Federal Whistleblower Protection Overview

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Congress has recognized that federal employees who report waste, fraud and abuse in government need legal protections if they are retaliated against, which is why it has unanimously passed whistleblower protection legislation three times – as part of the Civil Service Reform Act of 1978, the Whistleblower Protection Act of 1989, and 1994 amendments to strengthen the Act. Each time the law not only failed to protect, but ended up creating far more retaliation victims than it helped. Since 2000, only three out of 53 whistleblowers have received final rulings in their favor from the Merit Systems Protection Board (MSPB), where federal employees receive an administrative hearing. The Federal Circuit Court of Appeals, the only court which can hear federal whistleblower appeals of administrative decisions, has consistently ruled against whistleblowers, with whistleblowers winning only four cases out of 203 since October 1994 when Congress last strengthened the law.

In each instance, the cause was weak due process enforcement through hostile administrative or limited judicial review. Since 1999 Congress has been trying again to pass credible rights. After six hearings, nine committee approvals, four unanimous House or Senate votes, constant veto threats and consistent frustration due to procedural objections or secret holds, the legislation now has a new lease on life.

However, with a new Administration more receptive to whistleblower protections, and legislation introduced in Congress to restore the WPA, the momentum for passage of a strong whistleblower protection bill this year is at its climax. Last May the House held a hearing on their bill, HR. 1507, which was introduced by Van Hollen-Platts. In June of 2009 the Senate held a hearing on Senator Akaka's Whistleblower Protection Enhancement Act, S. 372, and passed its bill in the Homeland Security and Governmental Affairs Committee by unanimous voice vote.

Intensive dialogue between the Make It Safe Coalition, the Administration and the Senate paved the way for a unanimous bipartisan voice vote by the Senate Homeland Security Governmental Affairs Committee on S. 372. Most significantly, this bill provides those covered by the WPA access to jury trials in federal district court to challenge major disciplinary actions when the administrative process fails. This is a giant step forward in extending first class due process rights to the civil service. Historically, the Senate has excluded jury trial rights for federal workers due to fear of politically driven opposition that would result in a "hold" on the final legislation. MISC continues to engage in Senate advocacy for passage of S. 372, which must happen before the House can move its bill forward. However, ongoing negotiations have resulted in unprecedented bicameral language that should allow for swift reconciliation of the House and Senate reforms.

The emerging legislative consensus includes several long-overdue reforms which would close judicially created loopholes that have gutted the original WPA. For instance, it cancels the effect of a Supreme Court decision which limits federal workers' free speech rights while carrying out job duties. Federal whistleblowers will finally have a fair chance at victory. It also ends the Federal Circuit Court of Appeals monopoly on appellate review of the Whistleblower Protection Act (the Court has single-handedly gutted the WPA, leading to a 3-201 record against whistleblowers for decisions on the merits from October 1994 through July 2009), restoring all-Circuit review, as in the original 1978 Civil Service Reform Act and the Administrative Procedures Act. Moreover, it makes permanent, and provides a remedy for, the anti-gag statute which bans agency gag orders.

In relation to the Office of Special Counsel (OSC), which is where federal employees go to file a whistleblower disclosure, both the House and Senate bills modify the burdens of proof to make it more realistic for the OSC to seek disciplinary accountability against those who retaliate, and provides the Special Counsel with authority to file friend of the court briefs in support of whistleblower rights cases appealed from the administrative level.

This new consensus also broadens the scope of federal employees and protected categories covered by the law. In addition to restoring the unqualified, original "reasonable belief" standard established in the 1978 Civil Service Reform Act for whistleblowers to qualify for protection, it provides normal whistleblower rights to those who refuse to violate the law. It creates specific protection for scientific freedom, making it an abuse of authority to censor, obstruct dissemination, or misrepresent the results of federal research. Further, it provides specific authority for whistleblowers to disclose classified information to Members of Congress on relevant oversight committees or their staff. Both bills also extend WPA rights to 40,000 airport baggage screeners. This will be a sea change in free speech rights for government workers who want to challenge free speech that undermines the public interest.

Lastly, employees at intelligence agencies would have increased whistleblower protections in this reform. These employees remain the single most effective tool to prevent breakdowns in our national security programs and violations of fundamental civil liberties. As evidenced by a litany of embarrassing intelligence gaffes, from the attempted Christmas Delta bombing to the Fort Hood shooting, our national security efforts will be strengthened by providing intelligence community employees a safer channel to effectively challenge abuses that undermine our safety at home and abroad.