



## U.S. OFFICE OF SPECIAL COUNSEL

### Fact Sheet for Whistleblower Retaliation

#### *Purpose*

The purpose of this fact sheet is to provide general guidance on whistleblower retaliation, a specific prohibited personnel practice, and the right to file an Individual Right of Action with the Merit Systems Protection Board (Board). This document does not serve as legal advice and should not be cited as legal authority; rather, the relevant [statute](#), the Board's [regulations](#), and current case law are the final authority on these issues.

#### *What is the Whistleblower Protection Act?*

Congress enacted the Whistleblower Protection Act of 1989 (WPA), later amended by the Whistleblower Protection Enhancement Act of 2012 and other laws, to strengthen and improve protections for federal employee whistleblowers. The WPA prohibits retaliation for protected disclosures and activities, described more fully below. The U.S. Office of Special Counsel (OSC) investigates and prosecutes WPA cases and can seek corrective action for victims of whistleblower retaliation as well as disciplinary action against federal officials who violate the law.

#### *Who is Covered under the Whistleblower Protection Act?*

With few exceptions, the WPA protects current employees, former employees, and applicants for employment in any Executive Branch agency, the Government Publishing Office, and government corporations. The WPA does not protect employees of the Government Accountability Office, U.S. Postal Service, Postal Rate Commission, Federal Bureau of Investigation, Central Intelligence Agency, National Security Agency, and certain other intelligence agencies listed in the statute or excluded by the President. Other individuals may also be excluded based on their employment status.

#### *What Evidence Does OSC Rely On to Determine If Whistleblower Retaliation Occurred?*

To show whistleblower retaliation under the WPA, OSC must prove that an individual made a protected disclosure or engaged in protected activity that contributed to a personnel action taken, not taken, or threatened against that individual. Protected disclosures, defined in [5 U.S.C. § 2302\(b\)\(8\)](#), include disclosures reasonably believed to evidence a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. Protected activities, defined in [5 U.S.C. § 2302\(b\)\(9\)](#), include activities like filing an administrative grievance or providing information to an Inspector General. OSC relies on evidence demonstrating (1) the employer's knowledge of the protected disclosure or activity; and (2) a connection between the protected disclosure or activity and the personnel action. Examples of such evidence may include the closeness in time between the protected disclosure or activity and the personnel action, as well as statements of retaliatory animus.

#### *How Can One Help OSC Review Allegations of Whistleblower Retaliation?*

When filing an OSC complaint (OSC Form 11), an individual should ***present information sufficient for OSC to understand the allegations and form a basis to pursue an investigation.*** To the extent possible, providing details such as the dates and descriptions of the protected disclosures and activities and the personnel actions taken in response may aid OSC in its review of the complaint. One should also inform OSC of any additional retaliation that occurs after the original filing. This process of filing an OSC Form 11 and providing sufficient information for OSC to understand the allegations is called “**exhaustion of administrative remedies.**”

### ***What Can One Do If OSC Closes the Whistleblower Retaliation Case?***

An individual may file an Individual Rights of Action (IRA) with the Board. An IRA is a complaint filed with the Board where the individual alleges that a personnel action was taken, not taken, or threatened in retaliation for making protected disclosures under section [2302\(b\)\(8\)](#) or for engaging in protected activities under section [2302\(b\)\(9\)\(A\)\(i\), \(B\), \(C\), or \(D\)](#). An IRA is referred to as an appeal of the challenged personnel action; it is not an appeal of OSC's decision and, as such, the Board may not hold it against you if OSC closes the case.

### ***When Can One File an Individual Right of Action?***

To file an IRA, an individual ***must demonstrate that the individual exhausted administrative remedies*** with OSC and that one of two conditions have been met:

- (1) **OSC closed the case.** If that occurs, OSC will provide the individual with a closure letter and an additional letter informing the individual of the right to file with the Board (called an IRA letter). The individual must file the IRA within 65 days from the date of OSC's IRA letter, or 60 days from receipt of it, whichever is later; or
- (2) **120 days passed from the filing of the OSC complaint.** Please note that if an individual chooses to file an IRA at this time, OSC will generally terminate its inquiry.

### ***How May One Show Exhaustion of Administrative Remedies to the Board?***

While this list is not comprehensive, an individual may demonstrate to the Board that the individual exhausted administrative remedies by including with the IRA any or all of the following:

- A copy of the IRA letter from OSC. Please note that the Board generally requires an individual to submit the IRA letter if OSC has closed the case.
- A copy of the OSC complaint (OSC Form 11) and all written amendments to it, such as letters or emails to OSC documenting additional allegations of whistleblower retaliation.
- An affidavit or declaration attesting to the substance of the OSC complaint. If an IRA letter is not submitted, this should include a statement that OSC has closed the complaint, or that 120 days have passed since the OSC complaint was filed.

When considering an IRA, the Board may not rely on OSC's earlier determinations in a case; rather, the Board should only review information to assess whether an individual has exhausted administrative remedies. If the Board requires copies of letters where OSC makes determinations about the case, the Board first must issue an order explaining why such letters are necessary and give the individual the opportunity to consent.

### ***Tips and Recommendations for Showing Exhaustion of Administrative Remedies***

- Maintain a clean copy of the OSC complaint (OSC Form 11) for record-keeping purposes.
- Provide OSC with a timeline of the allegations, including the dates of the protected disclosures or activities, who was involved, and the related personnel actions.
- Provide any additional allegations to OSC in writing.
- Keep a copy of all documents submitted to OSC, including any additional allegations submitted, and all communications to and from OSC (*e.g.*, email exchanges, OSC closure and IRA letters).

### ***What If One Has Other Procedural Questions?***

- Contact OSC's Prohibited Personnel Practice Hotline at [ppp@osc.gov](mailto:ppp@osc.gov) or (202) 804-7000.
- Visit the Board's website at <https://www.mspb.gov/appeals/appeals.htm> and/or review its regulations at [5 C.F.R. Parts 1209](#) and [1201.24](#) for additional information about the timing and content of an IRA appeal.