



Whistleblower Overview Virtual Learning Session

Office of Counsel to the Inspector General (OCIG)

February 9, 2021



Agenda

- Part I: Role of the HHS Whistleblower Protection Coordinator
- Part II: Whistleblower Overview
- Part III: Whistleblower Statute for HHS Contractors, Grantees, and Subs
- Part IV: OIG Whistleblower Reprisal Investigations





Whistleblower Protection Coordinator

- *Formerly named “Whistleblower Ombudsman”*
- **Authority:** IG Act Section 3(d)
- **Duties [E.P.I.C.]:**
 - ❑ **Educate:** Educate HHS employees on their whistleblower protections.
 - ❑ **Promote:** Promote the timely and appropriate handling and consideration of protected disclosures and allegations of reprisal.





Whistleblower Protection Coordinator

- **Duties Continued:**

- **Inform:** Provide information to whistleblowers on the timeliness of reprisal complaints, alternative dispute resolution (ADR), and other avenues for relief.
- **Connect:** Facilitate coordination with HHS, OSC, CIGIE, Congress and others on issues related to reprisal complaint timeliness, the appropriate handling of whistleblower disclosures, and the implementation and administration of whistleblower protection laws, rules and regulations.





PART II

Whistleblower Overview





Who Is a Protected Whistleblower?

- Not every person who files a complaint is a protected whistleblower under the WB statutes.
- **Protected Whistleblowers:**
 1. Federal employees (civilian or military)
 2. Applicants for Federal employment
 3. Federal contractor and subcontractor employees (including personal services contractors)
 4. Federal grantee and subgrantee employees





Who Is **Not** a Protected Whistleblower?

1. Medicare/Medicaid beneficiaries
2. Providers delivering healthcare services under a Medicare/Medicaid provider agreement
3. Employees of insurance or pharmaceutical companies
4. Concerned members of the public





Whistleblower Disclosures v. Retaliation

- **Whistleblower Disclosures:** When OIG receives a complaint from a Federal employee, applicant for Federal employment, contractor, subcontractor, grantee or subgrantee employee that alleges unlawful activity.
- **A whistleblower disclosure is a complaint of fraud, waste or abuse (including complaints of substantial and specific dangers to public health or safety or unlawful activity) that is filed by a protected whistleblower.**

References: Inspector General Act of 1978, Secs. 7(a), 12





Whistleblower Disclosures v. Retaliation

- **Whistleblower Retaliation:** When an employer takes or fails to take, or threatens to take or fail to take, a personnel action with respect to an employee or applicant for employment because he/she made a disclosure of unlawful activity. **AKA “Whistleblower Reprisal”**

References: Whistleblower Protection Act, 41 USC 4712; 10 USC 1034





Making it Plain

- **Disclosure Complaint:** Wrongdoing is fraud, waste or abuse or the underlying illegal activity reported by the whistleblower.
Allegation → FWA
- **Retaliation Complaint:**
Wrongdoing is the personnel action taken against the whistleblower because of a protected disclosure. **Allegation → Retaliation**





The Dual Case Nature of Whistleblower Reprisal Complaints

- **Golden Rule:** Every retaliation complaint creates two cases for investigation –
 1. **Allegation of retaliation** → Reprisal investigation
 2. **Alleged protected disclosure** → Fraud, waste or abuse investigation
- Retaliation case – Special Investigations Branch (SIB)
- Disclosure case – Regional/Field Office or SIB, as appropriate





Inspector General Act of 1978

Disclosure

- **Section 7(b):** The Inspector General “*shall not, after receipt of a complaint or information from an employee, disclose the identity of the employee without the consent of the employee, unless the Inspector General determines such disclosure is unavoidable during the course of the investigation.*”
- **Section 8M(b)(2)(B)** prohibits disclosures of the identity of any individual who files a complaint with the OIG Hotline without their consent.
- **Prevents disclosure of the identity of the whistleblower-employee without his/her consent, *including disclosure to HHS (OPDIV or StaffDIV).***
 - Includes the release of identifying information (address, email, phone number, work unit, other personal identifiers)





Mandatory Reporting & Access

Employee	Legal Authority	What it Says
Contractors	Contractor Code of Business Ethics and Conduct, Federal Acquisition Regulations 48 CFR 52.203-13	Requires contractor employees to disclose information sufficient for law enforcement to identify the nature and extent of violations, and to identify individuals who may be responsible.
Grantees	Grantee Mandatory Disclosures, 45 CFR 75.113	Requires grantee employees to disclose in writing to HHS or pass-through entity all violations of Federal criminal law potentially affecting the grant.
Grantees	Grantee Record Retention and Access, 45 CFR 75.364	Provides OIGs with the right to records, documents or papers as well as the right to grantee personnel for interviews.





PART III

Whistleblower Statute for HHS Contractors, Grantees, & Subs





THE “NDAA”: CONTRACTOR & GRANTEE RETALIATION



"My project is simply this. I want to find out once and for all whether there's any truth in the belief that money can't buy happiness."





National Defense Authorization Act of Fiscal Year 2013 (NDAA)

- **Citation:** 41 USC 4712
- **What It Did:** Expanded whistleblower protections to employees of Federal contractors, subcontractors, grantees and subgrantees.
- **Purpose:** Provides that a protected individual “may not be discharged, demoted, or otherwise discriminated against” in reprisal for making a **protected disclosure**.
- **Notification:** HHS must ensure all contractors and grantees have informed (in writing) all employees of whistleblower protections rights and remedies.





Protected Disclosures under the NDAA

Information *reasonably believed* to evidence:

- Violation of law, rule, or regulation related to a HHS contract or grant
- Gross waste or mismanagement of HHS funds
- Abuse of authority related to a HHS contract or grant
- Substantial and specific danger to public health or safety

❖ **Note:** The WB's disclosure does not need to be an actual violation of law.





What Is **Not** a Protected Disclosure

- Violations of Title VII discrimination laws (exception for military members)
- Union grievances or labor law violations
- Administrative Grievances/Workplace disputes

**Note: A whistleblower retaliation complaint is not an EEO complaint.*





Protected Sources under the NDAA

Disclosures by contractor or grantee employees are protected only when made to:

1. Members of Congress or Representatives of Congressional Committees
2. Inspector General
3. Government Accountability Office (GAO)
4. HHS employee responsible for contract/grant oversight





Protected Sources under the NDAA

5. Department of Justice or another law enforcement official
6. Court or grand jury
7. Management or employee of the contractor/grantee who is responsible for investigating, discovering, or addressing misconduct





What Makes the NDAA Special?

- **Right to Sue (Employer):** NDAA gives complainants the right to sue the contractor / grantee once remedies are exhausted with the OIG.
- **Right to Sue (HHS):** NDAA gives complainants the right to sue the HHS Secretary if he/she receives an unfavorable decision.
- **Enforcement Remedies:** NDAA gives the HHS Secretary the ability to enforce any order to remediate retaliation against the contractor or grantee.





NDAA Notification

- **41 U.S.C. 4712(d)** – HHS must ensure all contractors, grantees, and subs have informed (in writing) all employees of whistleblower protections rights and remedies.





PART IV

OIG Whistleblower Reprisal Investigations





Special Rules for NDAA Complaints

Investigation Time Limit

- **Investigation Time Limit:** Must investigate the complaint and submit report of findings to the HHS Secretary w/n **180 days** of complaint receipt.
- Extensions must be agreed upon by the complainant. OIG cannot unilaterally extend the time period in NDAA cases.





Special Rules for NDAA Complaints

Report of Investigation

- **Report:** The IG must submit a report “of the findings of the investigation” to the complainant, the contractor or grantee involved, and the HHS Secretary.
- **HHS Secretary:** The Secretary shall determine whether there is sufficient basis to conclude that the contractor or grantee concerned engaged in retaliation within **30 days** of receipt of the IG’s report and issue an order denying or granting relief.





Special Rules for NDAA Complaints Remedies

- **Possible relief the Secretary can grant:**
 - Order the contractor to take affirmative action to abate the reprisal;
 - Order the contractor to reinstate the person to the position he/she held prior to reprisal, along with compensatory damages, backpay, benefits, and other terms and conditions of employment to make the person whole; and/or
 - Order the contractor to pay the complainant an amount = to all costs and expenses reasonably incurred by complainant in bringing the complaint.





Special Rules for NDAA Complaints Remedies

- Consequence to the Contractor/Grantee if Secretary's Order is not followed ≈ **Enforcement Lawsuit by HHS (U.S. District Court)**





Retaliation Need to Know

- 41 U.S.C. 4712(d) requires that agencies ensure contractors and grantees inform their employees of their whistleblower protections.
- HHS OIG has sole jurisdiction to investigate whistleblower retaliation complaints under all statutes except the WPA; they cannot be investigated by other HHS investigative entities (EEO, OPDIV investigators).
- HHS OIG cannot under the **IG Act Section 7(b)** disclose the name of any whistleblower without his/her consent unless unavoidable during the course of an investigation.





HHS OIG Whistleblower Contact Information

- **HHS OIG Hotline**
 - <https://oig.hhs.gov/fraud/report-fraud/>
 - 1-800-HHS-TIPS (1-800-447-8477)
- **HHS Whistleblower Protection Coordinator**
 - <https://oig.hhs.gov/fraud/whistleblower/>
 - <https://oig.hhs.gov/faqs/files/NDAA-Notice-HHS-Contractors.pdf>
 - Whistleblower.Coordinator@oig.hhs.gov

