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) Notices.—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 employee 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."


[For abolition of Immigration and Naturalization Service, transfer of functions, and treatment of related references, see note set out under section 1551 of Title 8, Aliens and Nationality.]

[For transfer of authorities, functions, personnel, and assets of the Bureau of Alcohol, Tobacco and Firearms, including the related functions of the Secretary of the Treasury, to the Department of Justice, see section 531(c) of Title 6, Domestic Security, and section 599A(c)(1) of Title 28, Judiciary and Judicial Procedure.]

[Pub. L. 116–283, div. A, title XI, § 1134(a)(3), Jan. 1, 2021, 134 Stat. 3901, provided that: ‘‘Notwithstanding the requirements of section 203(a) of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 [Pub. L. 107–174] (5 U.S.C. 2301 note) [set out above], the report required under such section 203(a) may be submitted in an electronic format, as prescribed by the Director of the Office of Personnel Management, during the period beginning on the date of enactment of this Act [Jan. 1, 2021] and ending on the effective date in paragraph (2) [1 year after the date of enactment of this Act].’’]

[Memorandum of President of the United States, July 8, 2003, 68 F.R. 45155, delegated to Director of Office of Personnel Management authority of President under section 204(a) of Public Law 107–174, set out above.]

§ 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 psychological 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 Federal Bureau of Investigation, 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—

(1) 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 703 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 handicap, 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) become 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 3108(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 3108(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(b) 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;

(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 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;

(C) any disclosure to Congress (including any committee of Congress) by any employee of an agency or applicant for employment at an agency of information described in subparagraph (B) that is—

(i) not classified; or

(ii) if classified—

(I) has been classified by the head of an agency that is not an element of the intelligence community (as defined by section 3 of the National Security Act of 1947 (50 U.S.C. 3003)); and

(II) does not reveal intelligence sources and methods.

(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);

1 So in original. The period probably should be a semicolon.
(C) cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) refusing to obey an order that would require the individual to violate a law, rule, or regulation;

(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 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;

(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or 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 or safety, or (4) the protections against and remedies for a prohibited personnel practice described in paragraph (8) or subparagraph (A)(i), (B), (C), or (D) of paragraph (9) of subsection (b).

(2) The head of each agency shall be responsible for—

(A) preventing prohibited personnel practices;

(B) complying with and enforcing applicable civil service laws, rules, and regulations and other aspects of personnel management; and

(C) ensuring, in consultation with the Special Counsel and the Inspector General of the agency, that employees of the agency are informed of the rights and remedies available to the employees under this chapter and chapter 12, including—

(i) information with respect to whistleblower protections available to new employees during a probationary period;

(ii) the role of the Office of Special Counsel and the Merit Systems Protection Board with respect to whistleblower protections; and

(iii) the means by which, with respect to information that is otherwise required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs, an employee may make a lawful disclosure of the information to—

(I) the Special Counsel;

(II) the Inspector General of an agency;

(III) Congress (including any committee of Congress with respect to information
that is not classified or, if classified, has been classified by the head of an agency that is not an element of the intelligence community and does not reveal intelligence sources and methods; or

(IV) another employee of the agency who is designated to receive such a disclosure.

(3) The head of each agency shall ensure that the information described in paragraph (2) is provided to each new employee of the agency not later than 180 days after the date on which the new employee is appointed.

(4) The head of each agency shall make available information regarding whistleblower protections applicable to employees of the agency on the public website of the agency and on any online portal that is made available only to employees of the agency, if such portal exists.

(5) Any employee to whom the head of an agency delegates authority for any aspect of personnel management shall, within the limits of the scope of the delegation, be responsible for the activities described in paragraph (2).

(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), 728(c), 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.

1 See References in Text note below.

Editorial Notes

References in Text

Section 1308(b) of the Alaska National Interest Lands Conservation Act, referred to in subsec. (e)(1)(C), is classified to section 3198(b) of Title 16, Conservation.

Section 301(c) of the Foreign Service Act of 1980, referred to in subsec. (e)(1)(D), is classified to section 3198(b) of Title 16, Conservation.

Section 106(f) of title 38, referred to in subsec. (e)(1)(E), was enacted subsequent to the enactment of subsection (e) of this section.


Amendments


Subsec. (e)(2)(C)(ii)(III). Pub. L. 116–92, §5721(2), inserted “(including any committee of Congress with respect to information that is not classified or, if classified, has been classified by the head of an agency that is not an element of the intelligence community and does not reveal intelligence sources and methods)” after “Congress”.

2017—Subsec. (b)(9)(C). Pub. L. 115–91, §1097(c)(1)(A), inserted “(or any other component responsible for internal investigation or review)” after “Inspector General”.

Subsec. (b)(9)(D). Pub. L. 115–49 struck out “for” after “(D)” and inserted “, rule, or regulation” after “a law”.


Subsecs. (c) to (f). Pub. L. 115–91, §1097(b)(1)(B), added subsec. (c) and redesignated former subsec. (c) to (e) as (d) to (f), respectively.

Pub. L. 115–73, §107(a)(1), redesignated subsecs. (d) to (f) as (e) to (h), respectively, and struck out former subsec. (c) which read as follows: “The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable 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.”

Subsec. (f)(1)(F), (G), Pub. L. 115–91, §1097(c)(1)(B)(ii), added subpar. (F) and redesignated former subpar. (F) as (G).

Subsec. (f)(2). Pub. L. 115–91, §1097(c)(1)(B)(ii), added par. (2) and struck out former par. (2) which read as follows: “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, or any aspect thereof, shall be similarly responsible with respect to that employee in reprisal for the disclosure.”


2013—Subsec. (a)(2)(C)(ii). Pub. L. 112–277 added cl. (ii) and struck out former cl. (ii) which read as follows: “(I) the Federal Bureau of Investigation, the Central 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”.


Subsec. (a)(2)(C)(i). Pub. L. 112–199, §101(b)(1)(B), inserted “or section 2302(b)(9)(A)(i), (B), (C), or (D)” after “(b)(8)”.

Subsec. (a)(2)(C)(ii). Pub. L. 112–199, §105, added cl. (ii) and struck out former cl. (ii) which read as follows: “the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, and, 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; or”.


Subsec. (b). Pub. L. 112–199, §103, amended concluding provisions generally. Prior to amendment, concluding provisions read as follows: “This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.”


Subsec. (b)(8)(B)(i). Pub. L. 112–199, §101(a)(2), substituted “any violation (other than a violation of this section)” for “a violation”.

Subsec. (b)(9)(A). Pub. L. 112–199, §101(b)(2)(B)(i), added subpar. (A) and struck out former subpar. (A) which read as follows: “the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation”.


Subsec. (c). Pub. L. 112–199, §112, inserted “, 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” after “chapter 12 of this title”.


“(A) Any action described in subsection (b) of this section.

(B) Any action or failure to act that is designated as prohibited personnel practice under section 1599(c)(a) of title 10.”

Subsec. (b)(10) to (12). Pub. L. 105–339, §6(a), struck out “or” at end of par. (10), added par. (11), and redesignated former par. (11) as (12).


Subsec. (b)(2). Pub. L. 104–197 amended par. (2) generally. Prior to amendment, par. (2) read as follows: ‘‘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 except as provided under section 3303(f);’’.


Subsec. (a)(2)(A)(x), (xi). Pub. L. 103–424, §5(a)(1), (2), added cls. (x) and (xi) and struck out former cl. (x) which read as follows: ‘‘any other significant change in duties or responsibilities which is inconsistent with the employee’s salary or grade level;’’.

Subsec. (a)(2)(B). Pub. L. 103–424, §5(b), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: ‘‘covered position’ means 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—

‘‘(i) a position which is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

‘‘(ii) any position 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.’’

Subsec. (a)(2)(C)(i). Pub. L. 103–424, §5(c), inserted before semicolon ‘‘, except in the case of an alleged prohibited personnel practice described under subsection (b)(8)’’.


Subsec. (c). Pub. L. 103–424, §5(d), inserted before period at end of first sentence ‘‘, 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’’.

1995—Subsec. (b)(2). Pub. L. 103–194 amended par. (2) generally. Prior to amendment, par. (2) read as follows: ‘‘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.’’


nondisclosure policy, form, or agreement shall also post the statement required under section 2302(b)(13) of title 5, United States Code (as added by this Act) on the agency website, accompanied by the specific list of controlling Executive orders and statutory provisions.

**NonDisclosure Policy, Form, or Agreement in Effect Before the Effective Date**

Pub. L. 112–199, title I, §110(b)(3), Nov. 27, 2012, 128 Stat. 1471, provided that: “With respect to a nondisclosure policy, form, or agreement that was in effect before the effective date of this Act [see Effective Date of 2012 Amendment note above], but that does not contain the statement required under section 2302(b)(13) of title 5, United States Code (as added by this Act) for implementation or enforcement—

‘‘(A) it shall not be a prohibited personnel practice to enforce that policy, form, or agreement with regard to a current employee if the agency gives such employee notice of the statement; and

‘‘(B) it shall not be a prohibited personnel practice to enforce that policy, form, or agreement after the effective date of this Act with regard to a former employee if the agency complies with paragraph (2) of this subsection [set out as a note above].’’

**Disclosure of Censorship Related to Research, Analysis, or Technical Information**


‘‘(a) Definitions.—In this subsection—

‘‘(1) the term ‘agency’ has the meaning given under section 2302(a)(2)(C) of title 5, United States Code;

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

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

‘‘(4) the term ‘covered position’ has the meaning given under section 2302(a)(2)(B) of title 5, United States Code;

‘‘(5) the term ‘employee’ means an employee in a covered position in an agency; and

‘‘(6) the term ‘disclosure’ has the meaning given under section 2302(a)(2)(D) of title 5, United States Code.

‘‘(b) Protected Disclosure.—

‘‘(1) In General.—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—

‘‘(A) shall come within the protections of section 2302(b)(8)(A) of title 5, United States Code, if—

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

‘‘(I) any violation of 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; 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

‘‘(B) shall come within the protections of section 2302(b)(8)(B) of title 5, United States Code, if—

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

‘‘(I) any violation of 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; 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.

‘‘(2) Disclosures not excluded.—A disclosure shall not be excluded from paragraph (1) for any reason described under section 2302(f)(1) or (2) of title 5, United States Code.

‘‘(3) Rule of Construction.—Nothing in this section 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.’’

**NonDisclosure Policies, Forms, and Agreements**


‘‘(a) In General.—

‘‘(1) Requirement.—Each agreement in Standard Forms 312 and 4414 of the Government and any other nondisclosure policy, form, or agreement of the Government shall 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 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.’;

‘‘(2) Agency Websites.—Agencies making use of any nondisclosure policy, form, or agreement shall also post the statement required under paragraph (1) on the agency website, accompanied by the specific list of controlling Executive orders and statutory provisions.

‘‘(3) Enforceability.—

‘‘(A) In General.—Any nondisclosure policy, form, or agreement described under paragraph (2) that does not contain the statement required under paragraph (1) may not be implemented or enforced to the extent such policy, form, or agreement is inconsistent with that statement.

‘‘(B) Nondisclosure Policy, Form, or Agreement in Effect Before the Effective Date.—With respect to a nondisclosure policy, form, or agreement that was in effect before the effective date of this Act [see Effective Date of 2012 Amendment note above], but that does not contain the statement required under paragraph (1) for implementation or enforcement—

‘‘(i) it shall not be a prohibited personnel practice to enforce that policy, form, or agreement with regard to a current employee if the agency gives such employee notice of the statement; and

‘‘(ii) it shall not be a prohibited personnel practice to enforce that policy, form, or agreement after the effective date of this Act with regard to a former employee if the agency complies with paragraph (2).

‘‘(B) Persons Other Than Government Employees.—Notwithstanding subsection (a), a nondisclosure policy, form, or agreement that is to be executed by a person connected with the conduct of an intelligence or intelligence-related activity, other than an employee or-
ficer of the United States Government, may contain provisions appropriate to the particular activity for which such document is to be used. Such policy, form, or agreement shall, at a minimum, require that the person will not disclose any classified information received in the course of such activity unless specifically authorized to do so by the United States Government. Such nondisclosure policy, form, or agreement shall also make it clear that such forms do not bar disclosures to Congress or to an authorized official of an executive agency or the Department of Justice that are essential to reporting a substantial violation of law, consistent with the protection of sources and methods.”

Executive Documents

FEDERAL BENEFITS AND NON-DISCRIMINATION

Memorandum of President of the United States, June 17, 2009, 74 F.R. 29383, provided:

Memorandum for the Heads of Executive Departments and Agencies

Millions of hard-working, dedicated, and patriotic public servants are employed by the Federal Government as part of the civilian workforce, and many of these devoted Americans have same-sex domestic partners. Leading companies in the private sector are free to provide to same-sex domestic partners the same benefits they provide to married people of the opposite sex. Executive departments and agencies, however, may only provide benefits on that basis if they have legal authorization to do so. My Administration is not authorized by Federal law to extend a number of available Federal benefits to the same-sex partners of Federal employees. Within existing law, however, my Administration, in consultation with the Secretary of State, who oversees our Foreign Service employees, and the Director of the Office of Personnel Management, who oversees human resource management for our civil service employees, has identified areas in which statutory authority exists to achieve greater equality for the Federal workforce through extension to same-sex domestic partners of benefits currently available to married people of the opposite sex. Extending available benefits will help the Federal Government compete with the private sector to recruit and retain the best and the brightest employees.

I hereby request the following:

Section 1. Extension of Identified Benefits. The Secretary of State and the Director of the Office of Personnel Management shall, in consultation with the Department of Justice, extend the benefits they have requested to be identified to same-sex domestic partners of Federal employees where doing so can be achieved and is consistent with Federal law.

Section 2. Review of Governmentwide Benefits. The heads of other executive departments and agencies, in consultation with the Office of Personnel Management, shall conduct a review of the benefits provided by their respective departments and agencies to determine what authority they have to extend such benefits to same-sex domestic partners of Federal employees. The results of this review shall be reported within 90 days to the Director of the Office of Personnel Management, who, in consultation with the Department of Justice, shall recommend to me any additional measures that can be taken, consistent with existing law, to provide benefits to the same-sex domestic partners of Federal Government employees.

Section 3. Promoting Compliance with Existing Law Requiring Federal Workplaces to be Free of Discrimination Based on Non-Merit Factors. The Office of Personnel Management shall issue guidance within 90 days to all executive departments and agencies regarding compliance with, and implementation of, the civil service laws, rules, and regulations, including 5 U.S.C. 3302(b)(10), which make it unlawful to discriminate against Federal employees or applicants for Federal employment on the basis of factors not related to job performance.

Section 4. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) Authority granted by law or Executive Order to an agency, or the head thereof; or

(ii) Functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Section 5. Publication. The Director of the Office of Personnel Management is hereby authorized and directed to publish this memorandum in the Federal Register.

BARACK OBAMA.

EXTENSION OF BENEFITS TO SAME-SEX DOMESTIC PARTNERS OF FEDERAL EMPLOYEES

Memorandum of President of the United States, June 2, 2010, 75 F.R. 32247, provided:

Memorandum for the Heads of Executive Departments and Agencies

For far too long, many of our Government’s hard-working, dedicated LGBT employees have been denied equal access to the basic rights and benefits their colleagues enjoy. This kind of systemic inequality undermines the health, well-being, and security not just of our Federal workforce, but also of their families and communities. That is why, last June, I directed the heads of executive departments and agencies (agencies), in consultation with the Office of Personnel Management (OPM), to conduct a thorough review of the benefits they provide and to identify any that could be extended to LGBT employees and their partners and families. Although legislative action is necessary to provide full equality to LGBT Federal employees, the agencies have identified a number of benefits that can be extended under existing law. OPM, in consultation with the Department of Justice, has provided me with a report recommending that all of the identified benefits be extended.

Accordingly, I hereby direct the following:

Section 1. Immediate Actions To Extend Benefits. Agencies should immediately take the following actions, consistent with existing law, in order to extend benefits to the same-sex domestic partners of Federal employees, employees, and, where applicable, to the children of same-sex domestic partners of Federal employees:

(a) The Director of OPM should take appropriate action to:

(i) clarify that the children of employees’ same-sex domestic partners fall within the definition of “child” for purposes of Federal child-care subsidies, and, where appropriate, for child-care services;

(ii) clarify that, for purposes of employee assistance programs, same-sex domestic partners and their children qualify as “family members”;

(iii) issue a proposed rule that would clarify that employees’ same-sex domestic partners qualify as “family members” for purposes of noncompetitive appointments made pursuant to Executive Order 12721 of July 30, 1990;

(iv) issue a proposed rule that would add a Federal retiree’s same-sex domestic partner to the list of individuals presumed to have an insurable interest in the employee pursuant to 5 U.S.C. 8339(k)(1), 8420;

(v) amend its guidance on implementing President Clinton’s April 11, 1997, memorandum to heads of executive departments and agencies on “Expanded Family
and Medical Leave Policies' to specify that the 24 hours of unpaid leave made available to Federal employees in connection with (i) school and early childhood educational activities; (ii) routine family medical purposes; and (iii) elderly relatives' health or care needs, may be used to meet the needs of an employee's same-sex domestic partner or the same-sex domestic partner's children; and (vii) clarify that employees' same-sex domestic partners qualify as dependents for purposes of calculating the extra allowance payable under §5942a to assist employees stationed on Johnston Island, subject to any limitations applicable to spouses.

(b) The Administrator of General Services should take appropriate action to amend the definitions of 'immediate family' and 'dependent' appearing in the Federal Travel Regulations, 41 C.F.R. Chs. 300–304, to include same-sex domestic partners and their children, so that employees and their domestic partners and children can obtain the full benefits available under applicable law, including certain travel, relocation, and subsistence payments.

(c) All agencies offering any of the benefits specified by OPM in implementing guidance under section 3 of this memorandum, including credit union membership, access to fitness facilities, and access to planning and counseling services, should take all appropriate action to provide the same level of benefits that is provided to employees' spouses and their children to employees' same-sex domestic partners and their children. This section applies to appropriated and non-appropriated fund instrumentalities of such agencies.

(d) All agencies with authority to provide benefits to employees outside of the context of title 5, United States Code should take all appropriate actions to ensure that the benefits being provided to employees' spouses and their children are also being provided, at an equivalent level wherever permitted by law, to their employees' same-sex domestic partners and their children.

SEC. 2. Continuing Obligation To Provide New Benefits. In the future, all agencies that provide new benefits to the spouses of Federal employees and their children should, to the extent permitted by law, also provide them to the same-sex domestic partners of their employees and those same-sex domestic partners' children. This section applies to appropriated and non-appropriated fund instrumentalities of such agencies.

SEC. 3. Monitoring and Guidance. The Director of OPM shall monitor compliance with this memorandum, and may instruct agencies to provide the Director with reports on the status of their compliance, and prescribe the form Folio: 1633 (sic) and manner of such reports. The Director of OPM shall also issue guidance to ensure consistent and appropriate implementation.

SEC. 4. Reporting. By April 1, 2011, and annually thereafter, the Director of OPM shall provide the President with a report on the progress of the agencies in implementing this memorandum until such time as all recommendations have been appropriately implemented.

SEC. 5. General Provisions. (a) Except as expressly stated herein, nothing in this memorandum shall be construed to impair or otherwise affect:

(i) authority granted by law or Executive Order to an agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

SEC. 6. Publication. The Director of OPM is hereby authorized and directed to publish this memorandum in the Federal Register.

BARACK OBAMA.

§ 2303. Prohibited personnel practices in the Federal Bureau of Investigation

(a) Any employee of the Federal Bureau of Investigation who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to an employee in, or applicant for, a position in the Bureau as a reprisal for a disclosure of information—

(1) made—

(A) in the case of an employee, to a supervisor in the direct chain of command of the employee, up to and including the head of the employing agency;

(B) to the Inspector General;

(C) to the Office of Professional Responsibility of the Department of Justice;

(D) to the Office of Professional Responsibility of the Federal Bureau of Investigation;

(E) to the Inspection Division of the Federal Bureau of Investigation;

(F) as described in §7211;

(G) to the Office of Special Counsel; or

(H) to an employee designated by any officer, employee, office, or division described in subparagraphs (A) through (G) for the purpose of receiving such disclosures;

(2) which the employee or applicant reasonably believes evidences—

(A) any violation of any law, rule, or regulation; or

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

For the purpose of this subsection, "personnel action" means any action described in clauses (i) through (x) of section 2302(a)(2)(A) of this title with respect to an employee in, or applicant for, a position in the Bureau (other than a position of a confidential, policy-determining, policymaking, or policy-advocating character).

(b) The Attorney General shall prescribe regulations to ensure that such a personnel action shall not be taken against an employee of the Bureau as a reprisal for any disclosure of information described in subsection (a) of this section.

(c) The President shall provide for the enforcement of this section in a manner consistent with applicable provisions of sections 1214 and 1221 of this title.

(d)(1) An employee of the Federal Bureau of Investigation who makes an allegation of a reprisal under regulations promulgated under this section may appeal a final determination or corrective action order by the Bureau under those regulations to the Merit Systems Protection Board pursuant to section 1221.

(2) If no final determination or corrective action order has been made or issued for an allegation described in paragraph (1) before the expiration of the 180-day period beginning on the date on which the allegation is received by the Federal Bureau of Investigation, the employee described in that paragraph may seek corrective action directly from the Merit Systems Protection Board pursuant to section 1221.