

S 372 IS

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**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.

**IN THE SENATE OF THE UNITED STATES****February 3, 2009**

Mr. AKAKA (for himself, Ms. COLLINS, Mr. GRASSLEY, Mr. LEVIN, Mr. LIEBERMAN, Mr. VOINOVICH, Mr. LEAHY, Mr. KENNEDY, Mr. CARPER, Mr. PRYOR, and Ms. MIKULSKI) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

**A BILL**

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.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. PROTECTION OF CERTAIN DISCLOSURES OF INFORMATION BY FEDERAL EMPLOYEES.**

(a) Short Title- This Act may be cited as the `Whistleblower Protection Enhancement Act of 2009'.

(b) Clarification of Disclosures Covered-

(1) IN GENERAL- Section 2302(b)(8) of title 5, United States Code, is amended--

(A) in subparagraph (A)--

(i) by striking `which the employee or applicant reasonably believes evidences' and inserting `, without restriction to time, place, form, motive, context, forum, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties, that the employee or applicant reasonably believes is evidence of';

(ii) in clause (i), by striking `a violation' and inserting `any violation'; and

(iii) by striking `or' at the end;

(B) in subparagraph (B)--

(i) by striking `which the employee or applicant reasonably believes evidences' and inserting `, without restriction to time, place, form, motive, context, forum, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties, of information that the employee or applicant reasonably believes is evidence of';

(ii) in clause (i), by striking `a violation' and inserting `any violation (other than a violation of this section)'; and

(iii) in clause (ii), by adding `or' at the end; and

(C) by adding at the end the following:

`(C) any disclosure that--

FEEDBACK

` (i) is made by an employee or applicant of information required by law or Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs that the employee or applicant reasonably believes is direct and specific evidence of--

` (I) any violation of any law, rule, or regulation;

` (II) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; or

` (III) a false statement to Congress on an issue of material fact; and

` (ii) is made to--

` (I) a member of a committee of Congress having a primary responsibility for oversight of a department, agency, or element of the Federal Government to which the disclosed information relates and who is authorized to receive information of the type disclosed;

` (II) any other Member of Congress who is authorized to receive information of the type disclosed; or

` (III) an employee of Congress who has the appropriate security clearance and is authorized to receive information of the type disclosed.'

(2) PROHIBITED PERSONNEL PRACTICES UNDER SECTION 2302(b)(9)-

(A) TECHNICAL AND CONFORMING AMENDMENTS- Title 5, United States Code, is amended in subsections (a)(3), (b)(4)(A), and (b)(4)(B)(i) of section 1214, in subsections (a), (e)(1) and (i) of section 1221, and in subsection (a)(2)(C)(i) of 2302 by inserting `or 2302(b)(9) (B) through (D)' after `section 2302(b)(8)' or `(b)(8)' each place it appears.

(B) OTHER REFERENCES- Title 5, United States Code, is amended in subsection (b)(4)(B)(i) of section 1214 and in subsection (e)(1) of section 1221 by inserting `or protected activity' after `disclosure' each place it appears.

(c) Definitional Amendments-

(1) DISCLOSURES- Section 2302(a)(2) of title 5, United States Code, is amended--

(A) in subparagraph (B)(ii), by striking `and' at the end;

(B) in subparagraph (C)(iii), by striking the period at the end and inserting `; and'; and

(C) by adding at the end the following:

` (D) `disclosure' means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences--

` (i) any violation of any law, rule, or regulation; or

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

(2) CLEAR AND CONVINCING EVIDENCE- Sections 1214(b)(4)(B)(ii) and 1221(e)(2) of title 5, United States Code, are amended by adding at the end the following: `For purposes of the preceding sentence, `clear and convincing evidence' means evidence indicating that the matter to be proved is highly probable or reasonably certain.'

(d) Rebuttable Presumption- Section 2302(b) of title 5, United States Code, is amended by amending the matter following paragraph (12) to read as follows:

` This subsection shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress. For purposes of paragraph (8), any presumption relating to the performance of a duty by an employee who has authority to take, direct others to take, recommend, or approve any personnel action may be rebutted by substantial evidence. For purposes of paragraph (8), a determination as to whether an employee or applicant reasonably believes that they have disclosed information that

evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.'

(e) Personnel Actions and Prohibited Personnel Practices-

(1) PERSONNEL ACTION- Section 2302(a)(2)(A) of title 5, United States Code, is amended--

(A) in clause (x), by striking `and' after the semicolon; and

(B) by redesignating clause (xi) as clause (xiv) and inserting after clause (x) the following:

`(xi) the implementation or enforcement of any nondisclosure policy, form, or agreement;

`(xii) a suspension, revocation, or other determination relating to a security clearance or any other access determination by a covered agency;

`(xiii) an investigation, other than any ministerial or nondiscretionary fact finding activities necessary for the agency to perform its mission, of an employee or applicant for employment because of any activity protected under this section; and'

(2) PROHIBITED PERSONNEL PRACTICE- Section 2302(b) of title 5, United States Code, is amended--

(A) in paragraph (11), by striking `or' at the end;

(B) in paragraph (12), by striking the period and inserting a semicolon; and

(C) by inserting after paragraph (12) the following:

`(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: `These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code (governing disclosure to Congress by members of the military); section 2302(b)(8) of title 5, United States Code (governing disclosures of illegality, waste, fraud, abuse, or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosures that could compromise national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Control Act of 1950 (50 U.S.C. 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by such Executive order and such statutory provisions are incorporated into this agreement and are controlling'; or

`(14) conduct, or cause to be conducted, an investigation, other than any ministerial or nondiscretionary fact finding activities necessary for the agency to perform its mission, of an employee or applicant for employment because of any activity protected under this section.'

(f) Exclusion of Agencies by the President- Section 2302(a)(2)(C) of title 5, United States Code, is amended by striking clause (ii) and inserting the following:

`(ii)(I) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency; and

`(II) as determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, if the determination (as that determination relates to a personnel action) is made before that personnel action; or'.

(g) Disciplinary Action- Section 1215(a)(3) of title 5, United States Code, is amended to read as follows:

`(3)(A) A final order of the Board may impose--

`(i) disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, or reprimand;

`(ii) an assessment of a civil penalty not to exceed \$1,000; or

`(iii) any combination of disciplinary actions described under clause (i) and an assessment described under

clause (ii).

`(B) In any case in which the Board finds that an employee has committed a prohibited personnel practice under paragraph (8) or (9) of section 2302(b), the Board shall impose disciplinary action if the Board finds that the activity protected under paragraph (8) or (9) of section 2302(b) was a significant motivating factor, even if other factors also motivated the decision, for the employee's decision to take, fail to take, or threaten to take or fail to take a personnel action, unless that employee demonstrates, by preponderance of evidence, that the employee would have taken, failed to take, or threatened to take or fail to take the same personnel action, in the absence of such protected activity.'

(h) Remedies-

(1) ATTORNEY FEES- Section 1204(m)(1) of title 5, United States Code, is amended by striking `agency involved' and inserting `agency where the prevailing party is employed or has applied for employment'.

(2) DAMAGES- Sections 1214(g)(2) and 1221(g)(1)(A)(ii) of title 5, United States Code, are amended by striking all after `travel expenses,' and inserting `any other reasonable and foreseeable consequential damages, and compensatory damages (including attorney's fees, interest, reasonable expert witness fees, and costs).' each place it appears.

(i) Judicial Review-

(1) IN GENERAL- Section 7703(b)(1) of title 5, United States Code, is amended to read as follows:

`(b)(1)(A) Except as provided in subparagraph (B) and paragraph (2), a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

`(B) During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2009, a petition to review a final order or final decision of the Board in a case alleging a violation of paragraph (8) or (9) of section 2302(b) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction as provided under subsection (b)(2).'

(2) REVIEW OBTAINED BY OFFICE OF PERSONNEL MANAGEMENT- Section 7703(d) of title 5, United States Code, is amended to read as follows:

`(d)(1) Except as provided under paragraph (2), this paragraph shall apply to any review obtained by the Director of the Office of Personnel Management. The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

`(2) During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2009, this paragraph shall apply to any review relating to paragraph (8) or (9) of section 2302(b) obtained by the Director of the Office of Personnel Management. The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction as provided under subsection (b)(2) if the Director determines, in his discretion, that the Board erred in interpreting paragraph (8) or (9) of section 2302(b). If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the court of appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.'

(j) Merit System Protection Board Review of Security Clearances-

(1) IN GENERAL- Chapter 77 of title 5, United States Code, is amended by inserting after section 7702 the

following:

**Sec. 7702a. Actions relating to security clearances**

(a) In any appeal relating to the suspension, revocation, or other determination relating to a security clearance or access determination, the Merit Systems Protection Board or any reviewing court--

(1) shall determine whether paragraph (8) or (9) of section 2302(b) was violated;

(2) may not order the President or the designee of the President to restore a security clearance or otherwise reverse a determination of clearance status or reverse an access determination; and

(3) subject to paragraph (2), may issue declaratory relief and any other appropriate relief.

(b)(1) If, in any final judgment, the Board or court declares that any suspension, revocation, or other determination with regard to a security clearance or access determination was made in violation of paragraph (8) or (9) of section 2302(b), the affected agency shall conduct a review of that suspension, revocation, access determination, or other determination, giving great weight to the Board or court judgment.

(2) Not later than 30 days after any Board or court judgment declaring that a security clearance suspension, revocation, access determination, or other determination was made in violation of paragraph (8) or (9) of section 2302(b), the affected agency shall issue an unclassified report to the congressional committees of jurisdiction (with a classified annex if necessary), detailing the circumstances of the agency's security clearance suspension, revocation, other determination, or access determination. A report under this paragraph shall include any proposed agency action with regard to the security clearance or access determination.

(c) An allegation that a security clearance or access determination was revoked or suspended in retaliation for a protected disclosure shall receive expedited review by the Office of Special Counsel, the Merit Systems Protection Board, and any reviewing court.

(d) For purposes of this section, corrective action may not be ordered if the agency demonstrates by a preponderance of the evidence that it would have taken the same personnel action in the absence of such disclosure.'

(2) TECHNICAL AND CONFORMING AMENDMENT- The table of sections for chapter 77 of title 5, United States Code, is amended by inserting after the item relating to section 7702 the following:

7702a. Actions relating to security clearances.'

(k) Prohibited Personnel Practices Affecting the Transportation Security Administration-

(1) IN GENERAL- Chapter 23 of title 5, United States Code, is amended--

(A) by redesignating sections 2304 and 2305 as sections 2305 and 2306, respectively; and

(B) by inserting after section 2303 the following:

**Sec. 2304. Prohibited personnel practices affecting the Transportation Security Administration**

(a) In General- Notwithstanding any other provision 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.'

(2) TECHNICAL AND CONFORMING AMENDMENT- The table of sections for chapter 23 of title 5, United States Code, is amended by striking the items relating to sections 2304 and 2305, respectively, and by inserting the following:

Sec. 2304. Prohibited personnel practices affecting the Transportation Security Administration.

` Sec. 2305. Responsibility of the Government Accountability Office.

` Sec. 2306. Coordination with certain other provisions of law.'.

(3) EFFECTIVE DATE- The amendments made by this section shall take effect on the date of enactment of this section.

(l) Disclosure of Censorship Related to Research, Analysis, or Technical Information-

(1) DEFINITIONS- In this section--

(A) the term `applicant' means an applicant for a covered position;

(B) the term `censorship related to research, analysis, or technical information' means any effort to alter, misrepresent, or suppress research, analysis, or technical information;

(C) the term `covered position' has the meaning given under section 2302(a)(2)(B) of title 5, United States Code;

(D) the term `employee' means an employee in a covered position; and

(E) the term `disclosure' has the meaning given under section 2302(a)(2)(D) of title 5, United States Code.

(2) PROTECTED DISCLOSURE-

(A) IN GENERAL- Any disclosure of information by an employee or applicant for employment that the employee or applicant reasonably believes is evidence of censorship related to research, analysis, or technical information shall come within the protections of section 2302(b)(8)(A) of title 5, United States Code, if--

(i) the employee or applicant reasonably believes that the censorship related to research, analysis, or technical information is or will cause--

(I) any violation of law, rule, or regulation; or

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

(ii) the disclosure and information satisfy the conditions stated in the matter following clause (ii) of section 2302(b)(8)(A) of title 5, United States Code; and

(iii) shall come within the protections of section 2302(b)(8)(B) of title 5, United States Code, if--

(I) the conditions under clause (i) of this subparagraph are satisfied; and

(II) the disclosure is made to an individual referred to in the matter preceding clause (i) of section 2302(b)(8)(B) of title 5, United States Code, for the receipt of disclosures.

(B) APPLICATION- Paragraph (1) shall apply to any disclosure of information by an employee or applicant without restriction to time, place, form, motive, context, forum, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties.

(C) RULE OF CONSTRUCTION- Nothing in this section shall be construed to imply any limitation on the protections of employees and applicants afforded by any other provision of law, including protections with respect to any disclosure of information believed to be evidence of censorship related to research, analysis, or technical information.

(m) Clarification of Whistleblower Rights for Critical Infrastructure Information- Section 214(c) of the Homeland Security Act of 2002 (6 U.S.C. 133(c)) is amended by adding at the end the following: `For purposes of this section a permissible use of independently obtained information includes the disclosure of such information under section 2302(b)(8) of title 5, United States Code.'.

(n) Advising Employees of Rights- Section 2302(c) of title 5, United States Code, is amended by inserting `, including how to make a lawful disclosure of information that is specifically required by law or Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs to the Special Counsel, the Inspector General of an agency, Congress, or other agency employee designated to receive such disclosures' after `chapter 12 of this title'.

(o) Special Counsel Amicus Curiae Appearance- Section 1212 of title 5, United States Code, is amended by adding at the end the following:

`(h)(1) The Special Counsel is authorized to appear as amicus curiae in any action brought in a court of the United States related to any civil action brought in connection with section 2302(b) (8) or (9), or subchapter III of chapter 73, or as otherwise authorized by law. In any such action, the Special Counsel is authorized to present the views of the Special Counsel with respect to compliance with section 2302(b) (8) or (9) or subchapter III of chapter 73 and the impact court decisions would have on the enforcement of such provisions of law.

`(2) A court of the United States shall grant the application of the Special Counsel to appear in any such action for the purposes described in subsection (a).'

(p) Scope of Due Process-

(1) SPECIAL COUNSEL- Section 1214(b)(4)(B)(ii) of title 5, United States Code, is amended by inserting ` , after a finding that a protected disclosure was a contributing factor,' after `ordered if'.

(2) INDIVIDUAL ACTION- Section 1221(e)(2) of title 5, United States Code, is amended by inserting ` , after a finding that a protected disclosure was a contributing factor,' after `ordered if'.

(q) Nondisclosure Policies, Forms, and Agreements-

(1) IN GENERAL-

(A) REQUIREMENT- Each agreement in Standard Forms 312 and 4414 of the Government and any other nondisclosure policy, form, or agreement of the Government shall contain the following statement: `These restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code (governing disclosure to Congress by members of the military); section 2302(b)(8) of title 5, United States Code (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C. 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by such Executive order and such statutory provisions are incorporated into this agreement and are controlling.'

(B) ENFORCEABILITY- Any nondisclosure policy, form, or agreement described under subparagraph (A) that does not contain the statement required under subparagraph (A) may not be implemented or enforced to the extent such policy, form, or agreement is inconsistent with that statement.

(2) PERSONS OTHER THAN GOVERNMENT EMPLOYEES- Notwithstanding paragraph (1), a nondisclosure policy, form, or agreement that is to be executed by a person connected with the conduct of an intelligence or intelligence-related activity, other than an employee or officer of the United States Government, may contain provisions appropriate to the particular activity for which such document is to be used. Such form or agreement shall, at a minimum, require that the person will not disclose any classified information received in the course of such activity unless specifically authorized to do so by the United States Government. Such nondisclosure forms shall also make it clear that such forms do not bar disclosures to Congress or to an authorized official of an executive agency or the Department of Justice that are essential to reporting a substantial violation of law.

(r) Reporting Requirements-

(1) GOVERNMENT ACCOUNTABILITY OFFICE-

(A) IN GENERAL-

(i) REPORT- Not later than 40 months after the date of enactment of this Act, the Comptroller General shall submit a report to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives on the implementation of this Act.

(ii) CONTENTS- The report under this paragraph shall include--

(I) an analysis of any changes in the number of cases filed with the United States Merit Systems

Protection Board alleging violations of section 2302(b)(8) or (9) of title 5, United States Code, since the effective date of the Act;

(II) the outcome of the cases described under clause (i), including whether or not the United States Merit Systems Protection Board, the Federal Circuit Court of Appeals, or any other court determined the allegations to be frivolous or malicious; and

(III) any other matter as determined by the Comptroller General.

(B) STUDY ON REVOCATION OF SECURITY CLEARANCES-

(i) STUDY- The Comptroller General shall conduct a study of security clearance revocations of Federal employees at a select sample of executive branch agencies. The study shall consist of an examination of the number of security clearances revoked, the process employed by each agency in revoking a clearance, the pay and employment status of agency employees during the revocation process, how often such revocations result in termination of employment or reassignment, how often such revocations are based on an improper disclosure of information, and such other factors the Comptroller General deems appropriate.

(ii) REPORT- Not later than 18 months after the date of enactment of this Act, the Comptroller General shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives a report on the results of the study required under this subparagraph.

(2) MERIT SYSTEMS PROTECTION BOARD-

(A) IN GENERAL- Each report submitted annually by the Merit Systems Protection Board under section 1116 of title 31, United States Code, shall, with respect to the period covered by such report, include as an addendum the following:

(i) Information relating to the outcome of cases decided during the applicable year of the report in which violations of section 2302(b)(8) or (9) of title 5, United States Code, were alleged.

(ii) The number of such cases filed in the regional and field offices, the number of petitions for review filed in such cases, and the outcomes of such cases.

(B) FIRST REPORT- The first report described under subparagraph (A) submitted after the date of enactment of this Act shall include an addendum required under that subparagraph that covers the period beginning on January 1, 2009 through the end of the fiscal year 2009.

(s) Effective Date- This Act shall take effect 30 days after the date of enactment of this Act.

END