
Whistleblower Protection Enhancement Act of 2012 Signed into Law

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On November 27, 2012, President Obama signed S. 743, the Whistleblower Protection Enhancement Act of 2012, into law.¹ The Act strengthens existing protections for federal workers who disclose evidence of fraud, abuse, or waste they have encountered in the course of their employment. The new law clarifies the scope of protected disclosures, expands the class of persons protected, and corrects perceived unfairness in certain aspects of the process of seeking relief for violations.

Key Provisions

The Whistleblower Protection Enhancement Act of 2012 builds on anti-retaliation rights afforded to federal workers under the Whistleblower Protection Act of 1989. The 1989 law prohibits supervisors from taking or failing to take personnel actions against an employee because the employee disclosed evidence of abuse, waste, or the violation of a law, rule, or regulation. Personnel actions include promotions, disciplinary actions, transfers and reassignments, performance evaluations, and decisions concerning pay, benefits, or awards.

The new Act makes small adjustments, rather than radical changes, to these protections. Taken together, however, these changes will likely increase the willingness of at least some would-be whistleblowers to come forward.

Among the more significant provisions are several that clarify and expand the scope of disclosures protected under the law. For example, whistleblower protection is no longer limited to the first government worker to make a disclosure; those who subsequently come forward also receive protection under the new statute. The Act also protects employees who disclose evidence that scientific or technical data has been censored. Transportation Security Administration employees are also now afforded whistleblower protection.

Through the establishment of Whistleblower Protection Ombudsmen in federal agencies, the Act seeks to enhance education and understanding of whistleblower rights. In a similar vein, the Act

codifies a requirement that agencies notify their employees that their non-disclosure policies are superseded by whistleblower rights and other statutory rights.

The Act seeks to further discourage retaliation against whistleblowers in the federal government workplace by expanding the penalties for retaliating. The Merit System Protection Board is now explicitly permitted to impose any combination of previously available penalties, which include removal, reduction in grade, debarment from federal employment for up to five years, suspension, reprimand, and a civil penalty of up to \$1000. The statute also makes it easier to discipline supervisors who retaliate by adjusting the burdens of proof in disciplinary actions. Further, the Act removed a budgetary disincentive to the Office of Special Counsel's participation in disciplinary actions.

Several procedural changes may allow whistleblowers who feel they have suffered retaliation to seek relief more effectively. The Act provides compensatory damages for federal employees who prevail in administrative hearings regarding whistleblower claims. In the event that a whistleblower does not prevail, the Office of Special Counsel now has the authority to appear as *amicus curiae* in appeals. Additionally, the Act removes (for a two-year trial period) a limitation that all such appeals be heard only in the United States Court of Appeals for the Federal Circuit, a venue which some critics perceive as unfriendly to whistleblowers.

False Claims Act Implications

Earlier this year, the Fifth Circuit joined several other circuits in holding that a federal employee, even one whose job it is to investigate fraud, may bring an action under the False Claims Act's *qui tam* provisions.² This interpretation of the FCA, coupled with the Whistleblower Protection Enhancement Act's more robust protections for federal employee whistleblowers, could lead to increased exposure to federal employee *qui tam* lawsuits. Entities faced with the already difficult and important question of whether to voluntarily disclose false claims to the government should consider their potential exposure in light of these recent developments.

¹ The full text of the Act can be found [here](#).

² See *United States ex rel. Little v. Shell Exploration & Production Company*, 690 F.3d 282 (5th Cir. 2012).

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