

FEDERAL EMPLOYEE ANTIDISCRIMINATION
ACT OF 2015

—
R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

H.R. 1557

TO AMEND THE NOTIFICATION AND FEDERAL EMPLOYEE
ANTIDISCRIMINATION AND RETALIATION ACT OF 2002 TO
STRENGTHEN FEDERAL ANTIDISCRIMINATION LAWS ENFORCED
BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND
EXPAND ACCOUNTABILITY WITHIN THE FEDERAL GOVERNMENT,
AND FOR OTHER PURPOSES



JULY 12, 2016.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE

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114TH CONGRESS }
2d Session }

SENATE

{ REPORT
{ 114-300

FEDERAL EMPLOYEE ANTIDISCRIMINATION ACT OF 2015

JULY 12, 2016.—Ordered to be printed

Mr. JOHNSON, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany H.R. 1557]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (H.R. 1557), to amend the Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002 to strengthen Federal administration laws enforced by the Equal Employment Opportunity Commission and expand accountability within the Federal government, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

The purpose of H.R. 1557, the Federal Employee Antidiscrimination Act of 2015, is to amend Federal laws to strengthen Equal Employment Opportunity Protections for Federal employees, strengthen prohibitions against discrimination and retaliation against whistleblowers within the Federal workforce and to ensure Federal agencies and supervisors that violate the law are held accountable.

II. BACKGROUND AND THE NEED FOR LEGISLATION

Federal Equal Employment Opportunity (EEO) programs, which are required to identify and eliminate barriers to equal opportunity, are vital to ensuring that Federal workplaces provide the same guarantee of equal opportunity that is required of other employers across the country. Federal employees or applicants for employment in the Federal Government who believe they have been discriminated against can bring a complaint to their agency's EEO program, which investigates these complaints. The Equal Employment Opportunity Commission (EEOC) has released standards of a model EEO program that Federal agencies should follow. However, some Federal agencies' EEO programs have not met these standards.

Federal law prohibits discrimination against Federal employees in their workplace, including against job applicants and employees based on the "person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information."¹

In addition to prohibiting discrimination, Federal law prohibits retaliation against whistleblowers.² Whistleblowers remain a vital source of public accountability within the Federal workforce. Federal employees who courageously step forward to report instances of waste, fraud, abuse and criminality within the Federal Government help ensure that the Executive Branch is held accountable and assist the Congress with its constitutional responsibility to conduct oversight.

Whistleblowers can identify problems that lead to reforms that improve Federal agencies' performance and yield cost savings for taxpayers. For example, the Office of Special Counsel (OSC) reported that whistleblowers identifying problems within the Department of Homeland Security resulted in \$100 million in annual savings.³

Whistleblowers also may report instances of wrongdoing and criminality that have life and death consequences. Our nation's veterans have earned the right to the finest health care possible due to their service on behalf of the country. But in some cases, Department of Veterans Affairs' (VA) centers are not providing the highest standard of care, and whistleblowers have come forward to highlight abuses. For example, through an investigation and several hearings,⁴ the Committee learned about allegations of signifi-

¹ U.S. Equal Employment Opportunity Commission, *About* (Feb. 9, 2016), available at <http://www.eeoc.gov/eeoc/>.

² 5 U.S.C. § 2302.

³ *Nomination of Michael J. Missal to be Inspector General, U.S. Department of Veterans Affairs, and the Honorable Carolyn N. Lerner to be Special Counsel, Office of Special Counsel: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs* 3, 114th Cong. (2016) (statement of Carolyn Lerner, Special Counsel, Office of Special Counsel), available at <http://www.hsgac.senate.gov/hearings/nomination-of-carolyn-lerner-to-be-special-counsel-of-the-office-of-special-counsel-and-michael-missal-to-be-inspector-general-of-the-department-of-veterans-affairs>.

⁴ See, e.g., *Improving VA Accountability: Examining First-Hand Accounts of Department of Veterans Affairs Whistleblowers: Hearing Before the Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2015), available at <http://www.hsgac.senate.gov/hearings/improving-va-accountability-examining-first-hand-accounts-of-department-of-veterans-affairs-whistleblowers> [hereinafter *Improving VA Accountability*]; *Tomah VAMC: Examining Quality, Access, and a Culture of Overreliance on High-Risk Medications: Joint Field Hearing Before the Comm. of Homeland Sec. & Governmental Affairs and the H. Comm. on Veterans' Affairs*, 114th Cong. (2015), available at <http://www.hsgac.senate.gov/hearings/joint-field-hearing-tomah-vamc-exam>.

cant wrongdoing that occurred at the VA Medical Center in Tomah, Wisconsin. Several employees of the facility presented concerns to VA management, the Office of Inspector General, or their VA union representatives about overmedication that was occurring at the facility.⁵ The VA's alleged retaliation against these whistleblowers also had serious consequences. For example, in testimony before the Committee, Dr. Christopher Kirkpatrick's brother Sean Kirkpatrick testified that Dr. Kirkpatrick was a psychologist and whistleblower at the Tomah VA facility.⁶ Mr. Kirkpatrick testified that he believed his brother was fired after raising questions about the large number of narcotics prescribed to patients there, and committed suicide later that same day.⁷

Retaliation against whistleblowers has been particularly concerning in recent years at the VA. Special Counsel Lerner has publicly questioned the VA's handling of whistleblower complaints, stating that "it is clear that the workplace culture in many VA facilities is hostile to whistleblowers and actively discourages them from coming forward with what is often critical information."⁸ Indeed, OSC "has seen a sharp increase in the number of whistleblower cases from VA employees."⁹ VA cases averaged only 20 percent of all cases in 2009, 2010, and 2011.¹⁰ As of September 2015, the proportion of prohibited personnel practice complaints made to OSC by VA employees was approximately 35 percent of all the complaints received by OSC across the Federal Government.¹¹ To put this number in context, 2014 was the first year on record that cases filed with OSC by VA employees surpassed those by Department of Defense (DoD) employees, despite the fact that the DoD has two times more civilian employees than the VA.¹² The recent increase of whistleblower complaints coming from the VA has forced OSC to reallocate staff and resources and prioritize VA cases through an expedited review process.¹³

Unfortunately, the problem of retaliation against whistleblowers is not unique to the VA. In 2015, the Committee heard testimony from whistleblowers who served with the United States Army, United States Immigration and Customs Enforcement, the Social Security Administration, and United States Customs and Border

ining-quality-access-and-a-culture-of-overreliance-on-high-risk-medications [hereinafter *Tomah VAMC*].

⁵*Tomah VAMC* at 2-3 (statement of Noelle Johnson); *id.* at 2 (statement of Ryan Honl); *id.* at 1 (statement of Heather Simcakoski); *see also Improving VA Accountability* at 2 (statement of Sean Kirkpatrick).

⁶*Improving VA Accountability* (statement of Sean Kirkpatrick).

⁷*Id.*

⁸*VA Whistleblowers: Exposing Inadequate Service Provided to Veterans and Ensuring Appropriate Accountability: Hearing Before the H. Comm. on Veterans' Affairs*, 113th Cong. (2014) (statement of Carolyn Lerner, Special Counsel, Office of Special Counsel), available at <http://veterans.house.gov/hearing/va-whistleblowers-exposing-inadequate-service-provided-to-veterans-and-ensuring-appropriate>.

⁹*Improving VA Accountability* at 1 (statement of Carolyn Lerner, Special Counsel, Office of Special Counsel).

¹⁰*Addressing Continued Whistleblower Retaliation Within VA: Hearing Before H. Comm. on Veterans' Affairs, Subcomm. On Oversight & Investigations 1*, 114th Cong. (2015) (statement of Carolyn Lerner, Special Counsel, Office of Special Counsel), available at <http://veterans.house.gov/hearing/addressing-continued-whistleblower-retaliation-within-va>.

¹¹*Improving VA Accountability* at 2 (statement of Carolyn Lerner, Special Counsel, Office of Special Counsel).

¹²*Id.* at 2.

¹³*Id.*

Protection.¹⁴ Each described the challenges and retaliation they believed they experienced from their agencies after blowing the whistle on agency wrongdoing.¹⁵

Congress passed the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act) to strengthen laws prohibiting discriminatory or retaliatory acts against Federal employees, including by creating new reporting requirements to inform employees of their rights.¹⁶ The No FEAR Act also made Federal agencies directly financially accountable for violations of antidiscrimination and whistleblower protections.¹⁷

However, the No FEAR Act of 2002 did little to hold supervisors or other employees directly accountable for violating retaliation and discrimination laws. The law does not require discipline against employees judged to have committed acts of discrimination or retaliation, even though employees may not come forward without a belief that their disclosure will be heard and make a difference. As explained by the Legal Director of the Government Accountability Project, “[e]very academic or government study has concluded that the primary motivating, or chilling factor for would-be whistleblowers is whether they can make a difference by bearing witness.”¹⁸ Unfortunately, only 61 percent of Federal employees have confidence that they can blow the whistle without facing reprisal.¹⁹ OSC has raised concerns about the inconsistent use of discipline at the VA, in particular. In testimony before this Committee, Special Counsel Lerner noted numerous examples of the VA failing to discipline officials found responsible for posing significant risks to public health and safety or engaging in other misconduct.²⁰ Special Counsel Lerner added that this lack of discipline “stand[s] in stark contrast to disciplinary actions taken against VA whistleblowers . . . for minor indiscretions or for activity directly related to the employee’s whistleblowing.”²¹

Special Counsel Lerner testified to the Committee that the OSC was projected to receive 4,000 Government-wide prohibited personnel practice complaints in 2015, which include many whistleblower retaliation complaints.²² The EEOC, the Federal agency responsible for enforcing Federal employment discrimination laws, says 14,343 Federal employees and applicants filed 15,013 complaints alleging employment discrimination during fiscal year (FY)

¹⁴ *Blowing the Whistle on Retaliation: Accounts of Current and Former Federal Agency Whistleblowers: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2015) (statement of Chairman Ron Johnson), available at <http://www.hsgac.senate.gov/hearings/blowing-the-whistle-on-retaliation-accounts-of-current-and-former-federal-agency-whistleblowers> [hereinafter *Blowing the Whistle on Retaliation*].

¹⁵ *Id.*

¹⁶ Pub. L. No. 107–174, 107th Cong., (2002).

¹⁷ *Id.*

¹⁸ *Blowing the Whistle on Retaliation* (statement of Thomas M. Devine, Legal Director, Government Accountability Project).

¹⁹ OFFICE OF PERSONNEL MGMT., FEDERAL EMPLOYEE VIEWPOINT SURVEY RESULTS, GOVERNMENTWIDE MANAGEMENT REPORT 28 (2016) available at http://www.fedview.opm.gov/2015FILES/2015_FEVS_Gwide_Final_Report.PDF.

²⁰ *Improving VA Accountability* at 5–6 (statement of Carolyn Lerner, Special Counsel, Office of Special Counsel).

²¹ *Id.* at 6.

²² *Id.* at 2, 4.

2014.²³ In the same year, agencies paid \$44.8 million in monetary awards to complainants.²⁴

Additional measures to prevent retaliation against whistleblowers and discrimination against Federal employees are needed to protect Federal employees who report wrongdoing or illegality within the Federal Government or experience discrimination in the workplace.

H.R. 1557 would require Federal agencies to adopt best practices to manage their EEO programs. It would also strengthen transparency and accountability for discrimination and retaliation at Federal agencies. First, the bill updates the sense of the Congress of the No FEAR Act to stress the need for agencies to take appropriate disciplinary action against Federal employees who have been found to have committed discriminatory or retaliatory acts. As amended, the bill enforces this Sense of Congress by requiring a suspension of not less than 12 days for a first offense and removal for a second offense for employees found to have committed a discriminatory or retaliatory act. In these cases, Federal employees facing disciplinary action related to an alleged act of retaliation or discrimination are still afforded rights under Federal law to appeal the judgment.

The bill also aims to reduce discrimination and retaliation by mandating new transparency and reporting requirements for Federal agencies to disclose EEOC findings of discrimination, including through public reporting on agency websites. H.R. 1557 also creates other new rules for agencies, such as requiring a tracking system for complaints alleging discriminatory acts and requiring that agency EEO program offices not be controlled by agency general counsel or human capital offices.

The Committee also amended the legislation to remove a provision requiring the head of each Federal agency's EEO program to report directly to the head of the agency. This provision was removed to grant agencies and their Congressional authorizers flexibility to determine how best to organize the agency's management and reporting structure for these offices.

The bill also creates a new whistleblower protection. It amends Federal law to prohibit the implementation or enforcement of non-disclosure agreements that would limit an employee's ability to disclose certain information to OSC, the Office of Inspector General, or Congress.

III. LEGISLATIVE HISTORY

Representative Elijah E. Cummings of Maryland introduced H.R. 1557, the Federal Employee Antidiscrimination Act, on March 24, 2015. The Committee on Oversight and Government Reform in the House of Representatives favorably reported the bill on March 25, 2015. On a motion to suspend the rules and pass, the House of Representatives passed H.R. 1557 by a vote of 403 to 0.

H.R. 1557 was referred to the Senate Committee on Homeland Security and Governmental Affairs on July 22, 2015. The Com-

²³ UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, OFFICE OF FEDERAL OPERATIONS, ANNUAL REPORT ON THE FEDERAL WORKFORCE PART I, EEO COMPLAINTS PROCESSING, FISCAL YEAR 2014 (Dec. 15, 2015), *available at* <http://www.eeoc.gov/federal/reports/fsp2014/upload/Final-FY-2014-Annual-Report-Part-I.pdf>.

²⁴ *Id.*

mittee considered H.R. 1557 at a business meeting on December 9, 2015.

During the business meeting, Chairman Ron Johnson offered a substitute amendment that was adopted by unanimous consent. The substitute amendment included two substantive changes. First, the amendment struck section 403 of the act that would have required the head of each agency's EEO program to report directly to the head of the agency. Second, the amendment modified the original section 404 to codify the current memorandum of understanding between the EEOC and the OSC regarding referrals of EEOC findings. The amendment clarifies that the EEOC may refer findings to OSC if the Commission determines that the Federal agency did not take appropriate action. The amendment made other technical and conforming changes.

Senator James Lankford offered an amendment adding a new provision to the act to require that agencies discipline supervisors found to have discriminated or retaliated against whistleblowers: for the first offense, not less than a 12-day suspension, and for the second offense, removal. The amendment also includes a process for notifying an employee of these disciplinary actions, and allows a two-week period when the employee can appeal the action. The amendment was adopted by voice vote with Senators Johnson, Portman, Lankford, Ayotte, Ernst, Carper, Tester, Baldwin, and Booker present.

H.R. 1557, as amended by both the Johnson and Lankford amendments, was approved by voice vote with Senators Johnson, Portman, Lankford, Ayotte, Ernst, Carper, Tester, Baldwin, and Booker present.

IV. SECTION-BY-SECTION ANALYSIS OF THE ACT, AS REPORTED

Section 1. Short title

This section establishes the short title of the Act as the "Federal Employee Antidiscrimination Act of 2015."

Section 2. Sense of the Congress

This section amends the No FEAR Act of 2002 by updating the sense of the Congress. Specifically, the section states that "accountability in the enforcement of Federal employee rights is furthered when agencies take appropriate disciplinary action against Federal employees who have been found to have committed discriminatory or retaliatory acts." The section further amends the existing sense of the Congress to reiterate that Federal agencies should not violate employees' due process rights while enforcing new accountability measures.

Section 3. Notification of violation

This section amends Section 202 of the No FEAR Act to require that agencies publicly report an EEOC finding of discrimination or retaliation on their website for at least one year. The notification shall include information about the finding, including the law or laws violated by the discriminatory or retaliatory act or acts. The notification shall also advise employees of their rights.

Section 4. Reporting requirements

This section mandates that forms required by the No FEAR Act be submitted in an electronic format. The section also requires the agency to report to the EEOC on whether disciplinary actions have been initiated against a Federal employee as a result of a finding of discrimination or retaliation.

Section 5. Data to be posted by employing Federal agencies

This section amends the No FEAR Act to expand what data must be reported on agency websites regarding findings of discrimination or retaliation. Data must now include the date of the finding, the affected agency, the law violated, and whether a decision has been made regarding necessary disciplinary actions as a result of the finding. The section also requires reporting on data pertaining to class action complaints filed against Federal agencies.

Section 6. Data to be posted by the Equal Employment Opportunity Commission

This section amends the No FEAR Act to apply the reporting requirements amended by Section 5 to the EEOC.

Section 7. Notification and Federal Employee Antidiscrimination and Retaliation Act amendments

This section makes several changes to the NO FEAR Act. First, it requires Federal agencies to establish a system for tracking discrimination complaints and the outcomes of the complaints. Second, it requires that a Federal agency make a notation in an employee's personnel record if the employee has been found to commit an act of discrimination or retaliation after all appeals have been exhausted. Third, it requires that each Federal agency is responsible for establishing a model EEO program that is not under the control of a Human Capital or General Counsel office, is devoid of internal conflicts of interest, and ensures the efficient and fair resolution of complaints alleging discrimination or retaliation. Human Capital and General Counsel offices may still provide advice or counsel to Federal agency personnel in the processing or resolution of a complaint, including providing legal representation to an agency in any proceeding.

Finally, the No FEAR Act is amended to establish a process for EEOC referrals to OSC. The EEOC may refer matters to OSC if it determines that the Federal agency did not take appropriate action. The EEOC must include information about the number of these referrals in its annual report. The OSC must accept and review referrals from the EEOC and notify the EEOC in a case that it initiates disciplinary action. It clarifies that agencies may not initiate disciplinary actions against an employee for an alleged act of discrimination or retaliation while the matter is referred to the OSC.

Section 8. Non-disclosure agreements limitation

This section prohibits agencies from implementing or enforcing any nondisclosure policy, form, or agreement, if such policy, form, or agreement prohibits or restricts an employee from disclosing to Congress, the OSC, or an Office of Inspector General any information that relates to any violation of any law, rule, or regulation, or

mismanagement, a gross waste of funds, an abuse of authority, or a substantial, and specific danger to public health or safety, or any other whistleblower protections.

Section 9. Discipline of supervisors based on retaliation against whistleblowers or discrimination

This section requires that supervisors be disciplined based on discrimination or retaliation against whistleblowers. The head of an agency is required to propose a disciplinary action against a supervisor who is determined to have committed a prohibited personnel action, including discrimination or retaliation, by the head of that agency, an administrative law judge, the Merit System Protection Board, OSC, an adjudicating body provided under a union contract, a Federal judge, or the inspector general of the agency. The disciplinary action must be at least a 12-day suspension for the first offense and removal for the second offense. It establishes a process for supervisors to be notified and to respond to the proposed disciplinary action.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

JANUARY 8, 2016.

Hon. RON JOHNSON,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1557, the Federal Employee Antidiscrimination Act of 2015.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

KEITH HALL.

Enclosure.

H.R. 1557—Federal Employee Antidiscrimination Act of 2015

H.R. 1557 would amend the Notification and Federal Employee Antidiscrimination and Retaliation Act to expand the current process used to investigate and resolve federal employees' claims of discrimination by other federal employees. The act also would expand the amount of information that must be reported and made available concerning such discrimination cases.

Based on information from the Office of Personnel Management and the U.S. Equal Employment Opportunity Commission, most of the provisions in the act would expand current policies and prac-

tices of the federal government. Currently, the federal government, through laws, regulations, and agency policies, prohibits discrimination in all phases of employment. CBO expects that under the act there would be some minor additional costs for agencies to track and report discriminatory acts and to notify the public of violations of antidiscrimination laws. However, CBO estimates that implementing H.R. 1557 would increase federal administrative costs by less than \$500,000 annually; such spending would be subject to the availability of appropriated funds.

Enacting H.R. 1557 could affect direct spending by some agencies (such as the Tennessee Valley Authority) because they are authorized to use receipts from the sale of goods, fees, and other collections to cover their operating costs. Therefore, pay-as-you-go procedures apply. Because most of those agencies can make adjustments to the amounts collected, CBO estimates that any net changes in direct spending by those agencies would not be significant. Enacting the legislation would not affect revenues.

CBO estimates that enacting H.R. 1557 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2026.

H.R. 1557 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

On May 8, 2015, CBO transmitted a cost estimate for H.R. 1557, as ordered reported by the House Committee on Oversight and Government Reform on March 25, 2015. The two pieces of legislation are similar and CBO's estimates of their costs are the same.

The CBO staff contact for this estimate is Matthew Pickford. This estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAW MADE BY THE ACT, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the Act, as reported, are shown as follows: (existing law proposed to be omitted is enclosed in brackets, new matter is printed in *italics*, and existing law in which no change is proposed is shown in roman):

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

* * * * *

PART III—EMPLOYEES

* * * * *

CHAPTER 23—MERIT SYSTEM PRINCIPLES

* * * * *

SECTION 2301. MERIT SYSTEM PRINCIPLES

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**NOTIFICATION AND FEDERAL EMPLOYEE
ANTIDISCRIMINATION AND RETALIATION ACT OF 2002**

SEC. 1. SHORT TITLE; TABLE OF CONTENTS.

(a) * * *

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**TITLE II—FEDERAL EMPLOYEE DISCRIMINATION AND
RETALIATION**

Sec. 201. Reimbursement Requirement.

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Sec. 207. *Complaint tracking.*

Sec. 208. *Notation in personnel record.*

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TITLE IV—PROCESSING AND REFERRAL

Sec. 401. *Processing and resolution of complaints.*

Sec. 402. *No limitation on Human Capital or General Counsel advice.*

Sec. 403. *Referrals of findings of discrimination.*

* * * * *

TITLE I—GENERAL PROVISIONS

SEC. 101. * * *

SEC. 102. SENSE OF CONGRESS.

It is the sense of Congress that—

(1) * * *

(2) * * *

(3) * * *

[(4)

(A) accountability in the enforcement of employee rights is not furthered by terminating—

(i) the employment of other employees; or

(ii) the benefits to which those employees are entitled through statute or contract; and

(B) this Act is not intended to authorize those actions;]

(4) *accountability in the enforcement of Federal employee rights is furthered when Federal agencies take appropriate disciplinary action against Federal employees who have been found to have committed discriminatory or retaliatory acts;*

(5)

(A) [nor is accountability] *but accountability is not furthered if Federal agencies react to the increased accountability under this Act for what by law the agency is responsible by taking unfounded disciplinary actions against managers or by violating the procedural rights of managers who have been accused of discrimination; and*

(B) Federal agencies should ensure that managers have adequate training in the management of a diverse workforce and in dispute resolution and other essential communication skills; and

* * * * *

**TITLE II—FEDERAL EMPLOYEE
DISCRIMINATION AND RETALIATION**

SEC. 201. * * *

SEC. 202. NOTIFICATION REQUIREMENT.

(a) * * *

* * * * *

(d) *NOTIFICATION OF FINAL AGENCY ACTION.—*

(1) Not later than 30 days after a Federal agency takes final action or the Equal Employment Opportunity Commission issues an appellate decision involving a finding of discrimination or retaliation prohibited by a provision of law covered by paragraphs (1) or (2) of section 201(a), as applicable, the head of the Federal agency subject to the finding shall provide notice for at least 1 year on the Federal agency’s Internet Web site in a clear and prominent location linked directly from the Federal agency’s Internet home page stating that a finding of discrimination or retaliation has been made.

(2) The notification shall identify the date the finding was made, the date or dates on which the discriminatory or retaliatory act or acts occurred, and the law or laws violated by the discriminatory or retaliatory act or acts. The notification shall also advise Federal employees of the rights and protections available under the respective provisions of law covered by paragraphs (1) or (2) of section 201(a).

SEC. 203. REPORTING REQUIREMENTS.

(a) *ANNUAL REPORT.—*Subject to subsection (b), not later than 180 days after the end of each fiscal year, each Federal agency shall submit to the Speaker of the House of Representatives, the President pro tempore of the Senate, the Committee on *Homeland Security and Governmental Affairs* of the Senate, the Committee on *Oversight and Government Reform* of the House of Representatives, each committee of Congress with jurisdiction relating to the agency, the Equal Employment Opportunity Commission, and the Attorney General an annual report (*in an electronic format prescribed by the Office of Personnel Management*) which shall include, with respect to the fiscal year—

* * * * *

(c) *DISCIPLINARY ACTION REPORT.—*Not later than 60 days after the date on which a Federal agency takes final action or a Federal agency receives an appellate decision issued by the Equal Employment Opportunity Commission involving a finding of discrimination or retaliation in violation of a provision of law covered by paragraphs (1) or (2) of section 201(a), as applicable, the employing Federal agency shall submit to the Commission a report stating whether disciplinary action has been initiated against a Federal employee as a result of the violation.

* * * * *

SEC. 207. COMPLAINT TRACKING.

Not later than 1 year after the date of enactment of the Federal Employee Antidiscrimination Act of 2015, each Federal agency shall establish a system to track each complaint of discrimination arising

under section 2302(b)(1) of title 5, United States Code, and adjudicated through the Equal Employment Opportunity process from inception to resolution of the complaint, including whether a decision has been made regarding necessary disciplinary action as the result of a finding of discrimination.

SEC. 208. NOTATION IN PERSONNEL RECORD.

If a Federal agency takes an adverse action covered under section 7512 of title 5, United States Code, against an employee for an act of discrimination or retaliation prohibited by a provision of law covered by paragraphs (1) or (2) of section 201(a), the Federal agency shall, after all appeals relating to such action have been exhausted, include a notation of the adverse action and the reason for the action in the employee's personnel record.

TITLE III—EQUAL EMPLOYMENT OPPORTUNITY COMPLAINT DATA DISCLOSURE

SEC. 301. DATA TO BE POSTED BY EMPLOYING FEDERAL AGENCIES.

(a) * * *

(b) **CONTENT REQUIREMENTS.**—The data posted by a Federal agency under this section shall include, for the then current fiscal year, the following:

(1) * * *

* * * * *

(9) Of the total number of final agency actions rendered in such fiscal year involving a finding of discrimination—

(A) the number and percentage involving a finding of discrimination in connection with each of the respective issues of alleged discrimination, **[and]**

(B) of the number specified under subparagraph (A) for each of the respective issues of alleged discrimination—

(i) the number and percentage that were rendered without a hearing before an administrative judge of the Equal Employment Opportunity Commission, and

(ii) the number and percentage that were rendered after a hearing before an administrative judge of the Equal Employment Opportunity Commission**[.]**, and

(C) for each such finding counted under subparagraph (A), the agency shall specify—

(i) the date of the finding,

(ii) the affected Federal agency,

(iii) the law violated, and

(iv) whether a decision has been made regarding necessary disciplinary action as a result of the finding.

(10) * * *

(11) *Data regarding each class action complaint filed against the Federal agency alleging discrimination or retaliation, including—*

(A) *information regarding the date on which each complaint was filed,*

(B) *a general summary of the allegations alleged in the complaint,*

(C) *an estimate of the total number of plaintiffs joined in the complaint if known,*

*(D) the current status of the complaint, including whether the class has been certified, and
(E) the case numbers for the civil actions in which discrimination or retaliation has been found.*

* * * * *

SEC. 302. DATA TO BE POSTED BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

(a) * * *

(b) **SPECIFIC REQUIREMENTS.**—The data posted under this section shall, with respect to the hearings and appeals described in subsection (a), include summary statistical data corresponding to that described in paragraphs (1) through ~~[(10)]~~ (11) of section 301(b), and shall be subject to the same timing and other requirements as set forth in section 301(c).

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TITLE IV—PROCESSING AND REFERRAL

SEC. 401. PROCESSING AND RESOLUTION OF COMPLAINTS.

Each Federal agency is responsible for the fair, impartial processing and resolution of complaints of employment discrimination and retaliation arising in the Federal administrative process and shall establish a model Equal Employment Opportunity Program that—

- (1) is not under the control, either structurally or practically, of a Human Capital or General Counsel office;*
- (2) is devoid of internal conflicts of interest and ensures fairness and inclusiveness within the organization; and*
- (3) ensures the efficient and fair resolution of complaints alleging discrimination or retaliation.*

SEC. 402. NO LIMITATION ON HUMAN CAPITAL OR GENERAL COUNSEL ADVICE.

Nothing in this title shall prevent a Federal agency’s Human Capital or General Counsel office from providing advice or counsel to agency personnel on the processing and resolution of a complaint, including providing legal representation to an agency in any proceeding.

SEC. 403. REFERRALS OF FINDINGS OF DISCRIMINATION.

(a) **EEOC FINDINGS OF DISCRIMINATION.**—*Not later than 30 days after the Equal Employment Opportunity Commission issues an appellate decision involving a finding of discrimination or retaliation within a Federal agency the Commission shall refer the matter to the Office of Special Counsel, if the Commission determines that the Federal agency did not take appropriate action. The Commission shall include the number and a brief summary of such referrals in the Annual Report on the Federal Workforce of the Commission.*

(b) **REFERRALS TO SPECIAL COUNSEL.**—*The Office of Special Counsel shall accept and review a referral from the Commission under subsection (a) for purposes of seeking disciplinary action under its authority against an Federal employee who commits an act of discrimination or retaliation.*

(c) *NOTIFICATION.*—The Office of Special Counsel shall notify the Commission in a case in which the Office of Special Counsel initiates disciplinary action.

(d) *SPECIAL COUNSEL APPROVAL.*—An agency may not take disciplinary action against a Federal employee for an alleged act of discrimination or retaliation referred by the Commission under this section except in accordance with the requirements of section 1214(f) of title 5, United States Code.

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SEC. 2302. PROHIBITED PERSONNEL PRACTICES.

(a) * * *

(b) * * *

(1) * * *

(13) **[implement]**

(A) *implement* or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: “These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General or the Office of Special Counsel of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling[.]; or

(B) *implement* or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement prohibits or restricts an employee from disclosing to Congress, the Office of Special Counsel, or an Office of the Inspector General any information that relates to any violation of any law, rule, or regulation, or Mismanagement, a gross waste of funds, an abuse of authority, or a substantial, and specific danger to public health or safety, or any other whistleblower protection.

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CHAPTER 75—ADVERSE ACTIONS

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Subchapter II—Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

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SEC. 7515. DISCIPLINE OF SUPERVISORS BASED ON RETALIATION AGAINST WHISTLEBLOWERS OR DISCRIMINATION.

(a) *DEFINITIONS.*—In this section—

(1) The term ‘agency’ has the meaning given that term under section 2302;

(2) *The term 'prohibited personnel action' means—*

(A) *taking or failing to take an action in violation of paragraph (1), (8), or (9) of section 2302(b) against an employee of the agency; or*

(B) *accessing the medical records of another employee for the purpose of retaliation for a disclosure or activity protected under paragraphs (8) or (9) of subsection 2302(b); and*

(C) *the term 'supervisor' means a supervisor, as defined under section 7104(a), who is employed by an agency, as defined under paragraph (1) of this subsection.*

(b) *PROPOSED ADVERSE ACTIONS.—*

(1) *IN GENERAL.—In accordance with paragraph (2), the head of an agency shall propose against a supervisor whom the head of that agency, an administrative law judge, the Merit Systems Protection Board, the Office of Special Counsel, the Equal Employment Opportunity Commission, an adjudicating body provided under a union contract, a Federal judge, or the Inspector General of the agency determines committed a prohibited personnel action the following adverse actions:*

(A) *With respect to the first prohibited personnel action, an adverse action that is not less than a 12-day suspension.*

(B) *With respect to the second prohibited personnel action, removal.*

(2) *PROCEDURES.—*

(A) *NOTICE.—A supervisor against whom an adverse action under paragraph (1) is proposed is entitled to written notice.*

(B) *ANSWER AND EVIDENCE.—*

(i) *IN GENERAL.—A supervisor is notified under subparagraph (A) that the supervisor is the subject of a proposed adverse action under paragraph (1) is entitled to 14 days following the notification to answer and furnish evidence in support of the answer.*

(ii) *NO EVIDENCE.—After the end of the 14-day period described in clause (i), if a supervisor does not furnish evidence as described in clause (i) or if the head of the agency determines that such evidence is not sufficient to reverse the proposed adverse action, the head of the agency shall carry out the adverse action.*

(C) *SCOPE OF PROCEDURES.—Paragraphs (1) and (2) of subsection (b) of section 7513, subsection (c) of such section, paragraphs (1) and (2) of subsection (b) of section 7543, and subsection (c) of such section shall not apply with respect to an adverse action carried out under this subsection.*

(c) *LIMITATIONS ON OTHER ADVERSE ACTIONS.—With respect to a prohibited personnel action, if the head of the agency carries out an adverse action against a supervisor under another provision of law, the head of the agency may carry out an additional adverse action under this section based on the same prohibited personnel action.*