

Organizations, Associations and Businesses Support Swift Action to Restore Strong, Comprehensive Whistleblower Rights

An Open Letter to Members of Congress

August 14, 2012

The undersigned organizations and corporations write to urge completion of the landmark, decades-long legislative effort to restore credible whistleblower rights for federal employees. We offer our support to expeditiously pass legislation providing genuine protection for those who risk their careers to protect the taxpayers. Whistleblower protection is a foundation for any change in which the public can believe. It does not matter whether the issue is economic recovery, prescription drug safety, environmental protection, infrastructure spending, national health insurance, or foreign policy.

In May 2012, the Senate unanimously passed the Whistleblower Protection Enhancement Act (WPEA), for the fourth time since 2006. It is well past time to finish the job. Unfortunately, every month that passes means the status of federal government whistleblowers continues to erode, because none have viable rights. On average, more than 15 whistleblowers a month lose initial decisions from administrative hearings at the Merit Systems Protection Board (MSPB), and less than one prevails. The Whistleblower Protection Act was last restored in 1994, and has since fallen victim to hostile judicial activism. A recent MSPB survey found that federal whistleblowers were nine times more likely to be fired in 2010 compared to 1992. This reality maximizes government secrecy based on fear, the breeding ground for corruption.

Under current law, federal employees are not eligible for whistleblower protections if they:

- are not the first person who discloses given misconduct
- make a disclosure to a co-worker;
- make a disclosure to a supervisor;
- disclose the consequences of a policy decision;
- blow the whistle while carrying out job duties.

Current law remains a would-be whistleblower's best reason to turn a blind eye to government waste, fraud, abuse and public health and safety threats. We all want the same thing: that the Whistleblower Protection Enhancement Act become law this year.

However, we urge you to send a final bill to the President's desk that includes the best of both H.R. 3289 and S. 743—not a watered-down version. In the interest of serving that purpose, we want to clarify what we believe are the elements essential to any legislation that we can credibly support. These elements, listed below, are crucial to ensure that federal whistleblowers who protect taxpayer dollars and the public's trust are given adequate access to court, and provide meaningful protections for employees with access to classified information and those working in the intelligence community. Those landmark reforms have been the subject of extremely thoughtful deliberation and consensus for many months.

Absent any one of the elements listed below, we feel that we will be left with a bill that fails to adequately advance whistleblower and taxpayer protections.

* Appellate review: The Federal Circuit cannot retain its monopoly on appellate review of the Whistleblower Protection Act. This court has a long history of frustrating the congressional mandate, evidenced by a 3-226 track record (as of June 2012) against whistleblowers for decisions on the merits since 1994, when Congress last reaffirmed and strengthened those rights.

* Access to district court: We believe that the right to a jury trial is what whistleblowers deserve and ought to receive, and is what Congress has granted to private-sector whistleblowers ten times since 2002. Further, whistleblowers should have access to district court with the same burdens of proof afforded by the Whistleblower Protection Act of 1989. Reducing agency employers' burden of proof would be unprecedented and would roll back a cornerstone of the Act that Congress has reaffirmed in every whistleblower law for corporate employees since 1989.

* Administrative due process: The provision for summary judgment authority is widely perceived as giving MSPB permission to deprive whistleblowers of the opportunity for administrative due process hearings. At a minimum, summary judgment would force unemployed whistleblowers to spend thousands of dollars for depositions before they even know if a hearing will occur. That is too high a price for the legislation.

* Security clearance due process reform: Presently this is the harassment of choice against national security whistleblowers throughout government who challenge national security breakdowns. Since the consequences of security clearance loss frequently are permanent blacklisting, the lack of due process has much worse consequences than depriving whistleblowers of fair play. As a consequence, national security whistleblowers will be unlikely to come forward unless they are willing to commit career suicide. This will deprive the country of the most effective early warnings about national security breakdowns, and other evidence of waste, fraud and abuse.

We appreciate your bipartisan consensus support for significant reforms, including closure of judicially created loopholes; restoration of a functional, "reasonable belief" standard, codification of the anti-gag statute, extension of whistleblower rights to the intelligence community and to all federal employees facing security clearance retaliation through administration regulations, establishment of due process standards to prevent retaliation through security clearances, and expansion of contractor whistleblower rights in HR 3289. We believe it is essential that the law is clear that the WPEA provisions are additive, not substitutive, for current rights. A strong federal whistleblower statute is needed to close existing loopholes, and provide comparable rights and remedies to the dozen gold standard whistleblower rights that Congress has passed for private sector employees since 2000.

We know you share our commitment to more transparency and accountability in government. Passing a strong, bipartisan whistleblower reform law would do much to restore the public's faith in Congress, ensure efficient and accountable government, and save taxpayer dollars. Major studies confirm that whistleblowers have been and will continue to be our best defense against waste, fraud and abuse. Inexcusably, they have been waiting over 12 years for rights that give them a fighting chance to defend themselves when they defend the public by exposing government misconduct. Enough Is enough.

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