

112TH CONGRESS  
2D SESSION

# H. R. 6406

To expand whistleblower protections to non-Federal employees whose disclosures involve misuse of Federal funds.

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## IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 13, 2012

Ms. SPEIER (for herself and Mr. PLATTS) introduced the following bill; which was referred to the Committee on Oversight and Government Reform, and in addition to the Committees on Armed Services and Education and the Workforce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## A BILL

To expand whistleblower protections to non-Federal employees whose disclosures involve misuse of Federal funds.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Non-Federal Employee  
5 Whistleblower Protection Act of 2012”.

6 **SEC. 2. PROTECTING STATE AND LOCAL GOVERNMENT AND**  
7 **CONTRACTOR WHISTLEBLOWERS.**

8 (a) REPEALS.—

1 (1) CIVILIAN CONTRACTS.—Title 41, United  
2 States Code, is amended as follows:

3 (A) Section 4705 is repealed.

4 (B) The table of sections at the beginning  
5 of chapter 47 is amended by striking the item  
6 relating to section 4705.

7 (2) DEFENSE CONTRACTS.—Title 10, United  
8 States Code, is amended as follows:

9 (A) Section 2409 is repealed.

10 (B) The table of sections at the beginning  
11 of chapter 141 is amended by striking the item  
12 relating to section 2409.

13 (b) ENHANCED PROTECTION FOR STATE AND LOCAL  
14 GOVERNMENT AND CONTRACTOR WHISTLEBLOWERS.—

15 (1) IN GENERAL.—Chapter 23 of division B of  
16 title 41, United States Code, is amended by adding  
17 at the end the following new section:

18 **“§ 2314. Protection for State and local government  
19 and contractor whistleblowers**

20 “(a) PROHIBITION OF REPRISALS.—An employee of  
21 any non-Federal employer receiving covered funds may not  
22 be discharged, demoted, or otherwise discriminated  
23 against as a reprisal for initiating or participating in any  
24 proceeding related to the misuse of any Federal funds,  
25 reasonably opposing the misuse of any Federal funds, or

1 disclosing, including a disclosure made in the ordinary  
2 course of an employee's duties, to an inspector general,  
3 the Comptroller General of the United States, the Attor-  
4 ney General, a member of Congress, a State or Federal  
5 regulatory or law enforcement agency, a person with su-  
6 pervisory authority over the employee (or such other per-  
7 son working for the employer who has the authority to  
8 investigate, discover, or terminate misconduct), a court or  
9 grand jury, the head of a Federal agency, or their rep-  
10 resentatives information that the employee reasonably be-  
11 lieves is evidence of—

12           “(1) gross mismanagement of an agency con-  
13           tract or grant relating to covered funds;

14           “(2) a gross waste of covered funds;

15           “(3) a substantial and specific danger to public  
16           health or safety related to the implementation or use  
17           of covered funds;

18           “(4) an abuse of authority related to the imple-  
19           mentation or use of covered funds; or

20           “(5) a violation of law, rule, or regulation re-  
21           lated to an agency contract (including the competi-  
22           tion for or negotiation of a contract), subcontract, or  
23           grant, awarded or issued relating to covered funds.

24           “(b) INVESTIGATION OF COMPLAINTS BY INSPECTOR  
25           GENERAL.—

1           “(1) IN GENERAL.—A person who believes that  
2           the person has been subjected to a reprisal prohib-  
3           ited by subsection (a) may submit a complaint re-  
4           garding the reprisal to the appropriate inspector  
5           general. Except as provided under paragraph (3),  
6           unless the inspector general determines that the  
7           complaint is frivolous, does not relate to covered  
8           funds, or another Federal or State judicial or ad-  
9           ministrative proceeding has previously been invoked  
10          to resolve such complaint, the inspector general shall  
11          investigate the complaint and, upon completion of  
12          such investigation, submit a report of the findings of  
13          the investigation to the person, the person’s em-  
14          ployer, and the head of the appropriate agency.

15           “(2) TIME LIMITATIONS FOR ACTIONS IN RE-  
16          SPONSE TO COMPLAINTS.—

17           “(A) IN GENERAL.—Except as provided  
18           under subparagraph (B), the inspector general  
19           shall, not later than 180 days after receiving a  
20           complaint under paragraph (1)—

21                   “(i) make a determination that the  
22                   complaint is frivolous, does not relate to  
23                   covered funds, or another Federal or State  
24                   judicial or administrative proceeding has

1 previously been invoked to resolve such  
2 complaint; or

3 “(ii) submit a report under paragraph  
4 (1).

5 “(B) EXTENSIONS.—

6 “(i) VOLUNTARY EXTENSION AGREED  
7 TO BETWEEN INSPECTOR GENERAL AND  
8 COMPLAINANT.—If the inspector general is  
9 unable to complete an investigation under  
10 this section in time to submit a report  
11 within the 180-day period specified under  
12 subparagraph (A) and the person submit-  
13 ting the complaint agrees to an extension  
14 of time, the inspector general shall submit  
15 a report under paragraph (1) within such  
16 additional period of time, up to 180 days,  
17 as shall be agreed upon between the in-  
18 spector general and the person submitting  
19 the complaint.

20 “(ii) EXTENSION GRANTED BY IN-  
21 SPECTOR GENERAL.—If the inspector gen-  
22 eral is unable to complete an investigation  
23 under this section in time to submit a re-  
24 port within the 180-day period specified  
25 under subparagraph (A), the inspector

1           general may extend the period for not  
2           more than 90 days without agreeing with  
3           the person submitting the complaint to  
4           such extension, provided that the inspector  
5           general provides to the person submitting  
6           the complaint a written explanation (sub-  
7           ject to the authority to exclude information  
8           under paragraph (4)(C)) for the decision.

9           “(iii) SEMI-ANNUAL REPORT ON EX-  
10          TENSIONS.—The inspector general shall in-  
11          clude in semi-annual reports to Congress a  
12          list of those investigations for which the in-  
13          spector general received an extension.

14          “(3) DISCRETION NOT TO INVESTIGATE COM-  
15          PLAINTS.—

16          “(A) IN GENERAL.—The inspector general  
17          may decide not to conduct or continue an inves-  
18          tigation under this section upon providing to  
19          the person submitting the complaint a written  
20          explanation (subject to the authority to exclude  
21          information under paragraph (4)(C)) for such  
22          decision.

23          “(B) SEMI-ANNUAL REPORT.—The inspec-  
24          tor general shall include in semi-annual reports  
25          to Congress a list of those investigations the in-

1           spector general decided not to conduct or con-  
2           tinue under this paragraph.

3           “(4) ACCESS TO INVESTIGATIVE FILE.—

4                   “(A) IN GENERAL.—The person alleging a  
5           reprisal under this section shall have access to  
6           the investigation file of the appropriate inspec-  
7           tor general in accordance with section 552a of  
8           title 5 (commonly referred to as the ‘Privacy  
9           Act’). The investigation of the inspector general  
10          shall be deemed closed for purposes of disclo-  
11          sure under such section when an employee files  
12          an appeal to an agency head or a court of com-  
13          petent jurisdiction.

14                   “(B) CIVIL ACTION.—In the event the per-  
15          son alleging the reprisal brings suit under sub-  
16          section (d)(1), the person alleging the reprisal  
17          and the non-Federal employer shall have access  
18          to the investigative file of the inspector general  
19          in accordance with the Privacy Act.

20                   “(C) EXCEPTION.—

21                           “(i) IN GENERAL.—The inspector gen-  
22          eral may exclude from disclosure—

23                                   “(I) information protected from  
24          disclosure by a provision of law; and

1                   “(II) any additional information  
2                   the inspector general determines dis-  
3                   closure of which would impede a con-  
4                   tinuing investigation, provided that  
5                   such information is disclosed once  
6                   such disclosure would no longer im-  
7                   pede such investigation, unless the in-  
8                   spector general determines that disclo-  
9                   sure of law enforcement techniques,  
10                  procedures, or information could rea-  
11                  sonably be expected to risk circumven-  
12                  tion of the law or disclose the identity  
13                  of a confidential source.

14                  “(ii) LIMITATION.—Notwithstanding  
15                  clause (i)(II), the inspector general may  
16                  not withhold information from the em-  
17                  ployee which would otherwise be subject to  
18                  disclosure under section 552 of title 5  
19                  (commonly referred to as the Freedom of  
20                  Information Act) or the Privacy Act.

21                  “(5) PRIVACY OF INFORMATION.—An inspector  
22                  general investigating an alleged reprisal under this  
23                  section may not respond to any inquiry or disclose  
24                  any information from or about any person alleging  
25                  such reprisal, except in accordance with the provi-

1 sions of section 552a of title 5 or as required by any  
2 other applicable Federal law.

3 “(6) LIMITATION ON SUBMITTING COM-  
4 PLAINT.—A complaint under this subsection may  
5 not be brought more than 3 years after the date on  
6 which the alleged reprisal prohibited under sub-  
7 section (a) occurred.

8 “(c) ADMINISTRATIVE REMEDY AND ENFORCEMENT  
9 AUTHORITY.—

10 “(1) AGENCY ACTION.—Not later than 30 days  
11 after receiving an inspector general report under  
12 subsection (b), the head of the agency concerned  
13 shall determine whether there is sufficient basis to  
14 conclude that the non-Federal employer has, di-  
15 rectly, or indirectly on behalf of the Federal agency  
16 providing the employer covered funds, subjected the  
17 complainant to a reprisal prohibited by subsection  
18 (a) and shall either issue an order denying relief in  
19 whole or in part or shall take 1 or more of the fol-  
20 lowing actions:

21 “(A) Order the employer to take affirma-  
22 tive action to abate the reprisal.

23 “(B) Order the employer to reinstate the  
24 person to the position that the person held be-  
25 fore the reprisal, together with the compensa-

1           tion (including back pay), compensatory dam-  
2           ages, employment benefits, and other terms and  
3           conditions of employment that would apply to  
4           the person in that position if the reprisal had  
5           not been taken.

6           “(C) Order the employer to pay the com-  
7           plainant an amount equal to the aggregate  
8           amount of all costs and expenses (including at-  
9           torneys’ fees and expert witnesses’ fees) that  
10          were reasonably incurred by the complainant  
11          for, or in connection with, bringing the com-  
12          plaint regarding the reprisal, as determined by  
13          the head of the agency or a court of competent  
14          jurisdiction.

15          “(D) Where appropriate, order the posting  
16          of the decision of the inspector general in a  
17          manner in which every employee of the em-  
18          ployer will have notice of the decision and oth-  
19          erwise require a reasonable compliance program  
20          to ensure that no further retaliation is com-  
21          mitted by the employer.

22          “(E) In the case of a finding that the re-  
23          prisal was willful, wanton, or malicious, order  
24          the employer to pay the employee no more than

1           10 times the amount of all lost wages and other  
2           compensatory damages.

3           “(2) BURDEN OF PROOF.—

4                   “(A) DISCLOSURE AS CONTRIBUTING FAC-  
5           TOR IN REPRISAL.—

6                           “(i) IN GENERAL.—A person alleging  
7                           a reprisal under this section shall be  
8                           deemed to have affirmatively established  
9                           the occurrence of the reprisal if the person  
10                           demonstrates that a disclosure described in  
11                           subsection (a) was a contributing factor in  
12                           the reprisal.

13                           “(ii) USE OF CIRCUMSTANTIAL EVI-  
14                           DENCE.—A disclosure may be dem-  
15                           onstrated as a contributing factor in a re-  
16                           prisal for purposes of this paragraph by  
17                           circumstantial evidence, including—

18                                   “(I) evidence that the official un-  
19                                   dertaking the reprisal knew of the dis-  
20                                   closure;

21                                   “(II) evidence that the reprisal  
22                                   occurred within a period of time after  
23                                   the disclosure such that a reasonable  
24                                   person could conclude that the dislo-

1                   sure was a contributing factor in the  
2                   reprisal; or

3                                 “(III) evidence that the protected  
4                   disclosure was well founded in fact or  
5                   law.

6                                 “(B) OPPORTUNITY FOR REBUTTAL.—The  
7                   head of an agency may not find the occurrence  
8                   of a reprisal with respect to a reprisal that is  
9                   affirmatively established under subparagraph  
10                  (A) if the non-Federal employer demonstrates  
11                  by clear and convincing evidence that the non-  
12                  Federal employer would have taken the action  
13                  constituting the reprisal in the absence of the  
14                  disclosure. An employee may rebut this affirma-  
15                  tive defense by direct or circumstantial evi-  
16                  dence, including the evidence described in sub-  
17                  paragraph (A).

18                                 “(3) JUDICIAL ENFORCEMENT OF ORDER.—  
19                  Whenever a person fails to comply with an order  
20                  issued under paragraph (1), the head of the agency  
21                  shall file an action for enforcement of such order in  
22                  the United States district court for a district in  
23                  which the reprisal was found to have occurred. In  
24                  any action brought under this paragraph, the court  
25                  may grant appropriate relief, including injunctive re-

1       lief, compensatory and exemplary damages, and at-  
2       torneys' fees and costs. The person upon whose be-  
3       half an order was issued may also file such an action  
4       or join in an action filed by the head of the agency.

5       “(d) CIVIL ACTION AND JUDICIAL REVIEW.—

6               “(1) CIVIL ACTION.—A person who has sub-  
7       mitted a complaint under subsection (b) shall be  
8       deemed to have exhausted all administrative rem-  
9       edies with respect to the complaint and may bring  
10      a de novo action at law or equity against the em-  
11      ployer to seek compensatory damages and all other  
12      relief available under this section in the appropriate  
13      district court of the United States, which shall have  
14      jurisdiction over such an action without regard to  
15      the amount in controversy, if—

16                   “(A)(i) the head of an agency—

17                           “(I) issues an order denying relief in  
18                           whole or in part under subsection (c)(1);

19                           or

20                           “(II) has not issued an order—

21                                   “(aa) within 210 days after the  
22                                   submission of a complaint under sub-  
23                                   section (b); or

24                                   “(bb) in the case of an extension  
25                                   of time under subsection (b)(2)(B),

1                   within 30 days after the expiration of  
2                   the extension of time; or

3                   “(ii) the inspector general decides under  
4                   subsection (b)(3) not to investigate or to dis-  
5                   continue an investigation; and

6                   “(B) there is no showing that such delay  
7                   or decision is due to the bad faith of the com-  
8                   plainant.

9                   “(2) TRIAL BY JURY.—An action brought under  
10                  paragraph (1) shall, at the request of either party to  
11                  the action, be tried by the court with a jury.

12                  “(3) LIMITATION ON BRINGING CIVIL AC-  
13                  TION.—An action brought under paragraph (1) may  
14                  not be brought more than 2 years after the date on  
15                  which remedies are deemed exhausted under sub-  
16                  paragraph (A) of such paragraph.

17                  “(4) JUDICIAL REVIEW.—Any person adversely  
18                  affected or aggrieved by an order issued under sub-  
19                  section (c)(1) may obtain review of the order’s con-  
20                  formance with this subsection, and any regulations  
21                  issued to carry out this section, in the United States  
22                  court of appeals for a circuit in which the reprisal  
23                  is alleged in the order to have occurred. No petition  
24                  seeking such review may be filed more than 60 days  
25                  after issuance of the order by the head of the agen-

1 cy. Review shall conform to chapter 7 of title 5. Fil-  
2 ing such an appeal shall not act to stay the enforce-  
3 ment of the order of a head of an agency or the  
4 judgment of a district court.

5 “(e) NONENFORCEABILITY OF CERTAIN PROVISIONS  
6 WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBI-  
7 TRATION OF DISPUTES.—

8 “(1) WAIVER OF RIGHTS AND REMEDIES.—Ex-  
9 cept as provided under paragraph (3), the rights and  
10 remedies provided for in this section may not be  
11 waived by any agreement, policy, form, or condition  
12 of employment, including by any predispute arbitra-  
13 tion agreement.

14 “(2) PREDISPUTE ARBITRATION AGREE-  
15 MENTS.—Except as provided under paragraph (3),  
16 no predispute arbitration agreement shall be valid or  
17 enforceable if it requires arbitration of a dispute  
18 arising under this section.

19 “(3) EXCEPTION FOR COLLECTIVE BARGAINING  
20 AGREEMENTS.—Notwithstanding paragraphs (1)  
21 and (2), an arbitration provision in a collective bar-  
22 gaining agreement shall be enforceable as to dis-  
23 putes arising under the collective bargaining agree-  
24 ment.

1       “(f) REQUIREMENT TO NOTIFY EMPLOYEES OF  
2 RIGHTS AND REMEDIES.—Any non-Federal employer re-  
3 ceiving covered funds shall notify all employees of the  
4 rights and remedies provided under this section in English  
5 and the predominant native language of the workforce.

6       “(g) RULES OF CONSTRUCTION.—

7           “(1) NO IMPLIED AUTHORITY TO RETALIATE  
8 FOR NON-PROTECTED DISCLOSURES.—Nothing in  
9 this section may be construed to authorize the dis-  
10 charge of, demotion of, or discrimination against an  
11 employee for a disclosure other than a disclosure  
12 protected by subsection (a) or to modify or derogate  
13 from a right or remedy otherwise available to the  
14 employee.

15           “(2) RELATIONSHIP TO STATE LAWS.—Nothing  
16 in this section may be construed to preempt, pre-  
17 clude, or limit the protections provided for public or  
18 private employees under State whistleblower laws.

19       “(h) DEFINITIONS.—In this section:

20           “(1) ABUSE OF AUTHORITY.—The term ‘abuse  
21 of authority’ means an arbitrary and capricious ex-  
22 ercise of authority that adversely affects the rights  
23 of any person, or that results in personal gain or ad-  
24 vantage to the official or employee or to preferred  
25 other persons.

1           “(2) COVERED FUNDS.—The term ‘covered  
2 funds’ means any contract, grant, or other payment  
3 received by any non-Federal employer if the Federal  
4 Government provides any portion of the money or  
5 property that is provided, requested, or demanded.

6           “(3) EMPLOYEE.—The term ‘employee’—

7           “(A) except as provided under subpara-  
8 graph (B), means an individual performing  
9 services on behalf of an employer or a con-  
10 tractor, subcontractor, or agent of an employer;  
11 and

12           “(B) does not include any Federal em-  
13 ployee or member of the uniformed services (as  
14 that term is defined in section 101(a)(5) of title  
15 10).

16           “(4) NON-FEDERAL EMPLOYER.—The term  
17 ‘non-Federal employer’—

18           “(A) means—

19           “(i) any employer—

20           “(I) with respect to covered  
21 funds—

22           “(aa) the contractor, sub-  
23 contractor, grantee, or recipient,  
24 as the case may be, if the con-

1 tractor, grantee, or recipient is  
2 an employer; and

3 “(bb) any professional mem-  
4 bership organization, certification  
5 or other professional body, any  
6 agent or licensee of the Federal  
7 government, or any person acting  
8 directly or indirectly in the inter-  
9 est of an employer receiving cov-  
10 ered funds; or

11 “(II) with respect to covered  
12 funds received by a State or local gov-  
13 ernment, the State or local govern-  
14 ment receiving the funds and any con-  
15 tractor or subcontractor of the State  
16 or local government; and

17 “(ii) any corporation or person who  
18 receives any Federal funds; and

19 “(B) does not mean any department, agen-  
20 cy, or other entity of the Federal Government.

21 “(5) STATE OR LOCAL GOVERNMENT.—The  
22 term ‘State or local government’ means—

23 “(A) the government of each of the several  
24 States, the District of Columbia, the Common-  
25 wealth of Puerto Rico, Guam, American Samoa,

1 the Virgin Islands, the Commonwealth of the  
 2 Northern Mariana Islands, or any other terri-  
 3 tory or possession of the United States; or

4 “(B) the government of any political sub-  
 5 division of a government listed in subparagraph  
 6 (A).”.

7 (2) CONFORMING AMENDMENT.—The table of  
 8 sections at the beginning of chapter 23 of title 41,  
 9 United States Code, is amended by inserting after  
 10 the item relating to section 2313 the following new  
 11 item:

“2314. Protection for State and local government and contractor whistle-  
 blowers.”.

12 (c) APPLICABILITY.—

13 (1) REPRISALS AFTER DATE OF ENACTMENT.—  
 14 Section 2314 of title 41, United States Code, as  
 15 added by subsection (b), shall apply to alleged re-  
 16 prisals described under subsection (a) of such sec-  
 17 tion that occur on or after the date of the enactment  
 18 of this Act, regardless of the date on which the con-  
 19 tract, grant, cooperative agreement, or other ar-  
 20 rangement involving covered funds is entered into.

21 (2) REPRISALS BEFORE DATE OF ENACT-  
 22 MENT.—

23 (A) CIVILIAN CONTRACTS.—Section 4705  
 24 of title 41, United States Code, as in effect on

1 the day before the date of the enactment of this  
2 Act, shall apply to alleged reprisals described  
3 under such section that occurred on or after the  
4 date of the enactment of such section and be-  
5 fore the date of the enactment of this Act, re-  
6 gardless of the date on which the contract,  
7 grant, cooperative agreement, or other arrange-  
8 ment involving covered funds was entered into.

9 (B) DEFENSE CONTRACTS.—Section 2409  
10 of title 10, United States Code, as in effect on  
11 the day before the date of the enactment of this  
12 Act, shall apply to alleged reprisals described  
13 under such section that occurred on or after the  
14 date of the enactment of such section and be-  
15 fore the date of the enactment of this Act, re-  
16 gardless of the date on which the contract,  
17 grant, cooperative agreement, or other arrange-  
18 ment involving covered funds was entered into.

19 (d) REGULATIONS.—

20 (1) LIMITED ALLOWABILITY OF LEGAL FEES AS  
21 COSTS UNDER CONTRACTS.—Not later than 180  
22 days after the date of the enactment of this Act, the  
23 Federal Acquisition Regulatory Council shall amend  
24 the Federal Acquisition Regulation to provide that  
25 legal fees and other expenses related to a claim aris-

1       ing under a whistleblower protection law are not al-  
2       lowable costs under a contract unless and until the  
3       contractor has been found in an administrative or  
4       judicial proceeding not to be liable for such claim.

5               (2) NOTIFICATION OF EMPLOYEES OF RIGHTS  
6       AND REMEDIES.—Not later than 180 days after the  
7       date of the enactment of this Act, the Federal Ac-  
8       quisition Regulatory Council shall amend the Fed-  
9       eral Acquisition Regulation to require inclusion of a  
10      contract clause notifying contractors of the require-  
11      ment under section 2314(f) of title 41, United  
12      States Code, as added by subsection (b)(1), for non-  
13      Federal employers to notify employees of their rights  
14      and remedies under such section.

○