

141 Diverse Groups Support Swift

Action to Restore Strong, Comprehensive Whistleblower Rights

An Open Letter to Members of Congress

August 17, 2012

The undersigned organizations and businesses write to urge completion of the landmark, decades-long legislative effort to restore credible whistleblower rights for federal employees.

We support legislation providing genuine protection for public employees who serve the American public by risking their careers to protect taxpayers. Whistleblower protection is a foundation for any change the public can trust, whether the issue relates to economic recovery, civil rights and civil liberties, prescription drug safety, environmental protection, infrastructure spending, national health insurance, or foreign policy.

In May 2012, the Senate unanimously passed the Whistleblower Protection Enhancement Act (WPEA) for the fourth time since 2006. It is well past time to finish the job.

Unfortunately, every month that passes means the public is deprived the benefit of disclosures from federal government whistleblowers about fraud, waste or abuses that could remain ongoing. On average, more than 15 whistleblowers a month lose initial decisions from administrative hearings at the Merit Systems Protection Board (MSPB), and less than one prevails.

The Whistleblower Protection Act was last restored in 1994, and has since fallen victim to judicial activism. The MSPB found that federal whistleblowers were nine times more likely to be fired in 2010 compared to 1992. This culture of vulnerability maximizes government secrecy, which in turn breeds corruption.

Under current law, federal employees are not eligible for whistleblower protections if they:

- are not the first person who discloses given misconduct;
- make a disclosure to a co-worker;
- make a disclosure to a supervisor;
- disclose the consequences of a policy decision;
- blow the whistle while carrying out job duties.

The inadequate protections afforded by current law remains a would-be whistleblower's best reason to turn a blind eye to government waste, fraud, abuse, as well as threats to public health and safety.

We all want the same thing: that the Whistleblower Protection Enhancement Act become law this year. However, we urge you to send a final bill to the President's desk that includes the

best of both H.R. 3289 and S. 743—not a watered-down version. In the interest of serving that purpose, we write to clarify the most essential elements to any legislation that we can credibly support. These elements, listed below, are crucial to ensure that federal whistleblowers who protect taxpayer dollars and the public's trust are given adequate access to court, and provide meaningful protections for employees with access to classified information and those working in the intelligence community. Those landmark reforms have been the subject of extremely thoughtful deliberation and consensus for many months.

Absent any one of the elements listed below, we feel that we will be left with a bill that fails to adequately advance whistleblower and taxpayer protections.

* Appellate review: The Federal Circuit cannot retain its monopoly on appellate review of the Whistleblower Protection Act. This court has a long history of frustrating the congressional mandate, evidenced by a consistent track record of ruling against whistleblowers for decisions on the merits. Since 1994, when Congress last reaffirmed and strengthened those rights, the court has rejected 226 claims and sustained only 3 (as of June 2012).

* Access to district court: Government whistleblowers deserve a right to a jury trial, similar to what Congress has already granted to private-sector whistleblowers ten times since 2002. Further, whistleblowers should have the same burdens of proof afforded by the Whistleblower Protection Act of 1989. Reducing agency employers' burden of proof would be unprecedented and would roll back a cornerstone of the Act that Congress has reaffirmed in every whistleblower law for corporate employees since 1989.

* Administrative due process: The summary judgment provision granting new powers for the MSPB to dismiss cases before a hearing is widely perceived as permission to deprive whistleblowers of the opportunity for any due process administrative day in court. At a minimum, summary judgment would force unemployed whistleblowers to spend thousands of dollars for depositions before they even know if a hearing will occur. That is too high a price for the legislation. This poison pill should be removed.

* Security clearance due process reform: Revocation of security clearance is the harassment of choice against national security whistleblowers who challenge security breakdowns, fraud, waste, or abuse. Since losing security clearance can frequently lead to permanent blacklisting, the denial of due process has much further consequences than simply depriving whistleblowers of fair play. As a consequence, national security whistleblowers are unlikely to come forward unless they are willing to end their careers. This has deprived our country of the most effective source of information about national security breakdowns, as well as evidence of waste, fraud and abuse.

We appreciate your bipartisan consensus support for significant reforms, including closure of judicially created loopholes; restoration of a functional, "reasonable belief" standard, codification of the anti-gag statute, extension of whistleblower rights to the intelligence community through administration regulations, establishment of due process standards to prevent retaliation through security clearances, and expansion of contractor whistleblower rights in H.R. 3289.

It is essential that the law clarify that the WPEA provisions add to, rather than substitute for, current rights. A strong federal whistleblower statute is needed to close existing loopholes, and provide comparable rights and remedies to the dozen gold standard whistleblower rights that Congress has passed for private sector employees since 2000.

We know you share our commitment to more transparency and accountability in government. Passing a strong, bipartisan whistleblower reform law would do much to restore the public's faith in Congress, ensure efficient and accountable government, and save taxpayer dollars.

Major studies confirm that whistleblowers have been and will continue to be our best defense against waste, fraud and abuse. Inexcusably, they have been waiting over 12 years for rights that give them a fair chance to defend themselves when they defend the public by exposing government misconduct. Enough is enough.

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