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

IN THE SENATE OF THE UNITED STATES

JANUARY 31, 2011

Mrs. McCASKILL (for herself and Mr. WEBB) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Non-Federal Employee Whistleblower Protection Act of 2011”.

SEC. 2. PROTECTING STATE AND LOCAL GOVERNMENT AND CONTRACTOR WHISTLEBLOWERS.

(a) REPEAL.—Section 4705 of title 41, United States Code, is hereby repealed.
(b) **Enhanced Protection for State and Local Government and Contractor Whistleblowers.**—

Chapter 47 of division C of title 41, United States Code, is amended by inserting after section 4704 the following new section:

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§ 4705. Whistleblower protection for State and local government and contractor whistleblowers

“(a) Prohibition of reprisals.—An employee of any non-Federal employer receiving covered funds may not be discharged, demoted, or otherwise discriminated against as a reprisal for initiating or participating in any proceeding related to the misuse of any Federal funds, reasonably opposing the misuse of any Federal funds, or disclosing, including a disclosure made in the ordinary course of an employee’s duties, to an inspector general, the Comptroller General of the United States, the Attorney General, a member of Congress, a State or Federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct), a court or grand jury, the head of a Federal agency, or their representatives information that the employee reasonably believes is evidence of—
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“(1) gross mismanagement of an agency contract or grant relating to covered funds;

“(2) a gross waste of covered funds;

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

“(4) an abuse of authority related to the implementation or use of covered funds; or

“(5) a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract), subcontract, or grant, awarded or issued relating to covered funds.

“(b) INVESTIGATION OF COMPLAINTS.—

“(1) IN GENERAL.—A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint regarding the reprisal to the appropriate inspector general. Except as provided under paragraph (3), unless the inspector general determines that the complaint is frivolous, does not relate to covered funds, or another Federal or State judicial or administrative proceeding has previously been invoked to resolve such complaint, the inspector general shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of
the investigation to the person, the person’s em-
ployer, and the head of the appropriate agency.

“(2) Time limitations for actions.—

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

“(i) make a determination that the
complaint is frivolous, does not relate to
covered funds, or another Federal or State
judicial or administrative proceeding has
previously been invoked to resolve such
complaint; or

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

“(B) Extensions.—

“(i) Voluntary extension agreed
to between inspector general and
complainant.—If the inspector general is
unable to complete an investigation under
this section in time to submit a report
within the 180-day period specified under
subparagraph (A) and the person submit-
ting the complaint agrees to an extension
of time, the inspector general shall submit
a report under paragraph (1) within such additional period of time as shall be agreed upon between the inspector general and the person submitting the complaint.

“(ii) EXTENSION GRANTED BY INSPECTOR GENERAL.—If the inspector general is unable to complete an investigation under this section in time to submit a report within the 180-day period specified under subparagraph (A), the inspector general may extend the period for not more than 180 days without agreeing with the person submitting the complaint to such extension, provided that the inspector general provides a written explanation (subject to the authority to exclude information under paragraph (4)(C)) for the decision, which shall be provided to both the person submitting the complaint and the non-Federal employer.

“(iii) SEMI-ANNUAL REPORT ON EXTENSIONS.—The inspector general shall include in semi-annual reports to Congress a list of those investigations for which the inspector general received an extension.
“(3) Discretion not to investigate complaints.—

“(A) In general.—The inspector general may decide not to conduct or continue an investigation under this section upon providing to the person submitting the complaint and the non-Federal employer a written explanation (subject to the authority to exclude information under paragraph (4)(C)) for such decision.

“(B) Assumption of rights to civil remedy.—Upon receipt of an explanation of a decision not to conduct or continue an investigation under subparagraph (A), the person submitting a complaint shall immediately assume the right to a civil remedy under subsection (c)(3) as if the 210-day period specified under such subsection has already passed.

“(C) Semi-annual report.—The inspector general shall include in semi-annual reports to Congress a list of those investigations the inspector general decided not to conduct or continue under this paragraph.

“(4) Access to investigative file of inspector general.—
“(A) IN GENERAL.—The person alleging a reprisal under this section shall have access to the investigation file of the appropriate inspector general in accordance with section 552a of title 5 (commonly referred to as the ‘Privacy Act’). The investigation of the inspector general shall be deemed closed for purposes of disclosure under such section when an employee files an appeal to an agency head or a court of competent jurisdiction.

“(B) CIVIL ACTION.—In the event the person alleging the reprisal brings suit under subsection (c)(3), the person alleging the reprisal and the non-Federal employer shall have access to the investigative file of the inspector general in accordance with the Privacy Act.

“(C) EXCEPTION.—

“(i) IN GENERAL.—The inspector general may exclude from disclosure—

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

“(II) any additional information the inspector general determines disclosure of which would impede a continuing investigation, provided that
such information is disclosed once
such disclosure would no longer im-
pede such investigation, unless the in-
spector general determines that disclon-
sure of law enforcement techniques,
procedures, or information could rea-
sonably be expected to risk circumven-
tion of the law or disclose the identity
of a confidential source.

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

“(5) PRIVACY OF INFORMATION.—An inspector
general investigating an alleged reprisal under this
section may not respond to any inquiry or disclose
any information from or about any person alleging
such reprisal, except in accordance with the provi-
sions of section 552a of title 5 or as required by any
other applicable Federal law.

“(c) REMEDY AND ENFORCEMENT AUTHORITY.—

“(1) BURDEN OF PROOF.—
“(A) Disclosure as contributing factor in reprisal.—

“(i) In general.—A person alleging a reprisal under this section shall be deemed to have affirmatively established the occurrence of the reprisal if the person demonstrates that a disclosure described in subsection (a) was a contributing factor in the reprisal.

“(ii) Use of circumstantial evidence.—A disclosure may be demonstrated as a contributing factor in a reprisal for purposes of this paragraph by circumstantial evidence, including—

“(I) evidence that the official undertaking the reprisal knew of the disclosure;

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

“(B) OPPORTUNITY FOR REBUTTAL.—The head of an agency may not find the occurrence of a reprisal with respect to a reprisal that is affirmatively established under subparagraph (A) if the non-Federal employer demonstrates by clear and convincing evidence that the non-Federal employer would have taken the action constituting the reprisal in the absence of the disclosure. An employee may rebut this affirmative defense by direct or circumstantial evidence, including the evidence described in subparagraph (A).

“(2) AGENCY ACTION.—Not later than 30 days after receiving an inspector general report under subsection (b), the head of the agency concerned shall determine whether there is sufficient basis to conclude that the non-Federal employer has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief in whole or in part or shall take 1 or more of the following actions:
“(A) Order the employer to take affirmative action to abate the reprisal.

“(B) Order the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

“(C) Order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys’ fees and expert witnesses’ fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency or a court of competent jurisdiction.

“(D) Where appropriate, order the posting of the decision of the inspector general in a manner in which every employee of the employer will have notice of the decision and otherwise require a reasonable compliance program
to ensure that no further retaliation is committed by the employer.

“(E) In the case of a finding that the reprisal was willful, wanton, or malicious, pay the employee no more than 10 times the amount of all lost wages and other compensatory damages.

“(3) CIVIL ACTION.—If the head of an agency issues an order denying relief in whole or in part under paragraph (1), has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under subsection (b)(2)(B)(i), within 30 days after the expiration of the extension of time, or decides under subsection (b)(3) not to investigate or to discontinue an investigation, and there is no showing that such delay or decision is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the employer to seek compensatory damages and all other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action
shall, at the request of either party to the action, be tried by the court with a jury.

“(4) **JUDICIAL ENFORCEMENT OF ORDER.**—Whenever a person fails to comply with an order issued under paragraph (2), the head of the agency shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorneys’ fees and costs. The person upon whose behalf an order was issued may also file such an action or join in an action filed by the head of the agency.

“(5) **JUDICIAL REVIEW.**—Any person adversely affected or aggrieved by an order issued under paragraph (2) may obtain review of the order’s conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Review shall conform to chapter 7 of title 5. Filing such an appeal shall not act to stay the enforce-
ment of the order of a head of an agency or the
judgment of a district court.

“(6) Exhaustion of Administrative Remedies.—Regardless of any other time limit set forth
in this section, after 360 days an employee shall be
deemed to have exhausted his or her administrative
remedies and may file a civil action or amend a
claim under this section to any other pending civil
action filed by the employee.

“(d) Nonenforceability of Certain Provisions
Waiving Rights and Remedies or Requiring Arbitra-
tion of Disputes.—

“(1) Waiver of rights and remedies.—Ex-
cept as provided under paragraph (3), the rights and
remedies provided for in this section may not be
waived by any agreement, policy, form, or condition
of employment, including by any predispute arbitra-
tion agreement.

“(2) Predispute Arbitration Agree-
ments.—Except as provided under paragraph (3),
no predispute arbitration agreement shall be valid or
enforceable if it requires arbitration of a dispute
arising under this section.

“(3) Exception for Collective Bargaining
Agreements.—Notwithstanding paragraphs (1)
and (2), an arbitration provision in a collective bargain-
ing agreement shall be enforceable as to dis-
putes arising under the collective bargaining agree-
ment.

“(e) REQUIREMENT TO POST NOTICE OF RIGHTS
AND REMEDIES.—Any employer receiving covered funds
shall post notice of the rights and remedies provided under
this section.

“(f) RULES OF CONSTRUCTION.—

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

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

“(g) DEFINITIONS.—In this section:

“(1) ABUSE OF AUTHORITY.—The term ‘abuse
of authority’ means an arbitrary and capricious ex-
ercise of authority by a contracting official or em-
ployee that adversely affects the rights of any person, or that results in personal gain or advantage to the official or employee or to preferred other persons.

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

“(3) EMPLOYEE.—The term ‘employee’—

“(A) except as provided under subparagraph (B), means an individual performing services on behalf of an employer or a contractor, subcontractor, or agent of an employer; and

“(B) does not include any Federal employee or member of the uniformed services (as that term is defined in section 101(a)(5) of title 10).

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

“(A) means—

“(i) any employer—

“(I) with respect to covered funds—
“(aa) the contractor, subcontractor, grantee, or recipient, as the case may be, if the contractor, grantee, or recipient is an employer; and

“(bb) any professional membership organization, certification or other professional body, any agent or licensee of the Federal government, or any person acting directly or indirectly in the interest of an employer receiving covered funds; or

“(II) with respect to covered funds received by a State or local government, the State or local government receiving the funds and any contractor or subcontractor of the State or local government; and

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

“(B) does not mean any department, agency, or other entity of the Federal Government.

“(5) STATE OR LOCAL GOVERNMENT.—The term ‘State or local government’ means—
“(A) the government of each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, or any other territory or possession of the United States; or

“(B) the government of any political subdivision of a government listed in subparagraph (A).”.

(c) APPLICABILITY.—

(1) PENDING CLAIMS.—Section 4705 of title 41, United States Code, as added by subsection (b), shall apply to complaints submitted pursuant to such section on or after the date of the enactment of this Act.

(2) NEW CLAIMS.—Section 4705 of title 41, United States Code, as in effect on the day before the date of the enactment of this Act shall apply to claims submitted pursuant to such section before such date of enactment.