG in order to be covered by the WPA protections and remedies.

Protected Disclosures – Other Requirements

- 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, good faith belief" when you made the disclosure.

Protected Disclosures – Other Requirements

- However, if you know that your allegation is not truthful, and this can be shown, you will not have the protections of the WPA even if an adverse or other negative action is taken against you.
- The Whistleblower Protection Enhancement Act of 2012 specifically states that your motive in making an allegation of wrongdoing is not relevant.
- 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.

Protected Disclosures – 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 unless it is unavoidable or is compelled by a court order.

- 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, assisting another employee, as a witness or otherwise, who has alleged whistleblower retaliation, or 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

- If you make a "protected disclosure" and you believe that you have been retaliated against because you made the disclosure, the WPA provides you with certain rights and remedies.

- "Retaliation" includes almost any personnel action, or failure to take a personnel action, which adversely affects you.

Retaliation – Covered Actions

- The WPA specifically refers to the following potential retaliatory actions:
  - 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 change in duties, responsibilities, or working conditions

Retaliation – Making a Claim

There are three basic ways to claim retaliation for a "protected disclosure:"

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.

Retaliation – Making a Claim 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 for instructions on how to do this.

- OSC will review your retaliation complaint and 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. If DOL does not agree to provide corrective action, OSC can file a complaint against the Department, with the MSPB, to implement the corrective action.

Retaliation – Making a Claim to OSC

- 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.

- 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.

Retaliation – Individual Right of Action

- If you file a retaliation compliant with OSC, <u>and</u> OSC decides not to pursue an investigation, or does not pursue corrective action after an investigation, the WPA permits you to bring your own "Individual Right of Action" (IRA) against the agency to the Merit Systems Protection Board.

- You can only file an "IRA" if you have "exhausted" your OSC rights.

Retaliation – Nexus

- It is important to keep in mind that, regardless of the option used to assert a claim of retaliation, <u>you must be able to demonstrate a "nexus" between the agency's alleged retaliatory action and the "protected disclosure."</u>

Retaliation – Nexus

- 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.

Retaliation – Nexus

- However, even if a supervisor was somehow 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."

- These sorts of determinations usually arise before MSPB administrative judges and often involve individual credibility determinations.

Retaliation – Notifying the OIG

- In addition to the three options noted previously for claiming retaliation, you can also contact the OIG, especially if the protected disclosure was originally made to the OIG.

- However, the OIG is not required to review your claim. Further, unlike the Office of Special Counsel, 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 only report its findings to DOL officials.

- Finally, reporting a claim of retaliation to the OIG, as opposed to OSC, will not create an opportunity to bring an "individual right of action" to the MSPB.

Wrap-Up – Role of the Ombudsman

- 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.

- As the OIG's Whistleblower Protection Ombudsman, I am available to try to respond to questions which you may have regarding your rights and remedies, and the OIG has established a special email address for questions: OIGWhistleblower@oig.dol.gov.

- I will also provide DOL employees with updates or developments regarding whistleblower rights and procedures.

Wrap-Up – Role of the Ombudsman

- However, the Whistleblower Protection Enhancement Act specifically states that the Ombudsman should not act as a "legal representative, agent, or advocate" for DOL employees.

- Therefore, if you have questions related to specific circumstances and situations, you should probably 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.

Wrap-Up – OSC Contact Information

- If you have specific questions, you are also encouraged to contact the Office of Special Counsel. Their website may be accessed at www.osc.gov.
- The OSC Disclosure Unit, which handles "protected disclosures," may be reached at (202)254-3640.
- The OSC Complaints Examining Unit, which handles retaliation complaints, may be reached at (202)254-3670.

Wrap-Up – OIG Contact Information

- The OIG Hotline may be reached by:
  - email at hotline@oig.dol.gov
  - phone at 1-800-347-3756 or (202)693-6999
  - fax at (202)693-7020