

114TH CONGRESS
1ST SESSION

S. 2291

To amend title 38, United States Code, to establish procedures within the Department of Veterans Affairs for the processing of whistleblower complaints, and for other purposes.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 17, 2015

Mr. KIRK (for himself, Mr. BLUMENTHAL, Mr. GRASSLEY, Mrs. GILLIBRAND, Mr. JOHNSON, Ms. BALDWIN, and Mr. RUBIO) introduced the following bill; which was read twice and referred to the Committee on Veterans' Affairs

A BILL

To amend title 38, United States Code, to establish procedures within the Department of Veterans Affairs for the processing of whistleblower complaints, and for other purposes.

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 “VA Patient Protection
5 Act of 2015”.

1 **SEC. 2. TREATMENT OF WHISTLEBLOWER COMPLAINTS IN**
 2 **DEPARTMENT OF VETERANS AFFAIRS.**

3 (a) PROCEDURE AND ADMINISTRATION.—

4 (1) IN GENERAL.—Chapter 7 of title 38, United
 5 States Code, is amended by adding at the end the
 6 following new subchapter:

7 “SUBCHAPTER II—WHISTLEBLOWER
 8 COMPLAINTS

9 “§ 731. Whistleblower complaint defined

10 “In this subchapter, the term ‘whistleblower com-
 11 plaint’ means a complaint by an employee of the Depart-
 12 ment disclosing, or assisting another employee to disclose,
 13 a potential violation of any law, rule, or regulation, or
 14 gross mismanagement, gross waste of funds, abuse of au-
 15 thority, or substantial and specific danger to public health
 16 and safety.

17 “§ 732. Treatment of whistleblower complaints

18 “(a) FILING.—(1) In addition to any other method
 19 established by law in which an employee may file a whistle-
 20 blower complaint, an employee of the Department may file
 21 a whistleblower complaint in accordance with subsection
 22 (g) with a supervisor of the employee.

23 “(2) Except as provided by subsection (d)(1), in mak-
 24 ing a whistleblower complaint under paragraph (1), an
 25 employee shall file the initial complaint with the imme-
 26 diate supervisor of the employee.

1 “(b) NOTIFICATION.—(1)(A) Not later than four
2 business days after the date on which a supervisor receives
3 a whistleblower complaint by an employee under this sec-
4 tion, the supervisor shall notify, in writing, the employee
5 of whether the supervisor determines that there is a rea-
6 sonable likelihood that the complaint discloses a violation
7 of any law, rule, or regulation, or gross mismanagement,
8 gross waste of funds, abuse of authority, or substantial
9 and specific danger to public health and safety.

10 “(B) The supervisor shall retain written documenta-
11 tion regarding the whistleblower complaint and shall sub-
12 mit to the next-level supervisor and the central whistle-
13 blower office described in subsection (h) a written report
14 on the complaint.

15 “(2)(A) On a monthly basis, the supervisor shall sub-
16 mit to the appropriate director or other official who is su-
17 perior to the supervisor a written report that includes the
18 number of whistleblower complaints received by the super-
19 visor under this section during the month covered by the
20 report, the disposition of such complaints, and any actions
21 taken because of such complaints pursuant to subsection
22 (c).

23 “(B) In the case in which such a director or official
24 carries out this paragraph, the director or official shall
25 submit such monthly report to the supervisor of the direc-

1 tor or official and to the central whistleblower office de-
2 scribed in subsection (h).

3 “(c) POSITIVE DETERMINATION.—If a supervisor
4 makes a positive determination under subsection (b)(1) re-
5 garding a whistleblower complaint of an employee, the su-
6 pervisor shall include in the notification to the employee
7 under such subsection the specific actions that the super-
8 visor will take to address the complaint.

9 “(d) FILING COMPLAINT WITH NEXT-LEVEL SUPER-
10 VISORS.—(1) If any circumstance described in paragraph
11 (3) is met, an employee may file a whistleblower complaint
12 in accordance with subsection (g) with the next-level su-
13 pervisor who shall treat such complaint in accordance with
14 this section.

15 “(2) An employee may file a whistleblower complaint
16 with the Secretary if the employee has filed the whistle-
17 blower complaint to each level of supervisors between the
18 employee and the Secretary in accordance with paragraph
19 (1).

20 “(3) A circumstance described in this paragraph is
21 any of the following circumstances:

22 “(A) A supervisor does not make a timely de-
23 termination under subsection (b)(1) regarding a
24 whistleblower complaint.

1 “(B) The employee who made a whistleblower
2 complaint determines that the supervisor did not
3 adequately address the complaint pursuant to sub-
4 section (c).

5 “(C) The immediate supervisor of the employee
6 is the basis of the whistleblower complaint.

7 “(e) TRANSFER OF EMPLOYEE WHO FILES WHIS-
8 TLEBLOWER COMPLAINT.—If a supervisor makes a posi-
9 tive determination under subsection (b)(1) regarding a
10 whistleblower complaint filed by an employee, the Sec-
11 retary shall—

12 “(1) inform the employee of the ability to vol-
13 unteer for a transfer in accordance with section
14 3352 of title 5; and

15 “(2) give preference to the employee for such a
16 transfer in accordance with such section.

17 “(f) PROHIBITION ON EXEMPTION.—The Secretary
18 may not exempt any employee of the Department from
19 being covered by this section.

20 “(g) WHISTLEBLOWER COMPLAINT FORM.—(1) A
21 whistleblower complaint filed by an employee under sub-
22 section (a) or (d) shall consist of the form described in
23 paragraph (2) and any supporting materials or docu-
24 mentation the employee determines necessary.

1 “(2) The form described in this paragraph is a form
2 developed by the Secretary, in consultation with the Spe-
3 cial Counsel, that includes the following:

4 “(A) An explanation of the purpose of the whis-
5 tleblower complaint form.

6 “(B) Instructions for filing a whistleblower
7 complaint as described in this section.

8 “(C) An explanation that filing a whistleblower
9 complaint under this section does not preclude the
10 employee from any other method established by law
11 in which an employee may file a whistleblower com-
12 plaint.

13 “(D) A statement directing the employee to in-
14 formation accessible on the Internet website of the
15 Department as described in section 735(d).

16 “(E) Fields for the employee to provide—

17 “(i) the date that the form is submitted;

18 “(ii) the name of the employee;

19 “(iii) the contact information of the em-
20 ployee;

21 “(iv) a summary of the whistleblower com-
22 plaint (including the option to append sup-
23 porting documents pursuant to paragraph (1));
24 and

25 “(v) proposed solutions to the complaint.

1 “(F) Any other information or fields that the
2 Secretary determines appropriate.

3 “(3) The Secretary, in consultation with the Special
4 Counsel, shall develop the form described in paragraph (2)
5 by not later than 60 days after the date of the enactment
6 of this section.

7 “(h) CENTRAL WHISTLEBLOWER OFFICE.—(1) The
8 Secretary shall ensure that the central whistleblower of-
9 fice—

10 “(A) is not an element of the Office of the Gen-
11 eral Counsel;

12 “(B) is not headed by an official who reports to
13 the General Counsel;

14 “(C) does not provide, or receive from, the Gen-
15 eral Counsel any information regarding a whistle-
16 blower complaint except pursuant to an action re-
17 garding the complaint before an administrative body
18 or court; and

19 “(D) does not provide advice to the General
20 Counsel.

21 “(2) The central whistleblower office shall be respon-
22 sible for investigating all whistleblower complaints of the
23 Department, regardless of whether such complaints are
24 made by or against an employee who is not a member of
25 the Senior Executive Service.

1 “(3) The Secretary shall ensure that the central whis-
 2 tleblower office maintains a toll-free hotline to anony-
 3 mously receive whistleblower complaints.

4 “(4) The Secretary shall ensure that the central whis-
 5 tleblower office has such staff and resources as the Sec-
 6 retary considers necessary to carry out the functions of
 7 the central whistleblower office.

8 “(5) In this subsection, the term ‘central whistle-
 9 blower office’ means the Office of Accountability Review
 10 or a successor office that is established or designated by
 11 the Secretary to investigate whistleblower complaints filed
 12 under this section or any other method established by law.

13 **“§ 733. Adverse actions against supervisory employ-**
 14 **ees who commit prohibited personnel ac-**
 15 **tions relating to whistleblower com-**
 16 **plaints**

17 “(a) IN GENERAL.—(1) In accordance with para-
 18 graph (2), the Secretary shall carry out the following ad-
 19 verse actions against supervisory employees (as defined in
 20 section 7103(a) of title 5) whom the Secretary, an admin-
 21 istrative judge, the Merit Systems Protection Board, the
 22 Office of Special Counsel, an adjudicating body provided
 23 under a union contract, a Federal judge, or the Inspector
 24 General of the Department determines committed a pro-
 25 hibited personnel action described in subsection (c):

1 “(A) With respect to the first offense, an ad-
2 verse action that is not less than a 12-day suspen-
3 sion and not more than removal.

4 “(B) With respect to the second offense, re-
5 moval.

6 “(2)(A) An employee against whom an adverse action
7 under paragraph (1) is proposed is entitled to written no-
8 tice.

9 “(B)(i) An employee who is notified under subpara-
10 graph (A) of being the subject of a proposed adverse ac-
11 tion under paragraph (1) is entitled to 14 days following
12 such notification to answer and furnish evidence in sup-
13 port of the answer.

14 “(ii) If the employee does not furnish any such evi-
15 dence as described in clause (i) or if the Secretary deter-
16 mines that such evidence is not sufficient to reverse the
17 determination to propose the adverse action, the Secretary
18 shall carry out the adverse action following such 14-day
19 period.

20 “(C) Paragraphs (1) and (2) of subsection (b) of sec-
21 tion 7513 of title 5, subsection (c) of such section, para-
22 graphs (1) and (2) of subsection (b) of section 7543 of
23 such title, and subsection (c) of such section shall not
24 apply with respect to an adverse action carried out under
25 paragraph (1).

1 “(b) LIMITATION ON OTHER ADVERSE ACTIONS.—
 2 With respect to a prohibited personnel action described in
 3 subsection (c), if the Secretary carries out an adverse ac-
 4 tion against a supervisory employee, the Secretary may
 5 carry out an additional adverse action under this section
 6 based on the same prohibited personnel action if the total
 7 severity of the adverse actions do not exceed the level spec-
 8 ified in subsection (a).

9 “(c) PROHIBITED PERSONNEL ACTION DE-
 10 SCRIBED.—A prohibited personnel action described in this
 11 subsection is any of the following actions:

12 “(1) Taking or failing to take a personnel ac-
 13 tion in violation of section 2302 of title 5 against an
 14 employee relating to the employee—

15 “(A) filing a whistleblower complaint in ac-
 16 cordance with section 732 of this title;

17 “(B) filing a whistleblower complaint with
 18 the Inspector General of the Department, the
 19 Special Counsel, or Congress;

20 “(C) providing information or participating
 21 as a witness in an investigation of a whistle-
 22 blower complaint in accordance with section
 23 732 or with the Inspector General of the De-
 24 partment, the Special Counsel, or Congress;

1 “(D) participating in an audit or investiga-
2 tion by the Comptroller General of the United
3 States;

4 “(E) refusing to perform an action that is
5 unlawful or prohibited by the Department; or

6 “(F) engaging in communications that are
7 related to the duties of the position or are oth-
8 erwise protected.

9 “(2) Preventing or restricting an employee from
10 making an action described in any of subparagraphs
11 (A) through (F) of paragraph (1).

12 “(3) Conducting a negative peer review or open-
13 ing a retaliatory investigation because of an activity
14 of an employee that is protected by section 2302 of
15 title 5.

16 “(4) Requesting a contractor to carry out an
17 action that is prohibited by section 4705(b) or sec-
18 tion 4712(a)(1) of title 41, as the case may be.

19 **“§ 734. Evaluation criteria of supervisors and treat-**
20 **ment of bonuses**

21 “(a) EVALUATION CRITERIA.—(1) In evaluating the
22 performance of supervisors of the Department, the Sec-
23 retary shall include the criteria described in paragraph
24 (2).

1 “(2) The criteria described in this subsection are the
2 following:

3 “(A) Whether the supervisor treats whistle-
4 blower complaints in accordance with section 732 of
5 this title.

6 “(B) Whether the appropriate deciding official,
7 performance review board, or performance review
8 committee determines that the supervisor was found
9 to have committed a prohibited personnel action de-
10 scribed in section 733(b) of this title by an adminis-
11 trative judge, the Merit Systems Protection Board,
12 the Office of Special Counsel, an adjudicating body
13 provided under a union contract, a Federal judge,
14 or, in the case of a settlement of a whistleblower
15 complaint (regardless of whether any fault was as-
16 signed under such settlement), the Secretary.

17 “(b) BONUSES.—(1) The Secretary may not pay to
18 a supervisor described in subsection (a)(2)(B) an award
19 or bonus under this title or title 5, including under chapter
20 45 or 53 of such title, during the one-year period begin-
21 ning on the date on which the determination was made
22 under such subsection.

23 “(2) Notwithstanding any other provision of law, the
24 Secretary shall issue an order directing a supervisor de-
25 scribed in subsection (a)(2)(B) to repay the amount of any

1 award or bonus paid under this title or title 5, including
 2 under chapter 45 or 53 of such title, if—

3 “(A) such award or bonus was paid for per-
 4 formance during a period in which the supervisor
 5 committed a prohibited personnel action as deter-
 6 mined pursuant to such subsection (a)(2)(B);

7 “(B) the Secretary determines such repayment
 8 appropriate pursuant to regulations prescribed by
 9 the Secretary to carry out this section; and

10 “(C) the supervisor is afforded notice and an
 11 opportunity for a hearing before making such repay-
 12 ment.

13 **“§ 735. Training regarding whistleblower complaints**

14 “(a) TRAINING.—Not less frequently than once each
 15 year, the Secretary, in coordination with the Whistleblower
 16 Protection Ombudsman designated under section
 17 3(d)(1)(C) of the Inspector General Act of 1978 (5 U.S.C.
 18 App.), shall provide to each employee of the Department
 19 training regarding whistleblower complaints, including—

20 “(1) an explanation of each method established
 21 by law in which an employee may file a whistle-
 22 blower complaint;

23 “(2) an explanation of prohibited personnel ac-
 24 tions described by section 733(c) of this title;

1 “(3) with respect to supervisors, how to treat
2 whistleblower complaints in accordance with section
3 732 of this title;

4 “(4) the right of the employee to petition Con-
5 gress regarding a whistleblower complaint in accord-
6 ance with section 7211 of title 5;

7 “(5) an explanation that the employee may not
8 be prosecuted or reprisal against for disclosing in-
9 formation to Congress, the Inspector General, or an-
10 other investigatory agency in instances where such
11 disclosure is permitted by law, including under sec-
12 tions 5701, 5705, and 7732 of this title, under sec-
13 tion 552a of title 5 (commonly referred to as the
14 Privacy Act), under chapter 93 of title 18, and pur-
15 suant to regulations promulgated under section
16 264(c) of the Health Insurance Portability and Ac-
17 countability Act of 1996 (Public Law 104–191);

18 “(6) an explanation of the language that is re-
19 quired to be included in all nondisclosure policies,
20 forms, and agreements pursuant to section
21 115(a)(1) of the Whistleblower Protection Enhance-
22 ment Act of 2012 (5 U.S.C. 2302 note); and

23 “(7) the right of contractors to be protected
24 from reprisal for the disclosure of certain informa-
25 tion under section 4705 or 4712 of title 41.

1 “(b) MANNER TRAINING IS PROVIDED.—The Sec-
 2 retary shall ensure that training provided under sub-
 3 section (a) is provided in person.

4 “(c) CERTIFICATION.—Not less frequently than once
 5 each year, the Secretary shall provide training on merit
 6 system protection in a manner that the Special Counsel
 7 certifies as being satisfactory.

8 “(d) PUBLICATION.—(1) The Secretary shall publish
 9 on the Internet website of the Department, and display
 10 prominently at each facility of the Department, the rights
 11 of an employee to file a whistleblower complaint, including
 12 the information described in paragraphs (1) through (7)
 13 of subsection (a).

14 “(2) The Secretary shall publish on the Internet
 15 website of the Department, the whistleblower complaint
 16 form described in section 732(g)(2).

17 **“§ 736. Reports to Congress**

18 “(a) ANNUAL REPORTS.—Not less frequently than
 19 once each year, the Secretary shall submit to the appro-
 20 priate committees of Congress a report that includes—

21 “(1) with respect to whistleblower complaints
 22 filed under section 732 of this title during the year
 23 covered by the report—

24 “(A) the number of such complaints filed;

1 “(B) the disposition of such complaints;
2 and

3 “(C) the ways in which the Secretary ad-
4 dressed such complaints in which a positive de-
5 termination was made by a supervisor under
6 subsection (b)(1) of such section;

7 “(2) the number of whistleblower complaints
8 filed during the year covered by the report that are
9 not included under paragraph (1), including—

10 “(A) the method in which such complaints
11 were filed;

12 “(B) the disposition of such complaints;
13 and

14 “(C) the ways in which the Secretary ad-
15 dressed such complaints; and

16 “(3) with respect to disclosures made by a con-
17 tractor under section 4705 or 4712 of title 41—

18 “(A) the number of complaints relating to
19 such disclosures that were investigated by the
20 Inspector General of the Department of Vet-
21 erans Affairs during the year covered by the re-
22 port;

23 “(B) the disposition of such complaints;
24 and

1 “(C) the ways in which the Secretary ad-
2 dressed such complaints.

3 “(b) NOTICE OF OFFICE OF SPECIAL COUNSEL DE-
4 TERMINATIONS.—Not later than 30 days after the date
5 on which the Secretary receives from the Special Counsel
6 information relating to a whistleblower complaint pursu-
7 ant to section 1213 of title 5, the Secretary shall notify
8 the appropriate committees of Congress of such informa-
9 tion, including the determination made by the Special
10 Counsel.

11 “(c) APPROPRIATE COMMITTEES OF CONGRESS.—In
12 this section, the term ‘appropriate committees of Con-
13 gress’ means—

14 “(1) the Committee on Veterans’ Affairs and
15 the Committee on Homeland Security and Govern-
16 mental Affairs of the Senate; and

17 “(2) the Committee on Veterans’ Affairs and
18 the Committee on Oversight and Government Re-
19 form of the House of Representatives.”.

20 (2) CONFORMING AND CLERICAL AMEND-
21 MENTS.—

22 (A) CONFORMING AMENDMENT.—Such
23 chapter is further amended by inserting before
24 section 701 the following:

(B) CLERICAL AMENDMENTS.—The table of sections at the beginning of such chapter is amended—

6 (i) by inserting before the item relat-
7 ing to section 701 the following new item:

“SUBCHAPTER I—GENERAL EMPLOYEE MATTERS”;

8 and

9 (ii) by adding at the end the following
10 new items:

“SUBCHAPTER II—WHISTLEBLOWER COMPLAINTS

“731. Whistleblower complaint defined.

“732. Treatment of whistleblower complaints.

“733. Adverse actions against supervisory employees who commit prohibited personnel actions relating to whistleblower complaints.

“734. Evaluation criteria of supervisors and treatment of bonuses.

“735. Training regarding whistleblower complaints.

"736. Reports to Congress."

(b) EXPANSION OF DEFINITION OF PERSONNEL ACTION TO INCLUDE PERFORMANCE EVALUATIONS OF EMPLOYEES OF THE DEPARTMENT OF VETERANS AFFAIRS.—Section 2302(a)(2)(A)(viii) of title 5, United States Code, is amended by inserting “or under title 38” after “chapter 43 of this title”.

1 **SEC. 3. REQUIREMENT THAT THE INSPECTOR GENERAL OF**
2 **THE DEPARTMENT OF VETERANS AFFAIRS**
3 **SUBMIT AND MAKE AVAILABLE TO THE PUB-**
4 **LIC CERTAIN WORK PRODUCTS.**

5 Section 312 of title 38, United States Code, is
6 amended by adding at the end the following new sub-
7 section:

8 “(c)(1) Whenever the Inspector General, in carrying
9 out the duties and responsibilities established under the
10 Inspector General Act of 1978 (5 U.S.C. App.), issues a
11 work product that makes a recommendation or otherwise
12 suggests corrective action, the Inspector General shall—

13 “(A) submit the work product to—

14 “(i) the Secretary;

15 “(ii) the Committee on Veterans’ Affairs,
16 the Committee on Homeland Security and Gov-
17 ernmental Affairs, and the Committee on Ap-
18 propriations of the Senate;

19 “(iii) the Committee on Veterans’ Affairs,
20 the Committee on Oversight and Government
21 Reform, and the Committee on Appropriations
22 of the House of Representatives;

23 “(iv) if the work product was initiated
24 upon request by an individual or entity other
25 than the Inspector General, that individual or
26 entity; and

1 “(v) any Member of Congress upon re-
2 quest; and

3 “(B) not later than 3 days after the work prod-
4 uct is submitted in final form to the Secretary, post
5 the work product on the Internet website of the In-
6 specter General.

7 “(2) Nothing in this subsection shall be construed to
8 authorize the public disclosure of information that is spe-
9 cifically prohibited from disclosure by any other provision
10 of law.”.

11 **SEC. 4. TREATMENT OF CONGRESSIONAL TESTIMONY BY**
12 **DEPARTMENT OF VETERANS AFFAIRS EM-**
13 **PLOYEES AS OFFICIAL DUTY.**

14 (a) IN GENERAL.—Subchapter I of chapter 7 of title
15 38, United States Code, as designated by section
16 2(a)(2)(A), is amended by adding at the end the following
17 new section:

18 **“§ 715. Congressional testimony by employees: treat-**
19 **ment as official duty**

20 “(a) CONGRESSIONAL TESTIMONY.—An employee of
21 the Department is performing official duty during the pe-
22 riod with respect to which the employee is testifying in
23 an official capacity in front of either chamber of Congress,
24 a committee of either chamber of Congress, or a joint or
25 select committee of Congress.

1 “(b) TRAVEL EXPENSES.—The Secretary shall pro-
2 vide travel expenses, including per diem in lieu of subsist-
3 ence, in accordance with applicable provisions under sub-
4 chapter I of chapter 57 of title 5, to any employee of the
5 Department of Veterans Affairs performing official duty
6 described under subsection (a).”.

7 (b) CLERICAL AMENDMENT.—The table of sections
8 at the beginning of such chapter, as amended by section
9 2(a)(2)(B), is further amended by inserting after the item
10 relating to section 713 the following new item:

“715. Congressional testimony by employees: treatment as official duty.”.

