

114TH CONGRESS
1ST SESSION

S. 2127

To provide appropriate protections to probationary Federal employees, to provide the Special Counsel with adequate access to information, to provide greater awareness of Federal whistleblower protections, and for other purposes.

IN THE SENATE OF THE UNITED STATES

OCTOBER 1, 2015

Mr. JOHNSON (for himself and Ms. AYOTTE) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

To provide appropriate protections to probationary Federal employees, to provide the Special Counsel with adequate access to information, to provide greater awareness of Federal whistleblower protections, and for other purposes.

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; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Dr. Chris Kirkpatrick Whistleblower Protection Act of
6 2015”.

1 (b) TABLE OF CONTENTS.—The table of contents for
 2 this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—EMPLOYEES GENERALLY

- Sec. 101. Definitions.
 Sec. 102. Whistleblower protections for probationary employees.
 Sec. 103. Adequate access of Special Counsel to information.
 Sec. 104. Removal or demotion of employees based on retaliation against whistleblowers.
 Sec. 105. Suicide by executive branch employees.
 Sec. 106. Access to medical files.
 Sec. 107. Training for supervisors.
 Sec. 108. Information on whistleblower protections.

TITLE II—DEPARTMENT OF VETERANS AFFAIRS EMPLOYEES

- Sec. 201. Protecting medical privacy of employees of the Department of Veterans Affairs.
 Sec. 202. Mental health services for employees of the Department of Veterans Affairs.
 Sec. 203. Protocols to address threats against employees of the Department of Veterans Affairs.
 Sec. 204. Comptroller General of the United States study on accountability of chiefs of police of Department of Veterans Affairs medical centers.

3 **TITLE I—EMPLOYEES**
 4 **GENERALLY**

5 **SEC. 101. DEFINITIONS.**

6 In this title—

- 7 (1) the term “Executive agency” has the mean-
 8 ing given that term under section 105 of title 5,
 9 United States Code; and
 10 (2) the term “executive branch employee”
 11 means an employee of an Executive agency.

1 **SEC. 102. WHISTLEBLOWER PROTECTIONS FOR PROBA-**
2 **TIONARY EMPLOYEES.**

3 (a) IN GENERAL.—Section 1214 of title 5, United
4 States Code, is amended by adding at the end the fol-
5 lowing:

6 “(i)(1) In this subsection, the term ‘covered proba-
7 tionary employee’ means an individual who—

8 “(A) is an employee in probationary status; and

9 “(B) has submitted to the Special Counsel an
10 allegation of a prohibited personnel practice de-
11 scribed in paragraph (8) or subparagraph (A)(i),
12 (B), (C), or (D) of paragraph (9) of section 2302(b)
13 with respect to the individual.

14 “(2) Not later than 10 days after the date on which
15 an agency terminates a covered probationary employee,
16 the Special Counsel shall determine whether a substantial
17 likelihood exists that—

18 “(A) the agency engaged in the prohibited per-
19 sonnel practice alleged by the covered probationary
20 employee, as described in paragraph (1)(B); and

21 “(B) the termination of the covered proba-
22 tionary employee was related to that prohibited per-
23 sonnel practice.

24 “(3)(A) If the Special Counsel determines there is a
25 substantial likelihood the circumstances described in para-
26 graph (2) exist, the Special Counsel shall request and the

1 Merit Systems Protection Board, without further pro-
2 ceedings, shall order a stay of the termination for 60 days
3 for the Special Counsel to complete an investigation of the
4 termination of the covered probationary employee.

5 “(B) If, before the end of the 60-day period described
6 in subparagraph (A), the Special Counsel determines that
7 additional investigation is warranted, the Special Counsel
8 shall request and the Merit Systems Protection Board,
9 without further proceedings, shall order a stay of the ter-
10 mination for such period as the Special Counsel deter-
11 mines appropriate, which may not exceed an additional pe-
12 riod of 6 months.

13 “(4)(A) If the Special Counsel determines that the
14 agency employing a covered probationary employee en-
15 gaged in the prohibited personnel practice alleged by the
16 covered probationary employee, as described in paragraph
17 (1)(B), and the termination of the covered probationary
18 employee was related to that prohibited personnel practice,
19 the Special Counsel shall request and the Merit Systems
20 Protection Board, without further proceedings, shall order
21 the reinstatement of the covered probationary employee.

22 “(B) If the Special Counsel determines that the agen-
23 cy employing a covered probationary employee did not en-
24 gage in the prohibited personnel practice alleged by the
25 covered probationary employee, described in paragraph

1 (1)(B), or that the termination of the covered proba-
2 tionary employee was not related to that prohibited per-
3 sonnel practice, the Special Counsel shall request and the
4 Merit Systems Protection Board, without further pro-
5 ceedings, shall order the immediate enforcement of the
6 termination.

7 “(C) An order reinstating a covered probationary em-
8 ployee may be appealed by the agency to the Merit Sys-
9 tems Protection Board under section 7701.

10 “(5) If a stay is granted to a covered probationary
11 employee under paragraph (3) or a covered probationary
12 employee is reinstated under this subsection, the head of
13 the agency employing the covered probationary employee
14 shall give priority to a request for a transfer submitted
15 by the covered probationary employee.”.

16 (b) INDIVIDUAL RIGHT OF ACTION.—Section 1221 of
17 title 5, United States Code, is amended by adding at the
18 end the following:

19 “(k)(1) In this subsection, the term ‘covered proba-
20 tionary employee’ has the meaning given that term under
21 section 1214(i)(1).

22 “(2) In this section, the term ‘employee’ includes a
23 covered probationary employee who is terminated, includ-
24 ing for purposes of seeking a stay under subsection (c).

1 “(3) If the Merit Systems Protection Board grants
2 a stay to a covered probationary employee under sub-
3 section (c), the head of the agency employing the covered
4 probationary employee shall give priority to a request for
5 a transfer submitted by the covered probationary em-
6 ployee.”.

7 (c) STUDY REGARDING RETALIATION AGAINST PRO-
8 BATIONARY EMPLOYEES.—The Comptroller General of
9 the United States shall submit to the Committee on
10 Homeland Security and Governmental Affairs of the Sen-
11 ate and the Committee on Oversight and Government Re-
12 form of the House of Representatives a report discussing
13 retaliation against employees in probationary status relat-
14 ing to a disclosure by the employees of information de-
15 scribed in section 2302(b)(8) of title 5, United States
16 Code, by the employees.

17 **SEC. 103. ADEQUATE ACCESS OF SPECIAL COUNSEL TO IN-**
18 **FORMATION.**

19 Section 1212(b) of title 5, United States Code, is
20 amended by adding at the end the following:

21 “(5)(A) The Special Counsel, in carrying out this
22 subchapter, is authorized to—

23 “(i) have access to all records, reports, audits,
24 reviews, documents, papers, recommendations, or
25 other material available to the applicable agency

1 which relate to a matter within the jurisdiction or
2 authority of the Special Counsel; and

3 “(ii) request from any agency such information
4 or assistance as may be necessary for carrying out
5 the duties and responsibilities of the Special Counsel
6 under this subchapter.

7 “(B) Upon request of the Special Counsel for infor-
8 mation or assistance under subparagraph (A)(ii), the head
9 of the agency involved shall, insofar as is practicable and
10 not in contravention of any existing statutory restriction
11 or regulation of the agency from which the information
12 or assistance is requested, furnish to the Special Counsel
13 such information or assistance.”.

14 **SEC. 104. REMOVAL OR DEMOTION OF EMPLOYEES BASED**
15 **ON RETALIATION AGAINST WHISTLE-**
16 **BLOWERS.**

17 (a) IN GENERAL.—Subchapter II of chapter 75 of
18 title 5, United States Code, is amended by adding at the
19 end the following:

20 **“§ 7515. Removal or demotion of employees based on**
21 **retaliation against whistleblowers**

22 “(a) DEFINITION.—In this section, the term ‘retalia-
23 tion against a whistleblower’ means a prohibited personnel
24 practice described in paragraph (8) or subparagraph

1 (A)(i), (B), (C), or (D) of paragraph (9) of section
2 2302(b).

3 “(b) REMOVAL OR DEMOTION.—

4 “(1) IN GENERAL.—The head of an agency may
5 remove or demote an employee of the agency if the
6 head of the agency determines that the employee re-
7 taliated against a whistleblower.

8 “(2) IMPOSITION OF ACTION.—If the head of
9 an agency removes or demotes an employee under
10 this section, the head of the agency may—

11 “(A) remove the employee from the civil
12 service; or

13 “(B) demote the employee by means of—

14 “(i) a reduction in grade for which the
15 employee is qualified and that the head of
16 the agency determines is appropriate; or

17 “(ii) a reduction in annual rate of pay
18 that the head of the agency determines is
19 appropriate.

20 “(c) PAY OF CERTAIN DEMOTED EMPLOYEES.—

21 “(1) IN GENERAL.—Notwithstanding any other
22 provision of law, any employee subject to a demotion
23 under subsection (b)(2)(B)(i) shall, beginning on the
24 date of the demotion, receive the annual rate of pay
25 applicable to the applicable grade.

1 “(2) APPEAL.—An employee demoted under
2 subsection (b)(2)(B)(i) may not be placed on admin-
3 istrative leave or any other category of paid leave
4 during the period during which an appeal (if any)
5 under this section is ongoing.

6 “(3) FAILURE TO REPORT.—An employee de-
7 moted under subsection (b)(2)(B)(i)—

8 “(A) may only receive pay if the employee
9 reports for duty; and

10 “(B) if the employee does not report for
11 duty, shall not receive pay or other benefits de-
12 scribed in subsection (f)(5).

13 “(d) NOTICE TO CONGRESS.—Not later than 30 days
14 after removing or demoting an employee under subsection
15 (b), the head of an agency shall submit to each committee
16 of Congress with jurisdiction of the activities of the agency
17 notice in writing of the removal or demotion and the rea-
18 son for the removal or demotion.

19 “(e) PROCEDURE.—

20 “(1) IN GENERAL.—The procedures under sec-
21 tion 7513(b) and chapter 43, shall not apply to a re-
22 moval or demotion under this section.

23 “(2) APPEAL.—

24 “(A) IN GENERAL.—Subject to subpara-
25 graph (B) and subsection (f), any removal or

1 demotion under subsection (b) may be appealed
2 to the Merit Systems Protection Board under
3 section 7701.

4 “(B) TIME FOR MAKING AN APPEAL.—An
5 appeal under subparagraph (A) of a removal or
6 demotion may only be made if the appeal is
7 made not later than 7 days after the date of the
8 removal or demotion.

9 “(f) EXPEDITED REVIEW BY ADMINISTRATIVE LAW
10 JUDGE.—

11 “(1) IN GENERAL.—Upon receipt of an appeal
12 under subsection (e)(2)(A), the Merit Systems Pro-
13 tection Board shall refer the appeal to an adminis-
14 trative law judge under section 7701(b)(1), who
15 shall expedite the appeal and issue a decision not
16 later than 45 days after the date of the appeal.

17 “(2) FINALITY OF DECISION.—Notwithstanding
18 any other provision of law, including section 7703,
19 the decision of an administrative law judge under
20 paragraph (1) shall be final and shall not be subject
21 to any further appeal.

22 “(3) DELAY IN DECISION.—If an administrative
23 law judge cannot issue a decision before the end of
24 the 45-day period described in paragraph (1)—

25 “(A) the removal or demotion is final; and

1 “(B) not later than 14 days after the end
2 of the 45-day period, the Merit Systems Protec-
3 tion Board shall submit to each committee of
4 Congress with jurisdiction of the activities of
5 the applicable agency a report that explains the
6 reasons why a decision was not issued during
7 the period.

8 “(4) NO STAYS.—The Merit Systems Protection
9 Board or administrative law judge may not stay any
10 removal or demotion under this section.

11 “(5) NO PAY OR BENEFITS DURING PENDING
12 APPEAL.—During the period beginning on the date
13 on which an employee appeals a removal from the
14 civil service under subsection (e) and ending on the
15 date that the administrative law judge issues a final
16 decision on the appeal, the employee may not receive
17 any pay, awards, bonuses, incentives, allowances, dif-
18 ferentials, student loan repayments, special pay-
19 ments, or benefits.

20 “(6) ASSISTANCE BY AGENCY.—To the max-
21 imum extent practicable, the head of an agency shall
22 provide to the Merit Systems Protection Board, and
23 to any administrative law judge to whom an appeal
24 under this section is referred, such information and

1 assistance as may be necessary to ensure an appeal
2 under this subsection is expedited.

3 “(g) LIMITATION ON REMOVAL OR DEMOTION.—If
4 an employee seeking corrective action (or on behalf of
5 whom corrective action is sought) from the Office of Spe-
6 cial Counsel based on an alleged prohibited personnel
7 practice, the head of an agency may not remove or demote
8 the employee under subsection (b) without the approval
9 of the Special Counsel under section 1214(f).

10 “(h) RELATION TO OTHER PROVISIONS OF LAW.—

11 “(1) ADDITIONAL AUTHORITY.—The authority
12 provided by this section is in addition to any author-
13 ity provided under this chapter or chapter 43.

14 “(2) NOT SUBJECT TO OTHER PROVISIONS.—

15 The requirements under any other provision of this
16 chapter shall not apply to any action under this sec-
17 tion.”.

18 (b) TECHNICAL AND CONFORMING AMENDMENTS.—

19 (1) The table of sections for subchapter II of
20 chapter 75 of title 5, United States Code, is amend-
21 ed by adding at the end the following:

“7515. Removal or demotion of employees based on retaliation against whistle-
blowers.”.

22 (2) Section 4303(f) of title 5, United States
23 Code, is amended—

1 (A) by striking “or” at the end of para-
2 graph (2);

3 (B) by striking the period at the end of
4 paragraph (3) and inserting “, or”; and

5 (C) by adding at the end the following:

6 “(4) any removal or demotion under section
7 7515.”.

8 **SEC. 105. SUICIDE BY EXECUTIVE BRANCH EMPLOYEES.**

9 (a) REFERRAL.—The head of the Executive agency
10 employing an executive branch employee who commits sui-
11 cide shall refer the matter to the Inspector General of the
12 Executive agency, or senior ethics official of the Executive
13 agency for an Executive agency without an Inspector Gen-
14 eral, to determine whether the suicide of the executive
15 branch employee was work-related.

16 (b) INFORMATION TO NEXT OF KIN.—

17 (1) IN GENERAL.—Subject to paragraph (2),
18 the head of the Executive agency employing an execu-
19 tive branch employee who commits suicide shall
20 provide the personnel file of the Executive agency to
21 the next of kin of the executive branch employee.

22 (2) NATIONAL SECURITY EXCEPTION.—The
23 head of an Executive agency may withhold informa-
24 tion in a personnel file under paragraph (1) if the

1 head determines the disclosure of the information
2 would likely compromise national security.

3 **SEC. 106. ACCESS TO MEDICAL FILES.**

4 (a) IN GENERAL.—Except for an emergency situa-
5 tion, an executive branch employee may not access the
6 medical record of another executive branch employee, un-
7 less the executive branch employee whose medical record
8 will be accessed provides consent to the access.

9 (b) EMERGENCY SITUATIONS.—The Director of the
10 Office of Management and Budget shall promulgate regu-
11 lations defining the term “emergency situation” for pur-
12 poses of this section.

13 **SEC. 107. TRAINING FOR SUPERVISORS.**

14 The head of each Executive agency shall provide
15 training regarding how to respond to complaints alleging
16 a violation of whistleblower protections available to execu-
17 tive branch employee of the Executive agency to—

18 (1) executive branch employees appointed to su-
19 pervisory positions in the Executive agency who have
20 not previously served as a supervisor; and

21 (2) on an annual basis, to all executive branch
22 employees of the Executive agency serving in a su-
23 pervisory position.

1 **SEC. 108. INFORMATION ON WHISTLEBLOWER PROTEC-**
2 **TIONS.**

3 (a) IN GENERAL.—Chapter 23 of title 5, United
4 States Code, is amended by adding at the end the fol-
5 lowing:

6 **“§ 2307. Information on whistleblower protections**

7 “(a) DEFINITIONS.—In this section—

8 “(1) the term ‘new employee’ means an indi-
9 vidual—

10 “(A) appointed to a position as an em-
11 ployee on or after the date of enactment of the
12 Dr. Chris Kirkpatrick Whistleblower Protection
13 Act of 2015; and

14 “(B) who has not previously served as an
15 employee; and

16 “(2) the term ‘whistleblower protections’
17 means—

18 “(A) the protections against and remedies
19 for a prohibited personnel practice described in
20 paragraph (8) or subparagraph (A)(i), (B), (C),
21 or (D) of paragraph (9) of section 2302(b); and

22 “(B) similar protections for an employee
23 under any other provision of law.

24 “(b) INFORMATION FOR NEW HIRES.—The head of
25 each agency or other establishment in the Federal Govern-
26 ment shall provide each new employee of the agency or

1 establishment information regarding the whistleblower
 2 protections available to the new employee and the role of
 3 the Office of Special Counsel.

4 “(c) INFORMATION ONLINE.—The head of each agen-
 5 cy or other establishment in the Federal Government shall
 6 make available information regarding whistleblower pro-
 7 tections applicable to employees of the agency or other es-
 8 tablishment on any online portal that is made available
 9 only to employees of the agency or other establishment.”.

10 (b) TECHNICAL AND CONFORMING AMENDMENT.—
 11 The table of sections for chapter 23 of title 5, United
 12 States Code, is amended by adding at the end the fol-
 13 lowing:

“2307. Information on whistleblower protections.”.

14 **TITLE II—DEPARTMENT OF**
 15 **VETERANS AFFAIRS EMPLOYEES**
 16 **SEC. 201. PROTECTING MEDICAL PRIVACY OF EMPLOYEES**
 17 **OF THE DEPARTMENT OF VETERANS AF-**
 18 **FAIRS.**

19 (a) IN GENERAL.—Chapter 7 of title 38, United
 20 States Code, is amended by adding at the end the fol-
 21 lowing new section:

22 **“§ 714. Accessing of medical records of employees**

23 “(a) NOTICE OF ACCESS.—(1) Not later than five
 24 days after an employee of the Department accesses the
 25 medical record of another employee of the Department,

1 the Secretary shall notify the such other employee of such
2 access.

3 “(2) Notice under paragraph (1) shall include the fol-
4 lowing:

5 “(A) The name of the employee accessing the
6 medical record.

7 “(B) The date and time the employee accessed
8 the medical record.

9 “(C) The period during which the employee
10 accessed the medical record.

11 “(D) A description of any modification of the
12 medical record made by the employee.

13 “(b) DETERMINATION OF PROHIBITED ACCESS.—(1)
14 If an employee of the Department receives notice under
15 subsection (a) that a medical record of the employee was
16 accessed by another employee of the Department and the
17 employee believes that such access was conducted in viola-
18 tion of an applicable provision of Federal privacy law, the
19 employee shall file a complaint with the Office of Account-
20 ability Review.

21 “(2) If the Office of Accountability Review receives
22 a complaint from an employee with respect to a notice that
23 the employee received under subsection (a) not more than
24 45 days after the notice was transmitted to the employee,

1 the Office of Accountability Review shall, not later than
2 30 days after receiving such complaint—

3 “(A) determine whether the access identified in
4 the notice was conducted in violation of an applica-
5 ble provision of Federal privacy law; and

6 “(B) notify the employee of the determination.

7 “(c) ACTION IN RESPONSE TO UNAUTHORIZED AC-
8 CESS.—(1) If the Office of Accountability Review deter-
9 mines that an employee of the Department has accessed
10 the medical record of another employee of the Department
11 in violation of an applicable provision of Federal privacy
12 law, the Secretary shall—

13 “(A) for the first such access, issue an order
14 that, for the two-year period beginning on the date
15 of the order, the employee is not eligible to receive
16 any bonus or cash award from the Department, in-
17 cluding—

18 “(i) an award under chapter 45 of title 5;

19 “(ii) an award under section 5384 of title
20 5; and

21 “(iii) a retention bonus under section 5754
22 of title 5;

23 “(B) for the second such access, suspend the
24 employee for not less than 14 days; and

1 “(C) for the third such access, terminate the
2 employee.

3 “(2) Any action under paragraph (1)—

4 “(A) shall be taken in accordance with chapter
5 75 of title 5; and

6 “(B) may be appealed to the Merit Systems
7 Protection Board under section 7701 of title 5.

8 “(d) APPLICABLE PROVISION OF FEDERAL PRIVACY
9 LAW DEFINED.—In this section, the term ‘applicable pro-
10 vision of Federal privacy law’ includes the following:

11 “(1) The Federal regulations (concerning the
12 privacy of individually identifiable health informa-
13 tion) promulgated under section 264(c) of the
14 Health Insurance Portability and Accountability Act
15 of 1996.

16 “(2) Section 552a of title 5 (commonly known
17 as the ‘Privacy Act of 1974’).”.

18 (b) TECHNICAL AND CONFORMING AMENDMENT.—
19 The table of sections for chapter 7 of title 38, United
20 States Code, is amended by adding at the end the fol-
21 lowing new item:

“714. Accessing of medical records of employees.”.

22 **SEC. 202. MENTAL HEALTH SERVICES FOR EMPLOYEES OF**
23 **THE DEPARTMENT OF VETERANS AFFAIRS.**

24 (a) OUTREACH ON AVAILABILITY OF SERVICES.—
25 The Secretary of Veterans Affairs shall conduct a program

1 of outreach to employees of the Department of Veterans
2 Affairs to inform them of the mental health services avail-
3 able to them.

4 (b) STUDY ON USE OF MENTAL HEALTH PROFES-
5 SIONALS OF THE DEPARTMENT TO PROVIDE SERVICES
6 TO EMPLOYEES.—

7 (1) IN GENERAL.—The Secretary of Veterans
8 Affairs shall conduct a study to assess the feasibility
9 of using mental health professionals who provide
10 mental health services for the Department of Vet-
11 erans Affairs to provide mental health services to
12 employees of the Department.

13 (2) REPORT.—Upon completion of the study re-
14 quired by paragraph (1), the Secretary shall submit
15 to Congress a report on the findings of the Secretary
16 with respect to the study.

17 **SEC. 203. PROTOCOLS TO ADDRESS THREATS AGAINST EM-**
18 **PLOYEES OF THE DEPARTMENT OF VET-**
19 **ERANS AFFAIRS.**

20 The Secretary of Veterans Affairs shall develop pro-
21 tocols to address threats from individuals receiving health
22 care from the Department of Veterans Affairs directed to-
23 wards employees of the Department who are providing
24 such health care.

1 **SEC. 204. COMPTROLLER GENERAL OF THE UNITED**
2 **STATES STUDY ON ACCOUNTABILITY OF**
3 **CHIEFS OF POLICE OF DEPARTMENT OF VET-**
4 **ERANS AFFAIRS MEDICAL CENTERS.**

5 The Comptroller General of the United States shall
6 conduct a study to assess the reporting, accountability,
7 and chain of command structure of the Department of
8 Veterans Affairs police officers at medical centers of the
9 Department.

○