

114TH CONGRESS
2D SESSION

S. 3394

To amend the Energy Reorganization Act of 1974 to modify provisions relating to protection of the employees of the Department of Energy and the Nuclear Regulatory Commission.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 26, 2016

Mr. WYDEN (for himself, Mr. MARKEY, and Mrs. MCCASKILL) introduced the following bill; which was read twice and referred to the Committee on Energy and Natural Resources

A BILL

To amend the Energy Reorganization Act of 1974 to modify provisions relating to protection of the employees of the Department of Energy and the Nuclear Regulatory Commission.

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 “Department of Energy
5 Whistleblower Accountability Act”.

1 **SEC. 2. DEPARTMENT OF ENERGY AND NUCLEAR REGU-**
2 **LATORY COMMISSION EMPLOYEE PROTEC-**
3 **TION.**

4 (a) IN GENERAL.—Section 211 of the Energy Reor-
5 ganization Act of 1974 (42 U.S.C. 5851) is amended—

6 (1) in subsection (a)—

7 (A) by striking “(a)(1) No employer” and
8 inserting the following:

9 “(a) DISCRIMINATION AGAINST EMPLOYEES.—

10 “(1) IN GENERAL.—No employer”;

11 (B) in paragraph (1)—

12 (i) in the matter preceding subpara-
13 graph (A), by striking “his”;

14 (ii) by striking subparagraph (A) and
15 inserting the following:

16 “(A) notified the employer or an employee
17 concerns program of—

18 “(i) an alleged violation of—

19 “(I) this Act; or

20 “(II) the Atomic Energy Act of
21 1954 (42 U.S.C. 2011 et seq.); or

22 “(ii) a violation of any law, rule, or
23 regulation, an instance of gross mis-
24 management, gross waste of funds, or
25 abuse of authority, or a substantial and
26 specific danger to public health or safety.”;

1 (iii) in subparagraph (B), by inserting
 2 “described in subparagraph (A) or other-
 3 wise” after “any practice”;

4 (iv) in subparagraph (C), by striking
 5 “testified before Congress or at any Fed-
 6 eral or State proceeding regarding any pro-
 7 vision” and inserting the following: “dis-
 8 closed to a Member of Congress or a rep-
 9 resentative of a committee of Congress, the
 10 Government Accountability Office, or an
 11 Inspector General, or testified before Con-
 12 gress or at a Federal or State proceeding
 13 regarding—

14 “(i) an alleged violation or incident
 15 described in subparagraph (A); or

16 “(ii) any provision”;

17 (v) in subparagraph (D)—

18 (I) by striking “a proceeding
 19 under” and inserting the following: “a
 20 proceeding—

21 “(i) under”;

22 (II) in clause (i) (as so des-
 23 ignated), by striking “1954, as
 24 amended, or a proceeding for” and in-

1 serting the following: “1954 (42
2 U.S.C. 2011 et seq.);

3 “(ii) for”;

4 (III) in clause (ii) (as so des-
5 ignated), by striking “, as amended;”
6 and inserting “; or”; and

7 (IV) by adding at the end the fol-
8 lowing:

9 “(iii) involving an alleged violation or
10 incident described in subparagraph (A);”;

11 (vi) in subparagraph (E), by striking
12 “any such proceeding or;” and inserting
13 “any proceeding described in subparagraph
14 (D); or”; and

15 (vii) in subparagraph (F), by striking
16 “, as amended”; and

17 (C) in paragraph (2)—

18 (i) by redesignating subparagraphs
19 (A) through (G) as subclauses (I) through
20 (VII), respectively, and indenting the sub-
21 clauses appropriately;

22 (ii) by striking “(2) For purposes of
23 this section, the term” and inserting the
24 following:

25 “(2) DEFINITIONS.—In this section:

1 “(A) EMPLOYER.—

2 “(i) IN GENERAL.—The term”;

3 (iii) in subparagraph (A) (as so redes-
4 ignated)—

5 (I) in subclause (IV) of clause (i)
6 (as so redesignated), by striking “,
7 but” and all that follows through
8 “12344”; and

9 (II) by adding at the end the fol-
10 lowing:

11 “(ii) EXCLUSION.—The term ‘em-
12 ployer’ does not include any contractor or
13 subcontractor covered by Executive Order
14 12344 (47 Fed. Reg. 4979 (February 3,
15 1982)).”; and

16 (iv) by adding at the end the fol-
17 lowing:

18 “(B) SECRETARY.—The term ‘Secretary’
19 means the Secretary of Labor.”;

20 (2) in subsection (b)—

21 (A) by striking “(b)(1) Any employee who
22 believes that he” and inserting the following:

23 “(b) COMPLAINTS; ACTION BY SECRETARY.—

24 “(1) COMPLAINTS.—

1 “(A) IN GENERAL.—Any employee who be-
 2 lieves that the employee”;

3 (B) in subparagraph (A) of paragraph (1)
 4 (as so redesignated)—

5 (i) in the first sentence—

6 (I) by striking “180 days” and
 7 inserting “1 year”; and

8 (II) by striking “of Labor (in
 9 this section referred to as the ‘Sec-
 10 retary’)”; and

11 (ii) in the second sentence, by striking
 12 “Upon receipt of such a complaint” and
 13 inserting the following:

14 “(B) NOTIFICATION.—On receipt of a
 15 complaint under subparagraph (A)”;

16 (C) in paragraph (2)—

17 (i) by striking “(2)(A) Upon receipt”
 18 and inserting the following:

19 “(2) ACTION BY SECRETARY.—

20 “(A) INVESTIGATIONS; ORDERS; LIMITA-
 21 TION ON SETTLEMENT.—

22 “(i) INVESTIGATIONS.—

23 “(I) IN GENERAL.—On receipt”;

24 (ii) in subparagraph (A) (as so redesi-
 25 gnated)—

1 (I) in the second sentence, by
 2 striking “Within 30 days of the” and
 3 inserting the following:

4 “(II) COMPLETION.—Not later
 5 than 30 days after the date of”;

6 (II) in the third sentence, by
 7 striking “Within ninety days of the
 8 receipt of such complaint” and insert-
 9 ing the following:

10 “(ii) ORDERS.—

11 “(I) IN GENERAL.—Not later
 12 than 90 days after the date of receipt
 13 of a complaint under paragraph (1)”;

14 (III) in the fourth sentence, by
 15 striking “An order” and inserting the
 16 following:

17 “(II) PUBLIC NOTICE AND PAR-
 18 TICIPATION.—An order”;

19 (IV) in the fifth sentence, by
 20 striking “Upon the conclusion of such
 21 hearing” and inserting the following:

22 “(III) PRELIMINARY ORDERS.—
 23 On conclusion of a hearing under sub-
 24 clause (II)”;

1 (V) in the sixth sentence, by
 2 striking “The Secretary” and insert-
 3 ing the following:

4 “(iii) LIMITATION ON SETTLEMENT.—
 5 The Secretary”; and

6 (VI) in clause (i) (as so des-
 7 ignated), by adding at the end the fol-
 8 lowing:

9 “(III) REQUEST FOR ADMINIS-
 10 TRATIVE HEARING.—If the Secretary
 11 has not issued any finding relating to
 12 an investigation under this clause by
 13 the date that is 180 days after the
 14 date on which the relevant complaint
 15 was filed under paragraph (1), and if
 16 there is no showing that the delay is
 17 due to the bad faith of the complain-
 18 ant, the complainant may request a
 19 hearing on the complaint before an
 20 administrative law judge of the De-
 21 partment of Labor.”; and

22 (iii) in subparagraph (B)—

23 (I) by striking “(B) If” and in-
 24 serting the following:

25 “(B) SECRETARIAL ORDERS.—

1 “(i) IN GENERAL.—If”;

2 (II) in the first sentence—

3 (aa) by striking “the Sec-
4 retary shall order the person who
5 committed such violation to (i)
6 take affirmative action to abate
7 the violation, and (ii) reinstate”
8 and inserting the following: “the
9 Secretary—

10 “(I) shall order the person who
11 committed the violation—

12 “(aa) to take affirmative ac-
13 tion to abate the violation; and

14 “(bb) to reinstate”; and

15 (bb) by striking “his em-
16 ployment, and the Secretary may
17 order such person” and inserting
18 the following: “employment; and

19 “(II) may order the person”;

20 (III) in the second sentence, by
21 striking “If an order” and inserting
22 the following:

23 “(ii) COSTS AND EXPENSES.—

24 “(I) IN GENERAL.—Subject to
25 subclause (II), if an order”; and

1 (IV) in clause (ii) (as so des-
2 ignated), by adding at the end the fol-
3 lowing:

4 “(II) LIMITATION.—The Sec-
5 retary shall assess all administrative
6 and litigation costs and attorneys fees
7 incurred under this section only
8 against the responsible contractor of
9 the Commission or the Department of
10 Energy, unless that contractor dem-
11 onstrates to the satisfaction of the
12 Secretary that the Commission or the
13 Department of Energy, as applicable,
14 contributed to, or caused, the violation
15 by the contractor.

16 “(III) EXEMPLARY DAMAGES;
17 DEBARMENT; SUSPENSION.—The Sec-
18 retary may assess exemplary damages,
19 and debar, suspend, delicense, or take
20 any similar action, against any em-
21 ployer or responsible employee of an
22 employer against whom an order is
23 issued under this subparagraph, as
24 the Secretary determines to be appro-
25 priate to deter employer retaliation

1 against employees who report con-
 2 cerns or carry out other activities pro-
 3 tected under this section.”; and

4 (D) in paragraph (4), by inserting “(in-
 5 cluding a demand for a jury trial)” after “de
 6 novo review”;

7 (3) in subsection (e)(2), by striking “(2) The
 8 court” and inserting the following:

9 “(2) COSTS OF LITIGATION.—Subject to the
 10 limitation described in subsection (b)(2)(B)(ii)(II), a
 11 United States district court”;

12 (4) in subsection (g)—

13 (A) by striking “causes a violation” and
 14 inserting the following: “causes—

15 “(1) a violation”; and

16 (B) by striking “1954, as amended.” and
 17 inserting the following: “1954 (42 U.S.C. 2011
 18 et seq.); or

19 “(2) an incident described in subsection
 20 (a)(1)(A)(ii).”; and

21 (5) in subsection (i)—

22 (A) by striking “(i) The provisions” and
 23 inserting the following:

24 “(i) DUTIES AND AUTHORITY OF DEPARTMENT OF
 25 ENERGY AND COMMISSION.—

1 “(1) POSTING REQUIREMENT.—The Secretary
2 of Energy and the Chairperson of the Commission,
3 as applicable, shall ensure that the provisions”; and

4 (B) by adding at the end the following:

5 “(2) CONTRACTOR AND EMPLOYEE SANC-
6 TIONS.—The Secretary of Energy or the Chair-
7 person of the Commission may sanction any officer
8 or employee of the Department of Energy or the
9 Commission, as applicable, who exercises manage-
10 ment direction over a contractor who is the subject
11 of a complaint filed under this section in any case
12 in which the Secretary of Energy or the Chairperson
13 determines that—

14 “(A) the complaint against the contractor
15 is substantiated; and

16 “(B) the officer or employee of the Depart-
17 ment of Energy or the Commission, as applica-
18 ble, directly or indirectly permitted or sanc-
19 tioned the violation or incident that was the
20 subject of the complaint.”.

21 (b) CONFORMATION OF CONTRACTS.—

22 (1) IN GENERAL.—Notwithstanding any other
23 provision of law, not later than 180 days after the
24 date of enactment of this Act, the Secretary of En-
25 ergy and the Chairperson of the Nuclear Regulatory

1 Commission shall modify all contracts of the Depart-
2 ment of Energy and the Nuclear Regulatory Com-
3 mission, respectively, as the Secretary and the
4 Chairperson determine to be necessary to conform
5 the contracts to the applicable requirements of sec-
6 tion 211 of the Energy Reorganization Act of 1974
7 (42 U.S.C. 5851) (as amended by subsection (a)).

8 (2) EFFECT OF FAILURE TO CONFORM.—A fail-
9 ure by the Secretary of Energy or the Chairperson
10 of the Nuclear Regulatory Commission to modify a
11 contract in accordance with paragraph (1) shall not
12 affect the ability of any employee of the Department
13 of Energy or the Nuclear Regulatory Commission to
14 file a complaint under an applicable provision of sec-
15 tion 211 of the Energy Reorganization Act of 1974
16 (42 U.S.C. 5851) (as amended by subsection (a)).

○