

## S 743

Whistleblower Protection Enhancement Act of 2012

**Congress:** 112 (2011–2013, Ended)

**Chamber:** Senate

**Policy Area:** Government Operations and Politics

**Introduced:** Apr 6, 2011

**Current Status:** Became Public Law No: 112-199.

**Latest Action:** Became Public Law No: 112-199. (Nov 27, 2012)

**Law:** 112-199 (Enacted Nov 27, 2012)

**Official Text:** <https://www.congress.gov/bill/112th-congress/senate-bill/743>

### Sponsor

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

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

### Cosponsors (14 total)

Cosponsor	Party / State	Role	Date Joined
Sen. Begich, Mark [D-AK]	D · AK		Apr 6, 2011
Sen. Cardin, Benjamin L. [D-MD]	D · MD		Apr 6, 2011
Sen. Carper, Thomas R. [D-DE]	D · DE		Apr 6, 2011
Sen. Collins, Susan M. [R-ME]	R · ME		Apr 6, 2011
Sen. Grassley, Chuck [R-IA]	R · IA		Apr 6, 2011
Sen. Harkin, Tom [D-IA]	D · IA		Apr 6, 2011
Sen. Landrieu, Mary L. [D-LA]	D · LA		Apr 6, 2011
Sen. Leahy, Patrick J. [D-VT]	D · VT		Apr 6, 2011
Sen. Levin, Carl [D-MI]	D · MI		Apr 6, 2011
Sen. Lieberman, Joseph I. [ID-CT]	ID · CT		Apr 6, 2011
Sen. McCaskill, Claire [D-MO]	D · MO		Apr 6, 2011
Sen. Pryor, Mark L. [D-AR]	D · AR		Apr 6, 2011
Sen. Tester, Jon [D-MT]	D · MT		Apr 6, 2011
Sen. Coons, Christopher A. [D-DE]	D · DE		Sep 12, 2011

### Committee Activity

Committee	Chamber	Activity	Date
Homeland Security and Governmental Affairs Committee	Senate	Referred to	May 9, 2011
Homeland Security Committee	House	Referred to	Jun 14, 2012
Homeland Security Committee	House	Referred to	Jun 14, 2012
Intelligence (Permanent Select) Committee	House	Discharged From	Sep 28, 2012
Oversight and Government Reform Committee	House	Discharged From	Sep 28, 2012

## Subjects & Policy Tags

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### Policy Area:

Government Operations and Politics

### Related Bills

Bill	Relationship	Last Action
112 HR 3289	Related bill	Oct 1, 2012: Committee on Intelligence (Permanent) discharged.

**(This measure has not been amended since it was passed by the House on September 28, 2012. The summary of that version is repeated here.)**

Whistleblower Protection Enhancement Act of 2012 - **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 (currently, a violation of law).

Provides that a disclosure shall not be excluded from whistleblower protections because: (1) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant for employment 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) the disclosure revealed information that had been previously disclosed; (3) of the employee or applicant's motive for making the disclosure; (4) the disclosure was not made in writing; (5) the disclosure was made while the employee was off duty; or (6) 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; 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 and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or executive order relating to: (1) classified information; (2) communications to Congress; (3) the reporting to an Inspector General of a violation of any law, rule, or regulation or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; or (4) any other whistleblower protection.

Allows the enforcement of a nondisclosure policy, form, or agreement that was in effect prior to the effective date of this Act if the agency gives an affected employee notice of the statement required by this section.

Allows any action ordered to correct a prohibited personnel practice to include fees, costs, or damages reasonably incurred due to an agency investigation of an 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 cannot be deprived of WPA coverage unless the President removes the whistleblower's 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 is employed, or has applied for employment, if specified conditions apply; and (2) reasonable and foreseeable consequential and compensatory damages (including interest, reasonable expert witness fees, and costs) if MSPB orders corrective action.

(Sec. 108) Requires that, during the two-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). Allows such court discretion to grant a petition for judicial review.

(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.

(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 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 each government nondisclosure policy, form, or agreement to contain a specific statement that its provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or executive order relating to: (1) classified information; (2) communications to Congress; (3) the reporting to an Inspector General of a violation of any law, rule, or regulation or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; or (4) any other whistleblower protection. Prohibits implementing or enforcing any nondisclosure policy, form, or agreement that does not contain such statement to the extent such policy, form, or agreement is inconsistent with 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.

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.

(Sec. 116) Requires the Comptroller General (GAO), not later than four years after the enactment of this Act, to report to specified congressional committees on the implementation of this title, including an analysis of changes in the number of cases filed with MSPB alleging violations, the outcome of such cases, and the impact the process has had on MSPB and the federal court system.

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

(Sec. 117) Amends the Inspector General Act of 1978 to require each inspector general of a federal agency, except any agency that is an element of the intelligence community or whose principal function is the conduct of foreign intelligence or counter intelligence activities, to designate a Whistleblower Protection Ombudsman to educate agency employees about prohibitions on retaliation for protected disclosures and rights and remedies against such retaliation. Terminates the authority for such Ombudsman five years after the enactment of this Act.

**Title II: Savings Clause; Effective Date** - (Sec. 201) Declares that nothing in this Act shall be construed to imply any limitation on any protections afforded to employees and applicants for employment by any other provision of law.

(Sec. 202) Makes this Act effective 30 days after its enactment, except for provisions relating to TSA employees or applicants for employment, which shall be effective on the enactment date of this Act.

## Actions Timeline

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- **Nov 27, 2012:** Signed by President.
- **Nov 27, 2012:** Became Public Law No: 112-199.
- **Nov 16, 2012:** Presented to President.
- **Nov 14, 2012:** Message on Senate action sent to the House.
- **Nov 13, 2012:** Message on House action received in Senate and at desk: House amendment to Senate bill.
- **Nov 13, 2012:** Resolving differences -- Senate actions: Senate agreed to House amendment to the bill (S.743) by Unanimous Consent.(consideration: CR S6761; text as Senate agreed to House amendment: CR S6761)
- **Nov 13, 2012:** Senate agreed to House amendment to the bill (S.743) by Unanimous Consent. (consideration: CR S6761; text as Senate agreed to House amendment: CR S6761)
- **Sep 28, 2012:** Mr. Lewis (CA) asked unanimous consent to discharge from committee and consider.
- **Sep 28, 2012:** RESERVATION OF OBJECTION - Mr. Van Hollen reserved the right to object to the unanimous consent request. Subsequently, the reservation was withdrawn.
- **Sep 28, 2012:** Committee on Oversight and Government discharged.
- **Sep 28, 2012:** Committee on Intelligence (Permanent) discharged.
- **Sep 28, 2012:** Committee on Homeland Security discharged.
- **Sep 28, 2012:** Considered by unanimous consent. (consideration: CR H6286-6296; text as received in House: CR H6286-6293)
- **Sep 28, 2012:** Passed/agreed to in House: On passage Passed without objection.
- **Sep 28, 2012:** On passage Passed without objection.
- **Sep 28, 2012:** Motion to reconsider laid on the table Agreed to without objection.
- **Jun 14, 2012:** Referred to the Subcommittee on Oversight, Investigations, and Management.
- **Jun 14, 2012:** Referred to the Subcommittee on Counterterrorism and Intelligence.
- **May 9, 2012:** Message on Senate action sent to the House.
- **May 9, 2012:** Received in the House.
- **May 9, 2012:** Referred to the Committee on Oversight and Government Reform, and in addition to the Committees on Intelligence (Permanent Select), and Homeland Security, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.
- **May 8, 2012:** Passed/agreed to in Senate: Passed Senate with amendments by Unanimous Consent.(consideration: CR S2978-2985; text as passed Senate: CR S2978-2985)
- **May 8, 2012:** Passed Senate with amendments by Unanimous Consent. (consideration: CR S2978-2985; text as passed Senate: CR S2978-2985)
- **Apr 19, 2012:** Committee on Homeland Security and Governmental Affairs. Reported by Senator Lieberman with amendments. With written report No. 112-155.
- **Apr 19, 2012:** Placed on Senate Legislative Calendar under General Orders. Calendar No. 358.
- **Oct 19, 2011:** Committee on Homeland Security and Governmental Affairs. Ordered to be reported with an amendment favorably.
- **May 9, 2011:** Committee on Homeland Security and Governmental Affairs referred to Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia.
- **Apr 6, 2011:** Introduced in Senate
- **Apr 6, 2011:** Sponsor introductory remarks on measure. (CR S2194)
- **Apr 6, 2011:** Read twice and referred to the Committee on Homeland Security and Governmental Affairs. (text of measure as introduced: CR S2194-2201)