

Private Sector Whistleblower Protection Streamlining Act of 2007: Background, Major Elements, and Section-by-Section

BACKGROUND:

Employees who blow the whistle on illegal practices they discover in the course of their employment play a critical role in law enforcement. Without them, we would never discover major violations of laws passed by the Congress to protect health, the environment, food and drug safety, transportation safety, homeland security, securities requirements, and many law. But while we now have broad protections for Federal employees and government contractors who speak out, private sector employees generally have very limited protection. Speaking up can end their careers; and instead of earning the respect they deserve, they are often required to defend themselves against false allegations of misconduct or impropriety.

Over the last 40 years, the Congress has added limited whistleblower protections to a number of Federal laws in an attempt to encourage private sector employees to speak out when they observe violations. In 2002, whistleblower protections were added for whistleblowers who work for publicly traded companies and allege violations of various provisions of the Securities and Exchange Act (Sarbanes-Oxley Act); and just this year, whistleblower protections were added for various public transportation employees who report conduct that is reasonably believed to violate federal safety and security laws (Implementing the Recommendations of the 9/11 Commission Act of 2007). These statutes generally provide that when an employee suffers adverse employment consequences that may be a result of protected whistle-blowing, the Secretary of Labor will conduct an investigation to determine whether the employment action was, or was not, related to the whistle-blowing. Hearings and actions in court may ensue.

These protections have encouraged some private citizens to step forward. But as experience has accumulated, those organizations and lawyers who are approached by potential whistleblowers before they speak up have to warn them that proceeding is not without risk --

* **Limited and Uncertain Coverage.** Whistle-blowing about certain violations of Federal law is protected, but whistle-blowing on very similar kinds of violation is not protected. It is in many cases very difficult for an employee to know whether or not he will be protected if he speaks up. Sometimes even speaking to your own supervisor is not protected.

* **Confusing and limited opportunities to obtain relief.** The procedures for obtaining relief vary significantly from statute to statute, and the conditions for seeking relief are frequently difficult to satisfy. Short statutes of limitation, for example, often mean that by the time the employee learns there may be some relief from retaliation, it is too late to seek it. Some statutes provide no relief unless a busy US Attorney can be persuaded to take on such a case; still others place the cases in a long queue for the attention of administrative law judges,

without any possibility of temporary relief. And should an employee actually establish that illegal retaliation took place, the relief available is often small compared to the actual damages suffered by a whistleblower and family.

* **Weak Administration.** Responsibility for administering existing private sector whistleblower protection rights has generally been placed with the Department of Labor. Investigations of retaliation complaints are conducted by specially trained staff who are assigned, with little national direction, to field offices of the Occupational Safety and Health Administration responsible for OSHA enforcement activities. The investigative staff are entirely dependent on OSHA for funding, and report to Washington through the OSHA enforcement chain of command. Final adjudications are housed in the Office of the Secretary, where limited resources can often result in long and costly delays for whistleblowers. Only a few statutes permit the whistleblower the option of pursuing his or her own case in court should the delays become protracted.

The present situation also complicates the work of the Congress and the Administration. Since there is currently no uniform whistleblower program for private sector employees, the various committees of the Congress have no generally accepted model to use when they want to add whistleblower protections as part of a program revision.

MAJOR ELEMENTS OF THE LEGISLATION:

The "Private Sector Whistleblower Protection Streamlining Act of 2007" would address each of these problems.

First, the bill would establish a new and uniform program to protect private sector employees who report violations of Federal law concerning –

- (A) health and health care;
- (B) environmental protection;
- (C) food and drug safety;
- (D) transportation safety;
- (E) working conditions and benefits (other than occupational safety and health);
- (F) building and construction-related requirements, including safety requirements and structural and engineering standards;
- (G) energy, homeland, and community security, including facility safety;
- (H) financial transactions or reporting requirements, including banking, insurance, and securities laws; and
- (I) consumer protection.

Employees alleging retaliation would be provided strong substantive and procedural protections, including the right to bring cases in district courts, based on everything we have learned to date from existing whistleblower protection problems about what works and what doesn't.

Existing programs that protect some of these whistleblowers (e.g., the protections established by the Sarbanes-Oxley Act) would not be repealed. Rather, employees with a claim under the new program and one of the existing programs would have a choice of which claim to pursue. It is anticipated that once the improved and uniform protections of the new program become known, use of the existing programs will wither away. Second, the bill would re-allocate the responsibility for provide initial investigation of cases within the Department of Labor. Claims filed under this new program would be investigated by the Employment Standards Administration in DOL, which used to do similar work. The bill would also transfer from OSHA to ESA the responsibility for investigating any cases under 14 existing anti-retaliatory programs (e.g., retaliation against those who report Sarbanes-Oxley violations). However, OSHA (and MSHA) would retain responsibility for investigating anti-retaliation claims in connection with occupational safety and health conditions.

Finally, the bill would take a somewhat different approach in updating the existing legal protections for those who suffer retaliation for reporting occupational safety and health hazards. The existing rights that employees have enjoyed under the Occupational Safety and Health Act since 1970, and under the Mine Safety and Health Act since 1977, would only be adjusted by this bill in a very minor way, rather than making them fully equivalent with the rights for other whistleblowers being established by this bill. And as noted previously, the responsibility for *investigating* claims of retaliation on occupational safety and health matters and mine safety and health matters would remain with OSHA and MSHA. However, the bill would change the procedures used to process the OSHA anti-retaliation claims *following investigation*, as these have in large part rendered the statutory protections meaningless. These claims would henceforth be processed in the same manner as all the anti-retaliation cases to be investigated by ESA, including the option for claimants to go to Federal court if the Department does not finish processing a case in 120 days. MSHA administrative claims would continue to be processed as at present, through the Mine Safety and Health Review Commission, under present procedures; however, claimants would have the alternative of going to Federal court.

This legislation is not going to address all of the problems that discourage private citizens from speaking up about violations of Federal law. Many are concerned about the security of the hot lines or other reporting mechanisms established by Federal agencies for reporting violations. In the of mine safety, the Education and Labor Committee is attempting to address this problem through a provision of H.R. 2768, the "S-MINER Act", that would establish an ombudsman to receive and process such complaints to ensure the privacy of those reporting concerns and to ensure their complaints are not just ignored. And section 203 of this bill would provide for a study by the National Academy of Sciences of the factors which discourage whistle-blowing, and the presentation of appropriate recommendations to the Department and to the Congress.

SECTION-BY-SECTION:**Section 1. Short Title**

This section provides that the short title is “Private Sector Whistleblower Protection Streamlining Act of 2007.”

TITLE I - PRIVATE SECTOR EMPLOYMENT WHISTLEBLOWER PROTECTIONS.

This title sets up a new program to protect individuals in the private sector from retaliatory employment actions for blowing the whistle on violations of certain critical categories of Federal law.

Section 101. Definitions

This section provides definitions for key terms in this title to minimize potential misunderstandings about Congressional intent. Among the most significant are the terms:

“Applicable law”. This is the first of several terms that defines the scope of the new whistleblowing protection being provided under Title I of the bill. Not all private sector whistleblowing is covered. Specifically, the new program would protect employees who blow the whistle about “protected information” if the whistleblowing concerns Federal laws and regulations (including State implementing laws and regulations) about: health and health care, environmental protection, food and drug safety, transportation safety, working conditions and benefits, building and construction-related requirements, including safety requirements and structural and engineering standards, energy, homeland and community security, including facility safety; financial transactions or reporting requirements, including banking, insurance, and securities law; and consumer protection.

It should be noted that notwithstanding the inclusion of "working conditions and benefits", whistleblowing protected by section 11(c) of the OSHA Act or section 105(c) of the Mine Safety and Health Act is not intended to be included within the scope of the term "applicable law". See the explanation of title III in this regard.

“Protected information”. The information upon which whistleblowers can act must relate to a violation or possible violation of an applicable law, a hazard or potential danger, or fraud. Whistleblowers need not verify the information they are acting upon is valid, but must “reasonably believe” (a term itself defined, in a manner consistent with normal practice) the information is valid in order to be protected.

“Clear and convincing evidence” and “reasonably believes” and “contributing factor” define terms relevant to showings that must be made by one party or the other, pursuant to section 103, and relevant to what information is “protected information”. The definitions here are those commonly utilized under related laws.

"Whistleblowers" protected by this legislation include "employees" (a term itself defined to include various employment relationships) but also include doctors at a hospital and other similar situations where the whistleblower may not be an "employee" per se.

"Responsible party" refers to someone who takes an "unfavorable personnel action" towards a whistleblower. This includes an "employer" (a term defined to include commercial, governmental, nonprofit and other employers) but also other parties who may be in a position to discriminate against a whistleblower (e.g., a medical standards board or licensee of the Nuclear Regulatory Commission.).

“Unfavorable personnel action”. This term defines the types of employer retaliatory conduct which are prohibited in response to whistleblowing protected under Title I. It includes a long list of possible retaliatory actions in an employment context in order to ensure that the protection is comprehensive.

Section 102. Protection Against Retaliation or Discrimination Against Whistleblowers

This section protects an individual from any retaliation, discrimination or other “unfavorable personnel action” for whistleblowing under an “applicable law.”

A whistleblower is protected if he or she discloses threatens to disclose or assists in disclosing information to a public body (e.g., an enforcement agency, a legislature, a professional conduct board). A whistleblower is also protected for disclosures of such information internally to a manager or a fellow employee, or to the media or public. The bill also protects individuals who testify before a public body, refuse to break a law rule or regulation, or help another whistleblower. However, disclosure of information prohibited by Federal statute or classified is not protected.

The bill specifies that these provisions, and related definitions, are to be interpreted broadly.

Section 103. Enforcement

This section specifies the procedures that a whistleblower may utilize to file a complaint or action for redress based upon a violation of section 102 (and, pursuant to title III, to a violation of section 11(c) of OSHA). The provisions of this section draw upon experience with similar requirements under current whistleblower protection laws.

Subsection (a) provides that a whistleblower has a year to act after retaliatory action based on protected whistleblowing has occurred, or a year after he knows or reasonably should have known retaliatory action occurred. For purposes of this requirement, the bill provides that a violation of this Act (i.e., an illegal retaliatory action) occurs on every day the action continues. The whistleblower can either seek relief through an administrative

process starting with an investigation by the Department of Labor, or go to US District court.

Subection (b) specifies the procedures that will be followed by the Department of Labor in its administrative review, and the method for judicial review of its actions.

All whistleblowers will be counseled upon filing a complaint to determine if they have alternative protections available to them under various laws, and if so will be required to make an election. The bill provides that, with limited exception, complaints within the scope of the law protecting federal employees are to be considered under that law rather than under this law.

If the complainant does not have a prima facie case, the Secretary can make a final decision to dismiss the complaint. If the complainant does have a prima facie case, the Secretary can, upon request, issue a temporary reinstatement order to minimize harm to a complainant. The Secretary is then to conduct a prompt investigation with a decision in 30 days; a hearing can be requested any time thereafter. If the Secretary finds in favor of the complainant, the Secretary is to issue a preliminary order of relief. Each of these actions can be the basis of a request for a hearing before one of the Department's administrative law judges; otherwise the actions become final and cannot be appealed.

If requested, a hearing is to be held "expeditiously" and a decision issued within 90 days from filing objections to the preliminary order and request for a hearing. Such decisions become the final action of the Secretary unless timely appealed to the Department's Administrative Review Board, which shall have discretion whether to grant the appeal. If it does not grant the appeal, the decision of the administrative law judge is final. If the Board takes the case, it is limited to reviewing whether or not the decision of the administrative law judge is based upon substantial evidence and must issue a decision within 30 days. However, if the Department has not completed all administrative action on a complaint within 180 days of its filing, the complainant can start over in District Court just as if he or she had elected to do so in the first place (and with a special extension of the statute of limitations to preserve this right).

Each decision -- at the investigative, hearing and Board level -- has to be made in accordance with specified evidentiary showings. These are set forth in subsection (d) of section 103 (and are discussed below).

Settlements along the way may be approved, but the Department is a party and may not approve a settlement under which a whistleblower accepts employment restrictions (e.g., blackballing in an industry) that are contrary to the purposes of this law.

Relief can include, among other things, reinstatement, back pay, orders to expunge all derogatory information placed in electronic databases, posting of public notice of the violation, and punitive damages not to exceed \$250,000.

Review of final decisions of the Secretary would be in the Court of Appeals with a choice of circuits.

When a final order is issued, including a final order for temporary reinstatement, either the Secretary or the complainant can seek an enforcement order from a court. The Secretary's action will get priority if both file. Penalties of up to \$10,000 a month can be awarded for failure to comply with a final order.

Subsection (c) sets out the procedures for District Courts should complainants bring their actions for relief there. They provide for a trial by jury at the request of the complainant, authorize temporary reinstatement and broad relief, and require the judge or jury to use the same evidentiary showings as the Secretary -- i.e., the ones specified in subsection (d).

Subsection (d) sets forth the required evidentiary showings. The showings are typical of those found in existing whistleblower protection programs. A complaint is to be dismissed if the complaint does not set forth a prima facie case, and sets forth the kind of evidence that can meet this burden. If that showing is made, the investigation or hearing or action may proceed. The complainant then has to make a showing that, in fact, the whistleblowing was a contributing factor in the unfavorable personnel action by the employer. And should the complainant satisfy this burden, relief cannot be provided if the employer or other responsible party demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action had there been no protected whistleblowing. Both the terms "contributing factor" and "clear and convincing evidence" are defined in section 101 of the bill.

Section 104. Restrictions on Whistleblowing Prohibited; Confidentiality of Whistleblower

Subsection (a) prohibits the application of any policy, procedure, or contract that restricts the rights enumerated in section 102. Any such contract is void.

Subsection (b) makes unenforceable any agreement between a responsible party and a whistleblower requiring arbitration on a claim arising under this title is void, with the exception of post claim voluntary agreements to arbitrate or collective bargaining agreements.

Subsection (c) specifies that any disclosure to a government agency authorized under section 102 is confidential except upon the written consent of the whistleblower or in the case of imminent danger or violation of criminal law.

Section 105. Nonpreemption

This section specifies that the provisions of Title I do not diminish any rights the whistleblower may have from bargaining agreements or through other laws, nor does it preempt any State laws.

Section 106. Effective Date

This specifies that the provisions of Title I apply to any complaint or legal action filed after the date of enactment. The Secretary is directed to establish interim final rules to implement this Title within 60 days, and further provides that the clock doesn't start running on any complaints under this title until those rules are in effect.

TITLE II: WHISTLEBLOWER PROTECTION OFFICE.**Section 201. Establishment.**

This section establishes a new office in the Employment Standards Administration at DOL to administer the investigative requirements of title I and, after a year, to administer the investigative activities under a list of existing whistleblower laws currently administered by OSHA. It should be noted, however, that authority to investigate complaints arising under section 11(c) of the Occupational Safety and Health Act of 1970, and complaints arising under section 105(c) of the Mine Safety and Health Act of 1977, would stay with OSHA and MSHA respectively.

The Administrator of the Whistleblower Protection Office would be a presidential appointee. The Office would be on a par with the existing three units of the Employment Standards Administration (Wage and Hour, the Office of Federal Contract Compliance Programs, and the Office of Federal Workers' Compensation programs). The bill provides for a transfer of resources, budget authority, and related savings clauses.

Section 202. Other Private Sector Whistleblower Protections.

To ensure consistent administration, this section enumerates that these programs are to be administered in accordance with Title II in the future -- i.e., by the Whistleblower Protection Office in ESA. It is expected that in the future, most claims for whistleblower protection would be processed under the program established by Title I. However, the existing programs would not be eliminated at this time. Rather, pursuant to section 103(b)(2), a whistleblower covered by more than one program would have to make an election as to whether to proceed under Title I or under one of the existing programs.

Section 203. Duties, Powers, and Functions.

This section provides the Administrator of the Office with subpoena power (both under title I and for existing programs), authorizes rules, and provides for a transfer date.

The annual report issued by the Administrator requires the disclosure of the full text of all settlements approved by the Office with the elimination of all personal identifying information, and settlements that provide to the contrary are prohibited. Requiring such disclosure only on an annual basis provides important public information without inadvertently disclosing information considered confidential by named persons.

In addition, this section provides for a study by the National Academy of Science on the intimidation faced by whistleblowers, including the role played by a belief that whistleblowing will make no difference, fear of retaliation, cultural factors, and related matters. The results of this study are to be transmitted to the Congress.

TITLE III: CONFORMING AMENDMENTS

Section 301. Occupational Safety and Health.

This section would amend the whistleblower protections created by the Occupational Safety and Health Act of 1970, in section 11(c) of that Act, in two limited respects. First, it would make explicit that protection extends to reporting injuries and illnesses, and to reports made to safety and health committees or representatives. Second, it would incorporate into the language of the statute the long-standing parameters established by the Supreme Court as to when an employee can refuse to engage in unsafe conduct under the 1970 law.

This section would also replace the procedural mechanisms in section 11(c) of the Occupational Safety and Health Act. The current law requires the Department of Labor to initiate a district court action for relief. No administrative procedure for relief is provided, nor is a private civil action authorized. No other private sector whistleblower statute is so constrained. Section 301 would apply to these 11(c) cases the same procedural processes as it creates for the cases authorized by Title I. As explained in the discussion of Title II, however, the actual investigation of the 11(c) cases under these procedures would continue to be done by OSHA, whereas the investigation of cases arising out of title I would be done by ESA.

Section 302. Mine Safety and Health.

This section would amend the whistleblower protections created by the Mine Safety and Health Act of 1977 in only a few particulars. The bill would amend section 105(c) of that Act to make explicit that it includes protection for the reporting of injuries and illnesses, and to ensure that mine workers have a right to refuse work the miner has reasonable grounds to believe to be abnormally and immediately dangerous beyond the normal hazards inherent in the operation. Processing of complaints would remain unchanged by the legislation, but the practice of delaying investigations or hearings pending the outcome of a grievance would be specifically barred. Also, miners would be given the option of going to court under the same circumstances and rules as are applicable to claims under Title I.