

Speaking Up for Science

A Guide to Whistleblowing
for Federal Employees and
Contractors



GOVERNMENT
ACCOUNTABILITY
PROJECT

Government Accountability Project

1612 K Street NW, Suite 1100

Washington, DC 20006

● 202.457.0034

● www.whistleblower.org

Speaking Up for Science

A Guide to Whistleblowing for Federal Employees and Contractors

CONTENTS

01 Introduction

Science Under Attack

Whistleblowers in Science Who Made a Difference

06 What is Whistleblowing?

Whistleblowing: Employee Disclosures of Abuses of Public Trust

Not Whistleblowing: Disclosures of “Lesser” Misconduct and Policy Disagreements

The Truth About Whistleblowers: Tackling Misperceptions

10 Federal Employee and Contractor Whistleblower Rights and Remedies

Whistleblower Protections for Federal Employees

Whistleblower Protections for Federal Contractors

Whistleblower Rights Supersede Gag Orders

Other Speech Protections for Federal Employees and Contractors

23 Survival Tips: How to Report Wrongdoing Safely & Effectively

Pre-Disclosure Precautions & Practices

Avenues for Reporting

A Note on Anonymity

Best Practices for External Whistleblowing

32 Resources

Contact Government Accountability Project

Government Resources

Other Whistleblower Support Organizations

Books/Articles on Whistleblowing

Information Security

Introduction

Science Under Attack

Science is essential to effective policymaking and oversight. Alarmingly, the current administration has waged a war on science that is unprecedented in modern politics. Concern among federal scientists and contractors over what appears to be the ideologically based, anti-science culture of this administration is justified given recent trends that include:

- Disregarding the best available scientific evidence throughout the rulemaking process
- Political interference in grant allocation to research programs
- Decreasing the role or entirely disregarding the advice of scientific advisory committees
- Appointing unqualified individuals with clear conflicts of interest to key agency positions
- Censoring scientific research and limiting the public's ability to access this information from the federal government¹

This hostility to science has prompted some members of the federal workforce to leave their posts—often quietly after many years of dedicated public service. Others have quit in protest, choosing a “noisy exit,” naming names and calling out the wrongdoing they’ve witnessed or experienced by voicing their complaints in the press and on social media.

Many who choose to remain have become silent observers, witnessing affronts to scientific integrity while censoring themselves in order to maintain job security. In fact, most employees who witness wrongdoing in their workplace stay silent, either because they fear reprisal or believe speaking out will not solve the problem.²

1 For other examples of the Trump administration's attacks on science and scientists, see [Protecting Science at Federal Agencies: How Congress Can Help](#) (November 2018).

2 Research consistently identifies fear of reprisal and fear of futility as the dominant reasons employees stay silent despite witnessing wrongdoing. See, e.g., E.W. Morrison, “Employee Voice and Silence,” *Annual Review of Organizational Psychology and Organizational Behavior*, Vol. 1 (2016): 173-197; David Mayer, et al., “Encouraging employees to report unethical conduct internally: it takes a village,” *Organizational Behavior and Human Decision Processes* 121 (2013):89-103.

Others, however, use different strategies to fulfill their duty to protect the public trust that comes with public service, particularly important to the work of science-based agencies. Some employees question their superiors in small ways and are able to effect positive change from within. Some keep careful records, documenting concerns about activities that compromise an agency's public interest mission.

Then there are the courageous employees who decide to exercise their legal rights, whether as part of job duties or in dissent, to disclose illegality and other serious wrongdoing, abuses of authority or threats to public health, safety or the environment. They may do this by sharing information with managers they believe might respond with integrity, to an agency inspector general, to a member of Congress, or to a journalist or advocacy group.

These are whistleblowers.

Whistleblowers are often the best, and sometimes the only, pathway toward holding government institutions accountable, ensuring regulatory compliance, and protecting the public's interests. More than 60 federal whistleblower protection laws exist in the United States today, along with many state and local laws, which give employees the legal right to report wrongdoing free from reprisal. Even in the most factious periods of Congress, whistleblower protection is a policy issue that has consistently garnered unanimous, bipartisan support.

Government Accountability Project is the nation's leading whistleblower protection and advocacy organization, having assisted over 8,000 whistleblowers since its founding in 1977. We help whistleblowers hold government and corporate institutions accountable by presenting their verified concerns to public officials, advocacy groups, and journalists, and seeking justice when they suffer reprisal. Government Accountability Project has drafted, spearheaded the campaigns to pass, or helped defend all the federal whistleblower protection laws that exist today. We have unique expertise, earned over 40 years, in minimizing the risk and maximizing the effectiveness of whistleblowing.

Journalists and other advocacy organizations are increasingly encouraging employees to come forward with information, a welcome recognition of the important role whistleblowers play in promoting accountability and protecting democracy. However, unlike an experienced attorney, who will both understand how to protect the whistleblower while assessing safe avenues and strategies for disclosing concerns, a reporter or public interest group may place

a premium on securing valuable information while failing to fully appreciate the potential risks to their source, inadvertently causing them harm. Given that most employees are neither activists nor media-savvy, consulting with an experienced attorney about how to raise concerns safely and effectively is always a wise first step.

Government Accountability Project attorneys have prepared this guide for federal employees and contractors who have observed wrongdoing and want to take action, but are unfamiliar with the complex terrain of whistleblowing and wish to get a better sense of available protections and avenues for disclosing misconduct. While this guide is neither comprehensive nor should be construed as offering legal advice, it offers some basic guidance as a starting point for employees who seek information regarding their legal rights to report serious abuses that undermine scientific integrity. Information is power, and employees who are better informed of their rights, risks and options around disclosing wrongdoing will also be better able to answer the call of professional integrity and civic duty by reporting serious abuses of public trust.

Whistleblowers in Science Who Made a Difference

- **Drs. Scott Allen and Pamela McPherson** serve respectively as medical and mental health subject matter expert contractors for the Department of Homeland Security's **Office of Civil Rights and Civil Liberties**. Having reported concerns internally about systemic problems with conditions of care at family detention centers they investigated over four years, Drs. Allen and McPherson shared their concerns with Congress and the media about the threat of imminent harm to children posed by expanded detention under the Trump administration's "zero-tolerance" immigration policy. Their disclosures have supported Congressional efforts to ensure that immigration policies and practices prioritize care over confinement of children.
- **Kevin Chmielewski** began serving in May 2017 as the deputy chief of staff for operations under EPA Administrator **Scott Pruitt**. After he and other senior officials internally challenged Pruitt's spending and management practices, Chmielewski was put on administrative leave without pay and others were reassigned or demoted. The personnel actions triggered *New York Times* coverage in April 2018, followed swiftly by Congressional inquiries based on Chmielewski's disclosures of abuses of authority and gross waste of taxpayer funds, which included extravagant spending on a private phone booth, an excessive security detail, first-class air travel, and personal vacations. Administrator Pruitt ultimately resigned in July 2018, facing widespread public criticism and at least thirteen federal investigations.
- **Joel Clement** is a biologist who served as a top-level Policy Advisor to the Secretary of the Department of Interior. After speaking out about the dangerous climate change impacts on Alaskan Native communities, Clement was reassigned from his senior post to an office that collects oil royalty checks. After blowing the whistle by taking his story to the press and filing a formal complaint with the White House Office of Special Counsel (OSC), Clement eventually decided to leave the federal government and to continue to be a public advocate for accountability and scientific integrity. His case is ongoing.
- **Larry Criscione**, an engineer and risk analyst with the Nuclear Regulatory Commission (NRC), became increasingly alarmed that the Oconee nuclear power plant in South Carolina was at risk of flooding and undergoing a meltdown similar to the disaster at Fukushima. When his warnings went unheeded, he blew the whistle by reporting to Congress in 2012 that the NRC was failing to act on evidence that Oconee and nearly a quarter of the nation's nuclear plants could not withstand an upstream dam break, a risk that escalates as climate change exacerbates the threat of flooding. Criscione's

disclosures have drawn public attention to the urgent need to prevent a flood-related nuclear disaster. In 2016, he received the Joe A. Callaway Award for Civic Courage.

- **Dr. David Graham**, a Food and Drug Administration safety researcher, demonstrated that the painkiller medication Vioxx had caused over 40,000 fatal heart attacks. Graham testified before Congress in 2004 after the FDA attempted to suppress his findings. His disclosures forced Merck to recall Vioxx and pull it off the shelves, saving countless lives.
- **Rick Piltz** served as a senior associate in the Coordination Office of the U.S. Global Change Research Program (USGCRP). He witnessed a high-level official in the George W. Bush White House editing scientific reports on climate change so as to exaggerate scientific uncertainty and thwart justification for reducing carbon dioxide emissions from fossil fuel combustion. Piltz blew the whistle in 2005 by sharing evidence of the edited reports with *The New York Times*; the front-page story prompted the resignation of the offending official, a former oil lobbyist.
- **Aldric Saucier** was a physicist with the Army Strategic Defense Command who exposed gross mismanagement and waste associated with President Reagan's Strategic Defense Initiative (SDI), an anti-nuclear missile defense project Congress funded only after being misled about the program's feasibility and efficacy. Saucier's disclosures substantially eroded support for the SDI program, which was eventually abandoned, and prevented the launch of its next generation, a trillion-dollar program named "Brilliant Pebbles."
- **Walt Tamosaitis** is a PhD engineer who worked for a subcontractor of the Bechtel Corporation, a Department of Energy (DOE) contractor responsible for building the Waste Treatment Plant (WTP) at the Hanford nuclear site in Washington State. Tamosaitis exposed waste, fraud and technical problems at the WTP that could have resulted in a Fukushima-like nuclear explosion in the Pacific Northwest. Tamosaitis's concerns were validated by agency and media investigations and resulted in recovery of \$125 million for taxpayers, new whistleblower protections for 12 million federal contractor employees, and a halt to plant construction pending resolution of safety issues.
- **Dr. Susan Wood** served as Food and Drug Administration Assistant Commissioner for Women's Health for five years. When she concluded in 2005 that political interference from the George W. Bush administration was tying up the approval of Plan-B, not the safety or efficacy of this "morning-after pill" that was supported by strong data, she resigned in protest and spoke out forcefully that FDA science was being held captive by the anti-abortion movement. The political battle continued to be waged until 2013, when a court mandated that the emergency contraception be made available over-the-counter without age restrictions.

What is Whistleblowing?

Whistleblowing: Employee Disclosures of Abuses of Public Trust

Whistleblowers are those who witness wrongdoing in the workplace and, rather than stay silent, decide to speak up to expose serious violations of public trust.

While there is no single law that protects all whistleblowers, the primary laws that protect non-intelligence federal employees and federal contractors define a whistleblower as **an employee who discloses information that he or she reasonably believes evidences:**

- a violation of law, rule or regulation;
- gross mismanagement;
- a gross waste of funds;
- abuse of authority; or
- a substantial and specific danger to public health or safety.³

This definition captures two key points about whistleblowers. First, whistleblowers typically are current or former employees with direct, credible information about wrongdoing that they became aware of while on the job. Second, the concerns are serious and their disclosure promotes legal compliance or protects the public interest.

Not Whistleblowing: Disclosures of “Lesser” Misconduct and Policy Disagreements

If the misconduct does not rise to a level of serious concern as outlined above, it does not mean that the concern may not be important, valid, or even corrosive to workplace integrity. Likewise, an employee may have a legitimate dispute about a decision of management.

³ See Whistleblower Protection Act of 1989, 5 U.S.C. § 2302(b)(8) & (b)(9) and the protections for federal contractors under the National Defense Authorization Act (NDAA), 41 U.S.C. § 4712. In the Whistleblower Protection Enhancement Act of 2012, Congress unanimously expanded whistleblowing to shield disclosures of scientific censorship that would result in one of the aforementioned types of misconduct. Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, § 110(b) (“WPEA”). The WPA, WPEA and other laws that give federal employees and contractors the right to blow the whistle are covered in more detail later in this Guide.

However, if an employee's concern is not about legal violations, gross mismanagement, a gross waste of funds, abuse of authority, a substantial and specific danger to public health or safety, or censorship that would result in these forms of misconduct, **the disclosures would not rise to a level that would meet the standard of “whistleblowing” protected under the WPA or most other whistleblower protection laws.** This does not mean the employee is gagged, however. The First Amendment to the U.S. Constitution prohibits prior restraint, and in some cases will shield speech outside the whistleblower laws. But the rights are far less clear and difficult to prove.

Similarly, if an employee's disagreement with a policy decision is rooted in a difference of opinion, rather than about the specific consequences of the policy decision that the employee reasonably believes would result in legal violations, gross mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to public health or safety, **that policy disagreement would not constitute protected whistleblowing.** The flip side is reassuring, however, and a lesson for how to frame scientific dissent. While a scientist only has First Amendment rights for policy dissent, **disclosing the illegal, abusive or dangerous consequences of a policy triggers whistleblower protection.⁴**

The Truth About Whistleblowers: Tackling Misperceptions

Cultural biases, combined with natural resistance to those who challenge the behavior of their employers, have generated several common misperceptions about whistleblowers. Government Accountability Project's experience working with thousands of employees of conscience refutes these beliefs with several important truths:

TRUTH #1: Almost all whistleblowers raise concerns internally first.

First, it is important to note that employees who raise serious concerns internally to managers or through other internal channels are considered whistleblowers under nearly all whistleblower protection laws.

The vast majority of whistleblowers—over 95%—try to solve the problem internally first.⁵ Most employees have faith that raising legitimate concerns to their supervisors, an

⁴ 5 U.S.C. § 2302(a)(2)(D).

⁵ See Ethics Resource Center, "[Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey](#)" (2012).

ombudsman or through another internal mechanism will resolve the issue. Some employees spend months in frustration while diligently attempting to achieve corrective action in-house. Typically, it is only after attempts to address a problem are met with inadequate action or reprisal does an employee decide to “blow the whistle” externally.

TRUTH #2: Whistleblowers are motivated by a strong sense of professional, civic, ethical and/or legal duty influenced by the seriousness of the misconduct or degree of harm.

When employees do speak up, it is most often because they feel they are just doing their job.

Contrary to popular belief, the majority of whistleblowers do not typically speak up for self-preservation or enrichment. They speak out because they have witnessed misconduct they feel must be addressed, such as dangerous safety problems at nuclear weapons facilities, drugs that should be recalled because they are causing deaths, and gross waste of taxpayer dollars on defense contractor boondoggles.

Some whistleblower laws, like the False Claims Act and the Dodd-Frank Act, do offer whistleblowers a percentage of the portion of money recovered as an incentive for reporting fraud. While these laws have been very successful in encouraging reports of fraud, not only are the chances of winning an award very small, they are also not the norm: The Whistleblower Protection Act for federal employees and most non-financial whistleblower protection laws do not have award provisions , yet thousands of employees report forms of misconduct other than fraud--such as public safety threats, environmental violations, and other abuses--each year..

In our experience, most employees who feel compelled to speak out about wrongdoing explain that they had to act in order to remain true to themselves. As one explained, “I have to keep looking at myself in the mirror.”

TRUTH #3: Disclosing evidence of wrongdoing is not a crime. It is a legally protected right.

The aggressive prosecution under both the Obama and Trump administrations of intelligence community (IC) employees who released classified information to expose government illegality and abuses of authority has fueled a widespread belief that whistleblowing is a crime. It's not.

Whether or not you agree with the actions taken by Edward Snowden, Reality Winner, or Chelsea Manning, national security employees who have released classified information

dominate the public narrative about whistleblowing. Like Daniel Ellsberg, these were civil disobedience whistleblowers who, because of ineffective internal avenues for disclosure and limited legal protections available for IC employees and contractors, chose to commit a crime—revealing classified information—in order to report more significant crimes.

Intelligence community whistleblowers are unique, as they have very few legal protections and immense vulnerabilities. Most whistleblowers are not forced to risk breaking the law by disclosing classified information to expose wrongdoing. ***Only a small percentage of whistleblowers work in the intelligence community.***

As a rule, unless public release is barred by statute, whistleblowers who disclose evidence of illegality, financial fraud, environmental violations, or public health and safety threats are engaging in *legally-protected activity*. Disclosures are protected whether as dissent or part of job duties.

Unfortunately, prosecutions of IC whistleblowers combined with aggressive “anti-leak” rhetoric fuels the misperception that whistleblowing is rogue rather than legal activity. This confusion is then exploited and exacerbated by new attempts to suppress employee speech, including illegal gag orders, non-disclosure agreements, bans on using certain words in government documents, and mandatory “anti-leak” and “insider threat” trainings. Aimed to prevent “unauthorized disclosures” even when those disclosures are not classified (indeed, most whistleblowing to external sources is inherently “unauthorized”), these efforts create a dangerous chilling effect on employees who are often unclear about how or hesitant to exercise their legal rights to blow the whistle.

The good news is that the ongoing proliferation of gag orders is a legal bluff, as brazen as it is unlawful. The Whistleblower Protection Enhancement Act and the Consolidated Appropriations Act provide protection against repressive gag orders that would violate the whistleblower rights of federal employees and contractors.⁶ The bad news is that, despite the law, sweeping gag orders and criminal prosecutions are more prevalent than in decades. It matters to know the difference between the myth and strong legal rights.

⁶ 5 U.S.C. § 2302(a)(2)(a)(xi) (definition of “personnel action” to qualify for whistleblower rights); 5 U.S.C. § 2302(b)(13)(independent prohibited personnel practice); WPEA § 115 (generic ban on uncontrolled gag orders); §§713 and 744, Consolidated Appropriations Act, 2016; Division E, Financial Services and General Government Appropriations Act, 2016; Title VII, General Provisions, Government-Wide.

Federal Employee and Contractor Whistleblower Rights and Remedies

While various rights and remedies exist for federal employees to encourage them to blow the whistle on serious abuses free from reprisal, the legal landscape is complicated. Each law has different remedies, different procedural steps and different paths for enforcement. Not only can it be difficult to evaluate available legal options depending on each unique set of facts—assessing the content of the disclosure, to whom the disclosure should be (or was) made, and what kind of reprisal was suffered—it can also be difficult to navigate the legal process once a particular path is chosen.

Below we highlight the primary laws that support the rights of federal employees and contractors, particularly in the science-based agencies, to report serious misconduct they witness on the job. The list is not comprehensive, and we strongly encourage anyone thinking about blowing the whistle to seek advice from an attorney experienced in representing whistleblowers.

Whistleblower Protections for Federal Employees

The Whistleblower Protection Act

The Whistleblower Protection Act of 1989, amended by the Whistleblower Protection Enhancement Act of 2012,⁷ is the primary law that gives (non-intelligence) federal employees the right to blow the whistle—to report serious wrongdoing—free from reprisal.

Protected Activity

The WPA gives most federal employees⁸ the right to disclose information, both **internally** (to co-workers, managers, organizational hotlines, an agency Inspector General, etc.) and

⁷ See Whistleblower Protection Act of 1989, 5 U.S.C. § 2302(b)(8) & (b)(9); Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, § 110(b).

⁸ Law enforcement, military and intelligence agencies are exempted from the WPA, as are U.S. Postal Service employees, Government Accountability Office (GAO) employees, and federal contractors.

externally (to Congress, regulators, the media, watchdog organizations, etc.), that he or she reasonably believes evidences:

- **a violation of law, rule or regulation;**
- **gross mismanagement;**
- **a gross waste of funds;**
- **abuse of authority;**
- **a substantial and specific danger to public health or safety; or**
- **censorship related to research, analysis or technical information that is, or will cause, any of the above forms of misconduct.**

In addition, federal employees are protected from retaliation if they:

- **file a complaint, grievance or appeal;**
- **testify or help another person with exercising any of their rights;**
- **cooperate with or disclose information to the Office of Special Counsel (OSC), an agency Inspector General (IG), or Congress;⁹ or**
- **refuse to obey an order that would require the individual to violate a law, rule or regulation.¹⁰**

A disclosure is protected:

- if the employee is mistaken about the concerns but has a “reasonable belief” that the disclosure evidences serious wrongdoing;
- if the disclosure is made to a supervisor or person who participated in the wrongdoing;
- if it reveals information that was previously disclosed;
- no matter the employee’s motives for making the disclosure;
- if it is made when the employee is off duty;
- if it concerns events that occurred in the past;
- if it is made in the normal course of an employee’s duties.¹¹

⁹ Under the Lloyd Lafollette Act, federal employees have had since 1912 an unqualified right to safely communicate with Congress. 5 USC §7211. This right has also been embedded into the WPA.

¹⁰ Employees are safest if they first carry out what they believe to be an illegal order and then report the problem internally or externally, unless the order would violate a statute, rule or regulation; physically endanger the employee; or cause irreparable harm.

¹¹ 5 U.S.C. § 2302(f).

A disclosure is NOT PROTECTED under the WPA:

- ➔ if it **reflects only a disagreement with a policy or a decision** that is not otherwise unlawful or would not constitute or result in gross mismanagement, a gross waste of funds, an abuse of authority, a substantial and specific danger to public health or safety, or scientific censorship that would result in such misconduct;
- ➔ if, for public disclosures, an **executive order mandates that the information be kept secret in the interest of national defense or the conduct of foreign affairs**;
- ➔ if, for public disclosures, **disclosing the information is prohibited by law** (e.g., if public release of the information is barred by a statute, such as the Trade Secrets Act or the Privacy Act).¹² Note: an agency rule or regulation does not qualify as a bar to disclosure.¹³

Disclosures of classified or other information barred from public release may be made through alternative, lawful channels, including the Office of Special Counsel or an agency Inspector General. But disclosing such information outside of those channels, such as to the press or a non-profit organization, could result in prosecution.

“Duty Speech” Is Protected

Most whistleblowers do not think of themselves as people who act courageously to report wrongdoing; most view themselves as simply doing their jobs. Many employees are expressly charged with investigating and disclosing wrongdoing as part of their job duties, such as an employee responsible for performing research and analysis that could obstruct a politically-motivated project or policy, or one charged with inspecting industry operations to ensure compliance with environmental or safety laws, or one tasked with preparing accurate scientific reports intended for Congress.

The Whistleblower Protection Enhancement Act corrected case law that previously

12 5 U.S.C. § 2302(b)(8).

13 See *Department of Homeland Security v. MacLean*, 574 U.S. ___ (2015) (https://www.supremecourt.gov/opinions/14pdf/13-894_e2qg.pdf).

exempted from protection disclosures of misconduct made in the course of performing one's duties.¹⁴ Now "duty speech"—concerns about illegality, gross mismanagement, gross waste of funds, abuse of authority, a substantial and specific danger to public health or safety, or scientific censorship that would result in such abuses raised in the course of doing one's job—is considered protected whistleblowing. However, there is a slight, but significant catch. For duty speech, a WPA violation requires retaliation, which includes proving animus. For all other disclosures, a mere causal link between the protected disclosure and the personnel action means rights have been violated. For duty speech, the "nothing personal, just business" explanation could cut off a whistleblower's rights.

Personnel Actions Against Whistleblowers are Prohibited

While some managers respond appropriately when employees raise concerns, attacking the messenger rather than addressing the problem that has been disclosed is a frequent enough response by employers to have warranted legislation prohibiting reprisal for whistleblowing. The Whistleblower Protection Act prohibits employers from **taking, failing to take, or threatening to take, personnel actions** against an employee because of whistleblowing activity described above.¹⁵ Prohibited personnel actions include:

- ➔ a promotion or failure to promote;
- ➔ disciplinary or corrective action;¹⁶
- ➔ a detail, transfer or reassignment;
- ➔ a poor performance evaluation;
- ➔ a change in pay, benefits or awards;
- ➔ a decision regarding training or education if it would lead to a personnel action such as an appointment, promotion or personnel action;
- ➔ a change in duties, responsibilities, or working conditions;
- ➔ ordering a psychiatric exam;
- ➔ gag orders or non-disclosure agreements that do not include an exception for whistleblower rights and protections under the WPA;¹⁷
- ➔ threatening an employee with any of the above.

¹⁴ 5 USC§2302(f)(2).

¹⁵ 5 USC §2302(b)(8).

¹⁶ Disciplinary actions recognized under the WPA include a demotion; a reduction in pay or grade; a furlough; removal from federal employment; a suspension; being put on administrative leave; a warning letter; a reduction in force; a reprimand

¹⁷ 5 USC §2302(a)(2)(A).

In addition to retaliation being prohibited, recently enacted legislation, the [Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017](#),¹⁸ mandates that supervisors found to have committed a prohibited personnel action be disciplined, with a minimum suspension for the first offense and with proposed removal for a second offense.

Remedies for Retaliation

Anyone who has experienced any of the actions listed above as a result of a **disclosure**, **cooperation with an investigation** with an Office of Inspector General or the Office of Special Counsel, or **refusal to disobey a law**, can file a reprisal claim.

To prove a reprisal claim for whistleblowing, an employee must establish by a preponderance of the evidence that:

- ➔ he or she **engaged in protected activity** (i.e., disclosure of information he or she reasonably believed evidenced a violation of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; a substantial and specific threat to public health or safety; or scientific censorship that would result in any of these forms of misconduct);
- ➔ a **personnel action was taken, threatened or not taken** after the protected activity;
- ➔ the **employer had knowledge of the protected activity**;
- ➔ that the **protected activity was a relevant, or "contributing factor" that prompted the retaliatory personnel action.**¹⁹

If the employee can establish these elements of a reprisal claim, the burden shifts to the employer to prove, by clear and convincing evidence (a very high standard of proof), that it would have taken the personnel action against the employee even if the employee had not blown the whistle.²⁰

Who to Contact About Retaliation

Below are the primary entities available to federal employees for addressing retaliation. We strongly encourage consulting with an attorney experienced in representing government whistleblowers for strategic advice and counsel.

18 Public Law No: 115-73, S. 585, Section 104 (2017).

19 5 USC §1221(e).

20 *Id.*

► Office of the Special Counsel (OSC)

Employees who have experienced **retaliation on a smaller scale**, such as a change in responsibilities or a suspension of fewer than 14 days, must go to the OSC before utilizing the resources of the Merit Systems Protection Board (MSPB). Employees also may initiate a reprisal claim with the OSC for severe retaliation such as termination. The OSC will conduct an independent investigation, using best efforts to maintain confidentiality if requested by the employee. If the OSC finds that the agency engaged in reprisal, it can seek a stay of the adverse action, or it may seek to use mediation to resolve the claim (which has a very high success rate for resolution). If the OSC decides to take no action, finds against the employee, or delays issuing a finding, the employee can request a hearing with the MSPB by filing an individual right of action (an "IRA"), either 60 days after receiving a determination by the OSC, or 120 days after filing a complaint if no action has been taken. A case that has moved before the MSPB allows for discovery (but within very strict deadlines), a hearing before an administrative judge, and a written decision that can be appealed to the full Board and then to the U.S. Court of Appeals.

► Merit Systems Protection Board (MSPB)

Employees who experience **retaliation on a larger scale**, such as suspension for over 14 days or termination of employment – or tenured federal employees with additional civil service protections – may go directly to the MSPB for expedited discovery and a hearing before an administrative judge. The case will go before an administrative judge, and if appealed, to the full Board and then before a Federal Circuit Court of Appeals judge. Unfortunately, MSPB Administrative Judges typically **rule against whistleblowers**, deciding against them in the majority of cases. Administrative appeals to the full Board also drag out for years, with the 2018 backlog approaching 1,000 cases and the Board without a quorum to issue decisions. Until the civil service appeals system again becomes functional, whistleblowers should consider a little-used option to bypass the full Board and appeal adverse Administrative Judge rulings directly to the federal court of appeals.

► Union Representative

For employees who belong to a federal employee union, all collective bargaining agreements offer a distinct process for resolving whistleblower retaliation claims through independent, binding arbitration. While more expedited, favorable and less costly, exercising the union right means the whistleblower surrendering control of his or her rights. The case becomes the union's, which can withdraw the case despite the employee's objections.

The latter vulnerability is particularly significant, because an employee must **choose only one venue** (i.e., the OSC, MSPB, or the union grievance procedure) to pursue a claim. The

optimal path to pursue depends on the facts of each case. The deadlines and rules for filing are different for each path, so it is always wise to seek advice from an experienced whistleblower attorney as soon as you suffer an adverse personnel action for engaging in protected activity so they can help assess your case and advise you on the best path for seeking a remedy for reprisal.

The First Amendment

The First Amendment protects federal employees' ability to speak in their private capacities, on their own time, about matters of public concern.²¹ For speech to be protected under the First Amendment, courts must determine that the public benefit of the speech outweighs the government's interest in efficient operations free from disruption.²² Generally speaking, public employees may not be disciplined for engaging in public discourse about political, social or community concerns as private citizens, such as writing a letter to the editor critical of policy choices or speaking at a public meeting about climate science as a concerned citizen.

The First Amendment has also been effective as a protection against prior restraint, or efforts by the government to require employees to seek approval before communicating in their private capacities.

The First Amendment affords very limited protection for employee speech when it touches on matters relating to the internal operations of their workplace, such as office morale or administrative policies, since such speech would be of limited public concern and highly disruptive to government operations.

The balancing test applied by a court—whether the employee's interest in free speech outweighs the government employer's interest in orderly operations—can be complicated and difficult for an employee to prevail. For example, if there are agency rules that mandate that all press interviews must be pre-approved by the communications office,²³ an employee who speaks to the press in violation of this policy would likely be deemed disruptive. Similarly, even off-duty speech as a private citizen may fall outside of constitutional protection if the speech discloses classified information, compromises an ongoing investigation, or violates confidentiality laws would disrupt the efficient operation of the agency.

Finally, duty speech—speech undertaken as part of one's job responsibilities—is not afforded

21 *Pickering v. Board of Education*, 391 U.S. 563 (1968).

22 Ibid.

23 Assuming such a policy explicitly states as it must that it does not trump an employee's whistleblower rights. See *Whistleblower Rights Supersede Gag Orders*, p.18.

constitutional protection.²⁴ This protection exists under the WPA and only if it meets the standard of a protected disclosure.

This is why the statutory rights created by the WPA that enumerate specifically the types of speech that benefit the public—disclosures that evidence potential or actual illegality, gross waste, gross mismanagement, abuse of authority, or substantial and specific danger to public health or safety—avoid the uncertainty inherent to constitutional protections. The legal burdens of proof and available remedies provided by the WPA are far more favorable to federal employees than those with constitutional claims.

Whistleblower Protections for Federal Contractors

Government contractor employees who work for non-intelligence federal agencies also have whistleblower protections. The National Defense Authorization Act (NDAA) essentially extends and strengthens the protections provided to federal employees under the Whistleblower Protection Act (WPA), covering all individuals performing work on a government contract or grant, including personal services contractors and employees of contractors, subcontractors, grantees or subgrantees.²⁵ Under the NDAA, government contractors, subcontractors and grantees can file a whistleblower retaliation claim if they experience reprisal for disclosing information that the employee reasonably believes is evidence of:

- ➔ gross mismanagement of a federal contract or grant;
- ➔ a gross waste of federal funds;
- ➔ an abuse of authority relating to a federal contract or grant;
- ➔ a violation of law, rule, or regulation related to a Federal contract or grant;
- ➔ a substantial and specific danger to public health or safety.²⁶

Employees must make disclosures to specified bodies enumerated in the statute: Congress, an Inspector General, the Government Accountability Office (GAO), the Department of Justice or other law enforcement agency, a federal employee responsible for contract or

²⁴ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

²⁵ Section 827 of the NDAA protects Department of Defense (DoD) and National Aeronautics and Space Administration (NASA) contractors (10 U.S.C. § 2409(a)(1)), and Section 828 applies to all other federal **non-intelligence** contractors (41 U.S.C. § 4712(a)(1)). See §§ 827 and 828, Pub. L. No. 112-239 Stat 1632 (2013), as amended by Pub. L. No. 114-261, 1301 Stat. 1363 (2016).

²⁶ Unlike in the WEPA for federal employees, disclosures of scientific censorship that would result in these forms of misconduct are not protected under the NDAA.

grant oversight at the relevant agency, or a management official of the contractor who has the responsibility to investigate, discover or address misconduct.

To seek relief for whistleblower retaliation—which includes discharge, demotion or other discrimination against an employee for making a protected disclosures—an employee must file a complaint within three years after the date of reprisal with the Office of Inspector General (OIG) of the agency that awarded the contract or grant. The OIG is charged with investigating the complaint and submitting a report to the agency head within 180 days of receiving the complaint. The agency head, within 30 days of receiving the OIG report, must issue an order either denying relief or ordering the contractor to abate the reprisal, offer reinstatement, pay the whistleblower back pay or compensatory damages, and/or pay attorney fees and costs.

If an employee is either denied relief after going to the OIG or has not obtained relief within 210 days of filing the original complaint, they may go to federal court and seek justice through a jury trial, an option not available for federal civil service employees. The NDAA is an important new law that expands whistleblower protections and offers meaningful rights to millions of federal contractors and grantees, many of whom are integral to the science-based missions of multiple federal agencies.

Whistleblower Rights Supersede Gag Orders on Both Federal Employees and Contractors

The Whistleblower Protection Enhancement Act (WPEA) and the anti-gag provisions in the FY 2017 Consolidated Appropriations Act (CAA) all make it illegal to gag federal employees and contractors from blowing the whistle.

Both the WPEA and CAA contain language prohibiting Congress from funding agencies that “implement or enforce” any “non-disclosure policy, form, or agreement if such policy, form, or agreement does not contain” provisions reaffirming that employee whistleblower rights are controlling, despite any non-disclosure restrictions.²⁷ **Federal government and contractor employers cannot block federal employees or contractors from speaking without including required language that informs employees that their statutory right to blow the whistle supersedes the terms and conditions of the nondisclosure agreement or policy.**

²⁷ 5 USC §2302(b)(13); §§713 and 744, Consolidated Appropriations Act, 2016; Division E, Financial Services and General Government Appropriations Act, 2016; Title VII, General Provisions, Government-Wide.

The Office of Special Counsel has interpreted “non-disclosure policy, form, or agreement” to include management communications broadly. Examples of non-disclosure edicts that would violate the anti-gag provisions of the WPEA or CAA, if issued without explicitly noting the primacy of whistleblower protection rights, include:

- ➔ posters that encourage employees to “Report Possible Insider Threat Indicators;”
- ➔ emailed instructions barring employees from using specific words such as “evidence based,” “climate change” or “fetus” in communications to Congress;
- ➔ policies that bar media correspondence;
- ➔ directives that mandate pre-screening communications through legal departments or public information officers;
- ➔ employment contracts with non-disclosure agreements.

When an agency unlawfully gags its employees, it threatens Congress’s ability to engage in oversight, hampers citizens’ right to know about threats to public health, safety and the environment, and undermines policy making that depends on science and evidence-based data. These efforts also create a chilling effect on the many federal employees committed to exercising scientific and professional integrity. It is important to know that policies that do not contain explicit language affirming that whistleblower rights trump any communication restrictions are unenforceable and unlawful.

Other Speech Protections for Federal Employees and Contractors

While this Guide focuses predominantly on the rights of federal employees and contractors to report wrongdoing they witness in the workplace that rises to a level of protected whistleblowing under the WPA and the contractor whistleblower protection provisions in the NDAA, other speech protections exist as well. The list below is not comprehensive but seeks to offer some additional insight into the patchwork of whistleblower protections that may apply to federal employees and contractors in the science-based agencies and departments.

Whistleblower Protection Provisions in Environmental, Health, Safety, Consumer and Investor Protection Laws

Twenty-two federal statutes, all enforced by the Department of Labor (DOL), contain whistleblower protection provisions that protect employees from reprisal for making

disclosures that further the laws' enforcement or administration. These laws, which regulate issues including environmental protection, nuclear safety, transportation safety, worker and consumer health and safety, and investor protection, prohibit most forms of reprisal taken against an employee for disclosures that further the specific statute, recognizing that employees are the most effective mechanism to ensure compliance with the goals and provisions of the Acts.²⁸

While all of the laws offer whistleblower protection to corporate employees and contractors, some also offer protection to federal employees. Of particular relevance to science-based employees are the "Big Seven" environmental statutes, five of which apply to federal employees in addition to private sector workers.²⁹ But other laws may also implicate science-based concerns, ranging from violations of the Food Safety Modernization Act (FSMA), the Pipeline Safety Improvement Act (PSIA), or the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) (addressing airline safety).

Unfortunately, the whistleblower protection provisions are not the same for each statute. As noted above, all of the laws protect private employees, while only a few offer protections to federal employees. There are also significant differences in statutes of limitations for filing an initial retaliation claim (e.g., the Clean Air Act (CAA) has a 30-day statute of limitations while the Energy Reorganization Act (ERA) that applies to nuclear safety has a 180-day window). Remedies available are also different, with some laws offering punitive damages and others only offering "make whole" relief (back pay, compensatory damages, and attorney fees and costs).

An employee seeking relief for retaliation suffered because they blew the whistle on compliance failures with one of these laws does so by first filing a complaint with the DOL's Occupational Health and Safety Administration's (OSHA) Whistleblower Protection Program. OSHA must complete an investigation of the violation within 30, or in some cases 60, days from the time the complaint is filed. Unfortunately, a tremendous backlog of cases (as well as a relatively poor track record of finding in favor of whistleblowers) keeps employees in a limbo stage often for months or even years waiting for a preliminary finding, ordering

28 For a list of all of the statutes that include whistleblower protection provisions, visit <https://www.whistleblowers.gov/statutes>.

29 The five of the "Big Seven" environmental statutes with whistleblower protection provisions that give rights to federal employees in addition to private sector workers are the Clean Air Act (CAA), 42 U.S.C. § 7622, the Energy Reorganization Act (ERA) (also encompassing the Atomic Energy Act), 42 U.S.C. § 5851, the Resource Conservation and Recovery Act (RCRA) (also encompassing the Solid Waste Disposal Act (SWDA)), 42 U.S.C. § 6901, the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (a.k.a. Superfund), 42 U.S.C. § 9610. The other two major environmental statutes that do not provide a right of action to federal employees for whistleblower retaliation are the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622 and the Federal Water Pollution Control Act (FWPCA) (a.k.a. Clean Water Act), 33 U.S.C. § 1367.

interim relief if the employee prevails, from the DOL investigator. Either side may appeal the finding to a DOL administrative law judge, with full discovery rights and a hearing. The judge's recommended decision can be appealed to an Administrative Review Board, which has the Secretary of Labor's delegated authority to issue final orders or decisions. Even then, an aggrieved party may appeal the Secretary's decision to the federal circuit court with jurisdiction, with final appeal to the U.S. Supreme Court.

While most of these whistleblower protection laws apply to private sector employees (many of whom may be federal contractors) rather than federal workers, those few that do extend coverage to federal workers offer an alternative process for relief than the primary path provided to federal employees by the Whistleblower Protection Act.

Several statutes, such as FSMA, the ERA, and the Affordable Care Act (ACA), provide opportunities to allow an employee to file a claim in federal district court, with access to a jury trial, if, after filing a complaint with the DOL a final decision has not been issued within the amount of time prescribed in the statute (some require 180, 210 or 365-day waiting periods). More recent laws even allow employees to file de novo review (as though hearing the case for the first time) in federal court within 90 days of a written determination by the DOL.³⁰

Government Accountability Project is engaged in ongoing efforts to strengthen the WPA so that it offers the same opportunities to federal workers for jury trials offered to federal contractors by the NDAA and many of the statutes administered by the DOL discussed here. Another long-term goal is to consolidate and align the whistleblower protection provisions found in these issue-specific statutes so they are consistent in terms of who is covered, the statutes of limitations for filing complaints, the relief available, and the right to remove to federal district court. Until that day, however, this patchwork of statutes can offer additional protections to federal contractors, and some federal employees, who exercise scientific integrity to speak up about threats to the environment, public health or safety, or other violations that undermine the public interest goals of these laws.

The False Claims Act

The False Claims Act (FCA), or the "Lincoln Law," was enacted in 1863 to combat fraud against the government during the Civil War. Today, the FCA, amended in 1986, recovers billions of dollars stolen by federal contractors through fraud each year, and the success

³⁰ For a list of the twenty-two statutes with whistleblower protection provisions, along with notes about who is protected, the statutes of limitations for filing claims, rights of removal to federal court, and remedies available, see https://www.whistleblowers.gov/whistleblower_acts-desk_reference.

of this law depends on whistleblowers.³¹ Many whistleblowers' disclosures of corporate fraud on the government—from sub-standard materials used by federal contractors in the nation's nuclear weapons complex, to fraudulently obtained oil and gas permits, to failures to report hazardous discharges to the environment required by law—have not only recovered millions of dollars for taxpayers, but have leveraged science to protect the public and the environment as well.

The False Claims Act allows individuals, including federal employees, with original knowledge of fraud against the government to file a "qui tam" suit on behalf of the government. To state a claim under the FCA, a plaintiff must allege (1) a false statement or fraudulent course of conduct; (2) made or carried out knowingly, (3) that was material, and (4) that is presented to the federal government.³² A whistleblower who is the first to file a claim as an original source, otherwise known as a "relator," can be entitled to a bounty award of 15-30% of the funds recovered by the government. Contractors found liable for fraud under the FCA can owe three times the amount of damages incurred by the government as a result of the fraud, plus penalties and costs.

To file a False Claims Act, a whistleblower/relator must first file a complaint with the Department of Justice (DOJ), which remains "under seal" (confidential) for at least 60 days while the DOJ investigates and decides whether or not to intervene in (join) the case. The seal is typically extended at least once or more. If the DOJ decides not to intervene in the case, the whistleblower can proceed independently against the contractors to prove the fraud.

The FCA, in addition to providing a private right of action for an individual to challenge fraud against the government if the DOJ declines to intervene, also contains anti-retaliation protections to contractor whistleblowers who disclose fraud and suffer reprisal. An employee or contractor can bring a FCA retaliation claim in federal district court within three years after the date of retaliation, and if successful, is entitled to "make whole" remedies that include reinstatement, compensatory damages, and two times any back pay owed plus interest.³³

Finally, although the FCA has strong anti-retaliation provisions, these do not apply to federal employees because of sovereign immunity. However, because FCA claims are filed under seal while the Department of Justice investigates and decides whether to file an enforcement action, the identity of federal employees who report fraud against the government is inherently protected during the confidential investigative process.

³¹ 31 U.S.C. § 3729.

³² 31 E.g., United States ex rel. Steury v. Cardinal Health, Inc., 625 F.3d 262, 267 (5th Cir. 2010).

³³ 31 U.S.C. § 3730(h).

Survival Tips: How to Report Wrongdoing Safely & Effectively

No matter how right you may be about an observed wrongdoing, and even though retaliation for blowing the whistle is prohibited, employees who speak out often suffer reprisal rather than receive thanks. Weighing the most effective legal options can be complicated and confusing, making it all the more important to secure case-specific legal advice.

Pre-Disclosure Precautions & Practices

Before making any type of disclosure, it is wise to take the following precautions:

1. Consult with a lawyer, specifically one who has **experience helping whistleblowers**.

Most lawyers aren't well-versed in whistleblower law, which is extremely complicated. No single law protects all whistleblowers; instead, a patchwork of more than 60 federal statutes and numerous state and local laws provide redress. Determining the legal remedies and strategies which are best in each situation is complicated. The attorney-client privilege will also ensure that your communications will remain protected and confidential.

2. Create a paper trail. Keep a log that is a timeline of all relevant developments: what happened, when and to whom you complained, and any resulting retaliation. Record all dates and note the details of any supporting emails, memos or other documentary evidence.

3. Print or save any relevant documents you possess, such as meeting notes, memos or emails. One can also record meetings secretly in one-party consent states (including 39 states and Washington, DC).

4. Keep evidence in a safe place. Authorities usually are not limited in access to the whistleblower's workplace, but home storage of documents can also be risky, subjecting a whistleblower to pretextual but seemingly valid discipline and harassment such as expanded retaliatory investigations for theft of government or corporate documents. Since agencies have subpoenaed, searched and ransacked homes, the best choice is to secure the evidence with the whistleblower's attorney, where it is shielded by attorney-client privilege.

5. Be careful to avoid being accused of stealing any documents. In instances where it is not practical to take evidence home, tactics such as mislabeling and misfiling records in your office, to be found later, can prevent their destruction. The strategy means keeping careful notes on a document's substance, but "burying" copies of the actual record in an archive file or innocuous electronic folder name. Be prepared to serve as navigator for law enforcement or other outside investigators to trace where to find copies of the

- documents that an agency acting in bad faith will claim do not exist.
- 6. Before doing anything, **make a plan**. For example, decide whether and when to blow the whistle internally or externally. When does it make sense to give up on internal channels? What documents, if any, should be shared with whom? Try to predict how those in the agency or department will react and respond to a disclosure.
 - 7. **Converse with family members and loved ones** before blowing the whistle. Consider the impact on family members and friends should retaliation occur. This is a decision you must make together, or you may find yourself alone. Develop alternate employment options before drawing attention to yourself. The old adage applies here: plan for the worst and hope for the best.
 - 8. **Avoid creating any other reason to be fired for cause**. Maintain good job performance and follow workplace rules, and if suspected be careful not to take the bait in pretextual confrontations.
 - 9. **Test the waters with work colleagues and attempt to garner their support**, if possible. Determine which colleagues would corroborate your observations or possibly even participate actively in blowing the whistle, although be discreet and start with trusted contacts.
 - 10. **Seek outside help**, including journalists, politicians and public interest organizations, judiciously. Solidarity is essential to both making a difference from blowing the whistle on misconduct and surviving the experience.

Avenues for Reporting

Below are some considerations about possible avenues for reporting information about serious abuses.

Reporting Internally

► Management and Agency Officials

This is usually the first place whistleblowers turn, attempting to solve the problem in house for the good of their organization. While legally protected, in some cases, whistleblowers face retaliation after they go to their supervisors, rather than seeing the problem corrected. If you take this route, document any actions and management responses to your disclosures.

► The Office of the Special Counsel (OSC)

In addition to reviewing claims of reprisal, the OSC also accepts disclosures unattached to a complaint of retaliation. The OSC will review submitted disclosures from current and former federal employees to determine it is a "substantial likelihood" that a validly disclosable violation occurred. If so, they will require the agency head to conduct an investigation into

the matter and issue a report regarding the issue investigated and what steps were taken, or will be taken, to address the problem. The whistleblower then gets the last word to comment on the report's adequacy and provide further evidence. The OSC finishes the cycle by grading the report pass or fail, and submitting the entire package to the President, congressional leadership, and appropriate congressional committees.

The OSC attempts to keep your identity confidential, but if your disclosure is judged to be an imminent threat to public health or safety, your anonymity may be compromised. Another weakness is that the OSC often doesn't meet deadlines. It is supposed to review a whistleblower's disclosure within 15 days, but a backlog of cases often prevents this from happening. Finally, the OSC lacks enforcement authority. It can offer recommendations, but can't force a government agency to do anything. As a result, it is an excellent outlet to complement other disclosure channels and forces agencies to deal with a whistleblower's concerns. But in isolation it is unlikely to spark change.

► **The Office of the Inspector General (OIG)**

Each agency has an inspectors general office that investigates complaints of fraud, waste and abuse internally. You have a right to report problems confidentially as well as anonymously. IGs are more reactive than proactive. They are more likely to investigate based on external controversy than an internal whistleblower's disclosure.

When it comes to whistleblower complaints, Inspectors General offices have not always respected confidentiality rights, aren't transparent, have no deadlines and can ignore complaints. Also, as a practical matter, even those with statutory independence are vulnerable to pressure from the head of the agency of which they are a part, meaning they can be compromised by office politics. Even if they do take action, like OSC, they only have power to offer recommendations. While some OIGs are strong and principled, in worst case scenarios, they can be used as a tool of retaliation against whistleblowers, investigating them instead of the disclosure.

Reporting Externally

► **Congress**

Whistleblowers may disclose information to a member of Congress or a congressional committee. In fact, all communications with Congress are legally protected, not just those with a reasonable belief of misconduct.³⁴ Be aware there is no guarantee of anonymity when disclosing to a member of Congress, and a single member of Congress has no direct authority over the executive branch. Complaints sent to congressional members usually are

³⁴ The Lloyd Lafollette Act of 1912, 5 USC §7211, enforced through the Civil Service Reform Act at 5 USC §2302(b)(12), protects the right of all federal employees to communicate with Congress without interference.

sent back to the agency with questions, which could alert them to a whistleblower in their midst who prompted the inquiry.

On the other hand, members of Congress can bring powerful attention to an issue, creating momentum for change and offering a shield for whistleblowers against retaliation.

Congress isn't primarily an investigative institution, but through its oversight duties has some investigatory powers. The Government Accountability Office (GAO) is a formal investigative arm, and a member of Congress can initiate a GAO probe. Individual congressional members can request information from agencies and publicize it. Individual members of Congress and their staff have various levels of expertise and interest in investigating concerns.

Combined with other channels such as the Office of Special Counsel, a congressional champion can be a powerful reinforcement. This is particularly true when a Member has significant legislative, oversight or appropriations authority. Whistleblower advocacy organizations can help you determine which members of Congress to reach out to, taking into account their interests, expertise and whether you are their constituent.

► Reporters

Federal employees can legally work with reporters to publicize wrongdoing as long as the information is not marked classified or specifically barred by statute from public disclosure. Federal contractors may want to consider maximizing their protections and legal options by first making disclosures to the entities enumerated in the NDAA, outlined on pp.17-18. Coverage of the issues by the press can help fix wrongdoing by building public pressure and shaming the agency into doing right. Active partnerships with media can create a powerful incentive for both law enforcement investigators and politicians to be most aggressive.

Press attention can also sometimes help prevent retaliation, because the spotlight will be on you and your employer would understand that retaliation would make the news. It can also help establish that the employer was aware of the employee's disclosure, critical to proving the "knowledge" element of a whistleblower reprisal claim if retaliation does occur.

Make sure you research the reporter you intend to provide information to so you know that they're serious and have expertise in the subject matter. Figure out if they're a beat reporter, who might have more subject matter expertise, or an investigative reporter, who will have more leeway to pursue a long investigation.

Journalists will also have to vet you and verify your concerns. Having documentation of what happened will help this process.

Be aware that journalism is often slow, especially investigative journalism, and big stories can take journalists months or even years. Journalists should be transparent about whether

they're still pursuing the story, but you shouldn't undermine a journalist by going to a different one simply because you feel they're taking too long. You should just check in with them and see where they are.

If there is a deadline before which you believe the disclosure needs to be made public, let the reporter know. However, understand that they may not judge the same things important that you do and may be unable to meet your deadlines. In fact, the article may not turn out exactly as you expect, because journalists will have different judgment than you do.

If you do seek anonymity, be sure you trust the journalist and the news organization to protect your identity. Work out an agreement with the reporter as early as possible; it is essential to work out the ground rules in advance. Otherwise, once you have shared information with a reporter, it's fair game for anything. "On the record" means there are no restraints for your identity. "Off the record" means not revealing your identity or identifying information that can be traced back to you. "Background" means the information can only be used indirectly as the context to ask questions or otherwise seek more information. As a general rule, unless retaliation has begun it is best to communicate on background until a partnership of mutual trust has been earned.

While reporters as professionals are committed to protecting their sources, with many being willing to go to jail rather than divulge a source in response to a subpoena, there is no federal shield law or reporter's privilege that applies to all journalists' communications; protections vary state by state.

Further, even with a reporter's willingness to defy a subpoena to reveal his or her source, often the identity of a source can be inferred by an employer, either because of the likelihood that the employee first informally raised concerns internally, because of the nature of the information disclosed that would point to job responsibilities and expertise, or because the employee may have used work equipment for communications.

► Public Interest Organizations

Non-profit public interest watchdog organizations may have experience with the issue about which you are concerned or your agency. They can be important allies in ensuring that information about corruption and wrongdoing is used effectively to address abuses of power and protect public interests. Environmental, food safety, science integrity, immigration, fiscal responsibility, and other social and economic justice groups are knowledgeable and influential advocates for reform. Solidarity is the magic word for whistleblowers to make a difference and minimize harassment. These organizations have accumulated credibility, know the territory for political or media partnerships, and represent a political constituency that can magnify the whistleblower's voice. Once a whistleblower has been identified, they can be indispensable partners, both as a lifeline for survival and to have an impact by getting evidence into the right hands.

However, while a few organizations like Government Accountability Project represent whistleblowers, most do not. **Non-profit advocacy organizations typically have limited experience working with whistleblowers and do not understand the complicated legal landscape and risks involved with disclosing serious concerns.** Well-meaning but inexperienced non-profit organizations may appreciate the value of inside information and promise to keep their sources anonymous. But like with journalists, because most employees have either raised concerns internally before going outside of their agency, or because their job responsibilities and expertise would associate them with the disclosure, these promises may be impossible to keep.

Further, unless the organization can explicitly offer legal advice about whistleblowing, your communications will not be protected by the attorney-client privilege. That can be dangerous when their agendas diverge from yours.

Working with a lawyer who is sympathetic to your public interest goals or a non-profit organization like Government Accountability Project that focuses both on protecting the employee and promoting accountability offers employees the best of both worlds: legal support in navigating internal and external avenues for disclosure and to address retaliation, as well as effective matchmaking with journalists, public interest organizations and elected officials to afford the greatest, and safest, opportunities to address the underlying problems.

A Note on Anonymity

Many whistleblowers want to disclose information but also maintain their anonymity. However, anonymity, as mentioned earlier, is not always possible to ensure if the information is used in public ways or through strategic discussions with government investigators, other whistleblowers, or advocacy groups. Indeed, because most employees raise concerns internally first, or because the information can be connected to an employee's job duties and expertise, a hostile employer may be able to identify the source of the information even if not named. Information described by the press, or a document sought in a Freedom of Information Act (FOIA) request with too much specificity by a journalist or a public interest organization, can tip off employers to likely sources.

Remaining anonymous may also not be the best strategy. For instance, trying to remain anonymous while the disclosure's information is public can make a legal case of reprisal more difficult, if not impossible. Under all whistleblower laws, an employee must show that the employer had knowledge of their whistleblowing. Therefore going public, with the whistleblower serving as a human interest focal point for news stories, can sustain the whistleblower's viable legal rights.

Public disclosure can even preempt reprisal by putting the employer on notice that the employee is engaging in protected whistleblowing. When a whistleblower experiences solidarity with a team of allies—advocacy groups, journalists, champions in Congress, a lawyer—focus can be put on the wrongdoing exposed by the whistleblower, thus defeating efforts to vilify the messenger. Surrounding the whistleblower with support not only can insulate the employee from retaliation, but it can amplify awareness of the underlying problems to demand reform.

Going public guarantees, however, that the employee has burned professional bridges. If a scorched earth, no-prisoners conflict did not already exist, that dynamic is a near-certainty once the whistleblower goes public. Further, isolation will cut off access to information to further prove misconduct. Whistleblowers accordingly should try to maintain anonymity as long as possible, disclosing publicly when there are imminent consequences or when it is clear they already are suspected or blamed.

Be aware, even with strong efforts at protecting a whistleblower's identity, the whistleblower is still at risk while an employer searches for the internal source. Harassing and expensive-to-defend defamation suits can be lodged against journalists and advocacy organizations to force divulgence of sources. Because of limited privileges afforded to journalists and public interest groups, whistleblowers should be wary of unqualified promises of absolute anonymity because it simply cannot be guaranteed. Brokering communications with external parties through an attorney with whom a whistleblower's communications are privileged can offer an important layer of protection for a whistleblower.

Best Practices for External Whistleblowing

1. **Before you begin working with a reporter or an advocacy group, negotiate the scope of what you're willing to disclose, whether you need anonymity, and any other protections or concerns.** It is easier for everyone to be clear on the rules from the beginning.
2. **If maintaining confidentiality and anonymity is critical, use secure, encrypted means to communicate,** including [Secure Drop](#) for document exchange, [Signal](#) for texts and calls, [ProtonMail](#) or another email platform that uses Pretty Good Privacy (PGP) encryption, or snail mail with no return address.
3. **Don't communicate with your contacts during your work hours, or use office equipment,** like office phones, computers, or even paper.
4. **Be aware that the best option for your safety may not necessarily be to remain anonymous,** but to instead blow the whistle publicly with the help of a lawyer. Public disclosure can help an employee prove that the employer had knowledge of the whistleblowing, a necessary element in a reprisal case. It can also preempt reprisal, particularly when you are supported by a team of allies.
5. **If you intend to leak documents anonymously, make sure that you are not the only person who possesses these documents so they can't be traced back to you.** If possible, send them out innocuously attached to legitimate listserv emails or upload them to an agency server or archiving system. Check whether any traceable marks are encrypted for electronic communications. Above all, unless you want to leave legal rights behind and be a civil disobedience whistleblower, do not make external disclosures with any information marked classified, or whose release is specifically prohibited by a federal statute. Those only can be disclosed internally, to the Special Counsel or an Inspector General.
6. **Rather than printing secure documents, take pictures of them on your personal secured phone.** Your access to the documents may be able to be tracked, and printing

will narrow the pool of potential people who have accessed the documents.³⁵ If you can't take a photo, make written notes. Again, however, do not take photographs of information for which public disclosure is unprotected. If your phone or camera is seized, you will be blamed for the illegal disclosure and lose your whistleblower rights.

- 7. Instead of providing documents, consider guiding reporters or NGOs in making a Freedom of Information Act (FOIA) request.** To do this, make sure problematic policies or practices are in writing. Try to get your agency to spell them out, or do it in your own emails. Be careful that the FOIA isn't so specific that it tips off the agency that there is a whistleblower. If the agency denies their existence and you have "buried" copies of the records in camouflaged locations, teaming with the requestor to expose that cover-up can be a significant development when challenging broader misconduct.
- 8. Strip meta data from any documents you send,** such as photo locations, watermarks, or tracked changes.

³⁵ Again, the advice in this Guide does not apply to classified documents or to federal employees or contractors in the intelligence community. Mishandling and disclosure of classified information can result in criminal prosecution, and there is no public interest defense for whistleblowers charged under the Espionage Act for possessing and releasing classified information.

Resources

Contact Government Accountability Project

Government Accountability Project is the international leader in whistleblower protection and advocacy. A non-partisan public-interest group, Government Accountability Project litigates whistleblower cases, helps expose wrongdoing to the public, and actively promotes both government and corporate accountability. Our longstanding work with more than 8,000 whistleblowers has involved fighting for accountability for decades in the areas of public health, food safety, national security, human rights, energy and the environment, finance and banking, and international institutions and expanding whistleblower protections domestically and internationally.

Government Accountability Project is available to offer legal and strategic advice and support to public interest organizations and their whistleblower sources, both government and corporate.

Contact us by email

 info@whistleblower.org

Contact us by phone

 **202.457.0034**

Government Resources

Office of Special Counsel - Whistleblower Disclosure Hotline

<https://osc.gov> (800) 572-2249

Merit Systems Protection Board

<https://www.mspb.gov> (202) 653-7200

Inspectors General Directory (includes all OIGs for federal agencies)

<https://www.ignet.gov/content/inspectors-general-directory>

Other Whistleblower Support Organizations

These organizations either offer direct legal representation of whistleblowers or have extensive experience working with whistleblowers and can offer referrals to experienced attorneys.

ExposeFacts - <https://whisper.exposefacts.org>

ExposeFacts is a journalism organization that aims to shed light on concealed activities that are relevant to human rights, corporate malfeasance, the environment, civil liberties and war. They offer legal support to national security whistleblowers as well through their Whistleblower and Source Protection Program (WHISPeR).

Project On Government Oversight (POGO) - <http://pogo.org>

POGO is a nonpartisan, independent watchdog organization that promotes good government reforms by investigating and exposing corruption, misconduct and conflicts of interest. POGO frequently works with government whistleblowers and other inside sources to document evidence of corruption, waste, fraud and abuse.

Public Employees for Environmental Responsibility (PEER) - <https://peer.org>

Public Employees for Environmental Responsibility (PEER) is a national alliance of local state and federal government scientists, land managers, environmental law enforcement agents, field specialists and other resource professionals committed to responsible management of America's public resources. PEER provides advocacy and legal support to employees who speak up for environmental ethics and scientific integrity within their agency.

Taxpayers Against Fraud - <https://taf.org>

The Taxpayers Against Fraud Education Fund is a public interest non-profit dedicated to fighting fraud against the government by incentivizing integrity. Through public-private partnerships, TAFEF advances the effectiveness of the False Claims Act and federal whistleblower programs to promote and protect the efficient use of taxpayer dollars.

Books/Articles on Whistleblowing

Devine, Tom and Tarek F. Maassarani. [The Corporate Whistleblower's Survival Guide: A Handbook for Committing the Truth](#), Berrett-Koehler (2011)

GAP, POGO & PEER, [The Art of Anonymous Activism: Serving the Public While Surviving Public Service](#) (PDF), (2002) (updated version forthcoming)

Kohn, Stephen, [The New Whistleblower's Handbook: A Step-By-Step Guide To doing What's Right and Protecting Yourself](#), Lyons Press; 3rd Ed. (2017)

Schwellenbach, Nick, "[Survivor's Guide to Being a Successful Whistleblower in the Federal Government](#)," Just Security (Feb. 22, 2017)

McCutcheon, Chuck, "[Whistleblowers](#)," CQ Researcher, 24.5 (Jan. 31, 2014)

Zuckerman, Jason and Eric Bachman, [The Whistleblower Protection Act: Federal Employees to Root Out Waste, Fraud and Abuse](#) (PDF), Zuckerman Law (2017)

Information Security

Freedom of the Press Foundation, [Guides and Training](#)
<https://freedom.press/training>



GOVERNMENT
ACCOUNTABILITY
PROJECT

www.whistleblower.org

 202.457.0034