

FEDERAL EMPLOYEE ANTIDISCRIMINATION ACT OF 2017

APRIL 4, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CHAFFETZ, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

[To accompany H.R. 702]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 702) to amend the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 to strengthen Federal antidiscrimination laws enforced by the Equal Employment Opportunity Commission and expand accountability within the Federal Government, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

H.R. 702, the Federal Employee Antidiscrimination Act of 2017, amends the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 to strengthen Equal Employment Opportunity protections for federal employees.

BACKGROUND AND NEED FOR LEGISLATION

The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act) was enacted to address the “need for accountability, reporting, and notification in regard to discrimination and retaliation against [f]ederal employees.”¹ The No FEAR Act sought to ensure federal employees and applicants were aware of their rights and appropriately able to seek adjudication of claims of discrimination. The No FEAR Act was prompted in part by House Committee on Science investigations and reporting by the U.S. General Accounting Office.²

The No FEAR Act was successful in improving employee and applicant awareness of Equal Employment Opportunity (EEO) protections and avenues for adjudication of complaints. However, challenges remain in preventing discrimination in the federal workplace and ensuring that claims of discrimination are adjudicated in a fair and timely manner. In 2014, for example, the EEO Commission released a Program Evaluation Report on the Social Security Administration (SSA), which concluded that SSA had failed to maintain the standards of a model EEO program. The Report made 12 findings and more than 60 recommendations to reform SSA’s EEO program.³

H.R. 702 amends the No FEAR Act to ensure that appropriate entities investigate and report on allegations of discrimination in a timely manner. H.R. 702 accomplishes this objective by increasing the transparency surrounding EEO processes and outcomes. H.R. 702 adds a new title to the No FEAR Act to improve agency EEO programs across the federal government by ensuring that they function independent of agency human resource and general counsel offices. H.R. 702 also requires that the heads of agency EEO programs report directly to agency heads to prevent potential conflicts of interest within an agency.

The legislation also requires that an agency post on its website a notation regarding any finding of discrimination or retaliation that includes the date of the finding, when the act or acts occurred, and what law(s) were violated. Such notices must be posted within 30 days of final agency action or the issuance by the EEO Commission of an appellate decision involving a finding of discrimination or retaliation and must remain on an agency’s website for at least one year. Additionally, H.R. 702 requires agencies to disclose to the EEO Commission whether disciplinary action was initiated against an employee who was found to have discriminated or retaliated against another employee or an applicant for employment. The bill

¹H.R. Rep. No. 107–101 pt. 1, at 9 (2001).

²General Accounting Office, GGD–99–75, Equal Employment Opportunity: Data Shortcomings Hinder Assessment of Conflicts in the Federal Workplace (1999).

³U.S. Equal Employment Opportunity Comm’n, Program Evaluation Report: Social Security Administration (May 14, 2014).

further requires agencies and the EEO Commission to release data regarding class action complaints alleging discrimination or retaliation against a federal agency.

To improve EEO complaint accountability, federal agencies are required within one year of enactment to establish a system to track discrimination complaints through the EEO process from inception to resolution, including whether a decision has been made regarding possible disciplinary action based on a finding of discrimination. The legislation also requires federal agencies to make a notation in the personnel record of any employee who was subject to an adverse action as a result of a finding of discrimination or retaliation that includes the reason for the adverse action.

According to the 2016 Federal Employee Viewpoint Survey, only 62 percent of respondents agreed with the statement that they could “disclose a suspected violation of any law, rule, or regulation without fear of reprisal.”⁴ To help address the concerns raised in that survey, H.R. 702 bars the implementation or enforcement of non-disclosure agreements that would prohibit federal employees from disclosing waste, fraud, violations of laws or rules, or other forms of mismanagement or abuse to Congress, the Office of Special Counsel, or an Office of Inspector General.

LEGISLATIVE HISTORY

On January 27, 2017, Ranking Member Elijah Cummings (D-MD) introduced H.R. 702, the Federal Employee Antidiscrimination Act of 2017, with Chairman Jason Chaffetz (R-UT), Representatives Sheila Jackson Lee (D-TX), James Sensenbrenner, Jr. (R-WI), and Delegate Eleanor Holmes Norton (D-DC) as original cosponsors. H.R. 702 was referred to the Committee on Oversight and Government Reform. The Committee considered H.R. 702 at a business meeting on February 2, 2017 and ordered the bill favorably reported, without amendment, by voice vote.

In the 114th Congress, Representative Cummings introduced a bill similar to H.R. 702, H.R. 1557, the Federal Employee Antidiscrimination Act of 2015. On March 25, 2015, the House Committee on Oversight and Government Reform ordered H.R. 1557 favorably reported. On July 21, 2015, the House of Representatives passed H.R. 1557 under suspension of the rules by a recorded vote of 403–0. The bill was referred to the Senate Committee on Homeland Security and Governmental Affairs, which ordered the bill favorably reported, as amended, on December 9, 2015. No further action was taken in the Senate.

SECTION-BY-SECTION

Section 1. Short title

This section identifies the bill as the “Federal Employee Antidiscrimination Act of 2017.”

Section 2. Sense of Congress

This section modifies the existing sense of Congress in the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (NO FEAR) Act, (5 U.S.C. § 2301 note) to affirm that

⁴U.S. Office of Personnel Mgmt., 2016 Government-wide Management Report (2016).

accountability in the enforcement of federal employee rights is furthered when federal agencies take appropriate disciplinary action against federal employees who have acted in a discriminatory or retaliatory manner, while preserving all of their due process rights.

Section 3. Notification of violation

This section amends Section 202 of the No FEAR Act to require that notification be posted for at least one year on an agency's internal website when an agency or the Equal Employment Opportunity Commission (EEOC) finds that a discriminatory or retaliatory act has occurred.

Section 4. Reporting requirements

This section amends Section 203 of the NO FEAR Act to require that annual reports mandated by the NO FEAR Act be submitted in electronic format.

This section also requires a federal agency to submit a report to the EEOC within 60 days of a finding that a discriminatory or retaliatory act has occurred stating whether disciplinary action has been initiated against a federal employee as a result of the improper act.

Section 5. Data to be posted by employing federal agencies

This section amends Section 301 of the NO FEAR Act to expand the information federal agencies are required to post on their websites regarding each finding of discrimination or retaliation to include the date of the finding, the date of the violation, the affected agency, the law violated, and whether a decision has been made regarding necessary disciplinary action as a result of the violation. This section also requires that agencies provide specific data on each class action complaint filed against the agency alleging discrimination or retaliation.

Section 6. Data to be posted by the Equal Employment Opportunity Commission

This section amends Section 302 of the NO FEAR Act to apply to the EEOC new requirements applied to federal agencies under Section 5 of the bill.

Section 7. Notification and Federal Employee Antidiscrimination and Retaliation Act amendments

This section amends the NO FEAR Act to add a new section requiring federal agencies to establish a system to track from inception to resolution each complaint alleging that a discriminatory act has been committed. The system must also track whether a decision has been made regarding disciplinary action pursuant to a finding that a discriminatory act occurred.

The section amends the NO FEAR Act to add a new section requiring that if an agency takes adverse action against an employee for an act of discrimination or retaliation, the agency shall make a notation of the adverse action in the personnel record of the individual against whom the action was taken after all appeals arising from the adverse action have been exhausted.

This section further amends the NO FEAR Act to add a new title (“Title IV, Processing and Referral”). This title requires each federal agency to implement a model Equal Employment Opportunity Program that is not under the control of the agency’s Human Capital or General Counsel office, is devoid of internal conflicts of interest, and ensures efficient and fair resolution of complaints alleging discrimination or retaliation. This section provides that nothing in the title prevents an agency’s Human Capital or General Counsel office from providing advice or counsel to agency personnel on the processing or resolution of an EEO complaint.

Title IV requires the head of each Equal Employment Opportunity Program in a federal agency to report directly to the head of the agency.

Title IV also requires the EEOC to make a referral to the Office of Special Counsel (OSC) whenever the EEOC issues a finding that a discriminatory or retaliatory act has occurred. This Title requires the OSC to accept and review referrals from the EEOC and to notify the EEOC whenever it initiates disciplinary action in response to a referral. Title IV requires an agency to comply with section 1214(f) of title 5, United States Code, before initiating disciplinary action against a federal employee for an alleged act of discrimination or retaliation referred to the OSC by the EEOC.

Section 8. Nondisclosure agreement limitation

This section amends section 2302(b) of title 5, United States Code, to prohibit the implementation or enforcement of nondisclosure policies, forms, or agreements that prohibit or restrict an employee from disclosing to Congress, the OSC, or an Office of the Inspector General any information that relates to any violation of any law, rule, or regulation; instance of mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health and safety; or any other whistleblower protection.

EXPLANATION OF AMENDMENTS

No amendments to H.R. 702 were offered or adopted during Committee consideration of the bill.

COMMITTEE CONSIDERATION

On February 2, 2017, the Committee met in open session and ordered reported favorably the bill, H.R. 702, by voice vote, a quorum being present.

ROLL CALL VOTES

No roll call votes were requested or conducted during Committee consideration of H.R. 702.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill amends the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 to strengthen Equal Employment Opportunity protections for

federal employees. As such, this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goal or objective of this bill is to amend the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 to strengthen Federal antidiscrimination laws enforced by the Equal Employment Opportunity Commission and expand accountability within the Federal government, and for other purposes.

DUPLICATION OF FEDERAL PROGRAMS

In accordance with clause 2(c)(5) of rule XIII, no provision of this bill establishes or reauthorizes a program of the federal government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting this bill does not direct the completion of any specific rule makings within the meaning of section 551 or title 5, United States Code.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of Section 5(b) of the appendix to title 5, United States Code.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104-4) requires a statement as to whether the provisions of the reported bill include unfunded mandates. In compliance with this requirement, the Committee has included below a letter received from the Congressional Budget Office.

EARMARK IDENTIFICATION

This bill does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that Rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974, which the Committee has included below.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 10, 2017.

Hon. JASON CHAFFETZ,
*Chairman, Committee on Oversight and Government Reform,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 702, the Federal Employee Antidiscrimination Act of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

KEITH HALL.

Enclosure.

H.R. 702—Federal Employee Antidiscrimination Act of 2017

H.R. 702 would amend the Notification and Federal Employee Antidiscrimination and Retaliation Act to expand the current process used to investigate and resolve federal employees' claims of discrimination by other federal employees. The bill also would expand the amount of information that must be reported and made available concerning such discrimination cases.

Based on information from the Office of Personnel Management and the U.S. Equal Employment Opportunity Commission, CBO expects that most of the provisions in the bill would build on the current policies and practices of the federal government. Currently, the federal government, through laws, regulations, and agency policies, prohibits discrimination in all phases of employment. CBO expects that under the bill there would be some minor additional costs for agencies to track and report discriminatory acts and to notify the public of violations of antidiscrimination laws. Based on the costs of similar activities, CBO estimates that implementing H.R. 702 would increase federal administrative costs by less than

\$500,000 annually; such spending would be subject to the availability of appropriated funds.

Enacting H.R. 702 could affect direct spending by some agencies (such as the Tennessee Valley Authority) because they are authorized to use receipts from the sale of goods, fees, and other collections to cover their operating costs. Therefore, pay-as-you-go procedures apply. Because most of those agencies can make adjustments to the amounts collected, CBO estimates that any net changes in direct spending by those agencies would be negligible. Enacting the legislation would not affect revenues.

CBO estimates that enacting H.R. 702 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 702 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Matthew Pickford. This estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

NOTIFICATION AND FEDERAL EMPLOYEE ANTIDISCRIMINATION AND RETALIATION ACT OF 2002

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002”.

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

*	*	*	*	*	*	*
TITLE II—FEDERAL EMPLOYEE DISCRIMINATION AND RETALIATION						
*	*	*	*	*	*	*
<i>Sec. 207. Complaint tracking.</i>						
<i>Sec. 208. Notation in personnel record.</i>						
*	*	*	*	*	*	*
TITLE IV—PROCESSING AND REFERRAL						
<i>Sec. 401. Processing and resolution of complaints.</i>						
<i>Sec. 402. No limitation on Human Capital or General Counsel advice.</i>						
<i>Sec. 403. Head of Program reports to head of agency.</i>						
<i>Sec. 404. Referrals of findings of discrimination.</i>						

TITLE I—GENERAL PROVISIONS

* * * * *

SEC. 102. SENSE OF CONGRESS.

It is the sense of Congress that—

(1) Federal agencies should not retaliate for court judgments or settlements relating to discrimination and whistleblower laws by targeting the claimant or other employees with reductions in compensation, benefits, or workforce to pay for such judgments or settlements;

(2) the mission of the Federal agency and the employment security of employees who are blameless in a whistleblower incident should not be compromised;

(3) Federal agencies should not use a reduction in force or furloughs as means of funding a reimbursement under this Act;

[(4)(A) accountability in the enforcement of employee rights is not furthered by terminating—

[(i) the employment of other employees; or

[(ii) the benefits to which those employees are entitled through statute or contract; and

[(B) this Act is not intended to authorize those actions;]

(4) accountability in the enforcement of Federal employee rights is furthered when Federal agencies take appropriate disciplinary action against Federal employees who have been found to have committed discriminatory or retaliatory acts;

(5)(A) [nor is accountability] but accountability is not furthered if Federal agencies react to the increased accountability under this Act for what by law the agency is responsible by taking unfounded disciplinary actions against managers or by violating the procedural rights of managers who have been accused of discrimination; and

(B) Federal agencies should ensure that managers have adequate training in the management of a diverse workforce and in dispute resolution and other essential communication skills; and

(6)(A) Federal agencies are expected to reimburse the General Fund of the Treasury within a reasonable time under this Act; and

(B) a Federal agency, particularly if the amount of reimbursement under this Act is large relative to annual appropriations for that agency, may need to extend reimbursement over several years in order to avoid—

(i) reductions in force;

(ii) furloughs;

(iii) other reductions in compensation or benefits for the workforce of the agency; or

(iv) an adverse effect on the mission of the agency.

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TITLE II—FEDERAL EMPLOYEE DISCRIMINATION AND RETALIATION

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SEC. 202. NOTIFICATION REQUIREMENT.

(a) IN GENERAL.—Written notification of the rights and protections available to Federal employees, former Federal employees, and applicants for Federal employment (as the case may be) in con-

nection with the respective provisions of law covered by paragraphs (1) and (2) of section 201(a) shall be provided to such employees, former employees, and applicants—

(1) in accordance with otherwise applicable provisions of law;
or

(2) if, or to the extent that, no such notification would otherwise be required, in such time, form, and manner as shall under section 204 be required in order to carry out the requirements of this section.

(b) **POSTING ON THE INTERNET.**—Any written notification under this section shall include, but not be limited to, the posting of the information required under paragraph (1) or (2) (as applicable) of subsection (a) on the Internet site of the Federal agency involved.

(c) **EMPLOYEE TRAINING.**—Each Federal agency shall provide to the employees of such agency training regarding the rights and remedies applicable to such employees under the laws cited in section 201(c).

(d) **NOTIFICATION OF FINAL AGENCY ACTION.**—

(1) *Not later than 30 days after a Federal agency takes final action or the Equal Employment Opportunity Commission issues an appellate decision involving a finding of discrimination or retaliation prohibited by a provision of law covered by paragraph (1) or (2) of section 201(a), as applicable, the head of the agency subject to the finding shall provide notice for at least 1 year on the agency's Internet Web site in a clear and prominent location linked directly from the agency's Internet home page stating that a finding of discrimination or retaliation has been made.*

(2) *The notification shall identify the date the finding was made, the date or dates on which the discriminatory or retaliatory act or acts occurred, and the law or laws violated by the discriminatory or retaliatory act or acts. The notification shall also advise Federal employees of the rights and protections available under the respective provisions of law covered by paragraph (1) or (2) of section 201(a).*

SEC. 203. REPORTING REQUIREMENT.

(a) **ANNUAL REPORT.**—Subject to subsection (b), not later than 180 days after the end of each fiscal year, each Federal agency shall submit to the Speaker of the House of Representatives, the President pro tempore of the Senate, the Committee on *Homeland Security and Governmental Affairs* of the Senate, the Committee on *Oversight and Government Reform* of the House of Representatives, each committee of Congress with jurisdiction relating to the agency, the Equal Employment Opportunity Commission, and the Attorney General an annual report (*in an electronic format prescribed by the Office of Personnel Management*) which shall include, with respect to the fiscal year—

(1) the number of cases arising under each of the respective provisions of law covered by paragraphs (1) and (2) of section 201(a) in which discrimination on the part of such agency was alleged;

(2) the status or disposition of cases described in paragraph (1);

(3) the amount of money required to be reimbursed by such agency under section 201 in connection with each of such

cases, separately identifying the aggregate amount of such reimbursements attributable to the payment of attorneys' fees, if any;

(4) the number of employees disciplined for discrimination, retaliation, harassment, or any other infraction of any provision of law referred to in paragraph (1);

(5) the final year-end data posted under section 301(c)(1)(B) for such fiscal year (without regard to section 301(c)(2));

(6) a detailed description of—

(A) the policy implemented by that agency relating to appropriate disciplinary actions against a Federal employee who—

(i) discriminated against any individual in violation of any of the laws cited under section 201(a) (1) or (2); or

(ii) committed another prohibited personnel practice that was revealed in the investigation of a complaint alleging a violation of any of the laws cited under section 201(a) (1) or (2); and

(B) with respect to each of such laws, the number of employees who are disciplined in accordance with such policy and the specific nature of the disciplinary action taken;

(7) an analysis of the information described under paragraphs (1) through (6) (in conjunction with data provided to the Equal Employment Opportunity Commission in compliance with part 1614 of title 29 of the Code of Federal Regulations) including—

(A) an examination of trends;

(B) causal analysis;

(C) practical knowledge gained through experience; and

(D) any actions planned or taken to improve complaint or civil rights programs of the agency; and

(8) any adjustment (to the extent the adjustment can be ascertained in the budget of the agency) to comply with the requirements under section 201.

(b) **FIRST REPORT.**—The 1st report submitted under subsection (a) shall include for each item under subsection (a) data for each of the 5 immediately preceding fiscal years (or, if data are not available for all 5 fiscal years, for each of those 5 fiscal years for which data are available).

(c) **DISCIPLINARY ACTION REPORT.**—*Not later than 60 days after the date on which a Federal agency takes final action or a Federal agency receives an appellate decision issued by the Equal Employment Opportunity Commission involving a finding of discrimination or retaliation in violation of a provision of law covered by paragraph (1) or (2) of section 201(a), as applicable, the employing Federal agency shall submit to the Commission a report stating whether disciplinary action has been initiated against a Federal employee as a result of the violation.*

* * * * *

SEC. 207. COMPLAINT TRACKING.

Not later than 1 year after the date of enactment of the Federal Employee Antidiscrimination Act of 2017, each Federal agency shall establish a system to track each complaint of discrimination arising

under section 2302(b)(1) of title 5, United States Code, and adjudicated through the Equal Employment Opportunity process from inception to resolution of the complaint, including whether a decision has been made regarding necessary disciplinary action as the result of a finding of discrimination.

SEC. 208. NOTATION IN PERSONNEL RECORD.

If a Federal agency takes an adverse action covered under section 7512 of title 5, United States Code, against a Federal employee for an act of discrimination or retaliation prohibited by a provision of law covered by paragraph (1) or (2) of section 201(a), the agency shall, after all appeals relating to such action have been exhausted, include a notation of the adverse action and the reason for the action in the employee's personnel record.

TITLE III—EQUAL EMPLOYMENT OPPORTUNITY COMPLAINT DATA DISCLOSURE

SEC. 301. DATA TO BE POSTED BY EMPLOYING FEDERAL AGENCIES.

(a) **IN GENERAL.**—Each Federal agency shall post on its public Web site, in the time, form, and manner prescribed under section 303 (in conformance with the requirements of this section), summary statistical data relating to equal employment opportunity complaints filed with such agency by employees or former employees of, or applicants for employment with, such agency.

(b) **CONTENT REQUIREMENTS.**—The data posted by a Federal agency under this section shall include, for the then current fiscal year, the following:

(1) The number of complaints filed with such agency in such fiscal year.

(2) The number of individuals filing those complaints (including as the agent of a class).

(3) The number of individuals who filed 2 or more of those complaints.

(4) The number of complaints (described in paragraph (1)) in which each of the various bases of alleged discrimination is alleged.

(5) The number of complaints (described in paragraph (1)) in which each of the various issues of alleged discrimination is alleged.

(6) The average length of time, for each step of the process, it is taking such agency to process complaints (taking into account all complaints pending for any length of time in such fiscal year, whether first filed in such fiscal year or earlier). Average times under this paragraph shall be posted—

(A) for all such complaints,

(B) for all such complaints in which a hearing before an administrative judge of the Equal Employment Opportunity Commission is not requested, and

(C) for all such complaints in which a hearing before an administrative judge of the Equal Employment Opportunity Commission is requested.

(7) The total number of final agency actions rendered in such fiscal year involving a finding of discrimination and, of that number—

(A) the number and percentage that were rendered without a hearing before an administrative judge of the Equal Employment Opportunity Commission, and

(B) the number and percentage that were rendered after a hearing before an administrative judge of the Equal Employment Opportunity Commission.

(8) Of the total number of final agency actions rendered in such fiscal year involving a finding of discrimination—

(A) the number and percentage involving a finding of discrimination based on each of the respective bases of alleged discrimination, and

(B) of the number specified under subparagraph (A) for each of the respective bases of alleged discrimination—

(i) the number and percentage that were rendered without a hearing before an administrative judge of the Equal Employment Opportunity Commission, and

(ii) the number and percentage that were rendered after a hearing before an administrative judge of the Equal Employment Opportunity Commission.

(9) Of the total number of final agency actions rendered in such fiscal year involving a finding of discrimination—

(A) the number and percentage involving a finding of discrimination in connection with each of the respective issues of alleged discrimination, **[and]**

(B) of the number specified under subparagraph (A) for each of the respective issues of alleged discrimination—

(i) the number and percentage that were rendered without a hearing before an administrative judge of the Equal Employment Opportunity Commission, and

(ii) the number and percentage that were rendered after a hearing before an administrative judge of the Equal Employment Opportunity Commission**[.]**, *and*

(C) for each such finding counted under subparagraph (A), the agency shall specify—

(i) the date of the finding;

(ii) the affected agency;

(iii) the law violated; and

(iv) whether a decision has been made regarding necessary disciplinary action as a result of the finding.

(10)(A) Of the total number of complaints pending in such fiscal year (as described in the parenthetical matter in paragraph (6)), the number that were first filed before the start of the then current fiscal year.

(B) With respect to those pending complaints that were first filed before the start of the then current fiscal year—

(i) the number of individuals who filed those complaints, and

(ii) the number of those complaints which are at the various steps of the complaint process.

(C) Of the total number of complaints pending in such fiscal year (as described in the parenthetical matter in paragraph (6)), the total number of complaints with respect to which the

agency violated the requirements of section 1614.106(e)(2) of title 29 of the Code of Federal Regulations (as in effect on July 1, 2000, and amended from time to time) by failing to conduct within 180 days of the filing of such complaints an impartial and appropriate investigation of such complaints.

(11) Data regarding each class action complaint filed against the agency alleging discrimination or retaliation, including—

(A) information regarding the date on which each complaint was filed;

(B) a general summary of the allegations alleged in the complaint;

(C) an estimate of the total number of plaintiffs joined in the complaint if known;

(D) the current status of the complaint, including whether the class has been certified; and

(E) the case numbers for the civil actions in which discrimination or retaliation has been found.

(c) **TIMING AND OTHER REQUIREMENTS.—**

(1) **CURRENT YEAR DATA.—**Data posted under this section for the then current fiscal year shall include both—

(A) interim year-to-date data, updated quarterly, and

(B) final year-end data.

(2) **DATA FOR PRIOR YEARS.—**The data posted by a Federal agency under this section for a fiscal year (both interim and final) shall include, for each item under subsection (b), such agency’s corresponding year-end data for each of the 5 immediately preceding fiscal years (or, if not available for all 5 fiscal years, for however many of those 5 fiscal years for which data are available).

SEC. 302. DATA TO BE POSTED BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

(a) **IN GENERAL.—**The Equal Employment Opportunity Commission shall post on its public Web site, in the time, form, and manner prescribed under section 303 for purposes of this section, summary statistical data relating to—

(1) hearings requested before an administrative judge of the Commission on complaints described in section 301, and

(2) appeals filed with the Commission from final agency actions on complaints described in section 301.

(b) **SPECIFIC REQUIREMENTS.—**The data posted under this section shall, with respect to the hearings and appeals described in subsection (a), include summary statistical data corresponding to that described in paragraphs (1) through ~~[(10)]~~ (11) of section 301(b), and shall be subject to the same timing and other requirements as set forth in section 301(c).

(c) **COORDINATION.—**The data required under this section shall be in addition to the data the Commission is required to post under section 301 as an employing Federal agency.

* * * * *

TITLE IV—PROCESSING AND REFERRAL

SEC. 401. PROCESSING AND RESOLUTION OF COMPLAINTS.

Each Federal agency is responsible for the fair, impartial processing and resolution of complaints of employment discrimination and retaliation arising in the Federal administrative process and shall establish a model Equal Employment Opportunity Program that—

- (1) is not under the control, either structurally or practically, of a Human Capital or General Counsel office;*
- (2) is devoid of internal conflicts of interest and ensures fairness and inclusiveness within the organization; and*
- (3) ensures the efficient and fair resolution of complaints alleging discrimination or retaliation.*

SEC. 402. NO LIMITATION ON HUMAN CAPITAL OR GENERAL COUNSEL ADVICE.

Nothing in this title shall prevent a Federal agency’s Human Capital or General Counsel office from providing advice or counsel to Federal agency personnel on the processing and resolution of a complaint, including providing legal representation to a Federal agency in any proceeding.

SEC. 403. HEAD OF PROGRAM REPORTS TO HEAD OF AGENCY.

The head of each Federal agency’s Equal Employment Opportunity Program shall report directly to the head of the agency.

SEC. 404. REFERRALS OF FINDINGS OF DISCRIMINATION.

(a) EEOC FINDINGS OF DISCRIMINATION.—Not later than 30 days after the Equal Employment Opportunity Commission issues an appellate decision involving a finding of discrimination or retaliation within a Federal agency, the Commission shall refer the matter to the Office of Special Counsel.

(b) REFERRALS TO SPECIAL COUNSEL.—The Office of Special Counsel shall accept and review a referral from the Commission under subsection (a) for purposes of seeking disciplinary action under its authority against a Federal employee who commits an act of discrimination or retaliation.

(c) NOTIFICATION.—The Office of Special Counsel shall notify the Commission in a case in which the Office of Special Counsel initiates disciplinary action.

(d) SPECIAL COUNSEL APPROVAL.—A Federal agency may not take disciplinary action against a Federal employee for an alleged act of discrimination or retaliation referred by the Commission under this section except in accordance with the requirements of section 1214(f) of title 5, United States Code.

TITLE 5, UNITED STATES CODE

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PART III—EMPLOYEES

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SUBPART A—GENERAL PROVISIONS

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CHAPTER 23—MERIT SYSTEM PRINCIPLES

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§ 2302. Prohibited personnel practices

(a)(1) For the purpose of this title, “prohibited personnel practice” means any action described in subsection (b).

(2) For the purpose of this section—

(A) “personnel action” means—

- (i) an appointment;
- (ii) a promotion;
- (iii) an action under chapter 75 of this title or other disciplinary or corrective action;
- (iv) a detail, transfer, or reassignment;
- (v) a reinstatement;
- (vi) a restoration;
- (vii) a reemployment;
- (viii) a performance evaluation under chapter 43 of this title or under title 38;
- (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;
- (x) a decision to order psychiatric testing or examination;
- (xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and
- (xii) any other significant change in duties, responsibilities, or working conditions;

with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

(B) “covered position” means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action—

- (i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or
- (ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration;

(C) “agency” means an Executive agency and the Government Publishing Office, but does not include—

- (i) a Government corporation, except in the case of an alleged prohibited personnel practice described under subsection (b)(8) or section 2302(b)(9) (A)(i), (B), (C), or (D);

- (ii)(I) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office; and
 - (II) as determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, provided that the determination be made prior to a personnel action; or
 - (iii) the Government Accountability Office; and
- (D) “disclosure” means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences—
- (i) any violation of any law, rule, or regulation; or
 - (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.
- (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—
- (1) discriminate for or against any employee or applicant for employment—
 - (A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);
 - (B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);
 - (C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));
 - (D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or
 - (E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;
 - (2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—
 - (A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or
 - (B) an evaluation of the character, loyalty, or suitability of such individual;
 - (3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;
 - (4) deceive or willfully obstruct any person with respect to such person’s right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) any violation of any law, rule, or regulation, or

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

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) any violation (other than a violation of this section) of any law, rule, or regulation, or

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

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—

(i) with regard to remedying a violation of paragraph (8); or

(ii) other than with regard to remedying a violation of paragraph (8);

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;

(11)(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement;

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title; or

(13) **[implement]** (A) *implement* or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General *or the Office of Special Counsel* of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling."**[.]**; or

(B) *implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement prohibits or restricts an employee from disclosing to Congress, the Office of Special Counsel, or an Office of the Inspector General any information that relates to any violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial, and specific danger to public health or safety, or any other whistleblower protection.*

This subsection shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress. For purposes of paragraph (8), (i) any presumption relating to the performance of a duty by an employee whose conduct is the subject of a disclosure as defined under subsection (a)(2)(D) may be rebutted by substantial evidence, and (ii) a determination as to whether an employee or applicant reasonably believes that such employee or

applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title, including how to make a lawful disclosure of information that is specifically required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs to the Special Counsel, the Inspector General of an agency, Congress, or other agency employee designated to receive such disclosures. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under—

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

(2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;

(4) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

(e)(1) For the purpose of this section, the term “veterans’ preference requirement” means any of the following provisions of law:

(A) Sections 2108, 3305(b), 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317(b), 3318, 3320, 3351, 3352, 3363, 3501, 3502(b), 3504, and 4303(e) and (with respect to a preference eligible referred to in section 7511(a)(1)(B)) subchapter II of chapter 75 and section 7701.

(B) Sections 943(c)(2) and 1784(c) of title 10.

(C) Section 1308(b) of the Alaska National Interest Lands Conservation Act.

(D) Section 301(c) of the Foreign Service Act of 1980.

(E) Sections 106(f), 7281(e), and 7802(5) of title 38.

(F) Section 1005(a) of title 39.

(G) Any other provision of law that the Director of the Office of Personnel Management designates in regulations as being a veterans' preference requirement for the purposes of this subsection.

(H) Any regulation prescribed under subsection (b) or (c) of section 1302 and any other regulation that implements a provision of law referred to in any of the preceding subparagraphs.

(2) Notwithstanding any other provision of this title, no authority to order corrective action shall be available in connection with a prohibited personnel practice described in subsection (b)(11). Nothing in this paragraph shall be considered to affect any authority under section 1215 (relating to disciplinary action).

(f)(1) A disclosure shall not be excluded from subsection (b)(8) because—

(A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);

(B) the disclosure revealed information that had been previously disclosed;

(C) of the employee's or applicant's motive for making the disclosure;

(D) the disclosure was not made in writing;

(E) the disclosure was made while the employee was off duty; or

(F) of the amount of time which has passed since the occurrence of the events described in the disclosure.

(2) If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8) if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure.

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