

EMPOWER OVERSIGHT

Whistleblowers & Research



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Morton J. Posner
General Counsel
Justice Management Division
U.S. Department of Justice
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Mr. Posner:

Thank you for the opportunity to submit comments on the Department of Justice's proposed update to the regulations on whistleblowers in the Federal Bureau of Investigation ("FBI").

Empower Oversight Whistleblowers & Research ("Empower Oversight") is a nonpartisan, nonprofit educational organization dedicated to enhancing independent oversight of government and corporate wrongdoing. It works to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities, and seeks to hold those authorities accountable to act on such reports by, among other means, publishing information concerning the same. Empower Oversight's leadership has extensive experience in FBI oversight and whistleblower matters, including playing key roles in the drafting and passage of the FBI Whistleblower Protection Enhancement Act of 2016. Empower Oversight has also recently represented several whistleblowers from the FBI.

Empower Oversight generally supports the Department's proposed changes. However, it is unclear why it took the Department nearly seven years since Congress passed the FBI Whistleblower Protection Enhancement Act of 2016 to adopt these regulations. This lengthy delay in promulgating regulations is simply unacceptable. 5 C.F.R. § 2635(b)(11) states that federal employees "shall disclose waste, fraud, abuse, and corruption to appropriate authorities." Congress passed the FBI Whistleblower Protection Enhancement Act of 2016 to identify at a minimum who those appropriate authorities must include. Congress also strengthened the baseline regarding which disclosures are protected from retaliation.

Through the James M. Inhofe National Defense Authorization Act (NDAA) for Fiscal Year 2023, Pub. L. No. 117-263, § 5304, 136 Stat. 3250 (2022), Congress has once again adopted legislation regarding whistleblowers at the FBI. This law amended 5 U.S.C. § 2302 to add a section (d), reading:

(1) An employee of the Federal Bureau of Investigation who makes an allegation of a reprisal under regulations promulgated under this section may appeal a final determination or corrective action order by the Bureau under those regulations to the Merit Systems Protection Board pursuant to section 1221.

(2) If no final determination or corrective action order has been made or issued for an allegation described in paragraph (1) before the expiration of the 180-day period beginning on the date on which the allegation is received by the Federal Bureau of Investigation, the employee described in that paragraph may seek corrective action directly from the Merit Systems Protection Board pursuant to section 1221.

Simply mentioning this change in the Notice of Proposed Rulemaking is not enough. The Department should explicitly mention this change in the substance of the proposed rule.

Furthermore, the Department should make clear in its rule that the right to appeal a final determination or corrective order, or to appeal after 180 days without a final determination or corrective order, applies to all FBI employees—including those who had retaliation complaints pending at the Department when the new law was passed.

The analytical framework for determining whether a statute should be given retroactive effect was set out by the Supreme Court in *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994):

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i. e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.

The James M. Inhofe NDAA does not impair any party's rights, increase liability for past conduct, or impose new duties with respect to transactions already completed. It simply gives FBI employees another forum to hear their retaliation claims under 5 U.S.C. § 2303(a)(2), which has not changed. As the Supreme Court noted in *Landgraf* of this type of jurisdictional change:

We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed. . . . Application of a new jurisdictional rule usually "takes away no substantive right but simply changes the tribunal that is to hear the case." *Hallowell*, 239 U. S., at 508.

511 U.S. 274.

Thank you again for the opportunity to provide these comments. We hope you will consider them as you seek to improve the FBI's whistleblower protection program.

Cordially,

/Tristan Leavitt/
Tristan Leavitt
President