

### **The Whistleblower Protection Enhancement Act of 2012: Will Anything Change?**

After over 12 years of debate, the Whistleblower Protection Enhancement Act (WPEA) was passed by Congress and became effective on December 27, 2012; and the new law clarifies the protections of the Whistleblower Protection Act (WPA), resolves many of the administrative and judicial loopholes encountered by previous whistleblowers, and expands the number of federal employees covered. But like the former WPA, the new WPEA will not change anything unless it is enforced; and most federal departments and agencies have not been enforcing the WPA .

For years, federal departments and agencies have been complying with parts of the WPA and the relatively recent No-Fear Act ---the training and educational requirements. They have put up notices, offered training programs, and required mandatory completion of on-line courses. On the other hand, they have done virtually nothing to investigate claims of retaliation, or assist those who have been the victims of retaliation, or punish violators of the laws. The situation is like a highway with many speed limit signs but no enforcement ---no speed traps or police patrols. And since federal employees know there's no significant enforcement of the WPA, the WPA has been useless and totally ineffective in protecting federal employees from retaliation. It's been a sham---it looks good on paper but it isn't doing anything.

Most departments and agencies have the equivalent of a Whistleblower ombudsmen or a Whistleblower section within their Office of Inspector General; and most of these are supposed to respond to Whistleblower complaints, conduct informal or formal inquiries into complaints, and punish or discipline violators; and only complaints that could not be resolved were supposed to have been referred to the Office of Special Counsel (OSC).

In reality, however, whistleblowers often find no one is interested in investigating their case. Most federal departments and agencies do nothing to respond quickly and effectively to whistleblower cases, they don't investigate complaints, and violators seldom are punished. "Remediation" or some kind of "alternative dispute resolution" is offered, but victims often find the "solution" requires them to return to the same job with the same supervisors, they are forced to accept "gag orders" and never discuss their case or its resolution publicly; and eventually they find they've been blackballed from ever being promoted or being able to transfer or move to a new position. In addition, violators usually are never punished and their violations are never publicized. At worse, they are quietly transferred to other positions within the government---not unlike the Catholic Church transferring erring priests from parish to parish.

In the past, if victims filed a case with the Office of Special Counsel, they found the OSC had a reputation for doing nothing; more recently, the OSC has been trying to do its job but it's so back-logged that it can take two years for cases to be investigated. And when simple, uncomplicated, and blatant violations of the Whistleblower Protection Act take years to be resolved, it means the law simply isn't working.

Consequently, who would report waste, fraud, or abuse if they knew it could mean almost certain retaliation, and an inability to be promoted, or moved, or be rehired? Who would try to make recommendations in how our government could save money and who would report those who are violating federal laws and regulations, if they knew they were not protected, or if they knew the statistical odds of ever winning a case are so small?

To be sure, a simple search on the internet will reveal there are virtually no federal whistleblower cases stemming from federal workers claiming they were victims of retaliation; and those that are listed, often are very dated. Is that because all the departments and agencies of the government are doing so well? Is it because “waste, fraud, and abuse” are being reported as they should be and whistleblowers are being protected? Or, is it because federal employees won’t risk their jobs and chances of promotion by reporting what they see? And is it because those that do report problems---and eventually suffer retaliation---don’t file complaints because they know the WPA is not working and is not being enforced?

Hopefully the new Whistleblower Protection Enhancement Act will make the intent of the original WPA a reality. And even more optimistically, we can hope the administration will mandate more enforcement of the law. After all, wasn’t that promised by President Obama when he first ran for president? And isn’t that’s what already required by the regulations of the Office of Personnel Management or by its own “Disciplinary Best Practices and Advisory Guidelines under the No Fear Act”?

(To read a typical example of what happens in a federal Whistleblower Protection Act complaint, go to <http://schundler.net/Whistleblower.htm>.)

Bruce E. Schundler

January 18, 2013