

Whistleblower Protection Enhancement Act

September 17—The most significant benefits in the Whistleblower Protection Enhancement Act, S. 743, as amended, the reconciled bill that likely will be considered in the House and the Senate again this week are listed below:

1.) Expanded Protection for Disclosures of Government Wrongdoing

- Closes judicially-created loopholes to protection that had narrowed the intended scope of the Whistleblower Protect Act (WPA) and discouraged whistleblowers from coming forward to disclose misconduct. (Sec. 101, 102)
- Clarifies that “any” disclosure of gross waste or mismanagement, fraud, abuse, or illegal activity may be protected, including the factual consequences of policies, but not disagreements over the validity of policy decisions. (Sec. 101, 102)
- Cancels the 1999 precedent that translates “reasonable belief” to require irrefragable proof, which has required employees to present “undeniable, uncontestable, or incontrovertible proof” before they are eligible for protection. (Sec. 103)
- Creates specific legal protection for scientific freedom, providing WPA rights to employees who challenge censorship, and makes it an abuse of authority to punish disclosures about scientific censorship. (Sec. 110)
- Codifies and provides a remedy for the “Anti-Gag” Statute – a rider in the Appropriations bill for the past 24 years – that requires a statement notifying employees that agency restrictions on disclosures are superseded by statutory rights to communicate with Congress, whistleblower rights, and other statutory rights and obligations. (Sec. 104(a), (b) and 115)
- Clarifies that protection of critical infrastructure information does not override WPA protection. (Sec. 111)

2.) Expanded Coverage and Fair Processes

- Suspends the Federal Circuit Court of Appeals sole jurisdiction on appellate review of the Whistleblower Protection Act in light of its consistent track record of narrowing the WPA’s protections. (The Court has a 3-226 record through May 2012 against whistleblowers for decisions on the merits since October 1994), restoring all-Circuit review for a two-year experiment as in the original 1978 Civil Service Reform Act and the Administrative Procedures Act. (Sec. 108)
- Codifies whistleblower protections for Transportation Security Administration employees. (Sec. 109)
- Overturns an unusual Merit Systems Protection Board (MSPB) practice that allows agencies in some cases to present their defense first and allows the MSPB to rule on the case prior to the whistleblowers’ presenting their evidence of retaliation. (Sec. 114)

- Requires that the President's exercise of his discretionary power to impose national security exemptions that deprive employees of Title 5 whistleblower rights must be done prior to the challenged personnel action. (Sec. 105)
- Provides compensatory damages for prevailing whistleblowers under WPA cases that prevail after an administrative hearing, (Sec. 107(b)), including retaliatory investigations (Sec. 104(c)).

3.) Administrative Authorities

- Provides the Office of Special Counsel (OSC) with authority to file friend-of-the-court briefs in court to support employees appealing MSPB rulings. (Sec. 113)
- Makes it easier for the Special Counsel to discipline those responsible for illegal retaliation by modifying the burdens of proof (Sec. 106(b)), and by ending OSC liability for attorney fees of government managers, if the Special Counsel does not prevail in a disciplinary action (Sec. 107(a)).
- Requires the designation of Whistleblower Protection Ombudsmen in Inspectors General Offices to educate agency personnel about whistleblower rights. (Sec. 117)
- Requires the MSPB to report on the outcomes of whistleblower cases, from the administrative judge through the Board appeal, in its annual reports. (Sec. 116(b))
- Requires the Government Accountability Office (GAO) to study the impact and feasibility of changes in the number and outcome of cases before the MSPB, the Federal Circuit, or any other court; and to provide Congress recommendations regarding whether the MSPB should be granted summary judgment authority and whether district courts should have jurisdiction over some WPA cases. (Sec. 116)