To amend title 5, United States Code, to modify and enhance protections for Federal Government whistleblowers, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 4, 2021

Mrs. CAROLYN B. MALONEY of New York (for herself, Mr. CONNOLLY, Ms. SPEIER, Ms. MACE, Ms. JOHNSON of Texas, and Miss RICE of New York) introduced the following bill; which was referred to the Committee on Oversight and Reform

MAY 17, 2022

Additional sponsors: Mr. MFUME, Mr. LYNCH, Mr. CASE, Ms. NORTON, Mr. COOPER, Mr. KRISHNAMOORTHI, Mr. KHANNA, Ms. PORTER, Ms. WASSERMAN SCHULTZ, Mr. WELCH, Mr. QUIGLEY, Ms. TLAIB, Ms. OCASIO-CORTEZ, Mr. SARBAES, Mr. RASKIN, Ms. KELLY of Illinois, Mrs. LAWRENCE, Mr. DESAULNIER, Ms. PRESSLEY, Mr. JOHNSON of Georgia, Mr. DANNY K. DAVIS of Illinois, Ms. BUSH, Mr. GOMEZ, and Ms. MENG

MAY 17, 2022

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in italic]

[For text of introduced bill, see copy of bill as introduced on May 4, 2021]
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A BILL

To amend title 5, United States Code, to modify and enhance protections for Federal Government whistleblowers, and for other purposes.
Be it enacted by the Senate and House of Representa-
tives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Whistleblower Protection
Improvement Act of 2021”.

SEC. 2. ADDITIONAL WHISTLEBLOWER PROTECTIONS.

(a) INVESTIGATIONS AS PERSONNEL ACTIONS.—

(1) IN GENERAL.—Section 2302(a)(2)(A) of title
5, United States Code, is amended—

(A) in clause (xi), by striking “and” at the
end;

(B) by redesignating clause (xii) as clause
(xiii); and

(C) by inserting after the clause (xi) the fol-
lowing:

“(xii) for purposes of subsection (b)(8)—

“(I) the commencement, expansion, or
extension of an investigation, but not in-
cluding any investigation that is ministe-
rial or nondiscretionary (including a min-
isterial or nondiscretionary investigation
described in section 1213) or any investiga-
tion that is conducted by an Inspector Gen-
eral of an entity of the Government of an
employee not employed by the office of that Inspector General; and

“(II) a referral to an Inspector General of an entity of the Government, except for a referral that is ministerial or nondiscretionary; and”.

(2) APPLICATION.—The amendment made by paragraph (1) shall apply to any investigation opened, or referral made, as described under clause (xii) of section 2302(a)(2)(A) of title 5, United States Code, as added by such paragraph, on or after the date of enactment of this Act.

(b) RIGHT TO PETITION CONGRESS.—

(1) IN GENERAL.—Section 2302(b)(9) of title 5, United States Code, is amended—

(A) in subparagraph (C), by striking “or” at the end;

(B) in subparagraph (D), by adding “or” after the semicolon at the end; and

(C) by adding at the end the following:

“(E) the exercise of any right protected under section 7211;”.

(2) APPLICATION.—The amendment made by paragraph (1) shall apply to the exercise of any right described in section 2302(b)(9)(E) of title 5, United
States Code, as added by paragraph (1), occurring on or after the date of enactment of this Act.

(c) Prohibition on Disclosure of Whistleblower Identity.—

(1) In General.—Section 2302 of title 5, United States Code, is amended by adding at the end the following:

“(g)(1) No employee of an agency may willfully communicate or transmit to any individual who is not an officer or employee of the Government the identity of, or personally identifiable information about, any other employee because that other employee has made, or is suspected to have made, a disclosure protected by subsection (b)(8), unless—

“(A) the other employee provides express written consent prior to the communication or transmission of their identity or personally identifiable information;

“(B) the communication or transmission is made in accordance with the provisions of section 552a;

“(C) the communication or transmission is made to a lawyer for the sole purpose of providing legal advice to an employee accused of whistleblower retaliation; or
“(D) the communication or transmission is required or permitted by any other provision of law.

“(2) In this subsection, the term ‘officer or employee of the Government’ means—

“(A) the President;

“(B) a Member of Congress;

“(C) a member of the uniformed services;

“(D) an employee as that term is defined in section 2105, including an employee of the United States Postal Service, the Postal Regulatory Commission, or the Department of Veterans Affairs (including any employee appointed pursuant to chapter 73 or 74 of title 38); and

“(E) any other officer or employee in any branch of the Government of the United States.”.

(2) APPLICATION.—The amendment made by paragraph (1) shall apply to any transmission or communication described in subsection (g) of section 2302 of title 5, United States Code, as added by paragraph (1), made on or after the date of enactment of this Act.

(d) RIGHT TO PETITION CONGRESS.—

(1) IN GENERAL.—Section 7211 of title 5, United States Code, is amended to read as follows:
§ 7211. Employees’ right to petition or furnish information or respond to Congress

“(a) IN GENERAL.—Each officer or employee of the Federal Government, individually or collectively, has a right to—

“(1) petition Congress or a Member of Congress;

“(2) furnish information, documents, or testimony to either House of Congress, any Member of Congress, or any committee or subcommittee of the Congress; or

“(3) respond to any request for information, documents, or testimony from either House of Congress or any Committee or subcommittee of Congress.

“(b) PROHIBITED ACTIONS.—No officer or employee of the Federal Government may interfere with or deny the right set forth in subsection (a), including by—

“(1) prohibiting or preventing, or attempting or threatening to prohibit or prevent, any other officer or employee of the Federal Government from engaging in activity protected in subsection (a); or

“(2) removing, suspending from duty without pay, demoting, reducing in rank, seniority, status, pay, or performance or efficiency rating, denying promotion to, relocating, reassigning, transferring, disciplining, or discriminating in regard to any employment right, entitlement, or benefit, or any term or
condition of employment of, any other officer or em-
ployee of the Federal Government or attempting or
threatening to commit any of the foregoing actions
protected in subsection (a).

“(c) APPLICATION.—This section shall not be construed
to authorize disclosure of any information that is—

“(1) specifically prohibited from disclosure by
any other provision of Federal law; or

“(2) specifically required by Executive order to
be kept secret in the interest of national defense or the
conduct of foreign affairs, unless disclosure is other-
wise authorized by law.

“(d) DEFINITION OF OFFICER OR EMPLOYEE OF THE
FEDERAL GOVERNMENT.—For purposes of this section, the
term ‘officer or employee of the Federal Government’ in-
cludes—

“(1) the President;

“(2) a Member of Congress;

“(3) a member of the uniformed services;

“(4) an employee (as that term is defined in sec-

tion 2105);

“(5) an employee of the United States Postal
Service or the Postal Regulatory Commission; and

“(6) an employee appointed under chapter 73 or

74 of title 38.”.
(2) CLERICAL AMENDMENT.—The table of sections for subchapter II of chapter 72 of title 5, United States Code, is amended by striking the item related to section 7211 and inserting the following:

“7211. Employees’ right to petition or furnish information or respond to Congress.”

SEC. 3. ENHANCEMENT OF WHISTLEBLOWER PROTECTIONS.

(a) DISCLOSURES RELATING TO OFFICERS OR EMPLOYEES OF AN OFFICE OF INSPECTOR GENERAL.—Section 1213(c) of title 5, United States Code, is amended by adding at the end the following:

“(3) If the information transmitted under this subsection disclosed a violation of law, rule, or regulation, or gross waste, gross mismanagement, abuse of authority, or a substantial and specific danger to public health or safety, by any officer or employee of an Office of Inspector General, the Special Counsel may refer the matter to the Council of the Inspectors General on Integrity and Efficiency, which shall comply with the standards and procedures applicable to investigations and reports under subsection (c).”.

(b) RETALIATORY REFERRALS TO INSPECTORS GENERAL.—Section 1214(d) of title 5, United States Code, is amended by adding at the end the following:

“(3) In any case in which the Special Counsel determines that a referral to an Inspector General of an entity
of the Federal Government was in retaliation for a disclosure or protected activity described in section 2302(b)(8)
or in retaliation for exercising a right described in section 2302(b)(9)(A)(i), the Special Counsel shall transmit that finding in writing to the Inspector General within seven days of making the finding. The Inspector General shall consider that finding and make a determination on whether to initiate an investigation or continue an investigation based on the referral that the Special Counsel found to be retaliatory.”.

(c) Ensuring Timely Relief.—

(1) Individual Right of Action.—Section 1221 of title 5, United States Code, is amended by striking “section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D),” each place it appears and inserting “section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g),”.

(2) Stays.—Section 1221(c)(2) of title 5, United States Code, is amended to read as follows:

“(2) Any stay requested under paragraph (1) shall be granted within 10 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date the request is made, if the Board determines—
“(A) that there is a substantial likelihood that
protected activity was a contributing factor to the
personnel action involved; or

“(B) the Board otherwise determines that such a
stay would be appropriate.”.

(3) APPEAL OF STAY.—Section 1221(c) of title 5,
United States Code, is amended by adding at the end
the following:

“(4) If any stay requested under paragraph (1)
is denied, the employee, former employee, or applicant
may, within 7 days after receiving notice of the de-
nial, file an appeal for expedited review by the Board.
The agency shall have 7 days thereafter to respond.
The Board shall provide a decision not later than 21
days after receiving the appeal. During the period of
appeal, both parties may supplement the record with
information unavailable to them at the time the stay
was first requested.”.

(4) ACCESS TO DISTRICT COURT; JURY TRIALS.—

(A) IN GENERAL.—Section 1221(i) of title
5, United States Code, is amended—

(i) by striking “(i) Subsections” and
inserting “(i)(1) Subsections”; and

(ii) by adding at the end the following:
“(2)(A) If, in the case of an employee, former employee, or applicant for employment who seeks corrective action from the Merit Systems Protection Board based on an alleged prohibited personnel practice described in section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g), no final order or decision is issued by the Board within 180 days after the date on which a request for such corrective action has been duly submitted to the Board, such employee, former employee, or applicant may, after providing written notice to the Special Counsel and the Board and only within 20 days after providing such notice, bring an action for review de novo before the appropriate United States district court, and such action shall, at the request of either party to such action, be tried before a jury. Upon filing of an action with the appropriate United States district court, any proceedings before the Board shall cease and the employee, former employee, or applicant for employment waives any right to refile with the Board.

“(B) If the Board certifies (in writing) to the parties of a case that the complexity of such case requires a longer period of review, subparagraph (A) shall be applied by substituting ‘240 days’ for ‘180 days’.

“(C) In any such action brought before a United States district court under subparagraph (A), the court—
“(i) shall apply the standards set forth in subsection (e); and

“(ii) may award any relief which the court considers appropriate, including any relief described in subsection (g).”.

(B) APPLICATION.—

(i) The amendments made by subparagraph (A) shall apply to any corrective action duly submitted to the Merit Systems Protection Board, during the five-year period preceding the date of enactment of this Act, by an employee, former employee, or applicant for employment based on an alleged prohibited personnel practice described in section 2302(b)(8), 2302(b)(9)(A)(i), (B), (C), or (D), or 2302(b)(13) of title 5, United States Code, with respect to which no final order or decision has been issued by the Board.

(ii) In the case of an individual described in clause (i) whose duly submitted claim to the Board was made not later than 180 days before the date of enactment of this Act, such individual may only bring an action before a United States district court as
described in section 1221(i)(2) of title 5, United States Code, (as added by subparagraph (A) if that individual—

(I) provides written notice to the Office of Special Counsel and the Merit Systems Protection Board not later than 90 days after the date of enactment of this Act; and

(II) brings such action not later than 20 days after providing such notice.

(d) RECIPIENTS OF WHISTLEBLOWER DISCLOSURES.—Section 2302(b)(8)(B) of title 5, United States Code, is amended by striking “or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures” and inserting “the Inspector General of an agency, a supervisor in the employee’s direct chain of command up to and including the head of the employing agency, or to an employee designated by any of the aforementioned individuals for the purpose of receiving such disclosures”.

(e) ATTORNEY FEES.—

(1) IN GENERAL.—Section 7703(a) of title 5, United States Code, is amended by adding at the end the following:
“(3) If an employee, former employee, or applicant for employment is the prevailing party under a proceeding brought under this section, the employee, former employee, or applicant for employment shall be entitled to attorney fees for all representation carried out pursuant to this section. In such an action for attorney fees, the agency responsible for taking the personnel action shall be the respondent and shall be responsible for paying the fees.”.

(2) APPLICATION.—In addition to any proceeding brought by an employee, former employee, or applicant for employment on or after the date of enactment of this Act to a Federal court under section 7703 of title 5, United States Code, the amendment made by paragraph (1) shall apply to any proceeding brought by an employee, former employee, or applicant for employment under such section before the date of enactment of this Act with respect to which the applicable Federal court has not issued a final decision.

(f) EXTENDING WHISTLEBLOWER PROTECTION ACT TO CERTAIN EMPLOYEES.—

(1) IN GENERAL.—Section 2302(a)(2)(A) of title 5, United States Code, is amended in the matter following clause (xiii)—
(A) by inserting “subsection (b)(9)(A)(i), (B), (C), (D), or (E), subsection (b)(13), or subsection (g),” after “subsection (b)(8),”; and

(B) by inserting after “title 31” the following: “, a commissioned officer or applicant for employment in the Public Health Service, an officer or applicant for employment in the commissioned officer corps of the National Oceanic and Atmospheric Administration, and a non-career appointee in the Senior Executive Service”.

(2) CONFORMING AMENDMENTS.—Section 261 of the National Oceanic and Atmospheric Administration Commissioned Officer Corps Act of 2002 (33 U.S.C. 3071) is amended—

(A) in subsection (a)—

(i) by striking paragraph (8); and

(ii) by redesignating paragraphs (9) through (26) as paragraphs (8) through (25), respectively; and

(B) in subsection (b), by striking the second sentence.

(3) APPLICATION.—

(A) IN GENERAL.—With respect to an officer or applicant for employment in the commis-
sioned officer corps of the National Oceanic and Atmospheric Administration, the amendments made by paragraphs (1) and (2) shall apply to any personnel action taken against such officer or applicant on or after the date of enactment of the National Oceanic and Atmospheric Administration Commissioned Officer Corps Amendments Act of 2020 (Public Law 116–259) for making any disclosure protected under section 2302(8) of title 5, United States Code.

(B) EXCEPTION.—Subparagraph (A) shall not apply to any personnel action with respect to which a complaint has been filed pursuant to section 1034 of title 10, United States Code, and a final decision has been rendered regarding such complaint.

(g) RELIEF.—

(1) IN GENERAL.—Section 7701(b)(2)(A) of title 5, United States Code, is amended by striking “upon the making of the decision” and inserting “upon making of the decision, necessary to make the employee whole as if there had been no prohibited personnel practice, including training, seniority and promotions consistent with the employee’s prior record”.

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(2) APPLICATION.—In addition to any appeal made on or after the date of enactment of this Act to the Merit Systems Protection Board under section 7701 of title 5, United States Code, the amendment made by paragraph (1) shall apply to any appeal made under such section before the date of enactment of this Act with respect to which the Board has not issued a final decision.

SEC. 4. CLASSIFYING CERTAIN FURLoughs AS ADVERSE PERSONNEL ACTIONS.

(a) In General.—Section 7512 of title 5, United States Code, is amended—

(1) in paragraph (4), by striking “and” at the end; and

(2) by striking paragraph (5) and inserting the following:

“(5) a furlough of more than 14 days but less than 30 days; and

“(6) a furlough of 13 days or less that is not due to a lapse in appropriations;”.

(b) Application.—The amendment made by subsection (a) shall apply to any furlough covered by such section 7512(5) or (6) (as amended by such subsection) occurring on or after the date of enactment of this Act.
SEC. 5. CODIFICATION OF PROTECTIONS FOR DISCLOSURES OF CENSORSHIP RELATED TO RESEARCH, ANALYSIS, OR TECHNICAL INFORMATION.

(a) In General.—Section 2302 of title 5, United States Code, as amended by section 2(c)(1), is further amended by adding at the end the following:

“(h)(1) In this subsection—

“(A) the term ‘applicant’ means an applicant for a covered position;

“(B) the term ‘censorship related to research, analysis, or technical information’ means any effort to distort, misrepresent, or suppress research, analysis, or technical information; and

“(C) the term ‘employee’ means an employee in a covered position in an agency.

“(2)(A) Any disclosure of information by an employee or applicant for employment that the employee or applicant reasonably believes is evidence of censorship related to research, analysis, or technical information—

“(i) shall come within the protections of subsection (b)(8)(A) if—

“(I) the employee or applicant reasonably believes that the censorship related to research, analysis, or technical information is or will cause—
“(aa) any violation of law, rule, or regulation; or

“(bb) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; and

“(II) such disclosure is not specifically prohibited by law or such information is not specifically required by Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs; and

“(ii) shall come within the protections of subsection (b)(8)(B) if—

“(I) the employee or applicant reasonably believes that the censorship related to research, analysis, or technical information is or will cause—

“(aa) any violation of law, rule, or regulation; or

“(bb) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; and

“(II) the disclosure is made to the Special Counsel, or to the Inspector General of an agency
or another person designated by the head of the agency to receive such disclosures, consistent
with the protection of sources and methods.

“(3) A disclosure shall not be excluded from paragraph (2) for any reason described under subsection (f)(1) or (2).

“(4) Nothing in this subsection shall be construed to imply any limitation on the protections of employees and applicants afforded by any other provision of law, including protections with respect to any disclosure of information believed to be evidence of censorship related to research, analysis, or technical information.”.

(b) REPEAL.—

(1) IN GENERAL.—Section 110 of the Whistleblower Protection Enhancement Act of 2012 (Public Law 112–199) is hereby repealed.

(2) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to limit or otherwise affect any action under such section 110 commenced before the date of enactment of this Act or any protections afforded by such section with respect to such action.

SEC. 6. TITLE 5 TECHNICAL AND CONFORMING AMENDMENTS.

Title 5, United States Code, is amended—
(1) in section 1212(h), by striking “or (9)” each place it appears and inserting “(b)(9), (b)(13), or (g)”;

(2) in section 1214—

(A) in subsections (a) and (b), by striking “section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D)” each place it appears and inserting “section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g)”;

(B) in subsection (i), by striking “section 2302(b)(8) or subparagraph (A)(i), (B), (C), or (D) of section 2302(b)(9)” and inserting “section 2302(b)(8), subparagraph (A)(i), (B), (C), (D), or (E) of section 2302(b)(9), section 2302(b)(13), or section 2302(g)”;

(3) in section 1215(a)(3)(B), by striking “section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)” each place it appears and inserting “section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g)”;

(4) in section 2302—

(A) in subsection (a)—

(i) in paragraph (1), by inserting “or (g)” after “subsection (b)”; and
(ii) in paragraph (2)(C)(i), by striking “subsection (b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D)” and inserting “section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g)”;

(B) in subsection (c)(1)(B), by striking “paragraph (8) or subparagraph (A)(i), (B), (C), or (D) of paragraph (9) of subsection (b)” and inserting “paragraph (8), subparagraph (A)(i), (B), (C), or (D) of paragraph (9), or paragraph (13) of subsection (b) or subsection (g)”;

(5) in section 7515(a)(2), by striking “paragraph (8), (9), or (14) of section 2302(b)” and inserting “paragraph (8), (9), (13), or (14) of section 2302(b) or section 2302(g)”;

(6) in section 7701(c)(2)(B), by inserting “or section 2302(g)” after “section 2302(b)”; and

(7) in section 7703(b)(1)(B), by striking “section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)” and inserting “section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g)”. 
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