

117TH CONGRESS
1ST SESSION

S. 268

To protect certain whistleblowers seeking to ensure accountability and oversight of the Nation’s COVID–19 pandemic response, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 4, 2021

Ms. WARREN (for herself, Mrs. FEINSTEIN, Mr. MARKEY, Ms. SMITH, Mr. BLUMENTHAL, Mr. BROWN, Ms. HIRONO, Mr. WYDEN, Ms. KLOBUCHAR, Mr. SANDERS, Mr. DURBIN, Ms. BALDWIN, Mr. MERKLEY, Mr. VAN HOLLEN, and Mr. WHITEHOUSE) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

To protect certain whistleblowers seeking to ensure accountability and oversight of the Nation’s COVID–19 pandemic response, and for other purposes.

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 “COVID–19 Whistle-
5 blower Protection Act”.

6 **SEC. 2. DEFINITIONS.**

7 In this Act—

1 (1) the term “abuse of authority” means an ar-
2 bitrary and capricious exercise of authority by a con-
3 tracting officer or employee that adversely affects
4 the rights of any individual, or that results in per-
5 sonal gain or advantage to the officer or employee
6 or to preferred other individuals;

7 (2) the term “CARES Act” means the CARES
8 Act (Public Law 116–136);

9 (3) the term “Coronavirus pandemic-related
10 program, project, or activity”—

11 (A) means a program, project, or activity
12 of the executive branch of the Federal Govern-
13 ment authorized under or carried out using
14 amounts made available under an Act to re-
15 spond to or to provide aid or assistance to ad-
16 dress, relief from, or funding to address the
17 outbreak of COVID–19 that is enacted before,
18 on, or after the date of enactment of this Act;
19 and

20 (B) includes any program, project, or ac-
21 tivity of the executive branch of the Federal
22 Government authorized under or carried out
23 using amounts made available under—

24 (i) the Paycheck Protection Program
25 and Health Care Enhancement Act (Public

1 Law 116–139), or an amendment made by
2 that Act;

3 (ii) the CARES Act, or an amend-
4 ment made by that Act;

5 (iii) the Families First Coronavirus
6 Response Act (Public Law 116–127), or an
7 amendment made by that Act;

8 (iv) the Coronavirus Preparedness and
9 Response Supplemental Appropriations
10 Act, 2020 (Public Law 116–123), or an
11 amendment made by that Act; or

12 (v) division M or N of the Consoli-
13 dated Appropriations Act, 2021 (Public
14 Law 116–260), or an amendment made by
15 that division;

16 (4) the term “covered funds” means any con-
17 tract, subcontract, grant, subgrant, loan, loan guar-
18 antee, or other payment for which—

19 (A) the Federal Government provides any
20 portion of the funds or property that is pro-
21 vided, requested, or demanded; and

22 (B) any portion of the funds are appro-
23 priated or otherwise made available under or to
24 carry out a Coronavirus pandemic-related pro-
25 gram, project, or activity;

1 (5) the term “employee”—

2 (A) except as provided under subparagraph
3 (B), means an individual performing services on
4 behalf of an employer, including any individual
5 working for an employer under a contract with
6 such employer (including a contractor, subcon-
7 tractor, or agent of an employer); and

8 (B) does not include any Federal employee
9 or member of the uniformed services (as that
10 term is defined in section 101(a)(5) of title 10,
11 United States Code);

12 (6) the term “non-Federal employer”—

13 (A) means any employer—

14 (i) with respect to covered funds—

15 (I) the contractor, subcontractor,
16 grantee, subgrantee, or recipient, as
17 the case may be, if the contractor,
18 subcontractor, grantee, subgrantee, or
19 recipient is an employer; and

20 (II) any professional membership
21 organization, certification or other
22 professional body, any agent or li-
23 censee of the Federal Government, or
24 any person acting directly or indi-

1 rectly in the interest of an employer
2 receiving covered funds; or

3 (ii) with respect to covered funds re-
4 ceived by a State or local government, the
5 State or local government receiving the
6 funds and any contractor or subcontractor
7 of the State or local government; and

8 (B) does not mean any department, agen-
9 cy, or other entity of the Federal Government;

10 (7) the term “protected individual” means—

11 (A) an employee of, former employee of, or
12 individual seeking employment with, any non-
13 Federal employer receiving covered funds; or

14 (B) a Federal personal services contractor
15 receiving covered funds, former such Federal
16 personal services contractor, or applicant for a
17 Federal personal services contract involving
18 such funds;

19 (8) the term “reprisal” means an action (or, as
20 applicable, inaction) that is discharging, demoting,
21 blacklisting, or acting or failing to take an action in
22 a manner prejudicial against, or otherwise discrimi-
23 nating against in any way (including in the hiring
24 process and including by the threat of any such ac-
25 tion or inaction) a protected individual as described

1 in section 3(a)(1) for a reason described in subpara-
 2 graph (A) or (B) of such section; and

3 (9) the term “State or local government”
 4 means—

5 (A) the government of each of the several
 6 States, the District of Columbia, the Common-
 7 wealth of Puerto Rico, Guam, American Samoa,
 8 the Virgin Islands, the Commonwealth of the
 9 Northern Mariana Islands, or any other terri-
 10 tory or possession of the United States; or

11 (B) the government of any political sub-
 12 division of a government listed in subparagraph
 13 (A).

14 **SEC. 3. PROTECTING WHISTLEBLOWERS.**

15 (a) PROHIBITION OF REPRISALS.—

16 (1) IN GENERAL.—A protected individual may
 17 not be discharged, demoted, blacklisted, prejudiced
 18 by any action or lack of action, or otherwise dis-
 19 criminated against in any way (including in the hir-
 20 ing process and including by the threat of any such
 21 action or inaction) for—

22 (A) disclosing, being perceived as dis-
 23 closing, or preparing to disclose (including as-
 24 sisting in disclosing, being perceived as assist-
 25 ing in disclosing, or preparing to assist in dis-

1 closing and including a disclosure made in the
2 ordinary course of the duties of the protected
3 individual) to an officer or entity described in
4 paragraph (2) information that the protected
5 individual reasonably believes is evidence of
6 misconduct that violates, obstructs, or under-
7 mines any statute, rule, or regulation with re-
8 spect to any Coronavirus pandemic-related pro-
9 gram, project, or activity, including—

10 (i) gross mismanagement of an agency
11 contract, subcontract, grant, or subgrant
12 relating to covered funds;

13 (ii) a gross waste of covered funds;

14 (iii) a substantial and specific danger
15 to public health or safety;

16 (iv) an abuse of authority related to
17 the distribution, implementation, or use of
18 covered funds, including conflict of interest
19 or partiality; and

20 (v) a violation of any statute, rule, or
21 regulation related to an agency contract,
22 subcontract (including the competition for
23 or negotiation of a contract or sub-
24 contract), grant, or subgrant, awarded or
25 issued relating to covered funds; or

1 (B) refusing to obey an order that the pro-
 2 tected individual reasonably believes would re-
 3 quire that individual to violate a statute, rule,
 4 or regulation with respect to any Coronavirus
 5 pandemic-related program, project, or activity.

6 (2) OFFICERS AND ENTITIES.—The officers and
 7 entities described in this paragraph are—

8 (A) the Pandemic Response Accountability
 9 Committee;

10 (B) an inspector general, including the
 11 Special Inspector General for Pandemic Relief;

12 (C) the Congressional Oversight Commis-
 13 sion;

14 (D) the Comptroller General of the United
 15 States;

16 (E) a Member of Congress;

17 (F) a congressional committee;

18 (G) a State or Federal regulatory or law
 19 enforcement agency;

20 (H)(i) an individual with supervisory au-
 21 thority over a protected individual; or

22 (ii) another individual who—

23 (I) has authority to investigate, dis-
 24 cover, or terminate misconduct; and

(II) works for the non-Federal employer (in the case of a protected individual described in section 2(7)(A)), or the Federal Government (in the case of a protected individual described in section 2(7)(B));

(I) a court or grand jury;

(J) an officer or representative of a labor organization; or

(K) the head of a Federal agency or a designee of such a head.

(3) APPLICATION.—

(A) IN GENERAL.—For the purposes of paragraph (1)—

(i) a protected individual who initiates or provides evidence of misconduct by a contractor, subcontractor, grantee, or subgrantee in any judicial or administrative proceeding relating to waste, fraud, or abuse in connection with a Federal contract or grant shall be deemed to have made a disclosure covered by such paragraph; and

(ii) any discharge, demotion, discrimination, or other reprisal described in para-

graph (1) is prohibited even if it is undertaken at the request of an executive branch officer or employee, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

(B) PROTECTION OF WHISTLEBLOWER
IDENTITY.—

(i) IN GENERAL.—Except as required by law, an officer or entity described in paragraph (2) that receives information under paragraph (1) and any individual or entity to which the officer or entity discloses the information may not disclose the identity or identifying information of the protected individual providing the information without explicit written consent of the protected individual.

(ii) NOTICE.—If disclosure of the identity or identifying information of a protected individual providing information under paragraph (1) is required by law, the recipient shall provide timely notice of the disclosure to the protected individual.

1 (b) INVESTIGATION OF COMPLAINTS.—

2 (1) COMPLAINTS.—

3 (A) IN GENERAL.—A protected individual
4 who believes that the individual has been sub-
5 jected to a reprisal prohibited under subsection
6 (a) may, within 3 years after learning of the al-
7 leged reprisal, submit a complaint regarding the
8 reprisal to the Secretary of Labor in accordance
9 with paragraph (2).

10 (B) RESPONSE.—Not later than 60 days
11 after the submission of a complaint under sub-
12 paragraph (A), the applicable non-Federal em-
13 ployer (or the applicable agency head in the
14 case of a Federal personal services contract in-
15 volving covered funds) shall submit an answer
16 to the complaint to the Secretary of Labor.

17 (2) REMEDY AND ENFORCEMENT AUTHOR-
18 ITY.—

19 (A) RULES AND PROCEDURES.—Except to
20 the extent provided otherwise in this section,
21 any action alleging a reprisal prohibited under
22 subsection (a) shall be governed, to the max-
23 imum extent practicable, by the rules and pro-
24 cedures for administrative and judicial enforce-
25 ment, including for investigations, civil actions,

appeals, and relief, set forth under section 7623(d) of the Internal Revenue Code of 1986.

(B) BURDEN OF PROOF.—The Secretary of Labor, or the officer presiding in a judicial or administrative proceeding, shall apply the legal burdens of proof specified in section 1221(e) of title 5, United States Code, in determining whether a reprisal prohibited under subsection (a) has occurred in accordance with the rules and procedures under subparagraph (A).

(C) ACCESS TO INVESTIGATIVE FILE OF THE SECRETARY OF LABOR.—

(i) IN GENERAL.—A protected individual alleging a reprisal under this section shall have access to the investigation file of the Secretary of Labor in accordance with section 552a of title 5, United States Code (commonly referred to as the “Privacy Act”). The investigation of the Secretary of Labor shall be deemed closed for purposes of disclosure under such section when an individual files an appeal to an agency head or a court of competent jurisdiction.

1 (ii) CIVIL ACTION.—In the event a
2 protected individual alleging a reprisal
3 under this section brings a civil action
4 under this subsection, the protected indi-
5 vidual and the non-Federal employer (or
6 the head of the applicable agency in the
7 case of a Federal personal services con-
8 tract involving covered funds), if applica-
9 ble, shall have access to the investigative
10 file of the Secretary of Labor in accord-
11 ance with section 552a of title 5, United
12 States Code.

13 (iii) EXCEPTION.—The Secretary of
14 Labor may exclude from disclosure—

15 (I) information protected from
16 disclosure by a provision of law; and

17 (II) any additional information
18 the Secretary of Labor determines
19 disclosure of which would impede a
20 continuing investigation, if such infor-
21 mation is disclosed once such disclo-
22 sure would no longer impede such in-
23 vestigation, unless the Secretary of
24 Labor determines that disclosure of
25 law enforcement techniques, proce-

1 dures, or information could reasonably
2 be expected to risk circumvention of
3 the law or disclose the identity of a
4 confidential source.

5 (iv) PRIVACY OF INFORMATION.—The
6 Secretary of Labor investigating an alleged
7 reprisal under this section may not re-
8 spond to any inquiry or disclose any infor-
9 mation from or about any protected indi-
10 vidual alleging such reprisal, except in ac-
11 cordance with the provisions of section
12 552a of title 5, United States Code, or as
13 required by any other applicable Federal
14 law.

15 (c) GENERAL PROVISIONS.—

16 (1) RIGHTS RETAINED BY EMPLOYEE.—Noth-
17 ing in this section shall diminish the rights, privi-
18 leges, or remedies of any protected individual under
19 any Federal or State law, or under any collective
20 bargaining agreement.

21 (2) LIABILITY.—Notwithstanding any other
22 provision of law, a protected individual shall be im-
23 mune from civil and criminal liability with respect to
24 a disclosure by the individual if the individual would
25 be protected from reprisal under subsection (a) for

1 making the disclosure. The protected individual shall
2 bear the burden of proving that the individual would
3 be protected from reprisal under subsection (a) for
4 making the disclosure.

5 (3) NONENFORCEABILITY OF CERTAIN PROVI-
6 SIONS WAIVING RIGHTS AND REMEDIES OR REQUIR-
7 ING ARBITRATION OF DISPUTES.—

8 (A) WAIVER OF RIGHTS AND REMEDIES.—

9 Except as provided under subparagraph (C),
10 the rights and remedies provided for in this sec-
11 tion may not be waived by any public or private
12 agreement, policy, form, or condition of employ-
13 ment, including by any predispute arbitration
14 agreement.

15 (B) PREDISPUTE ARBITRATION AGREE-
16 MENTS.—Except as provided under subpara-
17 graph (C), no predispute arbitration agreement
18 shall be valid or enforceable if it requires arbi-
19 tration of a dispute arising under this section.

20 (C) EXCEPTION FOR COLLECTIVE BAR-
21 GAINING AGREEMENTS.—Notwithstanding sub-
22 paragraphs (A) and (B), an arbitration provi-
23 sion in a collective bargaining agreement shall
24 be enforceable as to disputes arising under the
25 collective bargaining agreement.

1 (4) REQUIREMENT TO POST NOTICE OF RIGHTS
 2 AND REMEDIES.—Any non-Federal employer receiv-
 3 ing covered funds (and the head of the applicable
 4 agency in the case of a Federal personal services
 5 contract involving covered funds) shall post notice of
 6 the rights and remedies provided under this section.

7 (d) RULES OF CONSTRUCTION.—

8 (1) NO IMPLIED AUTHORITY TO RETALIATE
 9 FOR NON-PROTECTED DISCLOSURES.—Nothing in
 10 this section may be construed to—

11 (A) authorize the discharge of, demotion
 12 of, or discrimination or other reprisal against a
 13 protected individual for a disclosure other than
 14 a disclosure protected by subsection (a); or

15 (B) modify or derogate from a right or
 16 remedy otherwise available to the protected in-
 17 dividual.

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

22 (e) COMPLAINT PORTAL.—The Special Inspector
 23 General for Pandemic Relief, the Pandemic Relief Ac-
 24 countability Committee, and the Congressional Oversight
 25 Commission shall each establish a public website where

1 any individual who believes that the individual has been
2 subjected to a reprisal prohibited under subsection (a)
3 may submit a complaint regarding the reprisal. Such com-
4 plaints shall be transmitted to the Secretary of Labor for
5 enforcement in accordance with this section.

6 (f) AUTHORIZATION OF APPROPRIATIONS.—There is
7 authorized to be appropriated to the Secretary of Labor
8 to carry out this Act \$20,000,000 for fiscal year 2021,
9 to remain available until expended.

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