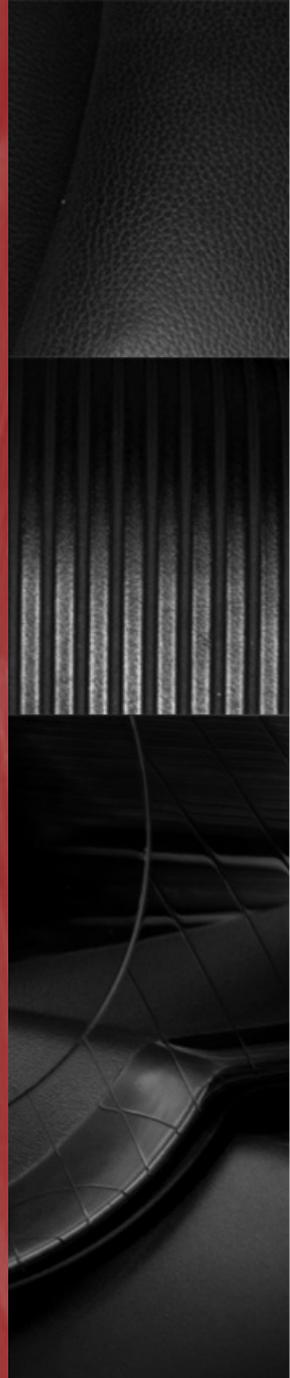


# Prohibited Personnel Practices

Whistleblower Protection Ombudsman

SBA Office Of Inspector General





# Responsibilities of Agency Officials

- Agency heads and officials with delegated personnel management authority, are responsible for —
  - Preventing prohibited personnel practices
  - Following and enforcing civil service laws, rules, and regulations
  - Ensuring that employees are informed of rights and remedies



# Key Concepts

- Merit System Principles
  - The framework and foundation for making all personnel decisions in the civil service
- Prohibited Personnel Practices
  - Admonitions against specific practices that conflict with merit systems principles
- Whistleblower Disclosures
  - Disclosures by current and former federal employees and applicants for federal employment



# Prohibited Personnel Practices

- 13 Prohibited Personnel Practices—5 general categories:
  - Discrimination
  - Political Coercion
  - Hiring practices that offend merit system principles
  - Retaliation for protected activity (including whistleblowing)
  - Catch-all: violation of law, rule or regulation that implement merit systems principles (including constitutional rights), Non-disclosure provisions



# Prohibited Personnel Practices: Discrimination & Hiring Offenses

- Prohibition against discriminating:
  - Based on race, color, nationality, religion, gender (including gender stereotyping), handicapping condition, age, marital status, or political affiliation —5 U.S.C. § 2302(b)(1)
  - Based on conduct which does not adversely affect the performance of the employee or applicant, or the performance of others, and includes discrimination based on sexual orientation — 5 U.S.C. § 2302(b)(10)
- Prohibited from interfering with one's employment prospects:
  - Making a recommendation or statement based on anything other than work performance of an employee or the evaluation of his/her character, loyalty, or suitability. —5 U.S.C. § 2302(b)(2)
  - Deceiving/willfully obstructing right to compete for employment —5 U.S.C. § 2302(b)(4)
  - Influencing withdrawal from competition to improve or injure employment prospects of another —5 U.S.C. § 2302(b)(5)
  - Granting unauthorized preference or advantage to improve or injure the prospects of any particular person for employment—5 U.S.C. § 2302(b)(6)



## Prohibited Personnel Practices, cont'd

- Appointing, employing, promoting, or advocating such preferences for a relative by an employee who has decision-making authority for such personnel action. —5 U.S.C. § 2302(b)(7)
- Knowingly violating a veterans' preference requirement —5 U.S.C. § 2302(b)(11)
- Prohibition on Political Coercion
  - Coercing the political activities of an employee, or taking any action against an employee or applicant as reprisal for an employee's refusal to participate in said activity. —5 U.S.C. § 2302(b)(3)



# Examples of Hiring Offenses

- Manager deliberately fails to post vacancy to stop particular candidate from applying
- Manipulation of the job requirements /skills in a vacancy announcement (i.e., insertion of an unnecessary language requirement) in order to benefit a particular candidate
- Supervisor gives employee dishonest recommendation or appraisal to keep valuable employee or to help another candidate
- Supervisor encourages subordinate not to compete, or to withdraw application, by promising future benefits that supervisor does not intend to grant
- Closed vacancy announcement is re-opened to permit favored candidate to apply
- Supervisor tells qualified employee not to apply for job in order to improve another employee's chances of selection



## Prohibited Personnel Practice: Retaliation for Whistleblowing — 5 U.S.C. § 2302(b)(8)

- Taking, failing to take, or threatening to take or fail to take a personnel action for —
  - Any disclosure of information by an employee which the employee reasonably believes evidences:
    - any violation of any law, rule, or regulation, or
    - gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety



## Elements of Proof: Reprisal for Whistleblowing (2302(b)(8))

- Must show —
  - Protected disclosure of information (or that employee was perceived as being a whistleblower)
  - Personnel action (broadly defined under 5 U.S.C. § 2302(a)(2)(a)) taken, not taken, or threatened
  - Actual or constructive knowledge of protected disclosure
    - Constructive Knowledge = person with actual knowledge of the disclosure influenced the acting official's decision.
  - Protected disclosure was contributing factor in personnel action
  - Contributing factor commonly proved through knowledge/timing test, i.e., if the official taking the personnel action knew of the disclosure and took the action within a period of time reasonable to conclude that the disclosure contributed to the personnel action.



## Burden Shift:

### Reprisal for Whistleblowing (2302(b)(8))

- Once reprisal elements met, burden shifts to agency to show —
  - By clear and convincing evidence—that it would have taken same action absent the disclosure
  - Factors considered:
    - Strength of evidence in support of personnel action
    - Existence & strength of motive to retaliate
    - Treatment of similar employees who are not whistleblowers



# Categories of Protected Disclosures

- Disclosure, which employee reasonably believes evidences:
  - Violation of any law, rule, or regulation
  - Gross mismanagement: substantial risk of significant impact on mission
  - Gross waste of funds: more than debatable expenditure
  - Abuse of authority
  - Substantial & specific danger to public health or safety
  - Censorship related to scientific research or analysis (scientific integrity)



# Nature of Disclosures

- Generally protected when made to any person
- Need not be accurate to be protected; Protected if employee reasonably believes that it is true—test is both objective and subjective
- No requirement to go through chain of command
- Whistleblower’s personal motivation does not negate reasonable belief
- Employee or applicant protected if employer mistakenly believes he or she is a whistleblower (“perceived whistleblower”)
- Disclosure does not lose protection because it:
  - Was made to person who participated in the wrongdoing;
  - Revealed information that had previously been disclosed;
  - Was made while off duty; or
  - Was made during the employee's normal course of duties.



# When Disclosure Is Not Protected

- Disclosure not protected where —
  - Prohibited by law; or
  - Required by Executive Order to be secret for national security or foreign affairs
  - Disclosure of classified information is protected where disclosure is made to entities who may receive such information, including the Office of Inspector General and the Office of Special Counsel.



## Retaliation for Employees who Engage in Protected Activity—5 U.S.C. § 2302(b)(9)

- Taking, failing to take, or threatening to take or fail to take a personnel action for —
  - (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation (includes EEO/MSPB activity, union grievances, etc.)
  - (B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);
  - (C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or;
  - (D) refusing to obey an order that would require the individual to violate a law.



## Elements of Proof:

### Reprisal for Engaging in Protected Activity (2302(b)(9))

- Must show —
  - Employee engaged in a protected activity;
  - Employee subject to a Personnel action (broadly defined under 5 U.S.C. § 2302(a)(2)(a)) taken, not taken, or threatened;
  - Officials had actual or constructive knowledge of protected activity
    - Constructive Knowledge = person with actual knowledge of the activity influenced the acting official's decision; and
  - Protected activity was contributing factor in personnel action.  
Contributing factor commonly proved through knowledge/timing test, i.e., if the official taking personnel action knew of the disclosure and took the action within a period time reasonable to conclude that the disclosure contributed to the personnel action.



# Catch-all Prohibited Personnel Practice

- Taking or failing to take personnel action, in violation of a law, rule, or regulation that implements or directly concerns a merit system principle— 5 U.S.C. § 2302(b)(12)
- Unlike other Prohibited Personnel Practices, no requirement for proving Improper Motive
- Merit Systems Principles defined at 5 U.S.C. § 2301
  - Examples of violations:
    - Failing to issue yearly performance evaluation ratings
    - Refraining from reappointing or reinstating someone because he ignored unconstitutional restrictions on his freedom of speech
    - Reclassifying certain positions into another pay category (from Wage Grade to General Schedule) deemed arbitrary and in violation of merit systems.



# Improper Non-Disclosure Agreements

## 5 U.S.C. 2302(b)(13)

- Non-disclosure agreements, policies, or forms must include a statement clarifying that agency restrictions on disclosures are superseded by statutory whistleblower rights.
- The implementation or enforcement of a non-disclosure agreement that fails to include this required statement related to whistleblower rights, is a Prohibited Personnel Practice.



# Consequences of Committing a PPP

- Employee may assert a Prohibited Personnel Practice as an affirmative defense in an appeal of removal, suspension greater than 14 days, or demotion before the Merit Systems Protection Board (MSPB).
- The Office of Special Counsel may investigate allegations from most federal employees of Prohibited Personnel Practices and seek corrective action from the agency or petition the MSPB for corrective action.
- The Office of Special Counsel may also petition MSPB to discipline an employee for having committed a Prohibited Personnel Practice. Discipline may range from reprimand to removal, to a 5-year debarment from Federal employment, to a civil penalty of up to \$1,000.
- Employee may bring an Individual Right of Action (IRA) Appeal before the MSPB for whistleblower retaliation if OSC does not seek corrective action within 120-days of OSC's receipt of the complaint or 65-days after closure of its investigation of the complaint. Employees may also may bring IRAs for protected activity described in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), and (D).



# Corrective Action

- Corrective action (reversing personnel action against employee) consists of “make whole” remedies, including:
  - Reinstatement
  - Back pay (lost wages)
  - Medical costs
  - Compensatory damages
  - Attorney’s fees and costs
  - Any other reasonable and foreseeable consequential damages



# Quiz

- Answer each of the following questions.



**1) A job announcement is advertised for a GS-11 Loan Specialist in the division that you supervise. You think that your nephew, who just received his Masters in Accounting, would be a perfect fit for the position. As a manager, what should you do?**

- a. Recuse yourself from the selection process
- b. Advocate for your nephew in the selection process
- c. Pass along his resume to selection personnel
- d. Serve as a reference for your nephew



# Question 1: Answer

**A job announcement is advertised for a GS-11 Loan Specialist in the division that you supervise. You think that your nephew, who just received his Masters in Accounting, would be a perfect fit for the position. As a manager, what should you do?**

**a. Recuse yourself from the selection process is the correct answer.**

Advocating for your nephew in the selection process, passing along his resume to selection personnel, and serving as a reference for your nephew are all examples of the prohibited personnel practice of engaging in nepotism (*i.e.*, hire, promote, or advocate the hiring or promotion of relatives), which is a violation of 5 U.S.C. § 2302(b)(7).



**2) Someone you supervise recently earned a Masters in Accounting. He just told you that he wants to apply for the same GS-11 Loan Specialist position as your nephew. While he and your nephew are highly qualified, you believe your nephew would be a better fit for the position. Which of the following are you permitted to do to promote the person you feel is the best candidate for the position?**

- a. Make yourself unavailable to sign your employee's performance appraisal, which is a required document for the application.
- b. Tell your employee to apply, instead, for a prospective/different position that should become available in the near future.
- c. Advise your employee that he may not be eligible for a potential performance bonus if he applies for a different position.
- d. None of the above.



## Question 2: Answer

Someone you supervise recently earned a Masters in Accounting. He just told you that he wants to apply for the same GS-11 Loan Specialist position as your nephew. While he and your nephew are highly qualified, you believe your nephew would be a better fit for the position. Which of the following are you permitted to do to promote the person you feel is the best candidate for the position?

d. None of the above is the correct answer.

Deceiving or willfully obstructing anyone from competing for employment is a prohibited personnel practice. 5 U.S.C. § 2302(b)(4). Taking actions to assist your nephew could also violate 5 U.S.C. §§ 2302(b)(6)(granting a preference or for the purpose of improving or injuring the prospects of another person) and (b)(7) (advocating employment candidacy of a relative).



**3) You manage an office of six people. One of your subordinates has submitted a request for a promotion. You have given him a superior rating each of the last three years. However, this subordinate constantly talks about himself and does not attend office gatherings held after hours. Can you deny this subordinate the promotion based on this conduct?**

- Yes
- No



## Question 3: Answer

**You manage an office of six people. One of your subordinates has submitted a request for a promotion. You have given him a superior rating each of the last three years. However, this subordinate constantly talks about himself and does not attend office gatherings held after hours. Can you deny this subordinate the promotion based on this conduct?**

No is the correct answer.

It is a prohibited personnel practice to take action against an employee as reprisal for non-job related conduct or interests that are unrelated to job performance. 5 U.S.C. § 2302(b)(10).



**4) You manage a finance office of seven women and one man. The end of the fiscal year is always the busiest and most demanding time of the year, but because of complications from the October 2013 sequestration, the chief of the office has ordered a moratorium on all leave requests, with the exception of sick leave. Your sole male employee, Jimmy, submits a leave request to complete his wedding plans. He and his partner plan on getting married on October 1. Based on the moratorium, are you authorized to deny Jimmy's leave request?**

- Yes
- No



## Question 4: Answer

You manage a finance office of seven women and one man. The end of the fiscal year is always the busiest and most demanding time of the year, but because of complications from the October 2013 sequestration, the chief of the office has ordered a moratorium on all leave requests, with the exception of sick leave. Your sole male employee, Jimmy, submits a leave request to complete his wedding plans. He and his partner plan on getting married on October 1. Based on the moratorium, are you authorized to deny Jimmy's leave request?

Yes is the correct answer.

It is not a prohibited personnel practice to deny leave as long as it is applied across the board, i.e. if you deny Jimmy's leave request, you must also deny other colleagues' non-sick leave requests.



**5) In November, you offer members of your staff 59 minutes of leave if they help canvass for a Presidential candidate, whom you strongly support, on Election Day. Jimmy, however, supports the opposing candidate and does not want to participate. You tell Jimmy that it's okay not to participate, but that he will have to remain in the office for those 59 minutes and cannot take the leave. Is this a prohibited personnel practice?**

- Yes
- No



## Question 5: Answer

**In November, you offer members of your staff 59 minutes of leave if they help canvass for a Presidential candidate, whom you strongly support, on Election Day. Jimmy, however, supports the opposing candidate and does not want to participate. You tell Jimmy that it's okay not to participate, but that he will have to remain in the office for those 59 minutes and cannot take the leave. Is this a prohibited personnel practice?**

Yes is the correct answer.

It is a prohibited personnel practice to take any action or reprisal against any employee for his refusal in participating in a political activity. Political coercion does not have to be extreme, and can be a single incident. 5 U.S.C. § 2302(b)(3)

This conduct would also violate the Hatch Act's restriction on using one's official authority or influence to affect the outcome of an election. 5 U.S.C. § 7323(a)(1)



In November, you offer members of your staff 59 minutes of leave if they help canvass for a Presidential candidate, whom you strongly support, on Election Day. Jimmy, however, supports the opposing candidate and does not want to participate. You tell Jimmy that it's okay not to participate, but that he will have to remain in the office for those 59 minutes and cannot take the leave.

6) Jimmy participated in the activity, but was really uncomfortable believing that this request was illegal. As such, he confides in your supervisor about the events that transpired. Has Jimmy made a *Protected Disclosure* to your supervisor?

- Yes
- No



## Question 6: Answer

In November, you offer members of your staff 59 minutes of leave if they help canvass for a Presidential candidate, whom you strongly support, on Election Day. Jimmy, however, supports the opposing candidate and does not want to participate. You tell Jimmy that it's okay not to participate, but that he will have to remain in the office for those 59 minutes and cannot take the leave.

Jimmy participated in the activity, but was really uncomfortable believing that this request was illegal. As such, he confides in your supervisor about the events that transpired. Has Jimmy made a *Protected Disclosure* to your supervisor?

Yes is the correct answer.

Disclosures are generally protected when made to any person; there is no requirement to go through chain of command. The disclosure does not need not be accurate to be protected as long as the employee reasonably believes that it is true. Disclosure does not lose protection because it 1) was made to person who participated in the wrongdoing; 2) revealed information that had previously been disclosed; 3) was made while off duty; or 4) was made during the employee's normal course of duties.



In November, you offer members of your staff 59 minutes of leave if they help canvass for a Presidential candidate, whom you strongly support, on Election Day. Jimmy, however, supports the opposing candidate and does not want to participate. You tell Jimmy that it's okay not to participate, but that he will have to remain in the office for those 59 minutes and cannot take the leave. Jimmy participated in the activity, but was really uncomfortable believing that this request was illegal. As such, he confides in your supervisor about the events that transpired.

## 7) Is Jimmy a Whistleblower?

- Yes
- No



## Question 7: Answer

In November, you offer members of your staff 59 minutes of leave if they help canvass for a Presidential candidate, whom you strongly support, on Election Day. Jimmy, however, supports the opposing candidate and does not want to participate. You tell Jimmy that it's okay not to participate, but that he will have to remain in the office for those 59 minutes and cannot take the leave. Jimmy participated in the activity, but was really uncomfortable believing that this request was illegal. As such, he confides in your supervisor about the events that transpired. Is Jimmy a Whistleblower?

Yes is the correct answer.

Because Jimmy has made a *Protected Disclosure*, he would be considered a Whistleblower. 5 U.S.C. § 2302(b)(8).



**8) As a matter of routine, Jimmy is eligible for a step increase. While you are reviewing the paperwork, your supervisor calls you into her office and informs you that you will be subject to disciplinary actions for your behavior described in the previous examples. When you return to your desk, you decide to decline Jimmy's request for a step increase. Is this an act of retaliation?**

- Yes
- No



## Question 8: Answer

As a matter of routine, Jimmy is eligible for a step increase. While you are reviewing the paperwork, your supervisor calls you into her office and informs you that you will be subject to disciplinary actions for your behavior described in the previous examples. When you return to your desk, you decide to decline Jimmy's request for a step increase. Is this an act of retaliation?

Yes is the correct answer.

You have committed an act of reprisal since it is probable that the disclosure was a contributing factor in your determination to deny his personnel action request. 5 U.S.C. § 2302(b)(8).



**9) Jimmy meets with the Whistleblower Ombudsman who recommends that he file a complaint of Whistleblower Retaliation with the Office of Special Counsel (OSC). The OSC pursues an investigation and petitions the MSPB to grant corrective action on Jimmy's behalf.**

**What remedies could the MSPB offer Jimmy?**

- a. Back pay
- b. Step increase
- c. Attorney fees & costs
- d. Any other reasonable and foreseeable consequential damages
- e. a & b
- f. c & d
- g. All of the above

## Question 9: Answer

Jimmy meets with the Whistleblower Ombudsman who recommends that he file a complaint of Whistleblower Retaliation with the Office of Special Counsel. The OSC pursues an investigation and asks the MSPB to grant corrective action on Jimmy's behalf.

**What remedies could the MSPB offer Jimmy?**

g. All of the above is the correct answer. If an appellant prevails on a 2302(b)(8) whistleblower claim, MSPB may, depending on the circumstances, order: (1) that the agency place the individual in the position the individual would have been in had the prohibited personnel practice not occurred; (2) back pay and related benefits; (3) medical costs incurred; (4) travel expenses; (5) any other reasonable and foreseeable consequential damages; and (6) attorney fees and costs.



**10) Jimmy meets with the Whistleblower Ombudsman who recommends that he file a complaint of Whistleblower Retaliation with the Office of Special Counsel. The OSC pursues an investigation and petitions the MSPB to impose disciplinary action against you due to your retaliation against Jimmy. As the supervisor, what consequences could you receive for committing prohibited personnel practices?**

- a. Reprimand
- b. Removal
- c. 5-year debarment from Federal employment
- d. Civil penalty up to \$1,000
- e. All of the above



## Question 10: Answer

**Jimmy meets with the Whistleblower Ombudsman who recommends that he file a complaint of Whistleblower Retaliation with the Office of Special Counsel. The OSC pursues an investigation and petitions the MSPB to grant corrective action on Jimmy's behalf.**

**As the supervisor, what consequences could you receive for committing prohibited personnel practices?**

e. All of the above is the correct answer. Individuals found by MSPB to have committed a prohibited personnel practice are subject to removal, reduction in grade, debarment from federal employment for up to five years, suspension, reprimand, or fine of up to \$1,000. or a combination of these potential disciplinary actions.