

FBI WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2016

*“I think whistleblowers are also a **critical element of a functioning democracy**. Folks have to feel free to raise their concerns, and if they are not addressed up their chain-of-command, to take them to an appropriate place.”—FBI Director James B. Comey, in his 2013 confirmation hearing*

BACKGROUND: FBI employees are the only employees in federal law enforcement exempt from the Whistleblower Protection Enhancement Act. FBI whistleblowers are instead subject to an ill-functioning carve-out that relegates whistleblower retaliation protections to regulation rather than statute. Reports by the Department of Justice (DOJ) and the Government Accountability Office (GAO) demonstrate that the current rules addressing cases of reprisal against FBI whistleblowers have resulted in inadequate protection, opaque procedures, and chronic delays of up to a decade or more. This bi-partisan proposal by Senate Judiciary Committee Chairman Grassley and Ranking Member Leahy will provide protection for the first time to FBI whistleblowers who disclose wrongdoing to their supervisors, encourage the efficient resolution of cases, and strengthen protections for FBI employees who are retaliated against for blowing the whistle.

WHAT THIS BILL DOES:

- Broadens the category of persons who can receive a protected disclosure, to include supervisors within an FBI employee’s chain of command. Current regulations only protect disclosures made to nine “designated officials,” which does not include supervisors. GAO found that a significant portion of FBI whistleblower complaints have been dismissed *because* an employee first reported to a supervisor, and FBI policy encourages reports of wrongdoing within the chain-of-command. This provision would ensure legal protections match the FBI’s own requirements.
- Makes it a prohibited practice to (1) retaliate for making protected disclosures, (2) retaliate for participating in protected activity (including filing a whistleblower complaint), and (3) enforce gag orders that are inconsistent with whistleblower protections and employee rights to communicate with Congress.
- Increases the independence and accountability of investigations by placing investigative authority with the DOJ Office of the Inspector General (DOJ OIG). Currently the DOJ OIG shares jurisdiction with the DOJ Office of Professional Responsibility.
- Encourages efficient case resolution by providing for interim relief from a retaliatory adverse action when the DOJ OIG finds a reasonable basis to believe that reprisal occurred, as imposing stays on adverse personnel actions often incentivizes agencies to prioritize mediation.
- Replaces the lengthy and opaque adjudication process currently housed in the Office of Attorney Recruitment and Management with adjudication by Administrative Law Judges (ALJs). It also leverages protections and procedures available under the Administrative Procedure Act. Under existing authority ALJs may be borrowed from another agency, such as the Department of Labor, whose ALJs have experience adjudicating whistleblower cases.
- Replaces the appellate role of the Deputy Attorney General (DAG) with Attorney General and appellate court judicial review. GAO found appeals have remained with the DAG’s office for up to a year or more.
- Ensures appropriate access to FBI whistleblower case precedent by requiring the Department to make ALJ determinations publicly available, subject to reasonable protections for sensitive and classified information.
- Increases oversight by imposing additional reporting requirements.