

116TH CONGRESS }
1st Session }

SENATE

{ REPORT
116-176 }

FEDERAL EMPLOYEE ANTIDISCRIMINATION
ACT OF 2019

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

H.R. 135

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



DECEMBER 16, 2019.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE

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Calendar No. 330

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FEDERAL EMPLOYEE ANTIDISCRIMINATION ACT OF 2019

DECEMBER 16, 2019.—Ordered to be printed

Mr. JOHNSON, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany H.R. 135]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (H.R. 135) to amend the Notification and Federal Employee Anti-discrimination 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, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill (as amended) do pass.

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I. PURPOSE AND SUMMARY

The purpose of H.R. 135, the Federal Employee Antidiscrimination Act of 2019, is to amend Federal law to strengthen Equal Employment Opportunity Protections for Federal employees, strengthen prohibitions against discrimination and retaliation against whis-

tleblowers within the Federal workforce and ensure Federal agencies and employees that violate the law are held accountable.¹

II. BACKGROUND AND THE NEED FOR LEGISLATION

Federal Equal Employment Opportunity (EEO) programs, which are required to identify and eliminate barriers to equal opportunity, are vital to ensuring that Federal workplaces provide the same guarantee of equal opportunity that is required of other employers across the country. Federal employees or applicants for employment in the Federal Government who believe they have been discriminated against can bring a complaint to their agency's EEO program, which investigates these complaints. The Equal Employment Opportunity Commission (EEOC) has released standards of a model EEO program that Federal agencies should follow. However, some Federal agencies' EEO programs have not met these standards.

Federal law prohibits discrimination against Federal employees in their workplace, including against job applicants and employees based on the "person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information."²

In addition to prohibiting discrimination, Federal law prohibits retaliation against whistleblowers.³ Whistleblowers remain a vital source of public accountability within the Federal workforce. Federal employees who courageously step forward to report instances of waste, fraud, abuse and criminality within the Federal Government help ensure that the Executive Branch is held accountable and assist the Congress with its constitutional responsibility to conduct oversight.

Whistleblowers can identify problems that lead to reforms that improve Federal agencies' performance and yield cost savings for taxpayers. For example, the Office of Special Counsel (OSC) reported that whistleblowers identifying problems within the Department of Homeland Security resulted in \$100 million in annual savings.⁴

Whistleblowers also may report instances of wrongdoing and criminality that have life and death consequences. Our nation's veterans have earned the right to the finest health care possible due to their service on behalf of the country. But in some cases, Department of Veterans Affairs' (VA) centers are not providing the highest standard of care, and whistleblowers have come forward to highlight abuses. For example, through an investigation and sev-

¹ On July 12, 2016, the Committee approved H.R. 1557, Federal Employee Antidiscrimination Act of 2015. That bill is substantially similar to H.R. 135. Accordingly, this committee report is in large part a reproduction of Chairman Johnson's committee report for H.R. 1557, S. Rep. No. 114-300.

² U.S. Equal Employment Opportunity Commission, *About* (Feb. 9, 2016), available at <http://www.eeoc.gov/eeoc/>.

³ 5 U.S.C. § 2302.

⁴ *Nomination of Michael J. Missal to be Inspector General, U.S. Department of Veterans Affairs, and the Honorable Carolyn N. Lerner to be Special Counsel, Office of Special Counsel: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs* 3, 114th Cong. (2016) (statement of Carolyn Lerner, Special Counsel, Office of Special Counsel), available at <http://www.hsgac.senate.gov/hearings/nomination-of-carolyn-lerner-to-be-special-counsel-of-the-office-of-special-counsel-and-michael-missal-to-be-inspector-general-of-the-department-of-veterans-affairs>.

eral hearings in the 114th Congress,⁵ the Committee learned about allegations of significant wrongdoing that occurred at the VA Medical Center in Tomah, Wisconsin. Several employees of the facility presented concerns to VA management, the Office of Inspector General, or their VA union representatives about overmedication that was occurring at the facility.⁶ The VA's alleged retaliation against these whistleblowers also had serious consequences. For example, in testimony before the Committee, Dr. Christopher Kirkpatrick's brother Sean Kirkpatrick testified that Dr. Kirkpatrick was a psychologist and whistleblower at the Tomah VA facility.⁷ Mr. Kirkpatrick testified that he believed his brother was fired after raising questions about the large number of narcotics prescribed to patients there, and committed suicide later that same day.⁸

Unfortunately, the problem of retaliation against whistleblowers is not unique to the VA. In 2015, the Committee heard testimony from whistleblowers who served with the United States Army, United States Immigration and Customs Enforcement, the Social Security Administration, and United States Customs and Border Protection.⁹ Each described the challenges and retaliation they believed they experienced from their agencies after blowing the whistle on agency wrongdoing.¹⁰

Congress passed the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act) to strengthen laws prohibiting discriminatory or retaliatory acts against Federal employees, including by creating new reporting requirements to inform employees of their rights.¹¹ The No FEAR Act also made Federal agencies directly financially accountable for violations of antidiscrimination and whistleblower protections.¹²

However, the No FEAR Act of 2002 did little to hold supervisors or other employees directly accountable for violating retaliation and discrimination laws. The law does not require discipline against employees judged to have committed acts of discrimination or retaliation, even though employees may not come forward without a belief that their disclosure will be heard and make a difference. As explained by the Legal Director of the Government Accountability Project, "[e]very academic or government study has concluded that the primary motivating, or chilling factor for would-be whistleblowers is whether they can make a difference by bearing wit-

⁵See, e.g., *Improving VA Accountability: Examining First-Hand Accounts of Department of Veterans Affairs Whistleblowers: Hearing Before the Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2015), available at <http://www.hsgac.senate.gov/hearings/improving-va-accountability-examining-first-hand-accounts-of-department-of-veterans-affairs-whistleblowers> [hereinafter *Improving VA Accountability*]; *Tomah VAMC: Examining Quality, Access, and a Culture of Overreliance on High-Risk Medications: Joint Field Hearing Before the Comm. of Homeland Sec. & Governmental Affairs and the H. Comm. on Veterans' Affairs*, 114th Cong. (2015), available at <http://www.hsgac.senate.gov/hearings/joint-field-hearing-tomah-vamc-examining-quality-access-and-a-culture-of-overreliance-on-high-risk-medications> [hereinafter *Tomah VAMC*].

⁶*Tomah VAMC* at 2–3 (statement of Noelle Johnson); *id.* at 2 (statement of Ryan Honl); *id.* at 1 (statement of Heather Simcakoski); see also *Improving VA Accountability* at 2 (statement of Sean Kirkpatrick).

⁷*Improving VA Accountability* (statement of Sean Kirkpatrick).

⁸*Id.*

⁹*Blowing the Whistle on Retaliation: Accounts of Current and Former Federal Agency Whistleblowers: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2015) (statement of Chairman Ron Johnson), available at <http://www.hsgac.senate.gov/hearings/blowing-the-whistle-on-retaliation-accounts-of-current-and-former-federal-agency-whistleblowers> [hereinafter *Blowing the Whistle on Retaliation*].

¹⁰*Id.*

¹¹Pub. L. No. 107–174, 107th Cong., (2002).

¹²*Id.*

ness.”¹³ Unfortunately, only 66 percent of Federal employees have confidence that they can blow the whistle without facing reprisal.¹⁴ OSC has raised concerns about the inconsistent use of discipline at the VA, in particular. In testimony before this Committee, former Special Counsel Lerner noted numerous examples of the VA failing to discipline officials found responsible for posing significant risks to public health and safety or engaging in other misconduct.¹⁵ Special Counsel Lerner added that this lack of discipline “stand[s] in stark contrast to disciplinary actions taken against VA whistleblowers . . . for minor indiscretions or for activity directly related to the employee’s whistleblowing.”¹⁶

Former Special Counsel Lerner testified to the Committee that the OSC was projected to receive 4,000 Government-wide prohibited personnel practice complaints in 2015, which include many whistleblower retaliation complaints.¹⁷ The EEOC, the Federal agency responsible for enforcing Federal employment discrimination laws, says 14,343 Federal employees and applicants filed 15,013 complaints alleging employment discrimination during fiscal year (FY) 2014.¹⁸ In the same year, agencies paid \$44.8 million in monetary awards to complainants.¹⁹

Additional measures to prevent retaliation against whistleblowers and discrimination against Federal employees are needed to protect Federal employees who report wrongdoing or illegality within the Federal Government or experience discrimination in the workplace.

H.R. 135 would require Federal agencies to adopt best practices to manage their EEO programs. It would also strengthen transparency and accountability for discrimination and retaliation at Federal agencies. First, the Act updates the sense of the Congress of the No FEAR Act to stress the need for agencies to take appropriate disciplinary action against Federal employees who have been found to have committed discriminatory or retaliatory acts.

The Act also aims to reduce discrimination and retaliation by mandating new transparency and reporting requirements for Federal agencies to disclose EEOC findings of discrimination, including through public reporting on agency websites. H.R. 135 also creates other new rules for agencies, such as requiring a tracking system for complaints alleging discriminatory acts and requiring that agency EEO program offices not be controlled by agency general counsel or human capital offices.

The Act also creates a new whistleblower protection. It amends Federal law to prohibit the implementation or enforcement of non-disclosure agreements that would limit an employee’s ability to dis-

¹³ *Blowing the Whistle on Retaliation* (statement of Thomas M. Devine, Legal Director, Government Accountability Project).

¹⁴ Office of Personnel Mgmt., Federal Employee Viewpoint Survey Results, Governmentwide Management Report 9 (2018) available at <https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-management-report/governmentwide-report/2018/2018-governmentwide-management-report.pdf>.

¹⁵ *Improving VA Accountability* at 5–6 (statement of Carolyn Lerner, Special Counsel, Office of Special Counsel).

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 2, 4.

¹⁸ United States Equal Employment Opportunity Commission, Office of Federal Operations, Annual Report on the Federal Workforce Part I, EEO Complaints Processing, Fiscal Year 2014 (Dec. 15, 2015), available at <http://www.eeoc.gov/federal/reports/fsp2014/upload/Final-FY-2014-Annual-Report-Part-I.pdf>.

¹⁹ *Id.*

close certain information to OSC, the Office of Inspector General, or Congress.

Finally, the Committee-reported amendment to the Act renames the legislation after the late Congressman Elijah E. Cummings, who first introduced this legislation in 2015. Representative Cummings passed away on October 17, 2019.

III. LEGISLATIVE HISTORY

Representative Elijah E. Cummings of Maryland introduced H.R. 135, the Federal Employee Antidiscrimination Act, on January 3, 2019. The Act was referred to the House Committee on Oversight and Reform. On January 15, 2019, the House of Representatives passed H.R. 135 by a vote of 424 to 0.

H.R. 135 was referred to the Senate Committee on Homeland Security and Governmental Affairs on January 16, 2019. The Committee considered H.R. 135 at a business meeting on November 6, 2019.

During the business meeting, Chairman Ron Johnson offered a substitute amendment that was adopted by unanimous consent. The substitute amendment changed the short title of the Act to the Elijah E. Cummings Federal Employee Antidiscrimination Act in memoriam of Representative Cummings. The substitute amendment also modified reporting and referral deadlines in the Act to ensure all appeals processes are exhausted before an agency publishes a report of a finding of discrimination or retaliation and clarified that an agency can receive advice and counsel from the Department of Justice in the resolution of an EEO complaint.

H.R. 135, as amended, was approved by voice vote *en bloc* with Senators Johnson, Portman, Paul, Lankford, Romney, Scott, Enzi, Hawley, Peters, Carper, Hassan, Sinema, and Rosen present.

IV. SECTION-BY-SECTION ANALYSIS OF THE ACT, AS REPORTED

Section 1. Short title

This section establishes the short title of the Act as the “Elijah E. Cummings Federal Employee Antidiscrimination Act of 2019.”

Section 2. Sense of the Congress

This section amends the No FEAR Act of 2002 by updating the sense of the Congress. Specifically, the section states that “accountability in the enforcement of the rights of Federal employees is furthered when Federal agencies agree to take appropriate disciplinary action against Federal employees who are found to have intentionally committed discriminatory (including retaliatory) acts.” The section further amends the existing sense of the Congress to reiterate that Federal agencies should not violate employees’ due process rights while enforcing new accountability measures.

Section 3. Notification of violation

This section amends Section 202 of the No FEAR Act to require that agencies publicly report an agency or EEOC finding of discrimination or retaliation on their website for at least one year. The report will be published after all appeals processes concerning the discriminatory or retaliatory act have been exhausted. The notification shall include information about the finding, including the

law or laws violated by the discriminatory or retaliatory act or acts. The notification shall also advise employees of their rights.

Section 4. Reporting requirements

This section mandates that forms required by the No FEAR Act be submitted in an electronic format. The section also requires the agency to report to the EEOC on whether disciplinary action has been proposed against a Federal employee as a result of a finding of discrimination or retaliation.

Section 5. Data to be posted by employing Federal agencies

This section amends the No FEAR Act to expand what data must be reported on agency websites regarding findings of discrimination or retaliation. Data must now include the date of the finding, the affected agency, the law violated, and whether a decision has been made regarding necessary disciplinary actions as a result of the finding. The section also requires reporting on data pertaining to class action complaints filed against Federal agencies.

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

This section amends the No FEAR Act to apply the reporting requirements amended by Section 5 to the EEOC.

Section 7. Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 amendments

This section makes several changes to the NO FEAR Act. First, it requires Federal agencies to establish a system for tracking discrimination complaints and the outcomes of the complaints. Second, it requires that a Federal agency make a notation in an employee's personnel record if the employee has been found to commit an act of discrimination or retaliation after all appeals have been exhausted. Third, it requires that each Federal agency is responsible for establishing a model EEO 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 the efficient and fair resolution of complaints alleging discrimination or retaliation. Agency Human Capital and General Counsel offices, as well as the Department of Justice, may still provide advice or counsel to Federal agency personnel in the resolution of a complaint.

Finally, the No FEAR Act is amended to establish a process for EEOC referrals to OSC. The EEOC may refer matters to OSC if it determines that the Federal agency did not take appropriate action. The EEOC must include information about the number of these referrals in its annual report. The OSC must accept and review referrals from the EEOC and notify the EEOC in a case that it pursues disciplinary action. It clarifies that agencies may not initiate disciplinary actions against an employee for an alleged act of discrimination or retaliation while the matter is referred to the OSC.

Section 8. Nondisclosure agreement limitation

This section prohibits agencies from implementing or enforcing any nondisclosure policy, form, or agreement, if such policy, form, or agreement prohibits or restricts an employee from disclosing to

Congress, the OSC, or an Office of 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 protections.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this Act and determined that the Act will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the Act contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 18, 2019.

Hon. RON JOHNSON,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 135, the Elijah E. Cummings Federal Employee Antidiscrimination Act of 2019.

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

Sincerely,

PHILLIP L. SWAGEL,
Director.

Enclosure.

H.R. 135, Elijah E. Cummings Federal Employee Antidiscrimination Act of 2019			
As ordered reported by the Senate Committee on Homeland Security and Governmental Affairs on November 6, 2019			
By Fiscal Year, Millions of Dollars	2020	2020-2024	2020-2029
Direct Spending (Outlays)	0	*	*
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	*	*
Spending Subject to Appropriation (Outlays)	0	1	not estimated
Statutory pay-as-you-go procedures apply?	Yes	Mandate Effects	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2030?	No	Contains intergovernmental mandate?	Excluded from UMRA
		Contains private-sector mandate?	Excluded from UMRA
* = between zero and \$500,000.			

H.R. 135 would amend the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 to expand the current process used to investigate and resolve federal employees' claims of discrimination by other federal employees. The act also would increase the amount of information that must be reported and made available concerning such discrimination cases.

Using information from the Office of Personnel Management and the Equal Employment Opportunity Commission, CBO expects that most of the provisions in the act 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 agencies would incur costs to track and report discriminatory acts and to notify the public of any violations of antidiscrimination laws. Based on the costs of similar activities, CBO estimates that implementing H.R. 135 would cost \$1 million over the 2020–2024 period; such spending would be subject to the availability of appropriated funds.

Enacting H.R. 135 could affect direct spending by some agencies that are allowed to use fees, receipts from the sale of goods, and other collections to cover operating costs. CBO estimates that any net changes in direct spending by those agencies would be negligible because most of them can adjust amounts collected to reflect changes in operating costs.

CBO has not reviewed H.R. 135 for intergovernmental or private-sector mandates. Section 4 of the Unfunded Mandates Reform Act excludes from the application of that act any legislative provisions that would establish or enforce statutory rights prohibiting discrimination. CBO has determined that this legislation falls within that exclusion because it would enforce protections for federal employees against discrimination based on race, color, religion, sex, national origin, age, or handicapped condition.

The CBO staff contacts for this estimate are Matthew Pickford (for federal costs) and Andrew Laughlin (for mandates). The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAW MADE BY THE ACT, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the Act, as reported, are shown as follows: (existing law proposed to be omitted is enclosed in brackets, new matter is printed in *italics*, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * *

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

* * * * *

PART III—EMPLOYEES

* * * * *

CHAPTER 23—MERIT SYSTEM PRINCIPLES

* * * * *

SECTION 2301. MERIT SYSTEM PRINCIPLES

* * * * *

**NOTIFICATION AND FEDERAL EMPLOYEE
ANTIDISCRIMINATION AND RETALIATION ACT OF 2002**

SEC. 1. SHORT TITLE; TABLE OF CONTENTS.

(a) * * *

* * * * *

TITLE II—FEDERAL EMPLOYEE DISCRIMINATION AND RETALIATION

Sec. 201. Reimbursement Requirement.

* * * * *

Sec. 207. *Complaint tracking.*

Sec. 208. *Notation in personnel record.*

* * * * *

TITLE IV—PROCESSING AND REFERRAL

Sec. 401. *Processing and resolution of complaints.*

Sec. 402. *No limitation on Human Capital or General Counsel advice.*

Sec. 403. *Referrals of findings of discrimination.*

* * * * *

TITLE I—GENERAL PROVISIONS

SEC. 101. * * *

SEC. 102. SENSE OF CONGRESS.—It is the sense of Congress that—

(1) * * *

(2) * * *

(3) * * *

[(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 the rights of Federal employees is furthered when Federal agencies agree to take appropriate disciplinary action against Federal employees who are found to have intentionally committed discriminatory (including retaliatory) acts;*

(5) (A) [nor is accountability] *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

* * * * *

SEC. 202. NOTIFICATION REQUIREMENT.

(a) * * *

* * * * *

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

(1) IN GENERAL.—Not later than 90 days after the date on which an event described in paragraph (2) occurs with respect to a finding of discrimination (including retaliation), the head of the Federal agency subject to the finding shall provide notice—

(A) on the public internet website of the agency, in a clear and prominent location linked directly from the home page of that website;

(B) stating that a finding of discrimination (including retaliation) has been made; and

(C) which shall remain posted for not less than 1 year.

(2) EVENTS DESCRIBED.—An event described in this paragraph is any of the following:

(A) All appeals of a final action by a Federal agency involving a finding of discrimination (including retaliation) prohibited by a provision of law covered by paragraph (1) or (2) of section 201(a) have been exhausted.

(B) All appeals of a final decision by the Equal Employment Opportunity Commission involving a finding of discrimination (including if the finding included a finding of retaliation) prohibited by a provision of law covered by paragraph (1) or (2) of section 201(a) have been exhausted.

(C) A court of jurisdiction issues a final judgment involving a finding of discrimination (including retaliation) prohibited by a provision of law covered by paragraph (1) or (2) of section 201(a).

(3) CONTENTS.—A notification provided under paragraph (1) with respect to a finding of discrimination (including retaliation) shall—

(A) identify the date on which the finding was made, the date on which each discriminatory act occurred, and the law violated by each such discriminatory act; and

(B) advise Federal employees of the rights and protections available under the provisions of law covered by paragraphs (1) and (2) of section 201(a).

SEC. 203. REPORTING REQUIREMENT.

(a) 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 Government Reform] on *Oversight and Reform* of the House of Representatives, each committee of Congress with jurisdiction relating to the agency, the Equal Employment Opportunity Commission, and the Attor-

ney General an annual report (*in an electronic format prescribed by the Director of the Office of Personnel Management*) which shall include, with respect to the fiscal year—

* * * * *

(c) *DISCIPLINARY ACTION REPORT.*—Not later than 120 days after the date on which a Federal agency takes final action, or a Federal agency receives a final decision issued by the Equal Employment Opportunity Commission, involving a finding of discrimination (including retaliation) in violation of a provision of law covered by paragraph (1) or (2) of section 201(a), as applicable, the applicable Federal agency shall submit to the Commission a report stating—

(1) *whether disciplinary action has been proposed against a Federal employee as a result of the violation; and*

(2) *the reasons for any disciplinary action proposed under paragraph (1).*

* * * * *

SEC. 207. COMPLAINT TRACKING.

Not later than 1 year after the date of enactment of the Elijah E. Cummings Federal Employee Antidiscrimination Act of 2019, 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 the filing of a complaint with the Federal agency to resolution of the complaint, including whether a decision has been made regarding 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 (including 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 that action have been exhausted, include a notation of the adverse action and the reason for the action in the personnel record of the employee.

* * * * *

**TITLE III—EQUAL EMPLOYMENT OPPORTUNITY
COMPLAINT DATA DISCLOSURE**

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

(a) * * *

(b) * * *

(1) * * *

* * * * *

(9) * * *

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

(B) * * *

(i) * * *

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

- (C) with respect to each finding described in subparagraph (A)—
 - (i) the date of the finding;
 - (ii) the affected Federal agency;
 - (iii) the law violated, and
 - (iv) whether a decision has been made regarding disciplinary action as a result of the finding.

* * * * *

(11) Data regarding each class action complaint filed against the agency alleging discrimination (including 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 (including retaliation) has been found.

* * * * *

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

(a) * * *

(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).

* * * * *

TITLE IV—PROCESSING AND REFERRAL

SEC. 401. PROCESSING AND RESOLUTION OF COMPLAINTS.

Each Federal agency shall—

- (1) be responsible for the fair and impartial processing and resolution of complaints of employment discrimination (including retaliation) prohibited by a provision of law covered by paragraph (1) or (2) of section 201(a); and
- (2) establish a model Equal Employment Opportunity Program that—
 - (A) is not under the control, either structurally or practically, of the agency’s Office of Human Capital or Office of the General Counsel (or the equivalent);
 - (B) is devoid of internal conflicts of interest and ensures fairness and inclusiveness within the agency; and
 - (C) ensures the efficient and fair resolution of complaints alleging discrimination (including retaliation).

SEC. 402. NO LIMITATION ON ADVICE OR COUNSEL.

Nothing in this title shall prevent a Federal agency or a subcomponent of a Federal agency, or the Department of Justice, from

providing advice or counsel to employees of that agency (or sub-component, as applicable) in the resolution of a complaint.

SEC. 403. HEAD OF PROGRAM SUPERVISED BY 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.**—

(1) **IN GENERAL.**—Not later than 30 days after the date on which the Equal Employment Opportunity Commission (referred to in this section as the "Commission") receives, or should have received, a Federal agency report required under section 203(c), the Commission may refer the matter to which the report relates to the Office of Special Counsel if the Commission determines that the Federal agency did not take appropriate action with respect to the finding that is the subject of the report.

(2) **NOTIFICATIONS.**—The Commission shall—

(A) notify the applicable Federal agency if the Commission refers a matter to the Office of Special Counsel under paragraph (1); and

(B) with respect to a fiscal year, include in the Annual Report of the Federal Workforce of the Commission covering that fiscal year—

(i) the number of referrals made under paragraph (1) during that fiscal year; and

(ii) a brief summary of each referral described in clause (i).

(b) **REFERRALS TO SPECIAL COUNSEL.**—The Office of Special Counsel shall accept and review a referral from the Commission under subsection (a)(1) for purposes of pursuing disciplinary action under the authority of the Office against a Federal employees who commits an act of discrimination (including retaliation).

(c) **NOTIFICATION.**—The Office of Special Counsel shall notify the Commission and the applicable Federal agency in a case in which—

(1) the Office of Special Counsel pursues disciplinary action under subsection (b); and

(2) the Federal agency imposes some form of disciplinary action against a Federal employee who commits an act of discrimination (including retaliation).

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

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SECTION 2302. PROHIBITED PERSONNEL PRACTICES

(a) * * *

(b) * * *

(1) * * *

* * * * *

(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or [agreement does not] agreement—

(A) *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 and 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) *prohibits or restricts an employee or applicant for employment from disclosing to Congress, the Special Counsel, the Inspector General of an agency, or any other agency component responsible for internal investigation or review 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; or*

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