

111TH CONGRESS }
1st Session }

SENATE

{ REPORT
111-101 }

WHISTLEBLOWER PROTECTION
ENHANCEMENT ACT OF 2009

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 372

TO AMEND CHAPTER 23 OF TITLE 5, UNITED STATES CODE, TO CLARIFY THE DISCLOSURES OF INFORMATION PROTECTED FROM PROHIBITED PERSONNEL PRACTICES, REQUIRE A STATEMENT IN NONDISCLOSURE POLICIES, FORMS, AND AGREEMENTS THAT SUCH POLICIES, FORMS, AND AGREEMENTS CONFORM WITH CERTAIN DISCLOSURE PROTECTIONS, PROVIDE CERTAIN AUTHORITY FOR THE SPECIAL COUNSEL, AND FOR OTHER PURPOSES



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telligence Community Whistleblower Protection Board within 60 days. The ICWPB's review of the record would be *de novo*, and its determination would be based on the entire record. The appeal would be conducted under the rules of procedure issued by the ICWPB, described in Section 121(c)(1). The ICWPB could not admit additional evidence, but it would have authority to remand to the agency for further fact-finding if necessary or if the agency improperly denied the employee or applicant the ability to present evidence. Unless the employee consents, the Board would be required to issue a decision within 180 days. The Board shall order the agency to take corrective action if it determines that a prohibited personnel practice has occurred. Corrective action would include the employee's reasonable attorney's fees and costs, and might include back pay and related benefits, travel expenses, and compensatory damages no greater than \$300,000. The Board could recommend, but not order, the reinstatement or hiring of a former employee or applicant. The Agency head would be required to take the actions ordered by the Board unless the President determines that doing so would endanger national security.

Section 121(c)(5) of the National Security Act, as amended, allows for judicial review of a final order. For a five-year trial period, an employee would be permitted to file a petition for review in the Court of Appeals for the Federal Circuit or the court of appeals of a circuit in which the reprisal is alleged in the order to have occurred. After that period, appeals would be filed in the Court of Appeals for the Federal Circuit. Any portions of the record that were submitted *ex parte* during agency proceedings would be submitted *ex parte* to the ICWPB and any reviewing court. Section 121(d) limits judicial review to the express provisions of this section. This section also requires the ICWPB to notify Congress when it issues final orders.

Section 121(d) of the National Security Act, as amended, limits judicial review to the express provisions of this section.

Section 121(e) of the National Security Act, as amended, provides that the legislation affords no protections for certain terminations of employment: (1) Those under 10 U.S.C. § 1609; and (2) those personally and summarily carried out by the Director of National Intelligence, the Director of the Central Intelligence Agency, or an agency head under 5 U.S.C. § 7532, if the Director or agency head determines the termination to be in the interest of the United States, determines that the procedures prescribed in other provisions of law that authorize the termination of the employee's employment cannot be invoked in a manner consistent with national security, and notifies Congress.

Section 121(f) of the National Security Act, as amended, requires employees challenging both a prohibited personnel practice under this section and an adverse security clearance determination to bring both claims under the procedures set forth for security clearances. The total amount of compensatory damages for such claims may not exceed \$300,000.

*** *Section 201(b)* strikes 5 U.S.C. § 2303.

Section 201(c) makes technical and conforming amendments.

✱ ✱ **SEC. 2303. PROHIBITED PERSONNEL PRACTICES IN THE FEDERAL BUREAU OF INVESTIGATION.**

[(a) Any employee of the Federal Bureau of Investigation who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to any employee of the Bureau as a reprisal for a disclosure of information by the employee to the Attorney General (or an employee designated by the Attorney General for such purpose) which the employee or applicant reasonably believes evidences—

[(1) a violation of any law, rule, or regulation, or

[(2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

For the purpose of this subsection, “personnel action” means any action described in clauses (i) through (x) of section 2302(a)(2)(A) of this title with respect to an employee in, or applicant for, a position in the Bureau (other than a position of a confidential, policy-determining, policymaking, or policy-advocating character).

[(b) The Attorney General shall prescribe regulations to ensure that such a personnel action shall not be taken against an employee of the Bureau as a reprisal for any disclosure of information described in subsection (a) of this section.

[(c) The President shall provide for the enforcement of this section in a manner consistent with applicable provisions of sections 1214 and 1221 of this title.]

SEC. 2304. PROHIBITED PERSONNEL PRACTICES AFFECTING THE TRANSPORTATION SECURITY ADMINISTRATION.

(a) *IN GENERAL.*—Notwithstanding any other provisions of law, any individual holding or applying for a position within the Transportation Security Administration shall be covered by—

(1) the provisions of section 2302(b)(1), (8), and (9);

(2) any provision of law implementing section 2302(b) (1), (8), or (9) by providing any right or remedy available to an employee or applicant for employment in the civil service; and

(3) any rule or regulation prescribed under any provision of law referred to in paragraph (1) or (2).

(b) *RULE OF CONSTRUCTION.*—Nothing in this section shall be construed to affect any rights, apart from those described in subsection (a), to which an individual described in subsection (a) might otherwise be entitled under law.

SEC. [2304] 2305. RESPONSIBILITIES OF THE GOVERNMENT ACCOUNTABILITY OFFICE.

SEC. [2305] 2306. COORDINATION WITH CERTAIN OTHER PROVISIONS OF LAW.

Subpart F—Labor Management and Employee Relations

CHAPTER 77—APPEALS

SEC. 7703. JUDICIAL REVIEW OF DECISIONS OF THE MERIT SYSTEMS PROTECTION BOARD.

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Sys-