

111TH CONGRESS
1ST SESSION

S. 1745

To expand whistleblower protections to non-Federal employees whose disclosures involve misuse of Federal funds.

IN THE SENATE OF THE UNITED STATES

OCTOBER 1, 2009

Mrs. MCCASKILL introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

To expand whistleblower protections to non-Federal employees whose disclosures involve misuse of Federal funds.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Non-Federal Employee
5 Whistleblower Protection Act of 2009”.

6 **SEC. 2. PROTECTING STATE AND LOCAL GOVERNMENT AND**
7 **CONTRACTOR WHISTLEBLOWERS.**

8 (a) REPEAL.—Section 315 of the Federal Property
9 and Administrative Services Act of 1949 (41 U.S.C. 265)
10 is hereby repealed.

1 (b) ENHANCED PROTECTION FOR STATE AND LOCAL
 2 GOVERNMENT AND CONTRACTOR WHISTLEBLOWERS.—
 3 Title III of the Federal Property and Administrative Serv-
 4 ices Act of 1949 (41 U.S.C. 251 et seq.), as amended by
 5 subsection (a), is amended by inserting after section 314B
 6 the following new section:

7 **“SEC. 315. WHISTLEBLOWER PROTECTION FOR STATE AND**
 8 **LOCAL GOVERNMENT AND CONTRACTOR**
 9 **WHISTLEBLOWERS.**

10 “(a) PROHIBITION OF REPRISALS.—An employee of
 11 any non-Federal employer receiving covered funds may not
 12 be discharged, demoted, or otherwise discriminated
 13 against as a reprisal for initiating or participating in any
 14 proceeding related to the misuse of any Federal funds,
 15 reasonably opposing the misuse of any Federal funds, or
 16 disclosing, including a disclosure made in the ordinary
 17 course of an employee’s duties, to an inspector general,
 18 the Comptroller General of the United States, the Attor-
 19 ney General, a member of Congress, a State or Federal
 20 regulatory or law enforcement agency, a person with su-
 21 pervisory authority over the employee (or such other per-
 22 son working for the employer who has the authority to
 23 investigate, discover, or terminate misconduct), a court or
 24 grand jury, the head of a Federal agency, or their rep-

1 representatives information that the employee reasonably be-
2 lieves is evidence of—

3 “(1) gross mismanagement of an agency con-
4 tract or grant relating to covered funds;

5 “(2) a gross waste of covered funds;

6 “(3) a substantial and specific danger to public
7 health or safety related to the implementation or use
8 of covered funds;

9 “(4) an abuse of authority related to the imple-
10 mentation or use of covered funds; or

11 “(5) a violation of law, rule, or regulation re-
12 lated to an agency contract (including the competi-
13 tion for or negotiation of a contract), subcontract, or
14 grant, awarded or issued relating to covered funds.

15 “(b) INVESTIGATION OF COMPLAINTS.—

16 “(1) IN GENERAL.—A person who believes that
17 the person has been subjected to a reprisal prohib-
18 ited by subsection (a) may submit a complaint re-
19 garding the reprisal to the appropriate inspector
20 general. Except as provided under paragraph (3),
21 unless the inspector general determines that the
22 complaint is frivolous, does not relate to covered
23 funds, or another Federal or State judicial or ad-
24 ministrative proceeding has previously been invoked
25 to resolve such complaint, the inspector general shall

1 investigate the complaint and, upon completion of
2 such investigation, submit a report of the findings of
3 the investigation to the person, the person's em-
4 ployer, and the head of the appropriate agency.

5 “(2) TIME LIMITATIONS FOR ACTIONS.—

6 “(A) IN GENERAL.—Except as provided
7 under subparagraph (B), the inspector general
8 shall, not later than 180 days after receiving a
9 complaint under paragraph (1)—

10 “(i) make a determination that the
11 complaint is frivolous, does not relate to
12 covered funds, or another Federal or State
13 judicial or administrative proceeding has
14 previously been invoked to resolve such
15 complaint; or

16 “(ii) submit a report under paragraph
17 (1).

18 “(B) EXTENSIONS.—

19 “(i) VOLUNTARY EXTENSION AGREED
20 TO BETWEEN INSPECTOR GENERAL AND
21 COMPLAINANT.—If the inspector general is
22 unable to complete an investigation under
23 this section in time to submit a report
24 within the 180-day period specified under
25 subparagraph (A) and the person submit-

1 ting the complaint agrees to an extension
2 of time, the inspector general shall submit
3 a report under paragraph (1) within such
4 additional period of time as shall be agreed
5 upon between the inspector general and
6 the person submitting the complaint.

7 “(ii) EXTENSION GRANTED BY IN-
8 SPECTOR GENERAL.—If the inspector gen-
9 eral is unable to complete an investigation
10 under this section in time to submit a re-
11 port within the 180-day period specified
12 under subparagraph (A), the inspector
13 general may extend the period for not
14 more than 180 days without agreeing with
15 the person submitting the complaint to
16 such extension, provided that the inspector
17 general provides a written explanation
18 (subject to the authority to exclude infor-
19 mation under paragraph (4)(C)) for the
20 decision, which shall be provided to both
21 the person submitting the complaint and
22 the non-Federal employer.

23 “(iii) SEMI-ANNUAL REPORT ON EX-
24 TENSIONS.—The inspector general shall in-
25 clude in semi-annual reports to Congress a

1 list of those investigations for which the in-
2 spector general received an extension.

3 “(3) DISCRETION NOT TO INVESTIGATE COM-
4 PLAINTS.—

5 “(A) IN GENERAL.—The inspector general
6 may decide not to conduct or continue an inves-
7 tigation under this section upon providing to
8 the person submitting the complaint and the
9 non-Federal employer a written explanation
10 (subject to the authority to exclude information
11 under paragraph (4)(C)) for such decision.

12 “(B) ASSUMPTION OF RIGHTS TO CIVIL
13 REMEDY.—Upon receipt of an explanation of a
14 decision not to conduct or continue an inves-
15 tigation under subparagraph (A), the person
16 submitting a complaint shall immediately as-
17 sume the right to a civil remedy under sub-
18 section (c)(3) as if the 210-day period specified
19 under such subsection has already passed.

20 “(C) SEMI-ANNUAL REPORT.—The inspec-
21 tor general shall include in semi-annual reports
22 to Congress a list of those investigations the in-
23 spector general decided not to conduct or con-
24 tinue under this paragraph.

1 “(4) ACCESS TO INVESTIGATIVE FILE OF IN-
2 SPECTOR GENERAL.—

3 “(A) IN GENERAL.—The person alleging a
4 reprisal under this section shall have access to
5 the investigation file of the appropriate inspec-
6 tor general in accordance with section 552a of
7 title 5, United States Code (commonly referred
8 to as the ‘Privacy Act’). The investigation of
9 the inspector general shall be deemed closed for
10 purposes of disclosure under such section when
11 an employee files an appeal to an agency head
12 or a court of competent jurisdiction.

13 “(B) CIVIL ACTION.—In the event the per-
14 son alleging the reprisal brings suit under sub-
15 section (c)(3), the person alleging the reprisal
16 and the non-Federal employer shall have access
17 to the investigative file of the inspector general
18 in accordance with the Privacy Act.

19 “(C) EXCEPTION.—

20 “(i) IN GENERAL.—The inspector gen-
21 eral may exclude from disclosure—

22 “(I) information protected from
23 disclosure by a provision of law; and

24 “(II) any additional information
25 the inspector general determines dis-

1 closure of which would impede a con-
2 tinuing investigation, provided that
3 such information is disclosed once
4 such disclosure would no longer im-
5 pede such investigation, unless the in-
6 spector general determines that disclo-
7 sure of law enforcement techniques,
8 procedures, or information could rea-
9 sonably be expected to risk circumven-
10 tion of the law or disclose the identity
11 of a confidential source.

12 “(ii) LIMITATION.—Notwithstanding
13 clause (i)(II), the inspector general may
14 not withhold information from the em-
15 ployee which would otherwise be subject to
16 disclosure under section 552 of title 5,
17 United States Code (commonly referred to
18 as the Freedom of Information Act) or the
19 Privacy Act.

20 “(5) PRIVACY OF INFORMATION.—An inspector
21 general investigating an alleged reprisal under this
22 section may not respond to any inquiry or disclose
23 any information from or about any person alleging
24 such reprisal, except in accordance with the provi-

sions of section 552a of title 5, United States Code,
or as required by any other applicable Federal law.

“(c) REMEDY AND ENFORCEMENT AUTHORITY.—

“(1) BURDEN OF PROOF.—

“(A) DISCLOSURE AS CONTRIBUTING FACTOR IN REPRISAL.—

“(i) IN GENERAL.—A person alleging a reprisal under this section shall be deemed to have affirmatively established the occurrence of the reprisal if the person demonstrates that a disclosure described in subsection (a) was a contributing factor in the reprisal.

“(ii) USE OF CIRCUMSTANTIAL EVIDENCE.—A disclosure may be demonstrated as a contributing factor in a reprisal for purposes of this paragraph by circumstantial evidence, including—

“(I) evidence that the official undertaking the reprisal knew of the disclosure;

“(II) evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclo-

1 sure was a contributing factor in the
2 reprisal; or

3 “(III) evidence that the protected
4 disclosure was well founded in fact or
5 law.

6 “(B) OPPORTUNITY FOR REBUTTAL.—The
7 head of an agency may not find the occurrence
8 of a reprisal with respect to a reprisal that is
9 affirmatively established under subparagraph
10 (A) if the non-Federal employer demonstrates
11 by clear and convincing evidence that the non-
12 Federal employer would have taken the action
13 constituting the reprisal in the absence of the
14 disclosure. An employee may rebut this affirma-
15 tive defense by direct or circumstantial evi-
16 dence, including the evidence described in sub-
17 paragraph (A).

18 “(2) AGENCY ACTION.—Not later than 30 days
19 after receiving an inspector general report under
20 subsection (b), the head of the agency concerned
21 shall determine whether there is sufficient basis to
22 conclude that the non-Federal employer has sub-
23 jected the complainant to a reprisal prohibited by
24 subsection (a) and shall either issue an order deny-

1 ing relief in whole or in part or shall take 1 or more
2 of the following actions:

3 “(A) Order the employer to take affirma-
4 tive action to abate the reprisal.

5 “(B) Order the employer to reinstate the
6 person to the position that the person held be-
7 fore the reprisal, together with the compensa-
8 tion (including back pay), compensatory dam-
9 ages, employment benefits, and other terms and
10 conditions of employment that would apply to
11 the person in that position if the reprisal had
12 not been taken.

13 “(C) Order the employer to pay the com-
14 plainant an amount equal to the aggregate
15 amount of all costs and expenses (including at-
16 torneys’ fees and expert witnesses’ fees) that
17 were reasonably incurred by the complainant
18 for, or in connection with, bringing the com-
19 plaint regarding the reprisal, as determined by
20 the head of the agency or a court of competent
21 jurisdiction.

22 “(D) Where appropriate, order the posting
23 of the decision of the inspector general in a
24 manner in which every employee of the em-
25 ployer will have notice of the decision and oth-

1 erwise require a reasonable compliance program
2 to ensure that no further retaliation is com-
3 mitted by the employer.

4 “(E) In the case of a finding that the re-
5 prisal was willful, wanton, or malicious, pay the
6 employee no more than 10 times the amount of
7 all lost wages and other compensatory damages.

8 “(3) CIVIL ACTION.—If the head of an agency
9 issues an order denying relief in whole or in part
10 under paragraph (1), has not issued an order within
11 210 days after the submission of a complaint under
12 subsection (b), or in the case of an extension of time
13 under subsection (b)(2)(B)(i), within 30 days after
14 the expiration of the extension of time, or decides
15 under subsection (b)(3) not to investigate or to dis-
16 continue an investigation, and there is no showing
17 that such delay or decision is due to the bad faith
18 of the complainant, the complainant shall be deemed
19 to have exhausted all administrative remedies with
20 respect to the complaint, and the complainant may
21 bring a de novo action at law or equity against the
22 employer to seek compensatory damages and all
23 other relief available under this section in the appro-
24 priate district court of the United States, which
25 shall have jurisdiction over such an action without

1 regard to the amount in controversy. Such an action
2 shall, at the request of either party to the action, be
3 tried by the court with a jury.

4 “(4) JUDICIAL ENFORCEMENT OF ORDER.—

5 Whenever a person fails to comply with an order
6 issued under paragraph (2), the head of the agency
7 shall file an action for enforcement of such order in
8 the United States district court for a district in
9 which the reprisal was found to have occurred. In
10 any action brought under this paragraph, the court
11 may grant appropriate relief, including injunctive re-
12 lief, compensatory and exemplary damages, and at-
13 torneys’ fees and costs. The person upon whose be-
14 half an order was issued may also file such an action
15 or join in an action filed by the head of the agency.

16 “(5) JUDICIAL REVIEW.—Any person adversely
17 affected or aggrieved by an order issued under para-
18 graph (2) may obtain review of the order’s conform-
19 ance with this subsection, and any regulations issued
20 to carry out this section, in the United States court
21 of appeals for a circuit in which the reprisal is al-
22 leged in the order to have occurred. No petition
23 seeking such review may be filed more than 60 days
24 after issuance of the order by the head of the agen-
25 cy. Review shall conform to chapter 7 of title 5,

1 United States Code. Filing such an appeal shall not
2 act to stay the enforcement of the order of a head
3 of an agency or the judgment of a district court.

4 “(6) EXHAUSTION OF ADMINISTRATIVE REM-
5 EDIES.—Regardless of any other time limit set forth
6 in this Act, after 360 days an employee shall be
7 deemed to have exhausted his or her administrative
8 remedies and may file a civil action or amend a
9 claim under this Act to any other pending civil ac-
10 tion filed by the employee.

11 “(d) NONENFORCEABILITY OF CERTAIN PROVISIONS
12 WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBI-
13 TRATION OF DISPUTES.—

14 “(1) WAIVER OF RIGHTS AND REMEDIES.—Ex-
15 cept as provided under paragraph (3), the rights and
16 remedies provided for in this section may not be
17 waived by any agreement, policy, form, or condition
18 of employment, including by any predispute arbitra-
19 tion agreement.

20 “(2) PREDISPUTE ARBITRATION AGREE-
21 MENTS.—Except as provided under paragraph (3),
22 no predispute arbitration agreement shall be valid or
23 enforceable if it requires arbitration of a dispute
24 arising under this section.

1 “(3) EXCEPTION FOR COLLECTIVE BARGAINING
 2 AGREEMENTS.—Notwithstanding paragraphs (1)
 3 and (2), an arbitration provision in a collective bar-
 4 gaining agreement shall be enforceable as to dis-
 5 putes arising under the collective bargaining agree-
 6 ment.

7 “(e) REQUIREMENT TO POST NOTICE OF RIGHTS
 8 AND REMEDIES.—Any employer receiving covered funds
 9 shall post notice of the rights and remedies provided under
 10 this section.

11 “(f) RULES OF CONSTRUCTION.—

12 “(1) NO IMPLIED AUTHORITY TO RETALIATE
 13 FOR NON-PROTECTED DISCLOSURES.—Nothing in
 14 this section may be construed to authorize the dis-
 15 charge of, demotion of, or discrimination against an
 16 employee for a disclosure other than a disclosure
 17 protected by subsection (a) or to modify or derogate
 18 from a right or remedy otherwise available to the
 19 employee.

20 “(2) RELATIONSHIP TO STATE LAWS.—Nothing
 21 in this section may be construed to preempt, pre-
 22 clude, or limit the protections provided for public or
 23 private employees under State whistleblower laws.

24 “(g) DEFINITIONS.—In this section:

1 “(1) ABUSE OF AUTHORITY.—The term ‘abuse
2 of authority’ means an arbitrary and capricious ex-
3 ercise of authority by a contracting official or em-
4 ployee that adversely affects the rights of any per-
5 son, or that results in personal gain or advantage to
6 the official or employee or to preferred other per-
7 sons.

8 “(2) COVERED FUNDS.—The term ‘covered
9 funds’ means any contract, grant, or other payment
10 received by any non-Federal employer if the Federal
11 Government provides any portion of the money or
12 property that is provided, requested, or demanded.

13 “(3) EMPLOYEE.—The term ‘employee’—

14 “(A) except as provided under subpara-
15 graph (B), means an individual performing
16 services on behalf of an employer or a con-
17 tractor, subcontractor, or agent of an employer;
18 and

19 “(B) does not include any Federal em-
20 ployee or member of the uniformed services (as
21 that term is defined in section 101(a)(5) of title
22 10, United States Code).

23 “(4) NON-FEDERAL EMPLOYER.—The term
24 ‘non-Federal employer’—

25 “(A) means—

1 “(i) any employer—

2 “(I) with respect to covered
3 funds—

4 “(aa) the contractor, sub-
5 contractor, grantee, or recipient,
6 as the case may be, if the con-
7 tractor, grantee, or recipient is
8 an employer; and

9 “(bb) any professional mem-
10 bership organization, certification
11 or other professional body, any
12 agent or licensee of the Federal
13 Government, or any person act-
14 ing directly or indirectly in the
15 interest of an employer receiving
16 covered funds; or

17 “(II) with respect to covered
18 funds received by a State or local gov-
19 ernment, the State or local govern-
20 ment receiving the funds and any con-
21 tractor or subcontractor of the State
22 or local government; and

23 “(ii) any corporation or person who
24 receives any Federal funds; and

1 “(B) does not mean any department, agen-
2 cy, or other entity of the Federal Government.

3 “(5) STATE OR LOCAL GOVERNMENT.—The
4 term ‘State or local government’ means—

5 “(A) the government of each of the several
6 States, the District of Columbia, the Common-
7 wealth of Puerto Rico, Guam, American Samoa,
8 the Virgin Islands, the Commonwealth of the
9 Northern Mariana Islands, or any other terri-
10 tory or possession of the United States; or

11 “(B) the government of any political sub-
12 division of a government listed in subparagraph
13 (A).”.

14 (c) APPLICABILITY.—

15 (1) PENDING CLAIMS.—Section 315 of the Fed-
16 eral Property and Administrative Services Act of
17 1949, as added by subsection (b), shall apply to
18 complaints submitted pursuant to such section on or
19 after the date of the enactment of this Act.

20 (2) NEW CLAIMS.—Section 315 of the Federal
21 Property and Administrative Services Act of 1949,
22 as in effect on the day before the date of the enact-
23 ment of this Act shall apply to claims submitted

- 1 pursuant to such section before such date of enact-
- 2 ment.

