New Whistleblower Bills Target Private Sector

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On September 13 members of the House of Representatives introduced two measures that would expand and strengthen whistleblower protections in the private sector. The Non-Federal Employees Whistleblower Protection Act (H.R. 6406), introduced by Reps. Jackie Speier (D-CA) and Todd Platts (R-PA), would extend whistleblower protections to non-federal government contractors and subcontractors who disclose information about the misuse of federal funds. The Private Sector Whistleblower Protection Streamlining Act of 2012 (H.R. 6409) introduced by Rep. Lynn Woolsey (D-CA) seeks to expand and streamline the administration of whistleblower protections for private-sector employees.

Non-Federal Employees Whistleblower Protection Act

The Non-Federal Employees Whistleblower Protection Act would shield employees of companies that receive federal agency funding in the form of grants, contracts, or other payments from retaliation for reasonably opposing the misuse of federal funds. The bill also prohibits retaliation against employees who disclose information they reasonably believe is evidence of (a) gross mismanagement, waste, or abuse of authority related to the use of government funds; (b) a violation of a rule or regulation related to an agency contract or grant; or (c) a substantial and specific public health or safety danger related to the implementation or use of government funds. Protected disclosures include those made to the employee’s supervisors or managers as well as to members of Congress, federal agencies, inspectors general, the Attorney General, courts, or any other state or federal regulatory or law enforcement agency.

Burden of Proof. The employee alleging retaliation would have the burden of showing that the disclosure was a contributing factor to the act of reprisal. The bill permits the use of the following examples to make such a showing:

- evidence that the official undertaking the reprisal knew of the disclosure;
- evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal; or
- evidence that the protected disclosure was well founded in fact or law.

The employer would then have the opportunity to rebut this claim by introducing clear and convincing evidence that it would have taken the same actions absent the employee’s protected disclosure.

Administrative Remedies. An employer found to have violated these whistleblower protections could be ordered to take affirmative steps to remedy the retaliatory actions; reinstate the employee with backpay and other compensatory damages; reimburse the employee for costs and expenses including attorneys’ fees; post notice of the inspector general’s decision; and institute a reasonable compliance program to prevent future retaliatory incidents. Employers found to have engaged in willful, wanton, or malicious acts of retaliation could be ordered to pay the employee 10 times the amount of all lost wages and other compensatory damages.

Right to File Administrative Claim, Civil Action. Employees would have three years from the date of the
alleged act of retaliation to submit a complaint to the appropriate inspector general. The bill provides the employee with both administrative redress and the right to file a civil action if a final administrative order is not issued within 210 days after the submission of the complaint or if the inspector general fails to investigate or ends the investigation, and the delay is not caused by the employee’s bad faith. In addition, the complaining employee would be entitled to access the Inspector General’s investigative file unless the release of such information is otherwise prohibited by federal law.

No Waiver of Rights. Under the terms of the bill, employers would be prevented from forcing employees to waive their whistleblower rights, including through a predispute arbitration agreement. In addition, employers would be required to affirmatively post a notice outlining the employees’ whistleblower rights afforded by this bill.

In a press release, Rep. Speier said: “Our legislation encourages badly needed accountability of taxpayer dollars. Whistleblowers also need protection for exposing safety concerns neglected by either the government or the contractor that manages a government program.”

Sen. Claire McCaskill (D-MO) introduced a companion bill (S. 241) in the Senate in January 2011 that was approved by the Senate Committee on Homeland Security and Governmental Affairs on April 25, 2012. Despite this committee approval, the bill has so far failed to advance any further.

Private Sector Whistleblower Protection Streamlining Act of 2012

The Private Sector Whistleblower Protection Streamlining Act would similarly preclude retaliation against a current, past, full or part-time employee; employee of a contractor or subcontractor; or member of a professional membership organization or other professional body who:

- Communicates or discloses protected information, which is broadly defined in the statute to mean any information that an employee reasonably believes evidences (a) a violation or the intent to commit a violation by the employer of an applicable law; (b) a hazard or potential danger to the health or safety of any employee or to the public, including any injury or illness; or (c) fraud on the part of the employer in connection with the implementation of or compliance with an applicable law or a standard of practice established by a professional standards setting body.
- Initiates, cooperates, or otherwise participates in an investigation or proceeding related to the disclosure of the protected information.
- Objects or refuse to participate in any activity, policy, practice, or assigned task that the employee reasonably believes is or would be in violation of an applicable law or endangers the safety or health of the employee or others.
- Informs others or discusses the protected information, so long as the disclosure is not classified or prohibited by law.
- Takes advantage of the rights and protections of this whistleblower law or assists others in exercising their rights under it.

Area of Coverage. The term “applicable law” is broadly defined to cover “any federal law, rule, regulation, or Executive order, or a law, rule or regulation of a state or political subdivision of a state implementing any federal law, rule or regulation” relating to a number of areas, including health and healthcare; environmental protection and resource management; food and drug safety; transportation; working conditions and benefits; building and construction-related requirements; energy production; homeland security; financial services; consumer protection; education; antitrust, copyright or patent; and communications and telecommunications.

Exemptions and Exclusions. Although the bill would provide wide-ranging coverage, it does exempt certain areas of law covered by existing whistleblower statutes, so long as those statutes are equally comprehensive. Specifically, the bill would not cover (a) civil rights laws administered by the Equal Employment Opportunity Commission (EEOC) that provide anti-retaliation protections for employees exercising their rights under such laws; (b) the Whistleblower Protection Act and laws administered by the Merit Systems Protection Board; and other federal laws, rules or regulations that provide employees with a base level of protection against retaliation.

Definition of Employer. The term “employer” would cover:

- one or more individuals, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, nongovernmental organizations, trustees, professional membership organizations (including a certification, disciplinary, or other professional body), including the agents of the employer or a person acting directly or indirectly in the interests of the employer, engaged in for profit or nonprofit business affecting commerce, including any subsidiaries, affiliates, and foreign operations of any business that are subject to applicable law, any entity of a State government or political subdivision of a State, or any nongovernmental organization, and any contractor or subcontractor of another employer.

Remedies. An aggrieved employee would have 180 days in which to file an administrative complaint. Like the
Non-Federal Employees Whistleblower Protection Act, this bill establishes the proceedings and timeframes for processing a whistleblower compliant, as well as a list of administrative remedies that would include injunctive relief, compensatory, and exemplary damages. The bill would also grant the employee the right to file an action in civil court once he or she has exhausted the administrative remedies available under the bill.

Both bills contain provisions banning employers from prohibiting or restricting an employee’s rights under the whistleblower statutes, including through the use of predispute arbitration agreements.

**Consistency of Whistleblower Statutes.** To facilitate the streamlining of the many whistleblower statutes administered by the Department of Labor, including Section 11 of the Occupational Safety and Health (OSH) Act, the bill would make conforming amendments to these laws. The Private Sector Whistleblower Protection Streamlining Act of 2012 would also create a whistleblower protection office within the Department of Labor to administer this and other whistleblower laws under its jurisdiction, as well as establish a 5-member Administrative Review Board.

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**TAGS:** Discrimination in the Workplace, Federal Contracts, H.R. 6406, H.R. 6409, Non-Federal Employees Whistleblower Protection Act, Private Sector Whistleblower Protection Streamlining Act of 2012