

# Free Speech at the Crossroads: Whistleblower & First Amendment Protections For Private and Public Employees

For Employment Law 2026: Navigating the Field, A Roadmap  
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*Garcetti v. Ceballos*,  
547 U.S. 410, 425  
(2006)

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First Amendment does not protect speech that the public employer “commissioned” the employee to make as part of their job duties.

“The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistleblower protection laws and labor codes—available to those who seek to expose wrongdoing. See, e.g., 5 U. S. C. §2302(b)(8)”

Paper, p. 5. lines 24-32

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# Whistleblower Protection Act (WPA)

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**“It is critical that employees know that the protection for disclosing wrongdoing is extremely broad and will not be narrowed retroactively by future MSPB or court opinions. Without that assurance, whistleblowers will hesitate to come forward.”**

S. REP. 112-155, \* 5, 2012 WL 1377618, 2012  
U.S. Code Cong. & Admin. News 589, 593

**“Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks.”**

*Dep’t Homeland Security v. MacLean*, 574 U.S. 383,  
393 (2015) 3

# Protected disclosures

At 5 U.S.C. § 2302(b)(8), the WPA protects:

- Lawful disclosures to anyone of
  - Violations of law, rule or regulation
  - Gross mismanagement, gross waste, abuse of authority
  - Substantial and specific danger to public health or safety
- Disclosures are lawful if they do not violate a law passed by Congress or an Executive Order “in the interest of national defense”.  
**See Paper, p. 20, lines 394-99.**

Violation of a regulation does not make a disclosure unlawful. *Dep’t of Homeland Sec. v. MacLean*, 574 U.S. 383, 393, 135 S.Ct. 913 (2015)

# What waste and mismanagement is “gross”?

Congress said that “gross” means anything that is more than “*de minimus*.”

S. REP. 112-155, \* 8, 2012 WL 1377618, 2012 U.S.Code Cong. & Admin.News 589.

The Board said that gross waste constitutes more than a debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government.

*Nafus v. Dep't of the Army*, 57 M.S.P.R. 386, 393 (1993), overruled on other grounds, *Frederick v. Department of Justice*, 65 M.S.P.R. 517, 531 (1994). **Paper p. 16, line 289-93**

# Substantial and specific danger to public health or safety

## **Federal Circuit analyzes several factors, including:**

- (1) the likelihood of harm resulting from the danger;
- (2) when the alleged harm may occur; and
- (3) the nature of the harm, i.e., the potential consequences.

**Chambers v. Dep't of Interior**, 515 F.3d 1362, 1369 (Fed. Cir. 2008).

...the disclosure of a danger only potentially arising in the future is not a protected disclosure. *Herman v. Dep't of Justice*, 193 F.3d 1375, 1379 (Fed. Cir. 1999). Rather, the danger must be substantial and specific.

**Paper, pp. 17-18, lines 310-20**

Substantial and  
specific danger  
to public health  
or safety

**Protected:**

Cooling system of a nuclear reactor is inadequate. S.Rep. No. 95-969, at 21 (1978), U.S.Code Cong. & Admin.News 1978, pp. 2723, 2743

National Park Service Police have inadequate funding  
(Chambers)

Failing to test inspectors for possible exposure to beryllium where test was inexpensive and exposure could lead to fatal lung ailment. *Acting Special Counsel ex rel. Finkel v. Dep't of Labor*, 93 M.S.P.R. 409, 413-14 (2003)

**Paper, p. 18, lines 321-38**

Substantial and  
specific danger  
to public health  
or safety

**Not Protected:**

1. EPA is not doing enough to protect the environment. S.Rep. No. 95-969, at 21 (1978), U.S.Code Cong. & Admin.News 1978, pp. 2723, 2743

2. *Disclosure by psychologist that prison did not comply with “the suicide watch room requirements.” Herman v. Dep't of Justice, 193 F.3d 1375, 1379 (Fed.Cir.1999) (WPA was “was not intended to apply to disclosure of trivial or de minimis matters.”)*

**Paper, p. 18-19, lines 339-62**

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# Occupational Safety and Health Act (OSH Act)

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Applies to federal agencies

- 29 U.S.C. § 668 (excluding USPS which is treated as a private sector employer)
- General duty clause (29 U.S.C. § 654) does NOT apply but specific safety standards do.

§ 668(a) The head of each agency shall (after consultation with representatives of the employees thereof)— (1) “provide safe and healthful places and conditions of employment, consistent with the standards set under section 655 of this title;”)

Federal sector general duty:

- The head of each agency shall develop and support organized safety promotion to reduce accidents and injuries among employees of his [or her] agency, encourage safe practices, and eliminate work hazards and health risks. 59 U.S.C. § 7902(d)

# Federal Sector OSHA regulations

*OSHA requires that:*

- The head of each federal agency “must assure safe and healthful working conditions for his/her employees.” 29 C.F.R. § 1960.1(g)
- *“The head of each [federal] agency shall furnish to each employee employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.” 29 C.F.R. § 1960.8(a)*

# Violation of law, rule or regulation

## What is a “rule?”

- *Rusin v. Dep’t of the Treasury*, 92 M.S.P.R. 298, 305-07 (2002)
- “[A]n established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation; or a prescribed guide for action or conduct, regulation or principle.” *Id.*, at 305-307 (citing Black's Law Dictionary 1330 (7th ed. 1999) and Barron's Law Dictionary 427 (3rd ed. 1991)).
- The instructions pertaining to using government credit cards was possibly protected. **Paper, p. 15, line 257**

# Violation of law, rule or regulation

## *What is a “rule?”*

- for the purposes of this appeal only, we will assume that the SPP Directive is a rule. See 5 U.S.C. § 551(4) (1994) (defining a “rule” as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy ...”). *Herman v. Dep't of Justice*, 193 F.3d 1375, 1380 (Fed. Cir. 1999)
- Department of State's Foreign Affairs Manual. See 3 FAM 4542 (intoxication on duty prohibited) is a rule. *Drake v. Agency for Int'l Dev.*, 543 F.3d 1377, 1379 (Fed. Cir. 2008)

## Why be gross?

*Don't rest on waste or safety alone.*

- Why risk a decision on what is “gross” or “specific and substantial” when a law, rule or regulation can be a basis for protection.

# Reasonable belief

## *What is a “reasonable belief?”*

■ *Ward v. Dep’t of the Army*, 67 M.S.P.R. 482, 485-486 (1995); *Russell v. Dep’t of Justice*, 68 M.S.P.R. 337, 342 (1995).

■ “The [whistleblower] need not prove that the condition reported established any of the situations detailed under 5 U.S.C. § 2302(b)(8) (A)(i) or (ii), but he [or she] must come forth with such proof, either in the form of testimony or documentary evidence, as will establish that the matter reported was one that a reasonable person in the employee’s position would believe to evidence one of the situations specified at 5 U.S.C. § 2302(b)(8).”

**Paper, pp. 20, lines 384-90**

# Reasonable belief

## *What is a “reasonable belief?”*

- Private sector applications
- Subjective and objective components. *Sylvester v. Parexel Int’l LLC*, ARB 07-123, 2011 WL 2517148 (ARB May 25, 2011)
- Objective reasonableness “is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Harp v. Charter Commc’ns*, 558 F.3d 722, 723 (7th Cir. 2009).

**Paper, pp. 57-58, lines 1317-58**

# Reasonable belief

## *What is a “reasonable belief?”*

- The reasonable belief standard requires an examination of the reasonableness of an employee’s beliefs, but *not* whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities. See, e.g., *Knox v. U.S. Dep’t. of Labor*, 434 F.3d 721, 725 (4th Cir. 2006) (Clean Air Act case).
- “[O]bjective reasonableness is a mixed question of law and fact” and thus subject to resolution as a matter of law “if the facts cannot support a verdict for the non-moving party.” *Welch v. Chao*, 536 F.3d 269, 278 (4th Cir. 2008) (SOX case).
- Ohio Supreme Court
- From a public policy prospective, the “reasonable belief” standard is the only acceptable interpretation of the statute. *Fox v. Bowling Green*, 1996-Ohio-104, 76 Ohio St. 3d 534, 538, 668 N.E.2d 898, 902 (claim under *ORC 4113.52*)

# Other Protected Activities “(b)(9)”

## *5 U.S.C. 2302(b)(9) protects:*

- (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—
  - (i) with regard to remedying a violation of paragraph (8); or
  - (ii) other than with regard to remedying a violation of paragraph (8);
- (B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);
- (C) cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law; or
- (D) refusing to obey an order that would require the individual to violate a law, rule, or regulation
- No “reasonable belief” required for “participation claims.”

# Participation claims

## *5 U.S.C. 2302(b)(9)(C) protects*

- any disclosure of information to an OIG or OSC was protected, regardless of its content, as long as the disclosure was made in accordance with applicable provisions of law. *Fisher v. Department of the Interior*, 2023 MSPB 11, ¶ 8
- The language of section 2302(b)(9)(C), which covers cooperating with or disclosing "information" to certain entities, is devoid of content-based limitations. This is notably different from the anti-retaliation provision for protected disclosures, which contains explicit content-based limitations[.] *Reese v. Navy*, 2025 MSPB 1, ¶46

**Paper, pp. 23-24, lines 456-81**

- **BOTTOM LINE:** Coach current employees to engage in “participation” in protected proceedings. Look for ways that other clients may have participated.

# Employer knowledge and “revelment”

## *A common defense is to deny knowledge of the protected activity*

- *It is harder to deny if the whistleblower has made a written disclosure to the manager.*
- *“Revelment letters” arose in union organizing*
- *A request for official time can serve the same purpose:*
- *I request \_\_\_\_\_ hours of official time to meet and confer with an attorney about making disclosures to the Inspector General and the Office of Special Counsel. I make this request pursuant to 5 C.F.R. Section 5.4. Please let me know if you will approve this request for official time. Thank you.*
- *For federal sector EEO cases, cite 29 CFR Section 1614.605(b)*

**Paper, p. 32, lines 683-92**

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# DHS v. MacLean

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- **Bob MacLean was an Air Marshal**
  - **Disclosed that TSA stopped all air marshal travel just as an Al Qaeda alert came out**
  - **Violated a TSA regulation against disclosing security information**
  - **BUT, information was NOT classified**
  - **Supreme Court said disclosure was “lawful” because it did not violate a law passed by Congress.**
  - **Violation of a regulation does not make a disclosure unlawful.**
  - ***Dep’t Homeland Security v. MacLean*, 574 U.S. 383 (2015).**

# HIPAA PERMITS CERTAIN WHISTLEBLOWER DISCLOSURES

- (j) Standard: Disclosures by whistleblowers and workforce member crime victims - ...
- (i) The workforce member or business associate believes in good faith that the covered entity has engaged in conduct that is unlawful or otherwise violates professional or clinical standards, or that the care, services, or conditions provided by the covered entity potentially endangers one or more patients, workers, or the public; and
- (ii) The disclosure is to: (A) A health oversight agency or public health authority authorized by law to investigate or otherwise oversee ... or to an appropriate health care accreditation organization ...; or
- (B) An attorney retained by or on behalf of the workforce member ... for the purpose of determining the legal options of the workforce member ... with regard to the conduct described in paragraph (j)(1)(i) of this section.
- 45 C.F.R. § 164.502(j)(1)

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# Lawful disclosures of classified information

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## ■ **WPA protects disclosures of classified information to:**

-to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures

### • **5 U.S.C. § 2302(b)(8)(B)**

-**To Congress, if NOT in IC and NOT “sources and methods”**

### • **5 U.S.C. § 2302(b)(8)(C)**

-**To Congress if approved by ICIG**

### • **50 U.S.C. § 3033(k)(5)**

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# Intelligence Community protections against retaliation

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## Intelligence Authorization Act of 2014

50 U.S.C. § 3234

PPD-19; ICD-120; DOD, Directive-Type  
Memorandum 13-008

Same definition of protected disclosures.  
50 U.S.C. § 3234(b)

Covers employees of contractors. 50  
U.S.C. § 3234(c)

Agency-specific procedures

Final decision-making by DNI and agency  
heads

Security clearance retaliation is covered by  
50 U.S.C. § 3341(j) (90 days to file a  
complaint)

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**Paper, p. 14, lines 226-40**

EEO laws are  
NOT “laws” for  
disclosures  
under  
§ 2302(b)(8)

- *Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679 (Fed. Cir. 1992)
- Actually said EEO proceedings are protected by (b)(9)(A)
- Therefore, can’t be protected by (b)(8)
- When IRA appeals were not allowed for (b)(9) claims
- *Edwards v. Department of Labor*, 2022 MSPB 9, ¶ 27
- *Young v. Merit Systems Protection Board*, 961 F.3d 1323, 1329 (Fed. Cir. 2020)

**Paper, p. 22, lines 429-35**

# Agency EEO proceedings ARE protected under § 2302(b)(9)(C)

- *Reese v. Dep't of the Navy*, 2025 MSPB 1, ¶ 46, Paper, p. 24
- MSPB invited amici briefs 89 Fed. Reg. 28816-01 (Apr. 19, 2024)
- Protected Reese's use of Navy Sexual Assault Prevention and Response (SAPR) policy
- OPM's petition to reconsider was dismissed, Paper, 26, line 550
- *Holman v. Dep't of the Army*, 2025 MSPB 2 (Feb. 27, 2025) ¶ 12
- Agency EEO office is an agency "component"

# Four main administrative avenues for raising these issues and obtaining relief.

- ▶ **UNION GRIEVANCE PROCESS** (election when grievance filed first)
- ▶ **EEOC'S EEO PROCESS** (election when formal EEO complaint filed first)
- ▶ **MSPB APPEAL** (as an affirmative defense in appealable actions or as an IRA after OSC exhaustion)
- ▶ **OFFICE OF SPECIAL COUNSEL (OSC) COMPLAINT on Whistleblowing Retaliation** (in cases of non-appealable actions or if necessary because MSPB or EEO deadlines have expired)

**Paper, p. 28, line 596**

# Serious adverse actions offer an election of remedies

*5 U.S.C. § 7121(g) requires choosing one of:*

1. an appeal to the Board under 5 U.S.C. § 7701;
2. a grievance under the applicable negotiated grievance procedures; or
3. a complaint seeking corrective action from the Office of Special Counsel under 5 U.S.C. chapter 12, subchapters II and III.

# Other adverse actions offer an election of remedies

## *Other adverse actions require choosing:*

1. a grievance under the applicable negotiated grievance procedures; or
2. EEO or OSC complaints, or both

*If no union grievance is filed, employees can pursue both OSC and EEO proceedings*

Collateral estoppel can apply after the first adjudication

# Elections must be made knowingly

For an election of an option to be binding, it must be knowing and informed. *Agoranos v. Department of Justice*, 119 M.S.P.R. 498, ¶ 16 (2013).

Agencies must provide the employee with notice of the available avenues of relief and the preclusive effect any election will have on the employee's Board appeal rights. See 5 C.F.R. § 1201.21(d)(1)

Agency failures free employees from the election of remedies. *Kaszowski v. Air Force*, 2023 MSPB 15, Docket No. CH-0752-16-0089-1-1 (Apr. 4, 2023)

**Paper, p. 29-30, lines 630-44**

# Contributing factor

Employee must establish by a preponderance of the evidence that the whistleblowing was a contributing factor in the action—in other words, that the agency action was “tainted.”

A “contributing factor” is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.”

Employee need **not** demonstrate that the protected conduct was a “significant,” motivating,” “substantial,” or “predominant” factor.

135 Cong. Rec. 5033 (1989); **Paper, pp. 30-31, lines 649-695**

# Contributing factor

Temporal proximity alone establishes a contributing factor.

- 5 U.S.C. § 1221(e)(1)(B) (“the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.”).

“Lack of knowledge by a single official is not dispositive,” *Shriver v. Dep’t of Veterans Affairs*, 89 M.S.P.R. 239, 245-46 (2001).

# Clear and convincing evidence

- Agency must demonstrate by clear and convincing evidence that it ***would have*** taken the same personnel action absent the protected disclosure. **Paper, p. 35, line 773-81**  
- 5 USC §1221(e)(2)
- “Clear and convincing” is a heightened standard of proof.

# Clear and convincing evidence

## ■ *Carr* Factors:

- (1) the strength of the agency's evidence in support of its action;
- (2) the existence and strength of any motive to retaliate on the part of agency officials involved in the decision; and
- (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but are otherwise similarly situated.

*Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

**Paper, pp. 34-35, lines 741-72**

# OSC Complaints must be filed with Form 14

## *5 CFR § 1800.1(c)(1) requires:*

- The Form OSC-14 must be used to file all such complaints (except those limited to an allegation or allegations of a Hatch Act violation - see paragraph (d) of this section for information on filing Hatch Act complaints).
- Can be filed on-line: [osc.gov/File a Complaint](https://osc.gov/File%20a%20Complaint)
- <https://osc.gov/Pages/File-Complaint.aspx>
- Amendments and supplements can be made by email or other means.
- *Edwards v. Dep't of Air Force*, 120 M.S.P.R. 307, 317 (2013); *Lewis v. Dep't of Def.*, 123 M.S.P.R. 255, 260 (2016) (“The appellant also may submit his own letters to OSC to demonstrate the scope of the complaints he has exhausted with that agency.”);
- *McCarthy v. MSPB*, 809 F.3d 1365, 1374 (Fed. Cir. 2016) (considering “written correspondence concerning [the employee’s] allegations.”).

**Paper, pp. 37-38, lines 819-54**

# Individual right of action (IRA appeals)

## *5 U.S.C. 1221(a) permits whistleblowers:*

- as a result of a prohibited personnel practice described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), to seek corrective action from the Merit Systems Protection Board. **Nb: no IRA for (b)(9)(A)(ii).**

- Expanded beyond 2302(b)(8) by 2012 WPEA

- MSPB appeals can be filed on-line from mspb.gov under “appeals” or “Electronic Filing” and “New Appeal.” 65 days

Distinguish which OSC letter states reasons and need not be disclosed. **Paper, p. 38, line 849**

# MERIT SYSTEM PROTECTION BOARD (MSPB)

- ▶ Governed by MSPB regulations at 5 CFR Part 1201.
  - ❑ If the agency is an executive agency subject to the MSPB (5 U.S.C. § 7511(b)),
  - ❑ if an employee is an “employee” (5 U.S.C. § 7511(a)(1)), and
  - ❑ if an MSPB appealable action is at issue (see 5 CFR § 1201.3(a)),
  - ❑ then a claim generally must be filed, if at all, with the Merit Systems Protection Board (MSPB) **within thirty (30) calendar days** of the effective date of the adverse action. 5 CFR § 1201.22(b).
  - ❑ Equitable tolling may apply, but high standard. 5 CFR § 1201.22(c).
  - ❑ Only **ten (10) business days** to file an appeal for certain Title 38 VA employees for removal, demotion, suspensions over 14 days. 38 U.S.C. § 714(c)(4)(B).
  
- ▶ MSPB-appealable issues (*not* the other many common complaints):
  - **Removal**
  - **Suspension without pay more than 14 days**
  - **Reduction (demotion) in pay or grade**
  - **Furlough/RIF**
  - **Constructive adverse actions, e.g., forced retirement, forced resignation, forced suspension over 14 days**
  - **Denial of a within grade increase (WIGI)**
  - **Denial of restoration of employment rights**

# MERIT SYSTEM PROTECTION BOARD (MSPB)

## ▶ Jurisdictional memos

- ❑ The Administrative Judge (AJ) may order an appellant to explain why the Board has jurisdiction
- ❑ The order may be buried in the Acknowledgment Order (“Ack Order”)
- ❑ AJs do this because there is NO summary judgment at the MSPB
- ❑ A jurisdictional order may be the last opportunity for an AJ to avoid a hearing
- ❑ A response is typically required within 10 days
- ❑ The time can be extended with a timely motion
- ❑ The response only needs to set out the **allegations** supporting jurisdiction
- ❑ The order may say evidence is required, but the courts say jurisdiction arises from allegations, not the evidence.
- ❑ Exhaustion is treated as jurisdictional, even though the Supreme Court says it is not. *Fort Bend Cnty., Tex., v. Davis*, 587 U.S. \_\_\_, 139 S. Ct. 1843, 1849 (2019)

## ▶ Discovery

- Must serve a first request within 30 days of the Ack Order
- A notice of deposition must specify the date, time and place
- Follow-up discovery requests are due within 10 days of each response
- Motions to compel are due within 20 days of each response and 10 days of each missed deadline (as of 2024). 5 CFR 1201.73

# MERIT SYSTEM PROTECTION BOARD (MSPB)

- ▶ Pre-hearing submission
  - Last chance to raise issues to be decided. 5 CFR 1201.24(b)
  - Must include a list of witnesses and a summary of unique testimony the witness can provide
  - Includes both favorable and unfavorable witnesses
  - Witness list often includes “any witnesses listed by the Agency”
  - Must include exhibits
  
- ▶ Withdraw the hearing request?
  - ❑ Avoids giving the AJ an opportunity to make credibility determinations
  - ❑ Credibility determinations are virtually unreviewable

# MIXED CASES = MSPB issue + EEO motive

- ▶ WARNING: Special election of remedies exist where the employee claims that an unlawful EEO (including EEO retaliation) basis motivated the decision-making in an **MSPB issue**.
- ▶ CHOICE to begin the claim:
  - ❑ in the EEO process (within 45 days then filing a timely formal EEO complaint) (explained above) as a mixed case (losing all other affirmative defenses other than EEO!). You still get an EEO investigation, but then move to MSPB for hearing and decision phase.
- ▶ OR
  - ❑ By filing a timely appeal with the MSPB (within 30 days typically) (explained above) as a mixed case appeal, where you appeal the agency's adverse action as lacking sufficient evidence and also claim that it was unlawfully motivated by a prohibited EEO basis (explained above) (and add all other appropriate affirmative defenses!).
- ❑ Hearing will only take place at the MSPB unless "unmixed" and sent to EEOC.
- ❑ Special appeal routes.

## Mixed cases in US District Court

- 5 U.S.C. § 7702(a), expressly provides that “[n]otwithstanding any other provision of law” the district court has jurisdiction over any discrimination claim by “any employee” “who has been affected by an action which the employee or applicant may appeal” to the MSPB.
  - For “mixed cases” “the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board[.]” 5 U.S.C. § 7702(a)(2)
  - Only one administrative avenue needs to be exhausted to preserve CSRA, WPA and EEO claims. 5 U.S.C. § 7702(f)

# Mixed cases in US District Court

- Numerous cases hold that district courts possess jurisdiction over non-discrimination claims in mixed cases when agencies fail to meet the time limit in § 7702(e)(1)(B).
  - *Ikossi v. Dep't of Navy*, 516 F.3d 1037, 1041–44 (D.C.Cir. 2008);
  - *Seay v. TVA*, 339 F.3d 454, 471–72 (6th Cir. 2003);
  - *Doyal v. Marsh*, 777 F.2d 1526, 1533, 1535–37 & n. 5 (11th Cir. 1985);
  - *Bonds v. Leavitt*, 629 F.3d 369, 379 (4th Cir. 2011).
- These cases did not require that employees start at, or ever actually use, MSPB jurisdiction.

# Third, let's sort out and summarize the options for a federal employee's election of remedies and evaluate them.

We are reviewing election of remedies when there is an EEO issue, an MSPB issue, a whistleblower retaliation issue, or a combination thereof:

- *EEO Issues*: GRIEVANCE v. EEO Complaint
- *MSPB Issues*: GRIEVANCE v. MSPB Appeal
- *Mixed EEO + MSPB Issues*: GRIEVANCE v. EEOC v. MSPB
- *Whistleblowing Retaliation Claims (no MSPB Issue)*: OSC THEN MSPB IRA Appeal
- *Whistleblowing Claims with MSPB Issue*: OSC v. MSPB Appeal v. Grievance

# NOTE: OTHER ISSUES/OPTIONS

- ▶ Outside of the election of remedies involving combinations of EEO, MSPB, and whistleblower retaliation issues, there are many other issues for which relief can be found in formal complaint processes (beyond scope of this panel presentation), such as:
  - ❑ FLRA complaint process for labor issues (ULPs) (but you cannot file both a grievance and ULP on the same issue - elect one complaint route)
  - ❑ General whistleblowing (wrongdoing that you reasonably believe to be gross waste, fraud, abuse, harm to health/public safety) - blow the whistle to IG, OSC, Congress, chain of command/manager, press (do not violate HIPAA while doing so, but see HIPAA's limited whistleblower exception at 45 C.F.R. § 164.502(j)(1))
  - ❑ Department of Labor (wage and hour claims; USERRA; certain whistleblower laws inc. Safe Drinking Water Act which permits exemplary damages)
  - ❑ OPM (retirement claims, may lead to OPM or MSPB appeal, other internal complaint options)
  - ❑ USERRA (retaliation for veteran status) (first DOL then OSC then MSPB)
  - ❑ Retaliation for environmental / safety complaints (think OSHA, SDWA)
  - ❑ OSC for Hatch Act

# Bypassing MSPB PFRs

*Whistleblowers can bypass MSPB Petition for Review (PFR):*

- Let time expire for PFR of AJ's Initial Decision (ID)
- After 35 days, the ID becomes the MSPB's Final Order 5 CFR 1201.113
- Then file PFR with the Circuit Court of Appeals within 60 days. 5 USC 7703(b)(1)(B), the All Circuit Review Extension Act.

**Paper, pp. 42-43, lines 939-51**

# Aviles and disclosures of third-party misconduct

## *MSPB, 5<sup>th</sup> and Federal Circuits say:*

- Disclosure of misconduct by non-federal employees is not protected. *Miller v. Department of Homeland Security*, 99 M.S.P.R. 175, ¶ 12 (2005); *Aviles v. Merit Systems Protection Board*, 799 F.3d 457 (5th Cir. 2015). However, MSPB adds:

- a disclosure of wrongdoing committed by a non-Federal Government entity may be protected only when the Government's interests and good name are implicated in the alleged wrongdoing, and the employee shows that she reasonably believed that the information she disclosed evidenced that wrongdoing. *Covington v. Department of the Interior*, 2023 MSPB 5, ¶¶ 16-19

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# Private Sector Remedies

## *The uneven and fragmented web:*

- Over 130 federal laws protect employees from various types of retaliation.
- A list is at: <https://taterenner.com/fedchart.php> (attached)
- Enforced by OSHA: <https://www.whistleblowers.gov/statutes>
- Gaping holes in the list include health care, Pharma, Intelligence Community, Postal Service, immigrant workers
- Catch-all laws for employees of federal contractors: 10 USC 4701 (called the Defense Contractor Whistleblower Protection Act for DoD and NASA contractors) and 41 USC 4712 (called NDAA for other federal executive agencies).



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## Federal Whistleblower Laws

This chart of federal laws complements the Tate & Renner [chart of state health and safety whistleblower rights](#). This chart is meant to call attention to the types of claims that employees should investigate. It is also meant to urge them to consult a lawyer to assess each claim before the time limits expire. "SOL" means "statute of limitations." It is the time limit to file a legal action. This chart is not updated on any regular basis, and it is not meant to establish an attorney-client relationship. Only by retaining an attorney can employees get answers they can legally rely on.

So, do not rely upon this table for legal advice. This summary table is provided for information only and to assist attorneys in legal research. It is not warranted to be accurate in any respect. This table cannot replace the need for independent research or legal advice regarding where, when, and how your claim can be brought. Further, the statutes of limitations herein may not apply to your case or situation, may no longer be applicable, and, like any employment-related law, are always subject to change at any time, by act of Congress, agency practice, the courts, or changing facts in the case itself. Thank you to Ann Lugbill for initiating the collection of the information on this page.

### News Flash: Intelligence Authorization Act now protects security clearances

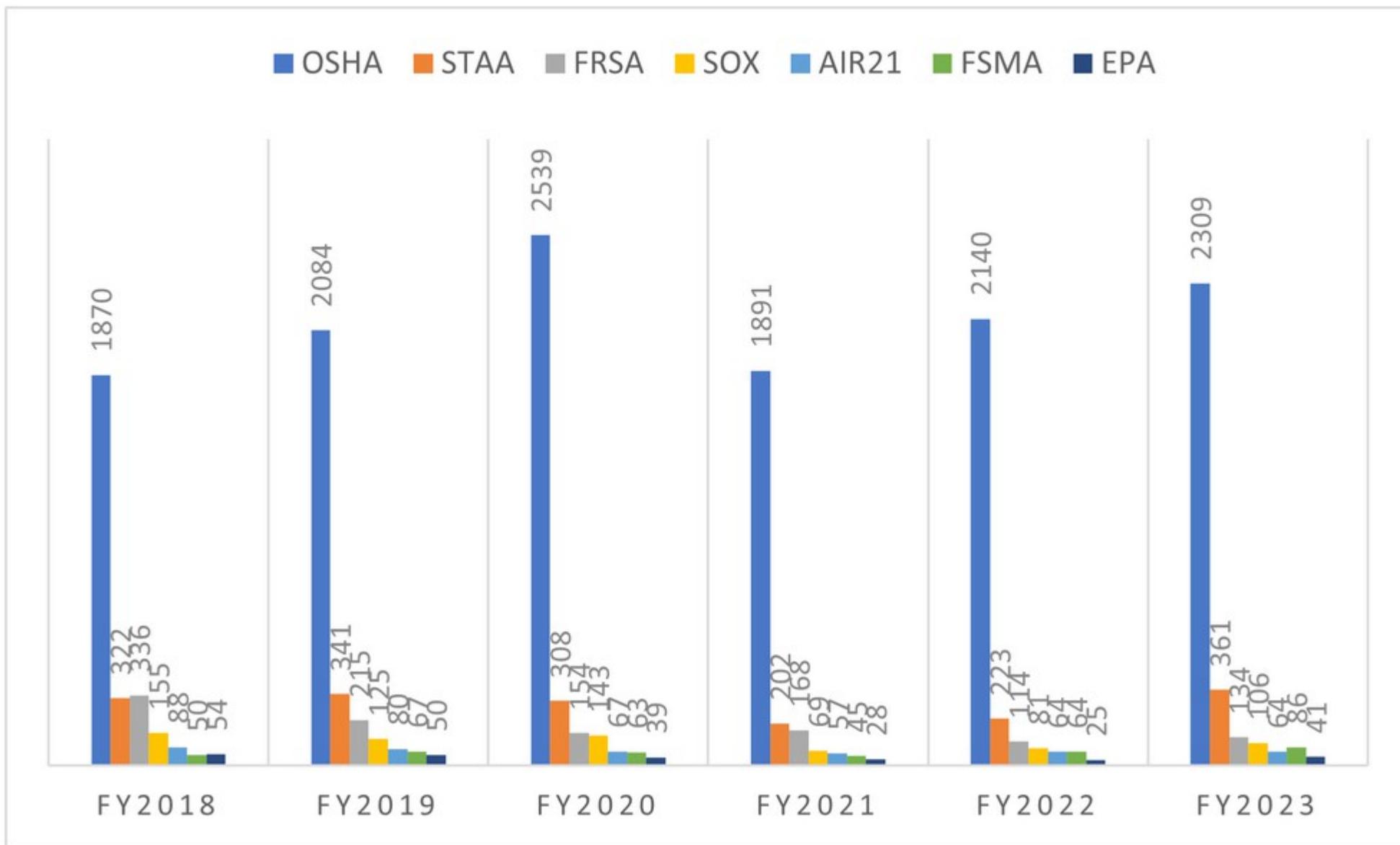
In 2014, Congress created a new whistleblower protection for security clearances in the Intelligence Authorization Act of 2014. [Click here to read my blog about it.](#) The time limit to initiate a retaliation claim under this new law is 90 days.

Whistleblower or Retaliation Statute	Legal Citation	Statute of Limitations (SOL)	Where to File
First Amendment	U.S. Const., 1 <sup>st</sup> Am.	State PI limit	state or fed ct.
Civil Rights Act of 1871	42 U.S.C. §§ 1981, 1983, 1985	State PI limit	state or fed ct.
Affordable Care Act (ACA)	29 U.S.C. § 218C; Section 1558	180 days	DOL / OSHA

**Occupational Safety and Health Administration  
 Directorate of Whistleblower Protection Programs (DWPP)  
 Whistleblower Statutes Desk Aid**

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compensatory	Punitive	Days	Venue	
<b>Section 11(c) of the Occupational Safety &amp; Health Act (OSHA) (1970)</b> [29 U.S.C. § 660(c)]. Protects employees from retaliation for exercising a variety of rights guaranteed under the Act, such as filing a S&H complaint with OSHA or their employers, participating in an inspection, etc. <b>29 CFR 1977</b>	30	Private sector U.S. Postal Service Certain tribal employers	90	No	Yes	No	Yes	Yes	15	OSHA	Motivating
<b>Asbestos Hazard Emergency Response Act (AHERA) (1986)</b> [15 U.S.C. § 2651]. Protects employees from retaliation for reporting violations of the law relating to asbestos in public or private non-profit elementary and secondary school systems. <b>29 CFR 1977</b>	90	Private sector State and local government Certain DoD schools Certain tribal schools	90	No	Yes	No	Yes	Yes	15	OSHA	Motivating
<b>International Safe Container Act (ISCA) (1977)</b> [46 U.S.C. § 80507]. Protects employees from retaliation for reporting to the Coast Guard the existence of an unsafe intermodal cargo container or another violation of the Act. <b>29 CFR 1977</b>	60	Private sector Local government Certain state government and interstate compact agencies	30	No	Yes	No	Yes	Yes	15	OSHA	Motivating
<b>Surface Transportation Assistance Act (STAA) (1982), as amended by the 9/11 Commission Act of 2007 (Public Law No. 110-053)</b> [49 U.S.C. § 31105]. Protects truck drivers and other covered employees from retaliation for refusing to violate regulations related to the safety or security of commercial motor vehicles or for reporting violations of those regulations, etc. <b>29 CFR 1978</b>	180	Private sector	60	210	Yes	Yes	Yes	Yes 250K cap	30	ALJ	Contributing

## Whistleblower Docketed Cases Received: FY2018 – FY2023



# Selected coverage issues

- OSH Act Section 11(c)
  - 1970, 29 U.S.C. §660(c)
  - No private right of action
  - Look for overlapping coverage with TSCA, or other laws
- Affordable Care Act and Title I
  - 29 U.S.C. § 218C
  - Title I is the insurance mandate
  - No employee protection for patient protection

# OSHA Outcome Statistics FY 2023

## Outcomes

Merit	23
Settled	509
Settled "other"	359
Dismissed	2154
Withdrew	562
Fed Ct. "kick out"	42

Total            3649

# DOL time limits

- 30 Days
  - OSH Act 11(c); environmental laws
- 60 Days
  - MSHA, mine safety complaints
- 90 Days
  - AIR 21; Asbestos
- 180 Days
  - STAA, ERA, SOX, FRSA, NTSSA, PSIA, CPSIA, ACA, SPA, FSMA, CFPA and MAP21.

# OSHA investigations

- OSHA's Whistleblower Investigations Manual (2022) and other policy documents are at

<https://www.whistleblowers.gov/policy/directives>

[http://www.whistleblowers.gov/regulations\\_page.html](http://www.whistleblowers.gov/regulations_page.html)

- Coping with delays
  - Persistent follow-ups, squeaky wheels
  - Directorate of the Whistleblower Protection Programs (DWPP), (202) 693-2199, 1-800-321-OSHA (6742)
  - Expedited Case Processing (ECP)

# OALJ practice

- File requests for hearing by fax: (202) 693-7365 (FAX)

<http://www.oalj.dol.gov/HEADQUARTERS.HTM>

- Or electronic filing: <https://www.dol.gov/agencies/oalj/EFS>

- Rules of Practice amended in 2020:

<https://www.dol.gov/agencies/oalj/topics/libraries/LIBRULES>

- Digest of case law in the Whistleblower Library:

<http://www.oalj.dol.gov/LIBWHIST.HTM>

- ARB cases:

<http://www.oalj.dol.gov/LIBARB.HTM>

## Kick-outs to federal court

- Permitted in STAA, FRSA, NTSSA, CPSIA, ACA, SPA, CFPA, FSMA and MAP-21 (after 210 days), ERA (365), and SOX (180).
- CPSIA, ACA, CFPA and FSMA also permit a kick-out within 90 days of OSHA determinations.
- *Jones v. SouthPeak Interactive Corp.* 777 F.3d 658 (4th Cir. 2015), holds that 4-year statute of limitations applies pursuant to 28 U.S.C. § 1658(a).
- *Jordan v. Sprint Nextel Corp.*, 3 F. Supp. 3d 917 (D. Kan. 2014), holds that no statute of limitations applies to kick-outs as they are “otherwise provided by law.”

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## Kick-outs to federal court: Current DOL policy

- Following *Jordan*, current DOL practice is to require that whistleblower actually file complaint in U.S. District Court while DOL complaint is still pending.
- Whistleblower then gives prompt (within 7 days) notice to DOL (OSHA, ALJ or ARB).
- Only then will DOL dismiss for want of jurisdiction.
- Older regulations still reflect prior policies in which DOL sought notice *before* filing in federal court.
- Statutes control, not the regulations.

# Direct causes of action

- No administrative exhaustion required; no agency help either.
  - Fair Labor Standards Act, 29 U.S.C. § 215(c)
  - False Claims Act, 31 U.S.C. § 3730(h)
  - Banking laws, 31 U.S.C. § 5328, 12 U.S.C. § 1831j, 12 U.S.C. § 1790b
  - Dodd-Frank Act, 15 U.S.C. § 78u-6(h)(1)(A)
  - ERISA, 29 U.S.C. § 2002

# Awards for Whistleblowers

- False Claims Act, 31 U.S.C. § 3729
  - “Little FCAs” under the Grassley Amendment
    - <https://www.taf.org/resources/state-false-claims-acts/>
    - N.C. Gen. Stat. §§ 1-605–618
- Dodd-Frank Act (for recoveries over \$1 million)
  - SEC
  - CFTC
- IRS (for recoveries of over \$2 million)

# North Carolina State Law claims

- Retaliatory Employment Discrimination Act (REDA), N.C.G.S. § 95-240, et seq. SOL 180 days.
- Protection for employees who obtain or attempt to obtain orders against domestic violence. N.C.G.S. § 50B-5.5(a). SOL 180 days.
- Public policy tort claim also available: *Sides v. Duke Hosp.*, 328 S.E.2d 818 (1985); *Salter v. E & J Healthcare, Inc.*, 155 N.C. App. 685, 693-694, 575 S.E.2d 46, 51-52 (2003). SOL 3 years.
- Whistleblower Act for public employees. N.C.G.S §§ 126-84 to 126-88. State employees may pursue a grievance, and then appeal to the Office of Administrative Hearings (OAH) within 30 days of a final decision on the grievance. N.C.G.S §§ 126-34.01 to 34.3. Other public employees can seek relief under REDA or in Superior Court (one year SOL N.C.G.S § 126-86).

# FCA and NDAA

- Both provide retaliation claims for employees of federal contractors
- A comparison of the options, prepared by attorney Jason Zuckerman:

	FCA Anti-retaliation	NDAA Secs. 827 and 828
Citation	31 U.S.C. § 3730(h)	10 U.S.C. § 2409; 41 U.S.C. § 4712
Coverage	Employee, contractor, or agent	Employee of a contractor, subcontractor, or grantee
Statute of Limitations	3 years	3 years

# Questions?

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