

# PROHIBITED PERSONNEL PRACTICES

## WHISTLEBLOWER PROTECTION



### *RIGHTS AND REMEDIES OF FEDERAL EMPLOYEES UNDER 5 U.S.C., CHAPTERS 12 & 23*

March 27, 2013

U.S. OFFICE OF SPECIAL COUNSEL

# Topics

5 U.S.C. Chapters 12, 23, 73



## U.S. Office of Special Counsel (OSC)



### Prohibited Personnel Practices



### Whistleblower Protection

# Office Of Special Counsel (OSC)

5 U.S.C. §§ 1211-19; 5 C.F.R. PART 1800



Authorized to —

- ❑ Investigate prohibited personnel practices and other activities prohibited by civil service law, rule, or regulation
- ❑ Seek corrective action for victims of prohibited personnel practices
- ❑ Seek disciplinary action against officials who commit prohibited personnel practices

# Office Of Special Counsel (OSC)

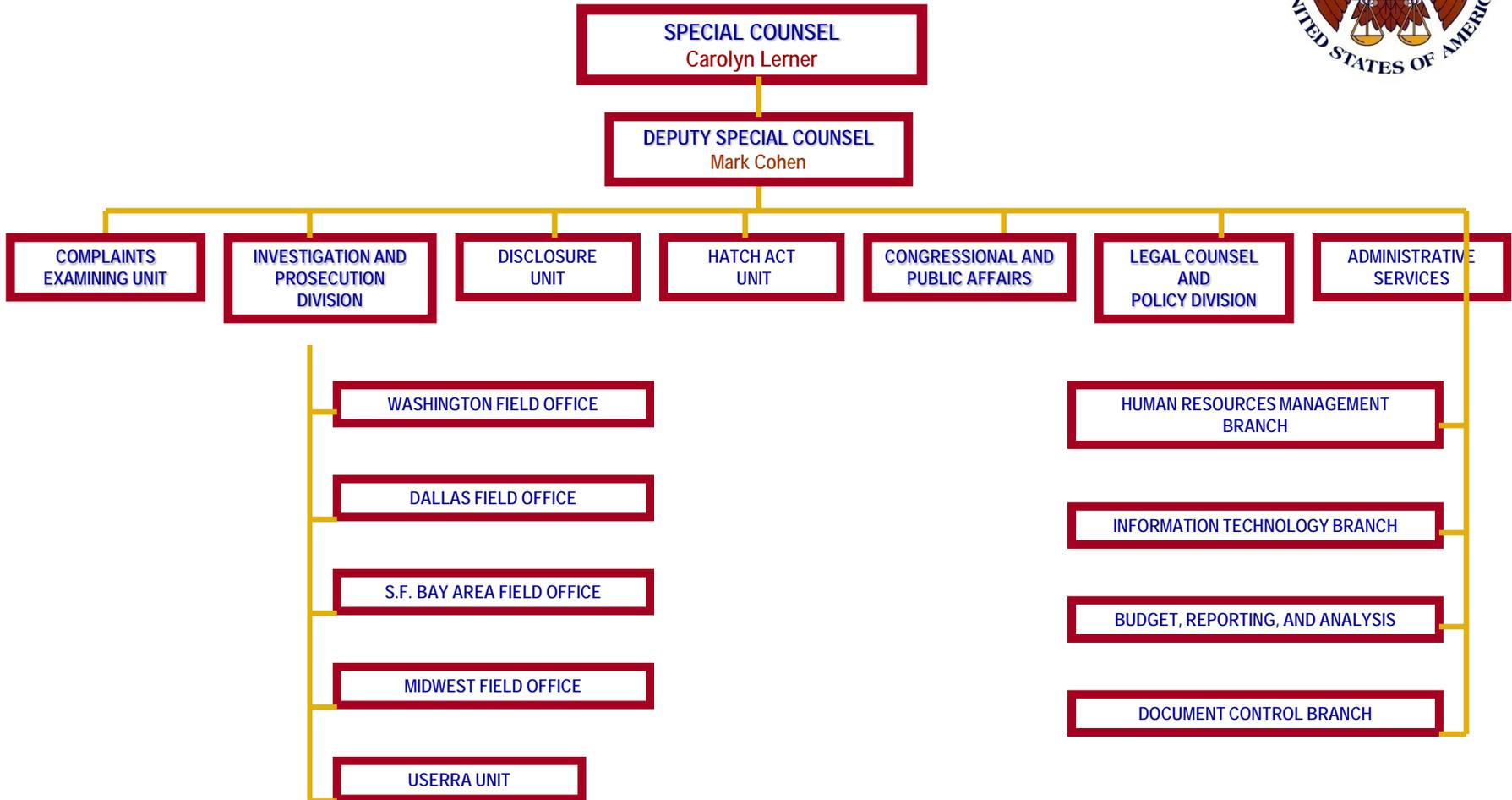
5 U.S.C. §§ 1211-19; 5 C.F.R. Part 1800



Authorized to —

- ❑ Provide safe channel for whistleblower disclosures
- ❑ Advise & enforce Hatch Act provisions on political activity by federal, state, and local government employees
- ❑ Protect reemployment rights of federal employee military veterans and reservists under USERRA

# OSC Organization



# Responsibilities of Agency Officials

5 U.S.C. § 2302(c)



Agency heads, and officials with delegated personnel management authority, are responsible for —

- | Preventing prohibited personnel practices
- | Following and enforcing civil service laws, rules, and regulations
- | Ensuring that employees are informed of rights and remedies (in consultation with OSC)

# Key Concepts



- *Merit System Principles*  
The framework and foundation for making all personnel decisions in the civil service
- *Prohibited Personnel Practices*  
Admonitions against specific practices that conflict with merit systems principles
- *Whistleblower Disclosures*  
OSC provides a safe channel for disclosures by current and former federal employees and applicants for federal employment

# Prohibited Personnel Practices: Overview



## 13 Prohibited Personnel Practices —four general categories:

- Discrimination
- Hiring practices that offend merit system
- Retaliation for protected activity (including whistleblowing)
- Catch-all: violation of law, rule or regulation that implement merit systems principles (including constitutional rights)

# Discrimination



## Prohibited Personnel Practice to discriminate:

- Based on race, color, nationality, religion, gender, handicapping condition, age, marital status, or political affiliation
- Based on “conduct which does not adversely affect the performance of the employee or applicant, or the performance of others,” including sexual orientation

*5 U.S.C. § 2302(b)(1) and (b)(10)*

# Political Activity



## Prohibited Personnel Practice to:

- Coerce political activity of any person (including providing any political contribution or service)
- Reprising against an employee or applicant for employment for the refusal of any person to engage in political activity

*5 U.S.C. § 2302(b)(3)*

# Hiring Offenses



- Obstructing the right to compete
- Influencing withdrawal from competition
- Unauthorized preferences
- Nepotism
- Considering improper job references
- Knowingly violating veterans' preference

*5 U.S.C. § 2302(b)(2); (b)(4); (b)(5); (b)(6);(b)(7); (b)(11)*

# Hiring Offenses



## Most common violations:

- Deceiving/willfully obstructing right to compete for employment — *5 U.S.C. § 2302(b)(4)*
- Influencing withdrawal from competition to improve or injure employment prospects of another — *5 U.S.C. § 2302(b)(5)*
- Granting unauthorized preference or advantage to improve or injure the prospects of any particular person for employment — *5 U.S.C. § 2302(b)(6)*

# Hiring Offenses



## Common misconception:

- Not prohibited to act upon preconceived idea that one person may be best selectee for particular position ("*preselection*")
- To violate the law there must be —
  - ✓ The grant of some illegal advantage
  - ✓ An intentional and purposeful manipulation of the system to insure that one person is favored and another is disadvantaged

# Hiring Offenses



## Caveats:

- While most hiring offenses require intent to deceive or manipulate, hiring in violation of a law, rule, or regulation implementing a merit system principle is also a PPP
- Negligent or imprudent actions can create appearance of violation leading to complaints and investigations — E.g., Broadcasting one's choice before competition

# Examples of Hiring Offenses



- Manager deliberately fails to post vacancy to stop particular candidate from applying
- Application received is deliberately misplaced or destroyed
- Supervisor gives employee dishonest recommendation or appraisal to keep valuable employee or to help another candidate

# Examples Of Hiring Offenses



- Supervisor encourages subordinate not to compete, or to withdraw application, by promising future benefits that supervisor does not intend to grant
- Closed vacancy announcement is re-opened to permit favored candidate to apply

# Examples Of Hiring Offenses



- Job qualifications are manipulated to favor particular applicant
- Supervisor tells qualified employee not to apply for job in order to improve another employee's chances of selection

# Catchall Prohibited Personnel Practice



Taking or failing to take personnel action,  
in violation of a law, rule, or regulation  
that implements or directly concerns a  
merit system principle

*5 U.S.C. § 2302(b)(12)*

# Retaliation

5 U.S.C. § 2302(b)(8), (b)(9)



Taking, failing to take, or threatening to take or fail to take personnel action for —

- Protected whistleblowing
- Exercise of appeal, complaint, or grievance rights
- Testimony or other assistance to person exercising such rights
- Cooperation with or disclosures to Special Counsel or Inspector General
- Refusal to obey an order that would require violation of law

# Elements of Proof: Reprisal for Whistleblowing

5 U.S.C. §§ 1214(b)(4)(a)-(b), 1221(e)



Must show —

- Protected disclosure of information under 5 U.S.C. § 2302(b)(8)
- Personnel action taken, not taken, or threatened
- Actual or constructive knowledge of protected disclosure
- Protected disclosure was contributing factor in personnel action

# Protected Whistleblower Disclosures

5 U.S.C. §§ 2302(b)(8), 1213



## Disclosure Categories

- Violation of any law, rule, or regulation
- Gross mismanagement: substantial risk of significant impact on mission
- Gross waste of funds: more than debatable expenditure
- Abuse of authority
- Substantial & specific danger to public health & safety
- Censorship related to scientific research or analysis (scientific integrity)

# Protected Whistleblower

## Disclosures *(cont'd)*

5 U.S.C. §§ 2302(b)(8), 1213



- Generally protected when made to any person
- Need not be accurate to be protected
- Protected if employee reasonably believes that it is true — test is both objective and subjective

# Protected Whistleblower Disclosures *(cont'd)*

5 U.S.C. §§ 2302(b)(8), 1213



- No requirement to go through chain of command
- Whistleblower's personal motivation does not negate reasonable belief
- Employee or applicant protected if employer mistakenly believes he or she is a whistleblower

# Protected Whistleblower Disclosures *(cont'd)*

5 U.S.C. §§ 2302(b)(8), 1213



- Disclosure does not lose protection because:
  - disclosure made to person who participated in the wrongdoing;
  - disclosure revealed information that had previously been disclosed;
  - disclosure made while off duty; or
  - disclosure made during the employee's normal course of duties.

# Protected Whistleblower

## Disclosures *(cont'd)*

5 U.S.C. §§ 2302(b)(8), 1213



Disclosure not protected (unless made to OSC or IG), where —

- | Prohibited by law (and certain regulations), or
- | Required by Executive Order to be secret for national security or foreign affairs

# Non-Disclosure Agreements



- Non-disclosure agreements, policies or forms must include a statement clarifying that agency restrictions on disclosures are superseded by statutory whistleblower rights.
- Implementing or enforcing a nondisclosure agreement that fails to provide this required notification of whistleblower rights is a PPP.

# Contributing Factor



Any factor which alone or in connection with others tends to affect in any way the outcome of the personnel action at issue

- | Can be established by knowledge / timing alone
- | Often established by circumstantial evidence

# Clear and Convincing Evidence

(Agency Defense)



- Agency must show — by clear and convincing evidence — that it would have taken same action without disclosure
- Factors:
  - Strength of evidence in support of personnel action
  - Existence & strength of motive to retaliate
  - Treatment of similar employees who are not whistleblowers

# OSC's management advice



- Be measured in your speech and actions
- Keep the merit systems concepts on your radar screen
- Foster an open work environment in which employees are not reluctant to disclose wrongdoing
- Set the right tone at the top
- Be consistent in managing employees
- Seek expert advice when you are unsure

# Corrective Action

5 U.S.C. § 1214



If OSC finds prohibited personnel practice committed, letter is sent to agency head requesting corrective action

*Example --*

Rescind suspension, issue back pay

In most cases, agencies agree to corrective action requested and settlement

# Corrective Action *(cont'd)*

5 U.S.C. § 1214



## Corrective Action includes:

- Placing individual in the position he or she would have been in had no wrongdoing occurred
- Reasonable and foreseeable consequential damages
  - Attorney fees, back pay and benefits, medical costs, travel expenses
  - Compensatory damages

# Corrective Action *(cont'd)*

5 U.S.C. § 1214



If agency does not act in reasonable time to correct PPP, OSC may petition the Board for corrective action

- | Board allows for oral or written comments by OSC, OPM, the agency involved, and by alleged PPP victim
- | If Board determines that OSC has demonstrated that PPP occurred, exists, or is to be taken, Board shall order appropriate corrective action

# Disciplinary Action

5 U.S.C. § 1215



May be sought by OSC for —

- | Prohibited personnel practices
- | Hatch Act violations
- | Other violations of civil service law, rule, or regulation

# Disciplinary Action *(cont'd)*

5 U.S.C. § 1215



May be sought by OSC from —

- | The Merit Systems Protection Board
- | Agency heads  
*(For uniformed service members and contractors)*
- | The President  
*(For most presidential appointees)*

# Disciplinary Action *(cont'd)*

5 U.S.C. § 1215



## Possible penalties —

- | Removal, reduction in grade, suspension, or reprimand
- | Debarment from federal employment  
*(Up to five years)*
- | Civil penalty  
*(Up to \$1,100)*

# Disciplinary Action *(cont'd)*

5 U.S.C. § 1215



Rights of charged employee include —

- | Opportunity to respond
- | Legal or other representation
- | Hearing before Merit Systems Protection Board Administrative Law Judge
- | Written decision

# Whistleblower Disclosures

5 U.S.C. § 1213



The Office of Special Counsel provides a safe channel for whistleblower disclosures by federal employees, former federal employees, and applicants for federal employment

# Whistleblower Disclosures

5 U.S.C. § 1213



## Jurisdictional elements

- Covered agency

Most executive branch agencies

- Covered position

Disclosure must involve occurrence connected to performance of employee's duties & responsibilities

# Whistleblower Disclosures

5 U.S.C. § 1213 (b)



## OSC has no investigative authority

- OSC shall make substantial likelihood determination 15 days after receiving information from whistleblower
- Substantial likelihood: agency investigation more likely than not to substantiate allegations
- Follows MSPB definitions of gross waste of funds, gross mismanagement, & abuse of authority

# Whistleblower Disclosures

5 U.S.C. § 1213 (c)



## Referrals--

If Special Counsel determines there is substantial likelihood that information shows one or more categories of wrongdoing, Special Counsel must transmit information to agency head

# Whistleblower Disclosures



- | Agency head required to investigate and submit written report of findings to the Special Counsel within 60 days—5 U.S.C. § 1213 (c)(1)
- | Special Counsel reviews report to determine if it contains information required by statute and if findings appear reasonable—5 U.S.C. § 1213 (d), (e)(2)

# Whistleblower Disclosures



## Whistleblower's Comments

Whistleblower has 15 days to  
comment on agency report

5 U.S.C. § 1213 (e) (1)

# Whistleblower Disclosures



Agency's report and any whistleblower comments are transmitted to President and congressional oversight committees with jurisdiction over the agency involved

5 U.S.C. § 1213 (e)(3)

# Whistleblower Disclosures



- If Special Counsel determines that there is no substantial likelihood that the information shows one of the categories of wrongdoing, then Special Counsel informs whistleblower
  - Reasons why disclosure may not be further acted on, and
  - Directs individual to other offices available for receiving disclosures—  
5 U.S.C. § 1213 (g)(3)

# OSC WEB SITE

(<http://www.osc.gov>)





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### SPECIAL COUNSEL ACTIONS

- > House Action on Whistleblower Protection
- > Senate Action on Whistleblower Protection
- > Special Counsel Calls for Overhaul of Hatch Act
- > Special Counsel Files Amicus Brief on Due Process Protections

### THE AGENCY

- » Senior Management Team
- » OSC Organizational Chart

### GENERAL INFORMATION

**Introduction to OSC**

The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. Our basic authorities come from four federal statutes: the Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act (USERRA). [read more](#)

### DIVISIONS

**Prohibited Personnel Practices (PPP)**

Protecting Federal Government Employees and Applicants from Prohibited Personnel Practices, including Reprisal for Whistleblowing  
[Recent Resolutions and Determinations](#)

**Whistleblower Disclosures (Disclosures)**

Providing a Safe Channel for Government Employees to Disclose Wrongdoing

**Political Activity (Hatch Act)**

Enforcing Restrictions on the Political Activity of Federal Government Employees and Employees of Certain State and Local Government Agencies

**USERRA**

Protecting the Employment and Reemployment Rights of Veterans, Guardsmen, and Reservists

**IMPORTANT NOTICE:** OSC now has an expanded role in handling certain USERRA complaints involving federal agencies. For further information, please see [USERRA Demonstration Project](#).

### HEADLINES:

**Latest OSC Press Release:**

**Statement Upon Release of Report Detailing Whistleblower Retaliation at the U.S. Port Mortuary Report**

**Office of Special Counsel Broadens Investigation into FDA's Surveillance of Employees' E-mail**

**Special Counsel Carolyn Lerner discusses the first six months of her tenure on NPR's Tell Me More."**

**Special Counsel on CNN Regarding Mortuary Whistleblowers: "If the whistleblowers hadn't come forward, we never would have known about this."**

[Lerner: Lack of accountability at Dover - John King USA - CNN.com Blogs](#)

**OSC's Intervention in Case of Franz Gayl**

In November, the Navy Central Adjudication Facility removed the threat of an indefinite suspension without pay from Franz Gayl and reinstated his security clearance. Last year, Mr. Gayl's security clearance was stripped in the aftermath of

# OSC Phone / e-mail contacts



## Complaints Examining Unit:

(202) 254-3670  
(800) 872-9855

## Disclosure Hotline:

(202) 254-3640  
(800) 572-2249

## Hatch Act Unit:

(800) 85-hatch  
(202) 254-3650  
[hatchact@osc.gov](mailto:hatchact@osc.gov)

## USERRA Unit:

(202) 254-3620  
[USERRA@osc.gov](mailto:USERRA@osc.gov)

## OSC Speakers/ Outreach Requests:

Shirine Moazed

(202) 254-3600

# OSC Mail Contacts



**U.S. Office of Special Counsel**

**1730 M Street, N.W. (Suite 218)**

**Washington, DC 20036-4505**



**March 27, 2013**

# **Whistleblower Protection Enhancement Act**

# Whistleblower Protection Enhancement Act

- P.L. 112-199
- Effective December 27, 2012
- S. Rep. 112-155
- Sections of the Code amended by the WPEA are available at  
<http://www.mspb.gov/appeals/uscode.htm>

# Purpose

- Close loopholes and restore original intent of WPA
  - Fed. Cir. and MSPB decisions denied coverage to individuals Congress intended to protect
  - Focus of WPA cases shifted to protected conduct
- Increase awareness of whistleblower rights
- Strengthen ability of OSC to pursue disciplinary action

# Purpose

- “S. 743 makes clear, once and for all, that Congress intends to protect ‘any disclosure’ of certain types of wrongdoing in order to encourage such disclosures. It is critical that employees know that the protection for disclosing wrongdoing is extremely broad . . . Without that assurance, whistleblowers will hesitate to come forward.” S. Rep. 112-155.
- Nov. 2011 MSPB study “*Blowing the Whistle: Barriers to Federal Employees Making Disclosures*” found that approximately one-third of the individuals who felt they had been identified as a source of a report of wrongdoing perceived either threats or acts of reprisal, or both.

# Clarifying Scope of Protected Conduct

- Clarification of Protected Disclosures
  - 2302(b)(8) protects:
    - Disclosure to wrongdoer
    - Disclosure revealing information previously disclosed
    - Disclosure made in normal course of duties
    - Oral disclosures
    - Off-duty disclosures

# Clarifying Scope of Protected Conduct

- Protected Disclosures
  - Motive and delay in making disclosure irrelevant
  - Disagreements over lawful policy decisions not protected
    - Section 102: “(D) ‘disclosure’ means a formal or informal communication or transmission, **but does not include a communication concerning policy decisions that lawfully exercise discretionary authority** unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences— “(i) any violation of any law, rule, or regulation; or “(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”

# Clarifying Scope of Protected Conduct

- “The court wrongly focused on whether or not disclosures of wrongdoing were protected, instead of applying the very broad protection required by the plain language of the WPA. The merits of these cases, instead, should have turned on the factual question of whether personnel action at issue in the case occurred ‘because of’ the protected disclosure.” S. Rep. 112-155.

# Protecting Disclosures About Censorship

- Protects disclosures about censorship related to research, analysis, or technical information
  - Censorship “means any effort to distort, misrepresent, or suppress research, analysis, or technical information.”
- Promotes scientific integrity

# Remedies

- Remedies
  - Uncapped compensatory damages
    - “any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs)”
  - Does not apply to claims arising prior to 12/27/12, except for some HWE claims

# Remedies

- Fees and costs incurred due to a retaliatory investigation
- *Russell v. DOJ*, 76 M.S.P.R. 317 (1997)
  - “[w]hen . . . an investigation is so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliate, and the agency does not show by clear and convincing evidence that the evidence would have been gathered absent the protected disclosure, then the appellant [whistleblower] will prevail on his affirmative defense of retaliation for whistleblowing.”

# Expanded Coverage

- Coverage
  - Grants TSA employees rights under 2302(b)(1), (8) and (9), effective 11/27/12.

# Whistleblower Protection for Intelligence Community Employees

- 10/10/12 Presidential Policy Directive 19 prohibits retaliation against whistleblowers in the intelligence community
- Requires intelligence agencies to establish by July 2013 a review process for claims of retaliation consistent with the procedures in the WPA.

# Procedural Enhancements

- Procedural Changes
  - 2-year all-circuit review pilot
  - Authorizes IRA appeal in 2302(b)(9)(A)(i)-(D) cases
    - retaliation for filing (b)(8) complaint (but not for exercising other appeal, complaint or grievance rights);
    - testifying for or otherwise lawfully assisting any individual in the exercise of an appeal, complaint or grievance right;
    - cooperating with or disclosing information to an IG or OSC; or
    - refusing to obey an order that would require the individual to violate a law.

# Procedural Enhancements

- AJ must permit IRA appellant to present her case before permitting the agency to present its defense
- 2302(b)(9) Burden of Proof
- OSC authority to file amicus briefs

# Disciplinary Action

- Disciplinary Action
  - Lowers OSC burden in disciplinary action cases
    - In (b)(8) and (b)(9) cases, “but for” causation → significant motivating factor
  - OSC would not be responsible to pay fees to a prevailing party in a disciplinary action case

# Nondisclosure Provisions

- New PPP
  - Implementing or enforcing a nondisclosure policy, form or agreement lacking required statement about whistleblower rights.
  - “These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.”

# Nondisclosure Provisions

- Agencies can enforce agreements or policies in effect prior to December 27, 2012 if they provide the statement to employees (modifying the agreement).
- Agencies must post the statement on their websites, accompanied by list of controlling Executive orders and statutory provisions.

# Nondisclosure Provisions

- Provisions that control in the case of a conflict with nondisclosure policy, form or agreement
  - Executive Order No. 13526;
  - section 7211 of title 5, United States Code (governing disclosures to Congress);
  - section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military);
  - section 2302(b)(8) of title 5, United States Code, as amended by the Whistleblower Protection Act of 1989 (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats);
  - the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents);
  - and the statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C. 783(b)).

# IG Whistleblower Protection Ombudsman

- PAS IGs must designate an ombudsman to educate employees about whistleblower rights and remedies.
- Ombudsman shall not act as a legal representative, agent, or advocate of the employee.
- Agency heads have a similar duty under 2302(c)

# OSC Outreach

- 2302(c) Certification
- Enhanced Outreach
  - “Know Your Rights When Reporting Wrongs,” posted in the outreach section of OSC’s website
  - 2302(c) slide presentation, posted at <http://www.osc.gov/outreach.htm>
  - Online training

# Whitmore

- *Whitmore v. Dep't of Labor*, No. 2011-3084  
(Fed. Cir. May 30, 2012)
- Landmark ruling about agency burden of proof
- Critical holding on the scope of discovery and scope of hearing

# Whitmore

- “‘Clear and convincing evidence’ **is a high burden of proof for the Government to bear.** It is intended as such for two reasons. First, this burden of proof comes into play only if the employee has established 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.” Second, this heightened burden of proof required of the agency also recognizes that when it comes to proving the basis for an agency’s decision, **the agency controls most of the cards—the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases.** In these circumstances, it is entirely appropriate that the agency bear a heavy burden to justify its actions.” (citing WPA legislative history)

# Whitmore

- Critical holding about scope of discovery and hearing.
  - “Evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion.”
  - Error to conclude no retaliatory motive where proposing and deciding officials were outside chain of command and not directly implicated in Whitmore’s whistleblowing.
    - Where disclosures cast an agency into a critical light, there can still be retaliatory motive imputed to an official who may not personally know the whistleblower, was not named in the disclosures, and not directly involved in the retaliation.