

Investigation Manual

CHAPTER 10 - WHISTLEBLOWER PROTECTION

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CHAPTER 10 - WHISTLEBLOWER PROTECTION

1001 INTRODUCTION: For centuries, the common law has recognized that an employee's duty of obedience and loyalty to an employer stops at the point where the employer directs the employee take action that violates a law or constitutes a threat to public health and safety. Similarly, the proposition that a military member has no obligation to obey an unlawful order is now beyond question. Indeed, it may be more appropriate to state that federal employees and military members, whose ultimate loyalty runs to the Constitution, have an affirmative duty to refuse to carry out unlawful orders.

The concept that employees or military members have a civic responsibility to disclose corporate or government wrongdoing that comes to their attention is more troubling. The ancient common law theory of misprision (concealment) of felony has received much lipservice, but little enforcement in the United States. Indeed, many statutes that implement the concept, such as 18 USC 4, include an affirmative act of concealment as an element of the crime. Mere silence is not punishable. Moreover, the ideal of loyalty to one's co-workers, comrades, office or military unit is so fundamental that it is not uncommon to see personnel admit their own wrongdoing while steadfastly refusing to identify others who have engaged in the same misconduct.

Gradually, the law has recognized that society benefits from the disclosure of wrongdoing, which should be encouraged by government; sometimes through the provision of monetary incentives, more often by offering protection from reprisal. "Blowing the whistle" on suspected impropriety is one of the principal means by which IGs become aware of situations that warrant investigation or inquiry. It is the concept behind any hotline system. For years, US Navy Regulations and SECNAV instructions have given DoN personnel an affirmative duty to report suspected wrongdoing to DoN investigative organizations or to designated officials within the chain of command. Although logic would dictate that no one should suffer retaliation for doing their duty, Congress has found it necessary to enact laws that encourage disclosure of certain types of wrongdoing by prohibiting retaliatory personnel actions. Over time, these laws have been extended to cover most civilian, military, and government contractor personnel.

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1002 OVERVIEW: This chapter begins by establishing working definitions for the terms whistleblowing, protected communications, reprisal and retaliation. It then reviews the laws and regulations intended to protect whistleblowers, with emphasis on the kinds of communications that are protected, and the types of responses that constitute reprisal, under each statute. In particular, this chapter discusses whistleblower protection for civilian government employees, military personnel, non-appropriated fund employees, and contractor employees. It then discusses IG action in response to whistleblowing complaints and allegations of reprisal and investigative issues peculiar to reprisal investigations. Return to [Chapter Table of Contents](#).

1003 WHISTLEBLOWING DEFINED: The mere use of the word "whistleblower" ignites intense feelings. To their supporters, whistleblowers are heroes who have the courage to place the interest of the public ahead of personal reputation and gain. To their detractors, whistleblowers are misfits who cannot work within a traditional organizational structure or, worse yet, misuse the concept to shield their own incompetence or misconduct. It is a measure of the ambivalence with which our society regards whistleblowers that not one of the statutes of interest to DoN IG organizations discussed below uses the term whistleblower, and the only implementing regulation that defines the word never uses it in the operative portion of that regulation.

Any discussion of whistleblower protection should include a working definition of the term. For our purposes, we adopt a slight variation of the definition used in DoD Directive 1401.3, which implements the statutory whistleblower protection afforded to non-appropriated fund employees. Thus, a whistleblower is any person who discloses information he or she reasonably believes is evidence of a violation of any law, rule or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial or specific danger to public health or safety. Note that some statutes imply a slightly different definition, for example, "gross" rather than "simple" mismanagement. Similarly, we say a whistleblower communication is the disclosure of information by a person who reasonably believes the information is evidence of a violation of any law, rule or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial or specific danger to public health or safety.

It is critical for investigators to remember two points that follow from these definitions. First, people who make reasonable mistakes are still whistleblowers. That is, they remain whistleblowers even if their allegations are refuted by the investigator during the course of the investigation. They lose whistleblower status only if the investigator concludes that they did not hold a reasonable belief the information they provided was evidence of a violation, etc., when they made the allegation. Under the statutes, this is a subjective test based on the knowledge and status of the individual making the disclosure, not an "objective person" test. Examples of situations in which a "belief" would be "unreasonable" include cases in which people making allegations know they are untrue, or know of information reasonably available to them that would tend to indicate the allegations are not true, but make a deliberate decision not to obtain that information before presenting the allegation. Further, for any given set of facts (those concerning a procurement action, for example), the reasonable belief of one group of people (government contracts attorneys) may differ from that of another (contract specialists).

The second critical point to keep in mind is that the motive for "blowing the whistle" does not play a role in determining whether or not someone is a whistleblower. Thus, an employee who remains silent about a superior's abuse of time and attendance rules until the superior does something to make the employee hostile to the superior, and only then reports the misconduct to the IG, is still a whistleblower. In short, "bad actors" may be "good whistleblowers"

nonetheless. The legislative history of the False Claims Act of 1863, generally considered the first federal law intended to encourage whistleblowing by offering a monetary incentive to sue contractors defrauding the government, is illustrative:

The effect of the [qui tam provision of the act] is simply to hold out to a confederate a strong temptation to betray his coconspirator, and bring him to justice. The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator ... based ... upon the old-fashioned idea of holding out a temptation, and "setting a rogue to catch a rogue ..."

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1004 PROTECTED COMMUNICATIONS: Not every whistleblower communication is protected under the whistleblower protection statutes. For each statute, it is necessary to determine the type of information that may be disclosed, and to whom it may be given, in order for the whistleblower to be entitled to statutory protection. A "protected communication" occurs when a person covered by the statute discloses information of the type permitted by the statute to a person the statute authorizes to receive it. For the most part, the statutes protect only whistleblower communications. The statute applicable to military members, 10 USC 1034, is an exception.

Under 10 USC 1034, both ordinary and whistleblower communications to Congress and the IG are protected. However, there is no express statutory provision or judicial interpretation that affords protection for military members who make "lawful" (discussed below) whistleblower, or even ordinary, communications to a member of the media. Since DoN Public Affairs Office (PAO) instructions at all levels routinely require coordination of press communications, a military member who provides information concerning the DoN to the press without following the procedures in the applicable PAO instruction may be subject to discipline for failing to comply with the instruction, especially if the member were to represent the information provided constitutes the official DoN position on a matter rather than a personal opinion.

Conversely, the Civil Service Reform Act of 1978 (CSRA), the whistleblower statute applicable to civilian federal employees, does not expressly state to whom a lawful whistleblower communication may be made. Based on the legislative history, the statute is usually construed to afford protection from reprisal for lawful whistleblower communications made to members of the press.

All of the whistleblower protection statutes applicable to DoN personnel draw a distinction between "lawful" and "unlawful" communications. Unlawful communications, hereafter referred to as "confidential communications," include the transmission of classified information and information that a law specifically prohibits from being disclosed. See [paragraph 1016](#) for a discussion of statutes that prohibit the release of certain types of information. The whistleblower statutes, in their current form, protect confidential whistleblower

communications (but not confidential ordinary communications) that are made to a restricted category of persons (generally, Congress, the Office of the Special Counsel (OSC), and an agency audit or investigative organization). Thus, although a civilian employee who makes a confidential whistleblower communication to the press is a whistleblower, the disclosure is not a "protected communication" because the CSRA does not designate members of the press to receive confidential whistleblower communications, i.e. the statutes contemplate that "unlawful" whistleblower communications will be made in a "confidential" manner to a limited group of government officials. Consequently, it would be proper to take disciplinary action against a civilian employee who gives classified information to a member of the press while making a whistleblower communication. The same information provided to a member of Congress or an IG, however, would be a protected communication under the CSRA, and reprisal for its disclosure would be improper. Sometimes it is difficult to determine whether or not the disclosure of specific information is prohibited by law or executive order, especially when the information is not marked properly. Unmarked proprietary or procurement sensitive information is an example of such information. Likewise, occasionally it may be unclear whether a particular person is one to whom an unlawful whistleblower communication properly may be made. For example, until October 1994, the whistleblower protection statute applicable to military members expressly provided protection for lawful whistleblower communications made to an IG. However, because of the nature of the statutory language, there was some question as to whether the same communication made to NCIS or NAVAUDSVC personnel was protected. Consequently, Congress amended the statute to make it clear that those communications also were protected under the statute. During an IG investigation, if there is any question in these areas, the investigator should ask whether a reasonable person with the same status of the whistleblower would have believed the communication was lawful, or that the person to whom the disclosure was made was a proper person to receive a confidential whistleblower communication. When there is reasonable doubt, the investigator should find in favor of the whistleblower.

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1005 REPRISAL AND RETALIATION: Curiously, the whistleblower protection statutes DoN IGs work with do not prohibit all forms of adverse or disparate treatment that may occur to one who makes a protected communication. Generally, they prohibit specific personnel actions, such as discharges, demotions, performance appraisals, or reassignments. Although most also prohibit "any other significant change" in working conditions, duties or responsibilities that is "inconsistent with" the whistleblower's rank, grade level, or salary, there are many ways to "get even" that can not be called a "prohibited personnel practice" (the phrase used in the CSRA). For IG purposes, we call action taken for the purpose of getting even that is prohibited by the whistleblower protection statutes "reprisal," and all other action taken for that

purpose "retaliation." NAVINSGEN takes the position that retaliation for protected communications is improper, and warrants remedial action, even if the retaliation does not constitute reprisal under an applicable statute. Consequently, IG investigators who find retaliation that does not constitute statutory reprisal should discuss the distinction in the investigative report, but go on to recommend remedial action to undo the adverse effect of the retaliation. Return to [Chapter Table of Contents](#).

1006 WHISTLEBLOWER STATUTES AND IMMUNITY: Whistleblower statutes are intended to protect the disclosure of improper conduct, not the underlying conduct itself. Consequently, none of the whistleblower statutes IGs are concerned with provide whistleblowers immunity from discipline or prosecution for their participation in the misconduct they disclose. Conversely, the statutes do not prohibit a grant of immunity from prosecution or discipline, and the False Claims Act even permits a participant to recover money for reporting the fraud, albeit at a reduced rate. IG investigators may be confronted by people who offer to make whistleblower communications in return for both immunity and protection from reprisal. Investigators must be careful not to promise whistleblowers immunity, and to ensure that any decision to grant immunity from prosecution or disciplinary action based on the underlying misconduct is made by proper authority. IG investigators also must remember that they can never guarantee whistleblowers freedom from retaliation or reprisal. They can promise a thorough investigation and an IG recommendation for remedial action if an allegation of reprisal or retaliation is substantiated. Return to [Chapter Table of Contents](#).

1007 STATUTORY AND INHERENT AUTHORITY: Before examining the specific whistleblower statutes, it is important to distinguish between an IG's statutory authority to investigate allegations of reprisal, and an IG's inherent, or general, authority to undertake such investigations. The US Navy Regulations and various SECNAV instructions state that DoN personnel have a duty to report suspected wrongdoing to various officials, including DoN IG organizations. Consequently, DoN IG organizations have a duty, independent of the whistleblower statutes, to investigate both the underlying allegation and any subsequent complaint of reprisal. In general, the whistleblower statutes indicate that the primary responsibility for investigation of allegations of reprisal rests with an organization outside DoN, such as the DoDIG or the OSC. However, DoN personnel who elect not to proceed under the applicable whistleblower statute, but have a DoN IG organization conduct the investigation, should not be penalized for their decision to keep the matter "in-house," and should be afforded the same rights as provided by the statute to the maximum extent possible. Nonetheless, the investigator must understand, and be prepared to explain, that some of the whistleblower statutes provide for remedies that are not within the power of the DoN to grant. Return to [Chapter Table of Contents](#).

1008 CIVILIAN GOVERNMENT EMPLOYEES: Protection for the whistleblowing activities of civilian employees was established in the CSRA and is

codified in 5 USC 1212-1215, and 2302. Congress made major revisions to the CSRA whistleblower protection provisions in 1989. Reprisal for protected whistleblowing is called a prohibited personnel practice, and civilians who commit a prohibited personnel practice may be disciplined.

Allegations that whistleblowing has resulted to the commission of a prohibited personnel action may be presented to the OSC, which can initiate legal proceedings at the MSPB in order to obtain remedial action for the injured whistleblower and to discipline civilians who committed prohibited personnel actions. OSC regulations describing how to file complaints of reprisal appear at 5 CFR 1800. A copy of the complaint form used by the OSC is in Appendix E. Under the CSRA, a whistleblower communication is one that discloses information a person reasonably believes constitutes evidence of:

1. a violation of law or regulation;
2. gross mismanagement;
3. gross waste of funds;
4. abuse of authority; or
5. a specific danger to public health or safety.

Under the CSRA, a lawful whistleblower communication consists of disclosures "not specifically prohibited by law" and "information [that] is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs," i.e., classified information. Disclosures of this type may be made to virtually anyone - Congress, the public, the press, an IG, etc. - in order to invoke the protection of the law. Since the 1989 amendments to the CSRA, most commentators agree that disclosures made within the chain of command, i.e., to a supervisor, or as part of the performance of one's regular duties, are protected under the statute.

Under the CSRA, confidential whistleblower communications may be made to the OSC, "the Inspector General of an agency," or to "another employee designated by the head of the agency to receive such disclosures of information." Within the DoN, the last category includes any person or organization authorized to receive or investigate, hotline complaints. Usually, the OSC will refer the whistleblower allegation to the agency concerned for investigation.

The CSRA also authorizes the OSC to investigate allegations of reprisal for making, or preparing to make, protected communications. The CSRA also authorizes the OSC to seek a stay of a prohibited personnel practice in appropriate cases.

The CSRA at 5 USC 2302, defines a personnel action as:

- an appointment;
- a promotion;
- a disciplinary or corrective action;
- a detail, transfer, or reassignment;
- a reinstatement, restoration, or reemployment;
- a performance evaluation;

a decision regarding 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 above;

a decision to order psychiatric testing or examination (see Oct 94 amendments); and - any other significant change in duties, responsibilities or working conditions (see Oct 94 amendments and note that OSC personnel suggest this language gives OSC authority in sexual harassment cases).

Under the CSRA, it is a prohibited personnel practice to "take or fail to take" any personnel action described in the previous paragraph in reprisal for making a protected communication. Directing, recommending or approving a prohibited personnel practice is also prohibited.

If the OSC substantiates the allegation of reprisal, it can recommend that the offending agency personnel be removed, reduced, suspended, reprimanded or fined. The offenders have the right to a hearing before the MSPB, and may appeal an adverse MSPB decision to United States Court of Appeals for the Federal Circuit.

Most executive branch (including DOD) personnel are protected. But there are exceptions: policymaking or confidential positions, such as non-career SES and Schedule C employees. Additionally, employees of certain intelligence agencies, including the FBI and CIA, are not protected by this law. Personnel hired other than under Title 5 of the US Code, such as employees of non-appropriated fund instrumentalities (exchanges, etc.) are also not covered under the CSRA provision; they are protected under another statute (see [paragraph 1005](#)).

In 1989, Congress made major revisions to the CSRA that affect the standard and burden of proof. See [paragraph 1015](#) below.

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1009 MILITARY PERSONNEL: The Military Whistleblower Protection Act, 10 USC 1034, as amended (most recently) by the FY95 Defense Authorization Act, prohibits interference with a military member's right to make protected communications to members of Congress, Inspectors General, members of DoD audit, inspection, investigation or law enforcement organizations, and other persons or organizations (including the chain of command) designated by regulation or administrative procedures.

Before 1988, 10 USC 1034 was entitled "Communicating with a Member of Congress" and simply stated "[n]o person may restrict any member of an armed force in communicating with a Member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States."

In 1988, Congress changed the title of 10 USC 1034 to "Communicating with a Member of Congress or Inspector General; prohibition of retaliatory personnel actions." In addition to classifying communications as "lawful" (protected) and "unlawful" (not protected), it also divided lawful communications into two subtypes - ordinary communications and whistleblower communications. The

latter have the same definition as in the CSRA except that the adjective "gross" does not appear before "mismanagement."

Under the 1988 statute, any statutory Inspector General (such as the DoDIG) and the service Inspectors General could receive and investigate lawful whistleblower communications from military members. However, only the DoDIG was authorized to investigate a military member's complaint of reprisal (or the threat of reprisal) for making (or preparing to make) a lawful whistleblower communication - and then only if the member "submits" the allegation to the DoDIG.

Experience with the 1988 statute suggested that the class of people or organizations a protected whistleblower communication could be made to needed expansion. For example, disclosures made during the course of interviews conducted by NCIS or NAVAUDSVC personnel were not protected under the literal language of the statute. In late 1991, the coverage was expanded by Section 843 of Public Law 102-190 to include communications to any DOD employee or member of the Armed Forces who is assigned to or belongs to an organization which has as its primary responsibility audit, inspection, investigation, or enforcement of any law or regulation. This expansion also required SECDEF to issue regulations - violation of which would be punishable under Article 92, UCMJ - prohibiting any military member from taking an unfavorable personnel action (or failing to take a favorable personnel action) in reprisal for whistleblowing. See DoDDIR 7050.6 and SECNAVINST 5370.7A

Still, as amended, the Military Whistleblower Protection statute provided no mechanism by which a military member could make a confidential whistleblower communication without being subject to discipline for the "unlawful" aspect of the disclosure. This gap in protection was closed by the 1994 amendments to 10 USC 1034, which appear in Section 531 of the FY95 Defense Authorization Act.

In addition to extending protection to confidential whistleblower communications, the 1994 amendments again expanded the group of people and organizations a protected whistleblower communication may be made to by adding "any other person or organization (including any person or organization in the chain of command) designated pursuant to regulations or other established administrative procedures for such communications."

The 1994 amendments also included a provision expressly stating that disclosures concerning the violation of laws or regulations prohibiting sexual harassment or unlawful discrimination were covered by the statute. This language should be construed as a Congressional exclamation point, not as an indication that such disclosures were not protected whistleblower communications prior to October 1994.

Unlike the statute applicable to civilians, 10 USC 1034 has never defined the types of "personnel actions" to which it applies. However, the House Report accompanying the 1988 amendments indicates a broad definition is applicable, stating that it includes:

... any unfavorable personnel action, or the withholding of a favorable personnel action, as a reprisal ... the prohibition against an unfavorable

personnel action is intended to include any action that has the effect or intended effect of harassment or discrimination against a member of the military ...

The regulatory definition appearing in DoD Directive 7050.6 is similar to the statutory definition used for civilians and includes:

any action taken on a member of the Armed Forces that affects or has the potential to affect that military member's current position or career. Such actions include:

- a promotion;
- a disciplinary or other corrective action;
- a transfer or reassignment;
- a performance evaluation;
- a decision on pay, benefits, awards or training; and
- any other significant change in duties or responsibilities inconsistent with the military member's rank

As now amended, 10 USC 1034 itself requires the DoDIG to investigate all allegations of reprisal (or threatened reprisal) for making (or preparing to make) protected communications. It requires the boards for correction of military records to consider such investigations, and hold hearings when appropriate, in connection with any application to correct the record of a member who alleges an improper personnel action. Disciplinary action can be recommended against a person who is determined to have committed the improper personnel action. The statute still requires the issuance of implementing regulations, and a new DoD regulation should be issued in the near future.

The amended statute permits the DoDIG to delegate the conduct of an investigation under the statute to a Service Inspector General, but in that case requires the DoDIG to ensure "that the inspector general conducting the investigation is outside the immediate chain of command of both the member submitting the allegation and the individual or individuals alleged to have taken the retaliatory action." The draft of the new DoD regulation would permit DoD component regulations to establish the meaning of "the immediate chain of command." See [paragraph 1013.2e](#) for further discussion.

The draft of the new DoD regulation includes a provision requiring that a Service IG who receives allegations of reprisal from a military member advise the member in writing that only written complaints of reprisal made to the DoDIG, or forwarded to the DoDIG, will receive consideration under the directive. The draft would require the Service IG to forward the complaint to the DoDIG upon the service member's written request.

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1010 NON-APPROPRIATED FUND EMPLOYEES: 10 USC 1587 provides whistleblower protection to civilian employees, paid from non-appropriated funds, of the Army and Air Force Exchange Service, the Navy Exchange system, and Marine Corps exchanges, or "any other instrumentality of the United States under the jurisdiction of the armed forces which is conducted for the comfort,

pleasure, contentment, or physical or mental improvement of members of the armed forces." Thus, Morale, Welfare and Recreation (MWR) employees are protected under this statute.

The statute prohibits civilian employees and military members who have authority to take, recommend, or approve personnel actions, or direct others to take personnel actions, from taking or failing to take a personnel action in reprisal for the employee's disclosure of information that he or she reasonably believes is evidence of a violation of law or regulation, or of mismanagement, gross waste of funds, abuse of authority, or danger to public health or safety. Personnel actions under the statute include:

- an appointment;
- a promotion;
- a disciplinary or corrective action;
- a transfer, detail, or reassignment;
- 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 or other action listed above; and
- any other significant change in duties or responsibilities that is inconsistent with the employee's salary or grade level.

Like the CSRA, the statute permits unlimited disclosure of "lawful" whistleblower information, and provides that a "confidential" whistleblower communication may be made to "any civilian employee or member of the armed forces designated by law or by the Secretary of Defense to receive such disclosures." However, the statute assigns the Secretary of Defense the responsibility for preventing acts of reprisal and for correction of any such acts. The statute expressly prohibits the Secretary from delegating the responsibility to correct acts of reprisal to the service secretaries.

The statute is implemented by DoD Directive 1401.3, "Employment Protection for Certain Non-appropriated Fund Instrumentality Employees/Applicants," dated 19 July 1985 (with changes 1 and 2). The directive assigns the DoDIG responsibility for the investigation of allegations of reprisal. It assigns the Director of Administration and Management, OSD (DA&M) responsibility for adjudicating complaints of reprisal and determining, based on the DoDIG report, whether or not reprisal action was taken as a result of a protected disclosure. It also authorizes the DA&M to order a stay of a personnel action pending such determinations. Finally, the directive requires the DoD Components to implement the corrective action directed by the DA&M.

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1011 CONTRACTOR EMPLOYEES: Two statutes, 10 USC 2409, and 10 USC 2409a, have provided a measure of protection to contractor personnel who report suspected violations of laws or regulations relating to defense contracts. DoN IG organizations (and many other DoN offices, such as contracts offices) are authorized to receive such disclosures, and contractor personnel who make disclosures to DoN IG (and other) organizations are entitled to the protection of

the statutes. However, DoN IG organizations are not authorized to receive or investigate contractor employee allegations of reprisal for making disclosures protected by the statutes.

Enacted in 1986, 10 USC 2409 prohibited defense contractors from discharging, demoting, or discriminating against their employees for making disclosures to Congress or authorized DoD or Department of Justice officials that related to "a substantial violation of law related to a defense contract (including the competition for or negotiation of a defense contract)." The statute required people who believed they were victims of contractor reprisal to submit their complaints to the DoDIG, which would investigate and submit a report of the findings to the complainant, the contractor, and SECDEF. The statute did not provide any specific remedy for substantiated allegations of reprisal. The statute imposed no time limit for making the complaint of reprisal, nor did it establish a minimum threshold for the value of the defense contracts to which it applied, or limit its application based on the type of product to be purchased under the contract.

In 1990, Congress enacted 10 USC 2409a. This statute required SECDEF to issue regulations applicable to each defense contract "entered into by a contractor and the [DoD] for an amount greater than \$500,000" except where the contract price was based "solely on established catalog or market prices of commercial items sold in substantial quantities to the general public." The statute went on to outline the contents of the regulations, which were placed in the DoD supplement to the Federal Acquisition Regulation (FAR) at DFARS Subpart 203.71, entitled "Contractor Employee Communications with Government Officials."

1. The regulations prohibited a defense contractor from discharging or otherwise discriminating "against any employee with respect to such employee's compensation or terms and conditions of employment because the employee (or any person acting pursuant to a request of the employee) discloses to an appropriate Government official information concerning a defense contract which the employee reasonably believes evidences a violation of any Federal law or regulation relating to defense procurement or the subject matter of the contract."
2. The regulations provided that contractor employee complaints of discharge or discrimination be certified, signed, and submitted to the Director, Defense Logistics Agency (DLA), not more than 180 days after the date on which the violation was alleged to have occurred, or the date on which the violation was discovered, whichever was later. DLA would refer the complaint to the DoDIG for investigation. Upon receipt of the completed report of investigation, DLA was to provide a copy of the report to the complainant, any person acting on the complainant's behalf, and the defense contractor alleged to have committed the violation. DLA was then required to issue an order providing relief; issue an order denying the complaint; or terminate the proceedings on the basis of a settlement agreement.

3. Under the regulations, DLA could order the contractor to abate the violation. DLA could also order the contractor to reinstate the complainant, with back pay and other appropriate remedies (including reimbursement for costs of pursuing the complaint such as attorney fees). The orders of DLA could be appealed by any person aggrieved by the orders (both the contractor and the complainant) to the Federal Circuit Court of Appeals for the circuit in which the violation alleged in the order occurred. DLA was also authorized to seek enforcement of its orders in the federal district court for the district in which the alleged violation occurred.

In 1991, Congress amended 10 USC 2409a to state that it would expire on 5 November 1994, and amended 10 USC 2409 to state that it would not be in effect during the period that 10 USC 2409(a) was in effect. In 1992, Congress again amended 10 USC 2409 to make it available to contractor employees who did not seek timely redress under 10 USC 2409a.

In September 1994, Congress enacted the Federal Acquisition Streamlining Act of 1994, PL 103-355. Sections 6005 and 6006 of the act repealed 10 USC 2409a and substantially rewrote 10 USC 2409, extending its coverage to federal civilian agency contractors. The new law represents a consolidation of the two pre-existing laws applicable to defense contracts in that it extends coverage to any contract, without regard to dollar value or type of item procured, as was the case with 10 USC 2409, and also provides contractor employee whistleblowers the procedural and enforcement protection that had been included in 10 USC 2409a. With the passage of the new law and the repeal of 10 USC 2409a, the DFARS regulations ceased to have effect.

On 21 July 1995, the FAR Council published in the Federal Register (60 FR 37774) a new FAR Subpart 3.9, entitled "Whistleblower Protection for Contractor Employees." The most significant change in the new regulation is that DLA will no longer have the responsibility for deciding, on behalf of DoD, what action should be taken upon receipt of the DoDIG report of investigation. Instead, pursuant to the terms of the statute (and when read in conjunction with the DFARS 202.101 definition of "head of the agency"), the regulation vests this authority in the heads of each of the military departments and, for the DoD agencies, the Secretary of Defense.

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1012 IG ACTION ON RECEIPT OF WHISTLEBLOWING

ALLEGATIONS: DoN IGs are authorized to receive and investigate complaints that include whistleblowing allegations. In some cases, especially where the complainant expresses a concern about the independence of the DoN IG organization, it is appropriate to suggest the complainant may wish to make the complaint to another organization, such as DoN IG organization at a higher echelon, the DoDIG, or the OSC. Of course, in those cases where the DoN IG organization itself recognizes that it would not satisfy the IG requirement for independence, it must refer the complaint to higher authority for investigation.

Those cases aside, it is incumbent upon the DoN IG organization receiving the investigation to conduct an appropriate inquiry into the whistleblowing allegations. This is the primary purpose for the establishment of the DoD and DoN hotline systems, at whatever level they may be implemented. Return to [Chapter Table of Contents](#).

1013 IG ACTION ON RECEIPT OF ALLEGATIONS OF REPRISAL: As indicated in the foregoing paragraphs, DoN IG organizations do not have the primary jurisdiction in the investigation of allegations of reprisal for making protected whistleblower disclosures and, in one case, have no authority to undertake an investigation at all. Therefore, upon receipt of a complaint of reprisal, determine the category in which the alleged victim of reprisal falls and take appropriate action as follows:

Civilian Appropriated Fund Employees - Advise complainants that DoN IG organizations have general authority to investigate the complaint and recommend appropriate corrective and remedial action within the DoN. In addition:

1. Advise that the OSC has special authority under 5 USC 1211-1215 to investigate such allegations and ensure that the DoN takes appropriate action. For example, the OSC may seek a stay of a proposed personnel action. Also, should the OSC and the DoN be unable to agree on the corrective action, if any, that should be taken, the OSC has the authority to bring the matter before the Merit Systems Protection Board for resolution. Finally, should the OSC and the DoN disagree on the disciplinary action, if any, that should be taken against a civilian employee the OSC believes has taken (or threatened to take) a retaliatory personnel action, the OSC may initiate disciplinary proceedings against the employee before the Merit Systems Protection Board.
2. Advise that the OSC does not object to the conduct of a reprisal investigation by a DoN IG organization and will review information obtained in that investigation before taking any action in response to a complaint filed with it. Thus, the employee may elect to allow the DoN IG organization to initiate and proceed with an investigation without prejudice to the employee's right to subsequently ask the OSC to intervene. Note, however, that once the OSC does intervene, the DoN investigative effort ordinarily would be terminated in order to avoid duplication of effort.
3. Provide a copy of the form in Appendix E that OSC provides to complainants in order to comply with its requirement that complaints of reprisal be made in writing (note that this form is an excellent checklist to use when conducting an interview of a complainant).
4. Provide OSC phone numbers that may be used to obtain information regarding complaints of reprisal: (800) 872-9855 and (202) 653-7188.

Military Members - Advise complainants that DoN IG organizations have

general authority to investigate the complaint and recommend appropriate corrective and remedial action within the DoN. Also advise, however, that DoN IG organizations do not have the authority to undertake an investigation under 10 USC 1034, the Military Whistleblower Protection Act, except at the direction of the DoDIG. In addition:

1. Advise that to receive all of the protection afforded by 10 USC 1034, the military member must file the complaint of reprisal with the DoDIG.
2. Explain that under the statute the reprisal investigation must be conducted by or under the direction of the DoDIG if the complaint of reprisal is submitted to the DoDIG within 60 days after the military member becomes aware of the personnel action (but DoDIG may waive the 60 day deadline); that the member is entitled to receive a copy of the investigative report automatically (without the need to make a FOIA request), which may be submitted to the Board for Correction of Naval Records (BCNR) in support of the member's request for correction; that the member is entitled to OSD review of the BCNR and Secretary of the Navy action on the petition for correction; and that the DoDIG is required to interview the military member after the final action on the complaint, in order obtain the member's views on the disposition of the matter.
3. Ask if the member wants to submit the complaint to the DoDIG, and if the response is affirmative, offer to assist the member in doing so. When possible, and especially if the 60 day filing window is about to expire, place a call to the DoDIG Hotline office in the presence of the complainant. Where this is not practical, assist the member in writing out the complaint and offer to mail or fax it to the DoDIG (in preparing the complaint, refer to the DoD Guide on Military Reprisal Investigations discussed in paragraph 1014 below and try to obtain as much pertinent information as possible).
4. Inform the member that the DoDIG will accept phone-in complaints of reprisal via its regular hotline numbers, (800) 424-9098 or (703) 604-8546, and that the address for filing written complaints is Department of Defense Inspector General; Attn: Hotline Division; The Pentagon; Washington, D.C. 20301-1900.
5. Pending the issuance of new DoD and SECNAV regulations to implement the 1994 amendments to 10 USC 1034, NAVINSGEN will review investigative taskings to ensure that the person in command of the office investigating an allegation of reprisal against a military member and the subject of the investigation do not report to the same person.

Non-Appropriated Fund Employees - Advise complainants that DoN IG organizations have general authority to investigate the complaint and recommend appropriate corrective and remedial action within the DoN, but that DoN IG organizations do not have the authority to undertake an investigation under 10 USC 1587, the Whistleblower Protection Act applicable

to non-appropriated fund employees. In addition:

1. Advise that regulations implementing the statute provide for investigation by the DoDIG, and review of the results by the DA&M. The regulations also authorize the DA&M to order a stay of a personnel action pending review of the report and require the DoN to implement the corrective action directed by the DA&M.
2. Offer to assist in filing the complaint with DoDIG as outlined in paragraph 1013(2)(c) above and provide the phone numbers and address for the DoDIG Hotline Division set forth in paragraph 1013(2)(d) above.

Defense Contractor Employees - Advise complainants that DoN IG organizations have no authority to investigate the complaint without the consent of the contractor in question, and consequently DoN IG organizations do not undertake such investigations. Advise that pursuant to 10 USC 2409 and implementing regulations, such investigations are undertaken by the DoDIG. Provide the DoDIG hotline phone numbers and address that are set forth in paragraph 1013(2)(d). If asked, advise that the 180 day time limit for filing complaints appearing in the DFARS was deleted from the new FAR Subpart 3.9, but that timeliness is still important to the success of the investigation.

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1014 DOD INVESTIGATIVE GUIDANCE: The DoDIG has published a manual or guide that details the procedure to follow when investigating allegations of reprisal against military personnel. Its use is mandatory for investigations of allegations received by the DoDIG and referred to a DoN IG organization for investigation. The manual is IGDG 7050.6DI, "Guide to Military Reprisal Investigations," dated September 30, 1992. The DoDIG intends to revise and reissue this guide after DoD Directive 7050.6 is revised in order to reflect the recent amendments to 10 USC 1034.

NAVINGEN recommends use of the guide in all other investigations of reprisal against military personnel. The guide contains information that should prove useful for all other reprisal investigations. The DoDIG routinely refers all whistleblower reprisal cases to its office of counsel for legal review. That office has requested that the services provide the name and phone number of the legal officer who reviewed the case before it was forwarded to the DoDIG. DoN IG investigators should consult with local counsel as appropriate, and, when feasible, obtain local legal review before forwarding the case. The name and phone number of the attorney who reviewed the case should accompany the report. NAVINGEN legal staff personnel are available for consultation at (202) 433-2222, FAX (202) 433-3277.

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1015 EVIDENTIARY ISSUES: In American jurisprudence, the plaintiff has the burden of proof. Plaintiffs who do not carry their burden lose their case. Courts and administrative tribunals such as the MSPB charged with hearing whistleblower reprisal cases have adopted the evidentiary standards used in Title VII discrimination cases, since whistleblower reprisal is regarded as a form of discrimination. In these cases, the plaintiff's burden of proof is complicated by the fact that the retaliatory personnel action, standing alone, is seldom illegal, and the plaintiff must prove the defendant had an improper state of mind or reason for taking the action.

To reduce the plaintiff's difficulty, the typical Title VII case uses the concepts of the prima facie case and the shifting burden of "going forward" with the production of evidence. Thus, in a typical employment discrimination case, the minority race plaintiff initially need prove only that he or she was qualified for the job or promotion, that the employer had reason to know the race of the applicants, and that members of a favored race who were less qualified were selected or promoted while the plaintiff was not. At that point, the plaintiff has made out a prima facie case for discrimination. Consequently, if the defendant puts on no evidence in rebuttal, the tribunal will adopt the presumption that the defendant's motive for the selections was based on race, and will find in favor of the plaintiff.

Once the plaintiff has made out a prima facie case of discrimination, then the burden of going forward with the production of evidence (but not the overall burden of proof) shifts to the defense, which must articulate (not prove) a legitimate non-discriminatory reason for not having selected the plaintiff. At that point the burden of going forward shifts back to the plaintiff, who must prove that the reason articulated by the defendant was just a pretext to cover the real, discriminatory reason for non-selection.

Between 1979 and 1989, MSPB and courts hearing whistleblower cases adopted these standards for trial of whistleblower reprisal cases. In addition, following the reasoning of first amendment free speech cases, they adopted the "but for" test to decide whether an action was reprisal when the employer had several legitimate reasons for taking action in addition to a retaliatory reason. Under that standard, the plaintiff had to prove that the protected whistleblowing was a significant, or major factor in the decision. In a case of failure to promote, for example, the plaintiff had to show he or she would have been promoted "but for" the protected whistleblowing. It was not enough to show that the protected communication was considered by management and contributed to its decision. In 1989, Congress decided that MSPB and court decisions placed too great a burden on the civilian whistleblower. Consequently, Congress made several significant changes to the CSRA in order to reverse existing whistleblower caselaw. In particular, Congress amended the CSRA to require management to prove by clear and convincing evidence that it had a legitimate, non-retaliatory reason for taking the personnel action in question. Thus, Congress changed the traditional rule that the plaintiff has the burden of proof for every element of the case, and substantially raised the evidentiary standard that the defense had to meet. Also, Congress did away with the "but for" test and substituted a

"contributing factor test." Thus, a personnel action would be reprisal if the whistleblowing activity was a reason for it, even if it was not a significant or major reason for the action.

Congress passed the Military Whistleblower Protection Act in 1989, the same year it amended the CSRA. Congress did not explicitly address the foregoing evidentiary issues in the military act. The DoDIG, however, takes the position that management has the burden to prove it had legitimate, non-retaliatory reasons for personnel actions involving military members, and that if protected conduct was a contributing factor, the personnel action is reprisal under the act. DoDIG personnel advise they have not come across a case in which it appears the degree of proof management must present - preponderance or clear and convincing - would have made a difference.

Because it is the motive of management that must be examined in whistleblower cases, it is not sufficient for the investigator to close the case upon determining that the personnel action in question was one that management had the authority to take, or that it was within the range of discretion permitted management. As noted earlier, most retaliatory personnel actions are not per se illegal, and would be within management prerogative but for the improper motive.

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1016 STATUTES THAT PROHIBIT DISCLOSURES: As noted in the preceding paragraphs, Congress has drawn a distinction between lawful and unlawful communications by making a general reference to laws and executive orders that prohibit disclosure of certain types of information. The whistleblower statutes do not provide a list of such laws and statutes. However, the Freedom of Information Act includes two exemptions based on the application of laws prohibiting disclosures of information, and one based on the non-disclosure of classified information. Enclosure (2) to the SECNAV FOIA Instruction 5720.42E, identifies the following as examples of statutes that specifically prohibit the disclosure of certain types of information:

National Security Agency Information, PL 86-36, Section 6

Patent Secrecy, 35 USC 181-188 (any records containing information relating to inventions that are the subject of patent applications on which Patent Secrecy Orders have been issued)

Restricted Data and Formerly Restricted Data, 42 USC 2162

Communication Intelligence, 18 USC 798

Authority to Withhold From Public Disclosure Certain Technical Data, 10 USC 130

Confidentiality of Medical Quality Records: Qualified Immunity Participants, 10 USC 1102

Physical Protection of Special Nuclear Material: Limitation on Dissemination of Unclassified Information, 10 USC 128 (prohibits unauthorized dissemination of unclassified information pertaining to security measures, including security plans, procedures, and equipment for the physical protection of special nuclear

material)

Protection of Intelligence Sources and Methods, 50 USC 403(d)(3)

Alcohol Abuse Prevention/Rehabilitation, 42 USC 4582 (protects records of identity, diagnosis, prognosis, or treatment of any patient maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly assisted by any department or agency of the US, unless expressly authorized)

Procurement Integrity Act Protected Information, 41 USC 423 (protects procurement sensitive information, and related proprietary and source selection information during the course of the procurement process)

The Trade Secrets Act, 18 USC 1905 (protects documents containing trade secrets or commercial or financial information received from a person or organization outside the government with the understanding that the information will be maintained on a privileged or confidential basis)

The Copyright Act of 1976, 17 USC 106 (which includes protection for computer software)

See Appendix E for an OSD memo that contains a more comprehensive list. Return to [Chapter Table of Contents](#).

1017 DISCLOSURES UNDER THE CIVIL FALSE CLAIMS ACT: This chapter started by pointing out that statutes encouraging whistleblowers can be traced to the qui tam provisions of the False Claims Act of 1863. In 1986, Congress revitalized this law by making it easier to bring, and win, qui tam actions. Since then, the government and qui tam whistleblowers have recovered millions of dollars in settlements and judgements. DoN IG organizations usually do not get involved in investigations leading to qui tam actions, and it is not clear that federal employees may bring qui tam actions based on information they learned during the course of performing their official duties. However, it is worth noting that the 1986 revisions to the act contain, at 31 USC 3730, the following comprehensive provision for the protection of qui tam whistleblowers:

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

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1018 SUGGESTED READING MATERIALS: See the appendix for a list of whistleblower reading materials.

