

S 372

Whistleblower Protection Enhancement Act of 2010

Congress: 111 (2009–2011, Ended)

Chamber: Senate

Policy Area: Government Operations and Politics

Introduced: Feb 3, 2009

Current Status: Message on House action received in Senate and at desk: House amendments to Senate bill.

Latest Action: Message on House action received in Senate and at desk: House amendments to Senate bill. (Dec 22, 2010)

Official Text: <https://www.congress.gov/bill/111th-congress/senate-bill/372>

Sponsor

Name: Sen. Akaka, Daniel K. [D-HI]

Party: Democratic • **State:** HI • **Chamber:** Senate

Cosponsors (13 total)

Cosponsor	Party / State	Role	Date Joined
Sen. Carper, Thomas R. [D-DE]	D · DE		Feb 3, 2009
Sen. Collins, Susan M. [R-ME]	R · ME		Feb 3, 2009
Sen. Grassley, Chuck [R-IA]	R · IA		Feb 3, 2009
Sen. Kennedy, Edward M. [D-MA]	D · MA		Feb 3, 2009
Sen. Leahy, Patrick J. [D-VT]	D · VT		Feb 3, 2009
Sen. Levin, Carl [D-MI]	D · MI		Feb 3, 2009
Sen. Lieberman, Joseph I. [ID-CT]	ID · CT		Feb 3, 2009
Sen. Mikulski, Barbara A. [D-MD]	D · MD		Feb 3, 2009
Sen. Pryor, Mark L. [D-AR]	D · AR		Feb 3, 2009
Sen. Voinovich, George V. [R-OH]	R · OH		Feb 3, 2009
Sen. Cardin, Benjamin L. [D-MD]	D · MD		Mar 30, 2009
Sen. Burris, Roland [D-IL]	D · IL		Mar 31, 2009
Sen. Tester, Jon [D-MT]	D · MT		Nov 30, 2010

Committee Activity

Committee	Chamber	Activity	Date
Homeland Security and Governmental Affairs Committee	Senate	Hearings By (subcommittee)	Jun 11, 2009
Homeland Security Committee	House	Bills of Interest - Exchange of Letters	Sep 22, 2010

Subjects & Policy Tags

Policy Area:

Government Operations and Politics

Related Bills

Bill	Relationship	Last Action
111 HR 1507	Related bill	May 14, 2009: Committee Hearings Held.

Whistleblower Protection Enhancement Act of 2010 - **Title I: Protection of Certain Disclosures of Information by Federal Employees** - (Sec. 101) Amends federal personnel law relating to whistleblower protections to provide that such protections shall apply to a disclosure of any violation of law, except for an alleged violation that is a minor, inadvertent violation that occurs during the conscientious carrying out of official duties.

Provides that a disclosure shall not be excluded from whistleblower protections: (1) because the disclosure was made to a person, including a supervisor, who participated in an activity that the employee or applicant reasonably believed to evidence gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety; (2) because the disclosure revealed information that had been previously disclosed; (3) because of the employee or applicant's motive for making the disclosure; (4) because the disclosure was not made in writing; (5) because the disclosure was made while the employee was off duty; or (6) because of the amount of time which has passed since the occurrence of the events described in the disclosure.

Provides that a disclosure shall not be excluded from whistleblower protections if it is made during the normal course of duties of an employee with respect to whom another employee with authority took, failed to take, or threatened to take or fail to take a personnel action in reprisal for the disclosure.

(Sec. 102) Defines "disclosure" as a formal or informal communication or transmission, excluding a communication concerning policy decisions that lawfully exercise discretionary authority, unless the employee or applicant making the disclosure reasonably believes that it evidences: (1) any violation of any law, rule, or regulation, except for an alleged violation that is a minor, inadvertent violation that occurs during the conscientious carrying out of official duties; or (2) gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety.

(Sec. 103) Provides that any presumption regarding a public officer's performance of a duty may be rebutted by substantial evidence.

Establishes a "disinterested observer" standard for evaluating the validity of disclosures that evidence violations of law, gross mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(Sec. 104) Includes as a prohibited personnel practice the implementation or enforcement of any nondisclosure policy, form, or agreement that does not contain a specific statement that its provisions are consistent with requirements that preserve the right of federal employees to make disclosures of illegality, waste, fraud, abuse, or public health or safety threats. Allows a non-disclosure policy, form, or agreement in effect before the enactment of this Act to be enforced after notice of such statement is provided to a specific employee or on the agency website.

Allows any action ordered to correct a prohibited personnel practice to include fees, costs, or damages reasonably incurred due to an agency investigation of the employee that was commenced, expanded, or extended in retaliation for the disclosure of protected activity that formed the basis of the corrective action.

(Sec. 105) Adds the Office of the Director of National Intelligence and the National Reconnaissance Office to the list of intelligence community entities excluded from coverage under the Whistleblower Protection Act of 1989 (WPA). Provides that a whistleblower at an agency cannot be deprived of WPA coverage unless the President removes the agency from coverage prior to a challenged personnel action taken against the whistleblower.

(Sec. 106) Revises the standard of proof in disciplinary proceedings against an agency employee who takes an adverse personnel action against a whistleblower to require the Office of Special Counsel to show that the whistleblower's protected disclosure was a significant motivating factor in the decision to take an adverse action, even if other factors also motivated the decision.

(Sec. 107) Authorizes: (1) the Merit Systems Protection Board (MSPB), in disciplinary actions, to require payment of reasonable attorney fees by the agency where the prevailing party was employed or had applied for employment at the time of the events giving rise to the case; and (2) compensatory damages (including interest, reasonable expert witness fees, and costs) if the MSPB orders corrective action.

(Sec. 108) Requires that, during the five-year period beginning on the effective date of this Act, a petition to review a final order or decision of the MSPB that raises no challenge to the MSPB's disposition of allegations of a prohibited personnel practice shall be filed in any court of appeals of competent jurisdiction (rather than exclusively in the Federal Circuit). Provides that the granting of a petition shall be at the discretion of the court of appeals.

(Sec. 109) Extends whistleblower and other anti-discrimination protections to employees (and applicants for employment) of the Transportation Security Administration (TSA).

(Sec. 110) Extends whistleblower protections to any current or prospective federal employee for disclosures that such employee reasonably believes are evidence of censorship related to research, analysis, or technical information and that are not specifically prohibited by law or that disclose information which is not specifically required to be kept classified in the interest of national defense or the conduct of foreign affairs.

(Sec. 111) Amends the Homeland Security Act of 2002 to provide that a permissible use of independently obtained infrastructure information includes the disclosure of such information for whistleblower purposes.

(Sec. 112) Requires federal agency heads to advise their employees on how to make a lawful disclosure of information that is required to be kept classified in the interest of national defense or the conduct of foreign affairs.

(Sec. 113) Authorizes the Special Counsel to appear as *amicus curiae* in civil whistleblower actions.

(Sec. 114) Provides that corrective action relating to a prohibited personnel practice may not be ordered if, after a finding that a protected disclosure was a contributing factor in taking a personnel action, the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

(Sec. 115) Requires all government nondisclosure policies, forms, or agreements to contain a specific statement preserving the right of federal employees to disclose certain protected information. Prohibits implementing or enforcing nondisclosure policies, forms, and agreements without such statement. Permits nondisclosure policies, forms, and agreements in effect before the enactment of this Act to continue to be enforced with respect to: (1) current employees if the agency provides notice of the statement to such employees; and (2) former employees if the agency posts notice of the statement on its website for a one-year period.

Provides that a nondisclosure policy, form, or agreement for a person who is not a federal employee, but who is connected with the conduct of intelligence or intelligence-related activity, shall contain appropriate provisions that: (1) require nondisclosure of classified information; and (2) make it clear that the forms do not bar disclosures to Congress or an authorized official that are essential to reporting a substantial violation of law, consistent with the protection of sources and methods.

(Sec. 116) Requires the Comptroller General to report to specified congressional committees on the implementation of this title, including an analysis of changes in the number of cases filed with the MSPB alleging violations, the outcome of such cases, and the impact the process has had on the MSPB and the federal court system.

Requires the MSPB to include in its annual program performance reports information on the number and outcome of whistleblower cases filed.

(Sec. 117) Establishes a five-year program to allow current and former federal employees or applicants for employment to seek de novo review in a U.S. district court if such an individual is seeking corrective action or has filed an appeal with the MSPB with respect to a personnel action.

(Sec. 118) Authorizes the MSPB, an administrative law judge appointed by the MSPB, or any designated MSPB employee to grant summary judgment motions in cases involving alleged prohibited personnel practices. Terminates this authority five years after the enactment of this Act.

Title II: Effective Date - Makes this Act effective 30 days after its enactment.

Actions Timeline

- **Dec 22, 2010:** Mr. Van Hollen asked unanimous consent to take from the Speaker's table and consider.
- **Dec 22, 2010:** Considered by unanimous consent. (consideration: CR H8966-8974; text as received in House: CR H8966-8973)
- **Dec 22, 2010:** Passed/agreed to in House: On passage Passed without objection.
- **Dec 22, 2010:** On passage Passed without objection.
- **Dec 22, 2010:** Motion to reconsider laid on the table Agreed to without objection.
- **Dec 22, 2010:** Message on House action received in Senate and at desk: House amendments to Senate bill.
- **Dec 14, 2010:** Received in the House.
- **Dec 14, 2010:** Message on Senate action sent to the House.
- **Dec 14, 2010:** Held at the desk.
- **Dec 10, 2010:** Measure laid before Senate by unanimous consent. (consideration: CR S8809-8824; text of measure as reported in Senate: CR S8809-8817)
- **Dec 10, 2010:** The committee substitute as amended agreed to by Unanimous Consent. (consideration: CR S8817)
- **Dec 10, 2010:** Passed/agreed to in Senate: Passed Senate with an amendment by Unanimous Consent.(text: CR S8817-8824)
- **Dec 10, 2010:** Passed Senate with an amendment by Unanimous Consent. (text: CR S8817-8824)
- **Dec 3, 2009:** Committee on Homeland Security and Governmental Affairs. Reported by Senator Lieberman with an amendment in the nature of a substitute. With written report No. 111-101.
- **Dec 3, 2009:** Placed on Senate Legislative Calendar under General Orders. Calendar No. 219.
- **Jul 29, 2009:** Committee on Homeland Security and Governmental Affairs. Ordered to be reported with an amendment in the nature of a substitute favorably.
- **Jun 11, 2009:** Committee on Homeland Security and Governmental Affairs Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia. Hearings held. With printed Hearing: S.Hrg. 111-299.
- **Mar 20, 2009:** Committee on Homeland Security and Governmental Affairs referred to Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia.
- **Feb 3, 2009:** Introduced in Senate
- **Feb 3, 2009:** Sponsor introductory remarks on measure. (CR S1434-1435)
- **Feb 3, 2009:** Read twice and referred to the Committee on Homeland Security and Governmental Affairs. (text of measure as introduced: CR S1435-1438)

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