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What's in the Senate markup bill (S. 372)?

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This is by no means intended to be an exhaustive list of every provision in the proposed Senate bill. Rather this provides a summary and analysis of some of the key provisions of the newly revised Senate bill.

Part 1: Changes to whistleblower protections for Title 5 civil servants.

1. Exception to protection for reporting "any" violations of law. [Section 101]

It says reporting "any" violations of law; however, the bill creates an exception or loophole to this protection by stating that "any minor or inadvertent violations" that are committed by "conscientious" violators carrying out their duties are not protected.

What does this mean? There is no existing legal standard to assist the U.S. Merit Systems Protection Board (MSPB) or the courts figure out the boundaries of this loophole. This will result in endless litigation arguing what is a "minor or inadvertent violation" or a "conscientious" violator? There is simply no such limitation that exists in other whistleblower laws. Does a whistleblower need to prove that a violation was actually committed to be protected under this standard? Would the whistleblower disclosure have to result in a civil or criminal penalty in order to be considered a violation of law? Numerous whistleblower cases that have merit and disclose violations of import will be tossed out of court on this exception.

This will also discourage the reporting of violations that may lead to the discovery of other violations and discourage the reporting of violations of law generally. It is worth remembering that there is an Executive Order requiring employees to report "any indications" of misconduct or violations of law. However, despite being told to report any violations employees will not be protected for good faith reporting.

The litigation burdens on employees and the confusion that will result from this provision will "chill" and discourage employees from making good faith whistleblower disclosures that should be otherwise protected.

2. Access to jury trials. [Section 117]

The Senate bill provides for de novo jury trials in U.S. district court for Title 5 employees in limited circumstances. This is somewhat of a breakthrough for the Senate bill which previously was silent on the matter of extending the right to court access and jury trials.

However, there are several limitations on the right to jury trials and this differs significantly from the House bill. The procedural hoops and limitations on jury trials in the Senate bill are as follows:

a. 5-year sunset provision. If this passes it means this district court jury trial provision is experimental and guarantees that Congress will re-visit this entire issue in 5 years.

b. Limiting jury trials only for major or significant personnel actions, such as removals from federal service, suspensions of more than 14 days or demotions/reductions in grade. This means that many of the most important cases brought by whistleblowers will never see the inside of a courtroom in the district court. Many of the more visible and high profile whistleblowers have not been fired or suspended but have suffered years of lesser forms of retaliation, like being given demeaning work or no work or severe harassment. Many high stakes whistleblower cases will never be eligible for a jury trial because the agency where the agency decides to suspend the employee for 13 days, or instead of firing subjects the employee to transfers, repeated acts of harassment or lesser discipline, or even ordering psychiatric testing. In these so-called lesser discipline cases the employee will only be able to take his or her case to the MSPB and will be barred from a district court jury trial.

c. Changing the burdens of proof only for jury trials for the agency employer to prove its case from the clear and convincing evidence to preponderance of evidence standard. This change in the agency's burden of proof will make it more difficult for some cases to proceed to a jury or prevail before a jury than currently exists under the standard of proof in whistleblower cases that are brought before the MSPB.

d. Finally, assuming an employee meets the other limitations, before going to district court an employee must get approval from the MSPB first, under a rather complex screening process that will be unique only to federal employee whistleblower cases. Shortly after filing a case with MSPB the employee could ask the MSPB to certify the case to district court which should be granted if the employee's whistleblower complaint would survive a motion to dismiss for failure to state a claim under Federal Rules of Civil Procedure, Rule 12(b)(6) or Rule 12(d). Alternatively, an employee can go to district court if the MSPB fails to decide the case within 270 days (once again, assuming the case is within the eligible category of cases for district court review).

e. **WARNING:** The Senate bill allows agencies to turn the motion to certify process into the more difficult summary judgment standard incorporated in Rule 12(d) in any case where the agency presents matters outside the pleadings in opposing the motion to certify. This provision will, in practice, result in a major litigation and delay in

determining whether an employee's whistleblower complaint qualifies for certification to district court, and could also become an insurmountable barrier to reaching the merits of any whistleblower case.

f. If the MSPB denies a request for certification of the case to district court an employee cannot immediately appeal that determination, but rather must proceed with his or her case before the MSPB, obtain a final order and then appeal after the MSPB rules on the merits of the case. Additionally, the appellate review procedure proposed in the bill is confusing and the standard of review from a MSPB denial of certification to district court is the arbitrary and capricious or abuse of discretion standard. This is the most deferential standard and not the ordinary standard of review that an appellate court would apply when reviewing a ruling on a motion to dismiss. In practice it will likely be extremely difficult and time consuming (and not to mention expensive) for an employee to seek certification or obtain a reversal of the MSPB if it denies a motion to certify a case to district court.

3. Remedies. [Section 107]

There are remedies available under the Senate bill that would permit an employee to seek an award of compensatory damages up to a limit of $300,000, in addition to back pay and other actual damages. No cap exists under the House bill. Under current law, compensatory damages are not available.

4. Appellate judicial review. [Section 108]

This is a very good reform. Currently, only one federal court of appeals (the Federal Circuit) has a monopoly over appeals from the MSPB in whistleblower cases. Providing all-circuits review for employees to permit them to take an appeal to the circuit court of appeals where they reside should enhance the quality of adjudications of whistleblower cases as exists under virtually every other federal employment law. However, there is a 5-year sunset provision for all-circuits review. In addition, there is one all-circuits review provision that permits the Office of Personnel Management to intervene in whistleblower cases before the MSPB and take control of the appeal, thus voiding all-circuit review rights for the whistleblower.

5. Protecting whistleblowers at TSA [Section 109], and protecting scientists and other employees from censorship [Section 110].

These two provisions are also very good and long overdue reforms. Screeners who work for the Transportation Security Administration (TSA) currently lack adequate protections from retaliation for making whistleblower disclosures. Considering that TSA screeners are on the front line of protecting citizens at our nation's airports, this reform is needed. Likewise, federal government scientists lack clear and specific protections where disclosures of censorship related to research, analysis, or technical information are made.

6. MSPB summary judgment procedures. [Section 118]

The bill adds for the first time a summary judgment procedure in whistleblower cases before the Board for an experimental 5-year period. Currently, under civil service law and MSPB procedures every employee is entitled to a Board hearing once jurisdiction of the Board is established. However, now federal employees will be faced with increased litigation burdens and dismissals by summary judgment. This will necessarily result in delays in processing a whistleblower case because the agencies will file motions for summary judgment in nearly every case. The MSPB administrative judge will have to read the briefs and excerpts of record and then issue a written decision either granting or denying the motion for summary judgment. Many cases will be dismissed by the MSPB without ever holding a hearing. The best way for a party to defeat a motion for summary judgment is to obtain evidence through extensive discovery procedures; however, the MSPB lacks all of the advanced discovery procedures that are available in federal courts.

Part 2: Revised procedures for FBI employees and Intelligence Agency employees.

The part of the bill addressing whistleblower rights for FBI and Intelligence Agency employees contains the largest contrasts with the House bill.

The House bill affords de novo district court access for FBI and intelligence agency employees, whereas the Senate bill does not.

The House bill provides for Inspector General investigations of whistleblower retaliation claims, whereas the Senate bill now proposes a new adjudicatory system within the agency that is accused of committing misconduct and carrying out retaliation against the employee who blew the whistle.

The Senate bill most likely would result in Inspectors General foregoing (or losing) jurisdiction to independently investigate whistleblower retaliation cases within intelligence agencies, as that authority is being explicitly delegated to the agency itself.

The Senate bill now proposes a new Intelligence Community Whistleblower Board that will hear appeals in whistleblower cases. However, the proposal does not permit adjudications before the new Board, rather the FBI and intelligence agencies themselves will conduct the hearings and fact-finding. This is problematic because the personnel, structure and procedures for adjudicating whistleblower cases will be controlled by the very agencies that are the focus of the whistleblower allegations.

The new Intelligence Community Whistleblower Board would not be subject to the minimum due process procedures mandated under the Administrative Procedure Act. The agencies would not be required to conduct on-the-record hearings and no administrative judges would be required to hear a case. The Intelligence Community Whistleblower Board would not have the authority to hold hearings, and is only given the authority to review the findings of the agency. If the Board believes that additional evidence is needed to be considered, it can only

remand the proceeding back to the agency (or another intelligence agency). The Board is also given the authority to determine a whistleblower's credibility solely on the basis of the record created by the employing agency. In other words, if the FBI makes credibility findings against an FBI employee in a whistleblower case (without even conducting a hearing and without using a judge or jury to make this finding), the Board can adopt the credibility determination in its final order.

During the internal agency review, the agency could submit "ex parte" information to the agency's decision maker if the "agency determines that the interests of national security so warrant." Thus, the agency can rely on secret evidence to rule against an employee and/or make credibility findings against an employee. The Board would not have the authority to order an agency to produce this secret evidence to an employee, and could not make the information available to the employee on its own.

The Board's ability to award compensatory damages is capped at $300,000.00, and is not tied to any cost-of-living index.

None of the protections currently existing in the Whistleblower Protection Act that prohibit the Office of Special Counsel from releasing negative information about a whistleblower to the public or an agency exist. The report created by the agency – which can make findings on a whistleblower's credibility and the merits of his case – can be widely distributed by the agency without any specific limitations. Indeed, the Board is required to inform four separate Congressional committees of the results of its review. There is no judicial review concerning what the Board publishes to these four committees.

Unlike the current requirements governing reports issued by the Office of Special Counsel, there is no provision that permits the whistleblower to review a draft of the agency findings, and provide written comment on that draft before it is finalized. These protections currently exist for FBI employees. They would be repealed under the Senate bill. In other words, the current right of FBI whistleblowers to review the draft findings of the Department of Justice Office of Inspector General would be repealed, as would the specific statutory limitations on the use of that report. Significantly, under the old Civil Service Reform Act, there were no limitations placed on the release of reports hostile to whistleblowers by the Office of Special Counsel. This was viewed as a major defect in the law, and was corrected for Title V employees under the Whistleblower Protection Act of 1989.

There needs to be a third party agency adjudicatory system that is independent of the agency that employs the whistleblower. This administrative system should follow the normal rules of administrative law, have administrative law judges and provide for adjudicatory rules of practice and procedure that comport with established laws on administrative procedure. Employees need to be able subpoena and compel the attendance of witnesses and evidence. Also, the Board can make recommendations, but lacks authority to order relief and to require agencies to reinstate employees or, alternatively, require reemployment of the employee in a comparable position.

In addition, Inspector Generals play an important role in conducting investigations and in developing facts in whistleblower cases. However, the new bill would bypass the Inspector Generals in the investigation and processing of whistleblower complaints.

In regards to FBI whistleblower procedures, the newly proposed system would reduce the rights of FBI employees by repealing the current law governing FBI employees, removing the Inspector General investigation and transferring the functions of adjudications from the U.S. Department of Justice to the FBI. The Senate bill contains a special retroactivity provision that would repeal the current statutory protections for FBI employees effective the date the Intelligence Board publishes its rules. This could result in the dismissal of all pending cases whistleblower cases currently being adjudicated within the Department of Justice, regardless of the merits of those cases or the amount of money spent by the whistleblower pursuing those claims over the years.

The Senate bill prevents the employee from legal protection for disclosing to agency officials information that is classified or prohibited by law. However, employees routinely disclose that type of information to agency officials so it is unclear how an employee at the FBI or the intelligence agencies could blow the whistle on a violation of law, gross mismanagement, gross waste, abuse of authority, etc., unless there was no classified or law enforcement information at issue. The scope of what can be reported as a protected disclosure at these agencies needs to be clarified.

The new Senate bill provides for some judicial appellate review of administrative determinations in FBI and intelligence agency whistleblower cases, for the first time. However, review is limited only to the "final order of the Board." When permitted, judicial review is limited to the factual record created by the agency and is not de novo. The court does not have the authority to authorize the whistleblower to obtain access to information submitted to the Board ex parte during the proceedings before the agency. In other words, the court cannot order the disclosure of the secret evidence used against the employee to the employee.

The Senate bill creates a sixty-day statute of limitations on filing claims. The current Whistleblower Protection Act contains no such statute of limitations. No such provision exists in the House bill.

The Senate bill excludes from coverage certain terminations. In other words, under the Senate bill the Director or agency head of each covered intelligence agency (including the FBI, CIA, DNI, NSA etc.) has the authority to "summarily terminate" any whistleblower – and this decision is not subject to any of the provisions contained in the Senate bill's intelligence whistleblower section, internal agency review, review by the Board or any judicial review.

Final note: the current Senate bill as drafted reduces certain rights that currently exist in law. While we would be highly reluctant to recommend that any employee file a claim for relief under these procedures as currently drafted, as they are costly, cumbersome and can result in findings by an employee's own agency which could devastate an employee's reputation or career, there likely will be opportunities and a commitment to fix these problems to achieve a final bill that addresses many of these concerns. At the end of the process, the whistleblower

community and attorneys for whistleblowers will have to review the final procedures that emerge from Congress to determine whether there are costs and risks that outweigh the benefit set forth in any final procedure. By creating a purely administrative system, without any access to district court even in cases that do not involve classified information or a threat to national security, the Senate bill attempts to replicate for FBI and intelligence agency employees the current MSPB system for federal employees that is indisputably flawed. Providing for district court/jury trial access for FBI and intelligence agency employees is needed to make any proposed administrative system functional and effective to remedy whistleblower retaliation and to encourage employees to report wrongdoing.

Part 3: Security clearance reviews.

The Senate bill provides for review by the proposed Intelligence Community Whistleblower Board of revocations of security clearances for all federal employees who make protected whistleblower disclosures. These security clearance claims would be processed under similar procedures as the Board would process whistleblower retaliation claims, and these provisions contain most of the problems set forth in Part 2.

In addition, although the bill provides authority of the Board to order relief, the President has the authority to deny part or all of the relief ordered by the Board. There would be no judicial review or appellate review of the Board's determination reviewing security clearance revocations and denials based on an employee making protected whistleblower disclosures.