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WHERE WE STAND ON THE WPEA

After years of advocacy, the National Whistleblowers Center (NWC) has decided to endorse the passage of the Whistleblower Protection Enhancement Act (WPEA) (S.743), in its current form. There is still much work to do to bring federal employee whistleblower protections up-to-date with other whistleblower laws, and the WPEA falls short of prior goals to include court access for all federal employees. However, the WPEA adds important rights for federal employee whistleblowers and it no longer takes away existing protections in order to give limited new protections.

Recognizing that our work is not done, the NWC is committed to working with the entire whistleblower community to continue to improve protections for federal employee whistleblowers to enact into law the major reforms that are left out of the WPEA.

Background

On November 12, 2003, the National Whistleblowers Center (NWC) testified before the Senate Committee on Government Affairs in support of amending the Whistleblower Protection Act to fix a number of grave defects in that law, which were undermining federal employee whistleblower rights.

Between that date and August, 2009, the NWC worked in coalition with a broad range of organizations, including American Civil Liberties Union, Public Citizen, Government Accountability Project, Project on Government Oversight, No FEAR Coalition, Federal Ethics Center and Union of Concerned Scientists, to advocate for strong whistleblower protections.

On February 1, 2007, whistleblower organizations met together as the Make it Safe Coalition (MISC) and agreed that we would support only bills that were improvements on the current law and contained no backward steps for anyone. Those goals were almost met on January 28, 2009 when the House of Representatives voted for strong whistleblower rights, including full federal court access for *all* federal employees.

However, over the summer of 2009 things started to go wrong. In negotiations the NWC attended with representatives from the White House and Congress, it became clear that some in the Senate did not support full protection for federal employee whistleblowers. Additionally, the White House retreated from earlier pledges to support a strong federal employee whistleblower law, and instead explicitly stated in private meetings that they would oppose full court access and due process protections for national security employees.

Things took a further turn for the worse in August of 2009 when the Senate Committee on Homeland Security and Government Affairs "marked-up" and approved the Whistleblower Protection Enhancement Act. At the committee meeting the Senate sponsors stated that their bill was the "best" whistleblowers could get, and the community needed to get behind it.

In response to the Senate Committee mark-up, the MISC Executive Committee endorsed the bill. However, the NWC saw a number of defects in the legislation that made it impossible for us to support passage of that version of the Senate bill. Instead, we became the "skunk at the picnic" and were placed in a very difficult position of having to publicly oppose that version of the bill. Some in the whistleblower community, including the No Fear Coalition, the Federal Ethics Center and the National Security Whistleblowers Coalition, and numerous individual whistleblowers, such as Dr. Frederic Whitehurst, Bunnatine ñBunnyò Greenhouse and Jane Turner, supported our position. Our opposition to the bill was fully explained in twelve detailed blog postings.

To recap, in 2009 and 2010, we had a number of major problems with the bill. On the one hand the bill did not deliver on a number of critical promises, including all circuit review and full court access. In regard to all circuit review, the bill permitted the Office of Personnel Management to require that the Federal Circuit hear any case it chose. Court access was so weakened that our analysis demonstrated that well over 95% of all whistleblower cases could never be heard in court.

But this is not what caused us the most concern. The bill contained a number of provisions that actually *reduced* the current rights of federal employees. These reductions were strategically placed, at the insistence of those who opposed whistleblower rights, and would have materially harmed numerous employees. After careful analysis we concluded that the poison pills would, in the long run, cause more harm to whistleblowers then would be achieved by the reforms offered in the legislation.

The most notable "poison pill" reductions in federal employee rights were:

- Administrative Judges of the Merit Systems Protection Board (MSPB) were granted Summary judgment authority to dismiss employee cases;

- The definition of a protected disclosure was gutted, permitting federal managers to fire employees who disclosed violations of law, if those managers believed the underlying violations were small or inadvertent.

- The current FBI whistleblower protections were repealed, and replaced by a restrictive national security procedures that significantly enhanced the ability of agencies to have whistleblower cases dismissed under the "states secrets" privilege and permitted agencies to use facts obtained in whistleblower cases to attack the whistleblower's security clearances.

Thereafter, the NWC worked as hard as we could with our friendly contacts in Congress to fix the WPEA so that the poison pills were eliminated. We also called public attention to these problems, and caused thousands upon thousands of letters to be sent to Members of Congress expressing concern over the problems with the bill.

By the end of the 2010 Congressional term, we were successful in convincing Congress that the repeal of FBI whistleblower rights had to be removed from the bill, and we were partially successful in blocking the worst provisions in the national security sections. However, the definition of protected disclosure was still gutted, and the summary judgment provision remained.

We sent a detailed letter to the responsible Congressional staff members setting forth why these two provisions needed to be cut from the bill.

Like in August of 2009, we were again told by Congressional staff members and others that the slightly improved WPEA was the best deal the whistleblower community could get, and that the bill was a "take it or leave it" proposition -- and could not be changed. We were again forced to "leave it" based on the two poison pills that remained. The Senate passed the bill, but the House voted to approve it with one major change. The House cut out the provisions protecting national security whistleblowers. Upon returning the bill to the Senate with all national security protections deleted, the bill died at the end of the 2010 Congress.

In 2011, the Senate Committee on Homeland Security and Governmental Affairs again reintroduced the WPEA. This time they removed one of the two poison pills. They agreed with our position that the definition of protected disclosure would not be gutted, but were again adamant that the summary judgment provision would remain in the bill.

We met with the key Congressional staff members in early 2011 and praised their decision to adopt the NWC position on the definition of a protected disclosure. However, we informed them that we still could not support a bill with summary judgment. The NWC decided to monitor the progress of the bill during the 2011-2012 legislative session, with the expectation that Congress and the White House would reconsider their position on summary judgment. We made it clear that the failure to change their position on summary judgment could and would result in further opposition from some within the whistleblower community. Within the MISC, the NWC agreed to work for a strong bill, but withheld our endorsement of the legislation pending a final decision on summary judgment. Other whistleblower groups, civil rights organizations, and individual whistleblowers supported the NWC position on opposing summary judgment. The No FEAR Coalition publicly stated that they would urge a presidential veto of any bill that empowered the MSPB to summarily dismiss whistleblower claims. The No FEAR Coalition, in conjunction with the NWC and occupy groups, organized demonstrations to call attention to the summary judgment provisions in the WPEA.

The September 2012 Compromise

On September 20, 2012, the House and Senate released their final compromise version of the WPEA. After over three years of struggle on the issue of summary judgment, the House and Senate leadership finally agreed to drop this provision. The final "poison pill" contained in the 2009 bill was eliminated.

Based on this concession the National Whistleblower Center now ***supports passage of the WPEA*** and will work with other public interest groups, whistleblowers and our supporters in Congress to ensure that the bill is passed. We will also continue to monitor the legislative activity to make sure that additional poison pills are not inserted onto the law. If any new "poison pill" is inserted into this bill, we will strongly oppose it and use all of our resources to ensure that the bill is defeated.

Why We Now Support the WPEA

We recognized from the beginning of this prolonged battle over the WPEA that we would not achieve all of our legislative goals. We are extremely disappointed that some highly needed reforms are not included in the WPEA, including real all-circuit review, structural reform of the Office of Special Counsel (OSC)/MSPB processes, retroactivity, court access and protections for national security whistleblowers. The bill is weak and clearly does not fix many of the problems faced every day by federal employees.

However, the current WPEA has become an albatross around the neck of federal employee reform. The bill, as cobbled together by the House-Senate-White House drafters in the summer of 2009 was so defective that it caused the reform efforts to stall, it divided our community and it blocked basic reforms for which there was a broad consensus.

By supporting the current version of the WPEA we can enact immediate reform that will help some whistleblowers and will fix some of the most outrageous defects, including:

- Fixes the definition of protected disclosure. This was identified as a *key* reform by the NWC in its 2004 Senate testimony.

- Permits the payment of compensatory damages. This was also identified as a *key* reform by the NWC in its 2004 Senate testimony.

- Provides some modest structural reform within the OSC that will better enable that agency to file charges against federal managers who retaliate, and file *amicus* briefs in court.

Because the bill achieves these goals, among others, it should be supported. However, it should only be supported if the public interest groups that stand behind the revised WPEA also agree to commit themselves to further legislative advocacy that will result in placing federal employees on par with their brothers and sisters who work in the private sector.

What Needs to be Done

We hope and expect that every whistleblower and whistleblower advocacy organization that participates in the MISC, including every member of the MISC Executive Committee, will publicly recognize that the current WPEA falls short of our communityôs legislative goal of strong whistleblower reform, and that further legislative action is needed to properly protect federal employee rights. Furthermore, we hope and expect that all of these organizations, and the whistleblowers who have rallied around this cause, will continue to fully dedicate themselves, in the next Congressional term, to fight for effective rights for federal employees.

We urge the MISC, and all whistleblower advocacy groups, to endorse the following legislative program for the next Congress:

1. Structural reform of the MSPB and OSC ï So, these organizations can properly investigate and adjudicate whistleblower cases consistent with the public interest.

2. All Circuit review, without limitation ï All other federal whistleblower laws have all-circuit review, and federal employees should not be considered second-class citizens.

3. Full court access ï All modern whistleblower bills enacted over the past ten years have these provisions.

4. Retroactive Application ï The thousands of federal employees harmed by the defects in the current system should not be left without a remedy.

5. Full protection for national security whistleblowers ï It is ironic and tragic that the class of federal employees most in need of protection is being completely excluded from the current WPEA. This cannot be tolerated.

6. Close all of the loopholes in federal employee protection ï Specifically, providing for protection for employees in the Public Health Service and National Oceanic and Atmospheric Administration (NOAA).

7. Protect whistleblowers from retaliatory security clearance/security review procedures.

8. Ensure that no future whistleblower rights legislation *ever* be permitted to contain any "poison pill" that would take away current rights. We cannot be placed into a position to be bargaining against ourselves on such an important reform campaign.

We look forward to working with the entire whistleblower community to formulate a new strategy for the next Congress and achieve these goals. Federal employees need real whistleblower protections consistent with those now in-place for most corporate workers. These reforms are clearly winnable and they are sorely needed to protect every taxpayer in

the United States who pays the tab for government fraud, waste and abuse. Over strong opposition the Dodd-Frank Act contained new and strong protections for millions of corporate whistleblowers. With strong, principled and persistent advocacy similar strong reforms can be achieved for *every* federal worker.

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