

New Federal Statute Protects Federal Employee Whistleblowers

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[Update on Sam Wright](#)

9.0—Miscellaneous

On October 26, 2017, President Trump signed the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017.³ This law is designed to ensure that federal supervisors will honor whistleblowers and act to correct the fraud, waste, and abuse that they have disclosed, rather than reprising against them. Attachment 1 is the Congressional Research Service (CRS) summary of this important new law. Attachment 2 is a Department of Homeland Security (DHS) announcement of this new law.

Protecting and encouraging whistleblowers is a matter of great interest to me. I worked for the United States Office of Special Counsel (OSC) as an attorney in 2007-08. In 1996-97, I served on

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1500 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1300 of the articles.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 35 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

³ Public Law 115-73, 131 Stat. 1224.

active duty, as a judge advocate and Navy Reserve Captain, as the Director of the Hotline Investigations Division for the Naval Inspector General.

I know that many people (especially those who are in authority in federal agencies) consider whistleblowers to be a nuisance or worse. I have just the opposite opinion of them. From my own military and civilian experience, I know that it is only through the disclosures of federal insiders (military and civilian) that fraud, waste, and abuse in federal agencies can be brought to the attention of inspectors general, so that these abuses can be corrected. Whistleblowers often show great courage in disregarding risks to their own careers to bring to light serious abuses.

Protecting federal employee whistleblowers, under this new law and existing laws, depends upon the Merit Systems Protection Board (MSPB). Thus, it is most unfortunate that the MSPB has ground to a halt because two of the three positions are vacant and the other will be vacant in a few weeks.⁴ I call upon President Trump to make three nominations to the MSPB as soon as possible, and I call upon the Senate to act expeditiously on the nominations once made.

Attachment 1—Congressional Research Service summary of the new law

Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 TITLE I--EMPLOYEES GENERALLY (Sec. 102) This bill directs federal agencies (excluding any entity that is an element of the intelligence community) to give priority to an employee transfer request if the Merit Systems Protection Board (MSPB) grants a stay of a personnel action at the request of: (1) the Office of Special Counsel (OSC) if the OSC determines the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice; or (2) the employee if the individual is in probationary status and seeks corrective action. The Government Accountability Office (GAO) shall report to Congress on retaliation against employees in probationary status. (Sec. 103) The bill: (1) prohibits any employee who has the authority to take a personnel action to access the medical records of another employee or applicant for employment, (2) authorizes disciplinary action against supervisors for retaliation against whistleblowers. (Sec. 105) Agencies must: (1) refer information about employee suicides to the OSC, (2) train supervisors on responding to complaints alleging whistleblower protections violations, (3) provide information regarding whistleblower protections to new employees during probationary periods, (4) inform employees of the role of the OSC and the MSPB with regard to whistleblower protection, and (5) make information about such protections available on agency websites. TITLE II--DEPARTMENT OF VETERANS AFFAIRS EMPLOYEES (Sec. 201) The Department of Veterans Affairs (VA) must: (1) submit a plan to prevent unauthorized access to the medical records of VA employees; (2) conduct an outreach program to inform its employees of available mental

⁴ Please see Law Review 17114 (November 2017).

health services, including telemedicine options; and (3) ensure protocols are in effect to address threats against VA employees providing health care. (Sec. 204) The GAO shall assess the reporting, staffing, accountability, and chain of command structure of the VA police officers at VA medical centers.

Attachment 2—Department of Homeland Security announcement about the new law

- November 29, 2017

Dear Colleagues,

Last month, the President signed into law the *Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017* to honor a U.S. Department of Veterans Affairs psychologist who suffered significant retaliation for reporting wrongdoing at work. Dr. Kirkpatrick committed suicide as a result. In his memory, the new law works to ensure that supervisors cannot exact retribution on employees who make protected disclosures about misconduct or illegal activities. The law includes mandatory penalties for supervisors who are found to have retaliated against a whistleblower. This law is part of the commitment by the Department and the Federal government to provide you a workplace in which you can safely report wrongdoing when you see it.

In addition to the 2017 law, the *Whistleblower Protection Act* protects federal employees and applicants against retaliation for making whistleblower disclosures and prohibits federal agencies from taking, or threatening, action because an employee or applicant made a whistleblower disclosure. The *Whistleblower Protection Enhancement Act of 2012* further strengthens the protections for federal employees who disclose evidence of misconduct and illegal activities. As a Department, we want every employee to be both empowered and protected in their reporting of any misconduct or illegal activities. By working together with employees and the public, the Department, Office of Inspector General (OIG), and Office of Special Counsel (OSC) aim to protect the integrity, effectiveness, and efficiency of all DHS programs. As a measure of our commitment to these protections, the Department's whistleblower protection program worked for many years and obtained OSC certification of the program in 2016.

There are a number of avenues for reporting perceived violations, including to the DHS OIG, OSC, and U.S. Congress. To help you easily determine both what you should report and how to report suspected issues, we have created a web resource – [DHS Whistleblower Protection](#). At this site, you can find frequently asked questions, see what training the Department offers, what legal protections are available, and a number of other helpful tools and guidance. If you believe you have been subjected to discrimination or retaliation for protected equal employment opportunity (EEO) activity, contact your component EEO office within 45 calendar days of the date of the alleged discriminatory or retaliatory act, or the date you knew or should have known of the alleged discrimination. Refer to [Filing an Equal Employment Opportunity](#)

Complaint for more information. Additional information regarding your rights as a whistleblower, the types of disclosures that are protected, and the complaint process is available on the OIG's Whistleblower Protection Unit website. This unit ensures Department employees and contract personnel are aware of the role and importance of whistleblowers in improving the effectiveness and efficiency of the Department's operations. The unit also provides education on your legal rights and protections against retaliation. More information about protected disclosures is also on the OSC website.

Remember, the manner by which we carry out our mission is also critical. We all have a responsibility to report wrongdoing and you should never be afraid to report illegal or unethical behavior that occurs here at DHS. Whistleblowers are protected by law and retaliation is prohibited. Your service and sacrifice on behalf of DHS deserve nothing less.

Sincerely,

Chip Fulghum
Deputy Under Secretary for Management
Department of Homeland Security

With honor and integrity, we will safeguard the American people, our homeland, and our values.
