

112TH CONGRESS
2D SESSION

H. R. 6406

To expand whistleblower protections to non-Federal employees whose disclosures involve misuse of Federal funds.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 13, 2012

Ms. SPEIER (for herself and Mr. PLATTS) introduced the following bill; which was referred to the Committee on Oversight and Government Reform, and in addition to the Committees on Armed Services and Education and the Workforce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To expand whistleblower protections to non-Federal employees whose disclosures involve misuse of Federal funds.

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 “Non-Federal Employee
5 Whistleblower Protection Act of 2012”.

6 **SEC. 2. PROTECTING STATE AND LOCAL GOVERNMENT AND**
7 **CONTRACTOR WHISTLEBLOWERS.**

8 (a) REPEALS.—

1 (1) CIVILIAN CONTRACTS.—Title 41, United
2 States Code, is amended as follows:

3 (A) Section 4705 is repealed.

4 (B) The table of sections at the beginning
5 of chapter 47 is amended by striking the item
6 relating to section 4705.

7 (2) DEFENSE CONTRACTS.—Title 10, United
8 States Code, is amended as follows:

9 (A) Section 2409 is repealed.

10 (B) The table of sections at the beginning
11 of chapter 141 is amended by striking the item
12 relating to section 2409.

13 (b) ENHANCED PROTECTION FOR STATE AND LOCAL
14 GOVERNMENT AND CONTRACTOR WHISTLEBLOWERS.—

15 (1) IN GENERAL.—Chapter 23 of division B of
16 title 41, United States Code, is amended by adding
17 at the end the following new section:

18 **“§ 2314. Protection for State and local government
19 and contractor whistleblowers**

20 “(a) PROHIBITION OF REPRISALS.—An employee of
21 any non-Federal employer receiving covered funds may not
22 be discharged, demoted, or otherwise discriminated
23 against as a reprisal for initiating or participating in any
24 proceeding related to the misuse of any Federal funds,
25 reasonably opposing the misuse of any Federal funds, or

1 disclosing, including a disclosure made in the ordinary
2 course of an employee's duties, to an inspector general,
3 the Comptroller General of the United States, the Attor-
4 ney General, a member of Congress, a State or Federal
5 regulatory or law enforcement agency, a person with su-
6 pervisory authority over the employee (or such other per-
7 son working for the employer who has the authority to
8 investigate, discover, or terminate misconduct), a court or
9 grand jury, the head of a Federal agency, or their rep-
10 resentatives information that the employee reasonably be-
11 lieves is evidence of—

12 “(1) gross mismanagement of an agency con-
13 tract or grant relating to covered funds;

14 “(2) a gross waste of covered funds;

15 “(3) a substantial and specific danger to public
16 health or safety related to the implementation or use
17 of covered funds;

18 “(4) an abuse of authority related to the imple-
19 mentation or use of covered funds; or

20 “(5) a violation of law, rule, or regulation re-
21 lated to an agency contract (including the competi-
22 tion for or negotiation of a contract), subcontract, or
23 grant, awarded or issued relating to covered funds.

24 “(b) INVESTIGATION OF COMPLAINTS BY INSPECTOR
25 GENERAL.—

1 “(1) IN GENERAL.—A person who believes that
2 the person has been subjected to a reprisal prohib-
3 ited by subsection (a) may submit a complaint re-
4 garding the reprisal to the appropriate inspector
5 general. Except as provided under paragraph (3),
6 unless the inspector general determines that the
7 complaint is frivolous, does not relate to covered
8 funds, or another Federal or State judicial or ad-
9 ministrative proceeding has previously been invoked
10 to resolve such complaint, the inspector general shall
11 investigate the complaint and, upon completion of
12 such investigation, submit a report of the findings of
13 the investigation to the person, the person’s em-
14 ployer, and the head of the appropriate agency.

15 “(2) TIME LIMITATIONS FOR ACTIONS IN RE-
16 SPONSE TO COMPLAINTS.—

17 “(A) IN GENERAL.—Except as provided
18 under subparagraph (B), the inspector general
19 shall, not later than 180 days after receiving a
20 complaint under paragraph (1)—

21 “(i) make a determination that the
22 complaint is frivolous, does not relate to
23 covered funds, or another Federal or State
24 judicial or administrative proceeding has

1 previously been invoked to resolve such
2 complaint; or

3 “(ii) submit a report under paragraph
4 (1).

5 “(B) EXTENSIONS.—

6 “(i) VOLUNTARY EXTENSION AGREED
7 TO BETWEEN INSPECTOR GENERAL AND
8 COMPLAINANT.—If the inspector general is
9 unable to complete an investigation under
10 this section in time to submit a report
11 within the 180-day period specified under
12 subparagraph (A) and the person submit-
13 ting the complaint agrees to an extension
14 of time, the inspector general shall submit
15 a report under paragraph (1) within such
16 additional period of time, up to 180 days,
17 as shall be agreed upon between the in-
18 spector general and the person submitting
19 the complaint.

20 “(ii) EXTENSION GRANTED BY IN-
21 SPECTOR GENERAL.—If the inspector gen-
22 eral is unable to complete an investigation
23 under this section in time to submit a re-
24 port within the 180-day period specified
25 under subparagraph (A), the inspector

1 general may extend the period for not
2 more than 90 days without agreeing with
3 the person submitting the complaint to
4 such extension, provided that the inspector
5 general provides to the person submitting
6 the complaint a written explanation (sub-
7 ject to the authority to exclude information
8 under paragraph (4)(C)) for the decision.

9 “(iii) SEMI-ANNUAL REPORT ON EX-
10 TENSIONS.—The inspector general shall in-
11 clude in semi-annual reports to Congress a
12 list of those investigations for which the in-
13 spector general received an extension.

14 “(3) DISCRETION NOT TO INVESTIGATE COM-
15 PLAINTS.—

16 “(A) IN GENERAL.—The inspector general
17 may decide not to conduct or continue an inves-
18 tigation under this section upon providing to
19 the person submitting the complaint a written
20 explanation (subject to the authority to exclude
21 information under paragraph (4)(C)) for such
22 decision.

23 “(B) SEMI-ANNUAL REPORT.—The inspec-
24 tor general shall include in semi-annual reports
25 to Congress a list of those investigations the in-

1 spector general decided not to conduct or con-
2 tinue under this paragraph.

3 “(4) ACCESS TO INVESTIGATIVE FILE.—

4 “(A) IN GENERAL.—The person alleging a
5 reprisal under this section shall have access to
6 the investigation file of the appropriate inspec-
7 tor general in accordance with section 552a of
8 title 5 (commonly referred to as the ‘Privacy
9 Act’). The investigation of the inspector general
10 shall be deemed closed for purposes of disclo-
11 sure under such section when an employee files
12 an appeal to an agency head or a court of com-
13 petent jurisdiction.

14 “(B) CIVIL ACTION.—In the event the per-
15 son alleging the reprisal brings suit under sub-
16 section (d)(1), the person alleging the reprisal
17 and the non-Federal employer shall have access
18 to the investigative file of the inspector general
19 in accordance with the Privacy Act.

20 “(C) EXCEPTION.—

21 “(i) IN GENERAL.—The inspector gen-
22 eral may exclude from disclosure—

23 “(I) information protected from
24 disclosure by a provision of law; and

1 “(II) any additional information
2 the inspector general determines dis-
3 closure of which would impede a con-
4 tinuing investigation, provided that
5 such information is disclosed once
6 such disclosure would no longer im-
7 pede such investigation, unless the in-
8 spector general determines that disclo-
9 sure of law enforcement techniques,
10 procedures, or information could rea-
11 sonably be expected to risk circumven-
12 tion of the law or disclose the identity
13 of a confidential source.

14 “(ii) LIMITATION.—Notwithstanding
15 clause (i)(II), the inspector general may
16 not withhold information from the em-
17 ployee which would otherwise be subject to
18 disclosure under section 552 of title 5
19 (commonly referred to as the Freedom of
20 Information Act) or the Privacy Act.

21 “(5) PRIVACY OF INFORMATION.—An inspector
22 general investigating an alleged reprisal under this
23 section may not respond to any inquiry or disclose
24 any information from or about any person alleging
25 such reprisal, except in accordance with the provi-

1 sions of section 552a of title 5 or as required by any
2 other applicable Federal law.

3 “(6) LIMITATION ON SUBMITTING COM-
4 PLAINT.—A complaint under this subsection may
5 not be brought more than 3 years after the date on
6 which the alleged reprisal prohibited under sub-
7 section (a) occurred.

8 “(c) ADMINISTRATIVE REMEDY AND ENFORCEMENT
9 AUTHORITY.—

10 “(1) AGENCY ACTION.—Not later than 30 days
11 after receiving an inspector general report under
12 subsection (b), the head of the agency concerned
13 shall determine whether there is sufficient basis to
14 conclude that the non-Federal employer has, di-
15 rectly, or indirectly on behalf of the Federal agency
16 providing the employer covered funds, subjected the
17 complainant to a reprisal prohibited by subsection
18 (a) and shall either issue an order denying relief in
19 whole or in part or shall take 1 or more of the fol-
20 lowing actions:

21 “(A) Order the employer to take affirma-
22 tive action to abate the reprisal.

23 “(B) Order the employer to reinstate the
24 person to the position that the person held be-
25 fore the reprisal, together with the compensa-

1 tion (including back pay), compensatory dam-
2 ages, employment benefits, and other terms and
3 conditions of employment that would apply to
4 the person in that position if the reprisal had
5 not been taken.

6 “(C) Order the employer to pay the com-
7 plainant an amount equal to the aggregate
8 amount of all costs and expenses (including at-
9 torneys’ fees and expert witnesses’ fees) that
10 were reasonably incurred by the complainant
11 for, or in connection with, bringing the com-
12 plaint regarding the reprisal, as determined by
13 the head of the agency or a court of competent
14 jurisdiction.

15 “(D) Where appropriate, order the posting
16 of the decision of the inspector general in a
17 manner in which every employee of the em-
18 ployer will have notice of the decision and oth-
19 erwise require a reasonable compliance program
20 to ensure that no further retaliation is com-
21 mitted by the employer.

22 “(E) In the case of a finding that the re-
23 prisal was willful, wanton, or malicious, order
24 the employer to pay the employee no more than

1 10 times the amount of all lost wages and other
2 compensatory damages.

3 “(2) BURDEN OF PROOF.—

4 “(A) DISCLOSURE AS CONTRIBUTING FAC-
5 TOR IN REPRISAL.—

6 “(i) IN GENERAL.—A person alleging
7 a reprisal under this section shall be
8 deemed to have affirmatively established
9 the occurrence of the reprisal if the person
10 demonstrates that a disclosure described in
11 subsection (a) was a contributing factor in
12 the reprisal.

13 “(ii) USE OF CIRCUMSTANTIAL EVI-
14 DENCE.—A disclosure may be dem-
15 onstrated as a contributing factor in a re-
16 prisal for purposes of this paragraph by
17 circumstantial evidence, including—

18 “(I) evidence that the official un-
19 dertaking the reprisal knew of the dis-
20 closure;

21 “(II) evidence that the reprisal
22 occurred within a period of time after
23 the disclosure such that a reasonable
24 person could conclude that the dislo-

1 sure was a contributing factor in the
2 reprisal; or

3 “(III) evidence that the protected
4 disclosure was well founded in fact or
5 law.

6 “(B) OPPORTUNITY FOR REBUTTAL.—The
7 head of an agency may not find the occurrence
8 of a reprisal with respect to a reprisal that is
9 affirmatively established under subparagraph
10 (A) if the non-Federal employer demonstrates
11 by clear and convincing evidence that the non-
12 Federal employer would have taken the action
13 constituting the reprisal in the absence of the
14 disclosure. An employee may rebut this affirma-
15 tive defense by direct or circumstantial evi-
16 dence, including the evidence described in sub-
17 paragraph (A).

18 “(3) JUDICIAL ENFORCEMENT OF ORDER.—
19 Whenever a person fails to comply with an order
20 issued under paragraph (1), the head of the agency
21 shall file an action for enforcement of such order in
22 the United States district court for a district in
23 which the reprisal was found to have occurred. In
24 any action brought under this paragraph, the court
25 may grant appropriate relief, including injunctive re-

1 lief, compensatory and exemplary damages, and at-
2 torneys' fees and costs. The person upon whose be-
3 half an order was issued may also file such an action
4 or join in an action filed by the head of the agency.

5 “(d) CIVIL ACTION AND JUDICIAL REVIEW.—

6 “(1) CIVIL ACTION.—A person who has sub-
7 mitted a complaint under subsection (b) shall be
8 deemed to have exhausted all administrative rem-
9 edies with respect to the complaint and may bring
10 a de novo action at law or equity against the em-
11 ployer to seek compensatory damages and all other
12 relief available under this section in the appropriate
13 district court of the United States, which shall have
14 jurisdiction over such an action without regard to
15 the amount in controversy, if—

16 “(A)(i) the head of an agency—

17 “(I) issues an order denying relief in
18 whole or in part under subsection (c)(1);

19 or

20 “(II) has not issued an order—

21 “(aa) within 210 days after the
22 submission of a complaint under sub-
23 section (b); or

24 “(bb) in the case of an extension
25 of time under subsection (b)(2)(B),

1 within 30 days after the expiration of
2 the extension of time; or

3 “(ii) the inspector general decides under
4 subsection (b)(3) not to investigate or to dis-
5 continue an investigation; and

6 “(B) there is no showing that such delay
7 or decision is due to the bad faith of the com-
8 plainant.

9 “(2) TRIAL BY JURY.—An action brought under
10 paragraph (1) shall, at the request of either party to
11 the action, be tried by the court with a jury.

12 “(3) LIMITATION ON BRINGING CIVIL AC-
13 TION.—An action brought under paragraph (1) may
14 not be brought more than 2 years after the date on
15 which remedies are deemed exhausted under sub-
16 paragraph (A) of such paragraph.

17 “(4) JUDICIAL REVIEW.—Any person adversely
18 affected or aggrieved by an order issued under sub-
19 section (c)(1) may obtain review of the order’s con-
20 formance with this subsection, and any regulations
21 issued to carry out this section, in the United States
22 court of appeals for a circuit in which the reprisal
23 is alleged in the order to have occurred. No petition
24 seeking such review may be filed more than 60 days
25 after issuance of the order by the head of the agen-

1 cy. Review shall conform to chapter 7 of title 5. Fil-
2 ing such an appeal shall not act to stay the enforce-
3 ment of the order of a head of an agency or the
4 judgment of a district court.

5 “(e) NONENFORCEABILITY OF CERTAIN PROVISIONS
6 WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBI-
7 TRATION OF DISPUTES.—

8 “(1) WAIVER OF RIGHTS AND REMEDIES.—Ex-
9 cept as provided under paragraph (3), the rights and
10 remedies provided for in this section may not be
11 waived by any agreement, policy, form, or condition
12 of employment, including by any predispute arbitra-
13 tion agreement.

14 “(2) PREDISPUTE ARBITRATION AGREE-
15 MENTS.—Except as provided under paragraph (3),
16 no predispute arbitration agreement shall be valid or
17 enforceable if it requires arbitration of a dispute
18 arising under this section.

19 “(3) EXCEPTION FOR COLLECTIVE BARGAINING
20 AGREEMENTS.—Notwithstanding paragraphs (1)
21 and (2), an arbitration provision in a collective bar-
22 gaining agreement shall be enforceable as to dis-
23 putes arising under the collective bargaining agree-
24 ment.

1 “(f) REQUIREMENT TO NOTIFY EMPLOYEES OF
2 RIGHTS AND REMEDIES.—Any non-Federal employer re-
3 ceiving covered funds shall notify all employees of the
4 rights and remedies provided under this section in English
5 and the predominant native language of the workforce.

6 “(g) RULES OF CONSTRUCTION.—

7 “(1) NO IMPLIED AUTHORITY TO RETALIATE
8 FOR NON-PROTECTED DISCLOSURES.—Nothing in
9 this section may be construed to authorize the dis-
10 charge of, demotion of, or discrimination against an
11 employee for a disclosure other than a disclosure
12 protected by subsection (a) or to modify or derogate
13 from a right or remedy otherwise available to the
14 employee.

15 “(2) RELATIONSHIP TO STATE LAWS.—Nothing
16 in this section may be construed to preempt, pre-
17 clude, or limit the protections provided for public or
18 private employees under State whistleblower laws.

19 “(h) DEFINITIONS.—In this section:

20 “(1) ABUSE OF AUTHORITY.—The term ‘abuse
21 of authority’ means an arbitrary and capricious ex-
22 ercise of authority that adversely affects the rights
23 of any person, or that results in personal gain or ad-
24 vantage to the official or employee or to preferred
25 other persons.

1 “(2) COVERED FUNDS.—The term ‘covered
2 funds’ means any contract, grant, or other payment
3 received by any non-Federal employer if the Federal
4 Government provides any portion of the money or
5 property that is provided, requested, or demanded.

6 “(3) EMPLOYEE.—The term ‘employee’—

7 “(A) except as provided under subpara-
8 graph (B), means an individual performing
9 services on behalf of an employer or a con-
10 tractor, subcontractor, or agent of an employer;
11 and

12 “(B) does not include any Federal em-
13 ployee or member of the uniformed services (as
14 that term is defined in section 101(a)(5) of title
15 10).

16 “(4) NON-FEDERAL EMPLOYER.—The term
17 ‘non-Federal employer’—

18 “(A) means—

19 “(i) any employer—

20 “(I) with respect to covered
21 funds—

22 “(aa) the contractor, sub-
23 contractor, grantee, or recipient,
24 as the case may be, if the con-

1 tractor, grantee, or recipient is
2 an employer; and

3 “(bb) any professional mem-
4 bership organization, certification
5 or other professional body, any
6 agent or licensee of the Federal
7 government, or any person acting
8 directly or indirectly in the inter-
9 est of an employer receiving cov-
10 ered funds; or

11 “(II) with respect to covered
12 funds received by a State or local gov-
13 ernment, the State or local govern-
14 ment receiving the funds and any con-
15 tractor or subcontractor of the State
16 or local government; and

17 “(ii) any corporation or person who
18 receives any Federal funds; and

19 “(B) does not mean any department, agen-
20 cy, or other entity of the Federal Government.

21 “(5) STATE OR LOCAL GOVERNMENT.—The
22 term ‘State or local government’ means—

23 “(A) the government of each of the several
24 States, the District of Columbia, the Common-
25 wealth of Puerto Rico, Guam, American Samoa,

1 the Virgin Islands, the Commonwealth of the
 2 Northern Mariana Islands, or any other terri-
 3 tory or possession of the United States; or

4 “(B) the government of any political sub-
 5 division of a government listed in subparagraph
 6 (A).”.

7 (2) CONFORMING AMENDMENT.—The table of
 8 sections at the beginning of chapter 23 of title 41,
 9 United States Code, is amended by inserting after
 10 the item relating to section 2313 the following new
 11 item:

“2314. Protection for State and local government and contractor whistle-
 blowers.”.

12 (c) APPLICABILITY.—

13 (1) REPRISALS AFTER DATE OF ENACTMENT.—
 14 Section 2314 of title 41, United States Code, as
 15 added by subsection (b), shall apply to alleged re-
 16 prisals described under subsection (a) of such sec-
 17 tion that occur on or after the date of the enactment
 18 of this Act, regardless of the date on which the con-
 19 tract, grant, cooperative agreement, or other ar-
 20 rangement involving covered funds is entered into.

21 (2) REPRISALS BEFORE DATE OF ENACT-
 22 MENT.—

23 (A) CIVILIAN CONTRACTS.—Section 4705
 24 of title 41, United States Code, as in effect on

1 the day before the date of the enactment of this
2 Act, shall apply to alleged reprisals described
3 under such section that occurred on or after the
4 date of the enactment of such section and be-
5 fore the date of the enactment of this Act, re-
6 gardless of the date on which the contract,
7 grant, cooperative agreement, or other arrange-
8 ment involving covered funds was entered into.

9 (B) DEFENSE CONTRACTS.—Section 2409
10 of title 10, United States Code, as in effect on
11 the day before the date of the enactment of this
12 Act, shall apply to alleged reprisals described
13 under such section that occurred on or after the
14 date of the enactment of such section and be-
15 fore the date of the enactment of this Act, re-
16 gardless of the date on which the contract,
17 grant, cooperative agreement, or other arrange-
18 ment involving covered funds was entered into.

19 (d) REGULATIONS.—

20 (1) LIMITED ALLOWABILITY OF LEGAL FEES AS
21 COSTS UNDER CONTRACTS.—Not later than 180
22 days after the date of the enactment of this Act, the
23 Federal Acquisition Regulatory Council shall amend
24 the Federal Acquisition Regulation to provide that
25 legal fees and other expenses related to a claim aris-

1 ing under a whistleblower protection law are not al-
2 lowable costs under a contract unless and until the
3 contractor has been found in an administrative or
4 judicial proceeding not to be liable for such claim.

5 (2) NOTIFICATION OF EMPLOYEES OF RIGHTS
6 AND REMEDIES.—Not later than 180 days after the
7 date of the enactment of this Act, the Federal Ac-
8 quisition Regulatory Council shall amend the Fed-
9 eral Acquisition Regulation to require inclusion of a
10 contract clause notifying contractors of the require-
11 ment under section 2314(f) of title 41, United
12 States Code, as added by subsection (b)(1), for non-
13 Federal employers to notify employees of their rights
14 and remedies under such section.

○