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LEGISLATIVE DIGEST
HOUSE REPUBLICAN CONFERENCE
CHAIRMAN ADAM PUTNAM WASHINGTON D.C. 226-2302

March 14, 2007

H.R. 985 – Whistleblower Protection Enhancement Act of 2007

Floor Situation
H.R. 985 is being considered on the floor pursuant to a structured rule. The rule:

- Provides 1 hour and 20 minutes of general debate, with 1 hour equally divided and controlled by the Chairman and the Ranking Member of the Committee on Oversight and Government Reform and 20 minutes equally divided and controlled by the Chairman and Ranking Member of the Committee on Homeland Security;

- Waives all points of order against consideration of the bill except clause 9 (earmarks) and 10 (PAYGO) of Rule XXI;

- Makes in order only those amendments printed in the Rules Committee report (see section on amendments below). Provides that the amendments made in order may be offered only in the order printed in the report and may be offered only by a Member designated in the report;

- Waives all points of order against the amendments printed in the report except for those arising under clauses 9 and 10 of Rule XXI;

- Provides one motion to recommit with or without instructions; and,

- During consideration in the House of Representatives of H.R 985, the Chair may postpone further consideration of the bill to a time designated by the Speaker.

This legislation was introduced by Representative Henry Waxman (D-CA) on February 12, 2007. The bill was ordered to be reported, as amended, from the Committee on Oversight and Government Reform, by unanimous consent, on February 14, 2007.

H.Res. 985 is expected to be considered on the floor on March 14, 2007.

**Note: H.R. 985 contains several provisions that were included in H.R. 1317, which was introduced by Representative Todd Platts (R-PA) on March 15, 2005. The bill was ordered to be reported, as amended, from the Committee on Government Reform, by a recorded vote of 34-1, on September 29, 2006. The bill was then referred to the Committee on Homeland Security, but no further action was taken.*

Summary

H.R. 985 expands federal employee whistleblower protection laws. One of the major changes involves granting whistleblower protections to Transportation Security Agency employees, which includes screeners at all airports. This provision of the bill will take affect immediately after enactment of the bill, while all other provisions will be enacted 30 days after the bill has been signed into law.

This legislation also defines the term "abuse of authority" (section 2302 (b(8) of Title 5) as "any action that compromises the validity or accuracy of federally funded research or analysis, and the dissemination of false or misleading scientific, medical, or technical information." The provision is intended to limit political interference with scientific research.

H.R. 985 provides additional whistleblower protections for national security personnel, which allows them to take their claims to court under certain circumstances. President Bush strongly opposes this provision and has issued a veto threat if H.R. 985 is presented to him in its current form.

The bill provides clarification that the threshold for a valid whistleblower claim is any credible evidence presented by an employee, former employee, or applicant (employee), which may show waste, abuse, or gross mismanagement, without restriction as to time, place, form, motive, context, or prior discourse.

This legislation defines "disclosure" as "a formal or informal communications," where the employee "providing the disclosure reasonably believes that the discourse evidences any violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."

H.R. 985 allows that a whistleblower could rebut the presumption that a federal official performed their duties in compliance with the law by providing "substantial evidence," rather than the "irrefutable evidence" required now. This is known as the "reasonable belief test."

Pursuant to H.R. 985, any covered agency under federal whistleblower laws may not implement or enforce any nondisclosure policies, forms, or agreements. It also prohibits any agency from enforcing any nondisclosure policies, forms, or agreements, if the policies, forms, or agreements do not contain a specific clause informing the employee of his or her rights. The bill prohibits any investigation, other than at the ministerial or nondiscretionary fact-finding level, of an employee or applicant relating to any whistleblower provisions protected by law.

The legislation authorizes the removal of any agency or unit responsible for the conduct of foreign intelligence or counterintelligence from whistleblower protection coverage prior to any personnel action being taken against a whistleblower at that agency. These

agencies and units are: the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, or the National Security Agency.

The Merit Systems Protection Board (MSPB) may impose discipline upon an employee if the Board finds that the primary motivating factor for an employee's actions were protected activities under federal whistleblower law. The penalty for such actions include: removal, reduction in grade, debarment from Federal employment for up to 5 years, a fine not to exceed $1,000, or a combination thereof.

H.R. 985 directs the Comptroller General to conduct a study of security clearance revocations, that occurred after 1996. The study will contain an examination of the number of clearances revoked, the number restored, and the relationship, if any, between the resolution of claims filed under such chapter and the restoration of such clearances.

The bill allows an employee to file a complaint in a federal district court if the MSPB does not take corrective action within 180 days of their retaliation complaint. Under current law there is not a timetable for the MSPB to act. The employee may file his or her case in the United States district court for the district where the prohibited personnel practice occurred, the district in which employment records are, or the district in which the whistleblower resides. This practice is known as "forum shopping."

The MSPB may award compensatory damage to a whistleblower, including: attorney's fees, interest, reasonable expert witness fees, and costs.

H.R. 985 makes it illegal for a national security employee to be discharged or discriminated against for disclosing classified information to an authorized member of Congress, authorized executive official, or the Inspector General (IG) of the covered agency. If an employee feels they have been subject to reprisal prohibited by the last sentence, the employee may submit a complaint to the IG of the covered agency and the IG will investigate the complaint and submit a report to the head of the covered agency, unless the IG finds the complaint to be frivolous. Within 180 days of the filing of the complaint, the head of the covered agency will consider the report from the IG and will either issue an order denying relief or will implement corrective action to return the employee to the position the employee would have held had the reprisal not occurred, or as close to the position as possible.

If the covered agency head has not taken action within 180 days, the employee may seek a trial by jury. The employee may file his or her case in the United States district court for the district where the prohibited personnel practice occurred, the district in which employment records are, or the district in which the whistleblower resides. The district court decision can be appealed to the United States court of appeals which has jurisdiction over appeals from the district court in which the case was introduced.

The bill states that if a covered agency withholds information regarding a federal whistleblower case based on the claim that disclosure will have an impact on national

security ("state secrets privilege"), the court is required to resolve the dispute in the employee's favor.

An employee in an Executive agency that is not a covered agency, for the purpose of any disclosure of covered information, shall be entitled to the same protections, rights, and remedies as an employee of a covered agency receives.

H.R. 985 requires that no later than 180 days after a contract employee files a complaint, the head of a civilian executive agency must determine if the contractor has been subject to a reprisal.

Amendments Made in Order Pursuant to the Rule
These amendments may be offered on the Floor during debate on H.R. 985. Please contact the offices of amendment sponsors for additional information or the text of an amendment.

**Note: GOP.gov will post updates as amendments are offered on the floor during consideration of H.R. 985.*

Rep. Stupak (D-MI) The amendment (#8) clarifies that instances of political interference with science are to be considered "abuses of authority" and their disclosure therefore protected (section 13 of the bill). The amendment adds an example of such interference, namely preventing a federal scientist or grantee from publishing or presenting their research. The amendment is debatable for 10 minutes.

Rep. Platts (R-PA) The amendment (#1) would require that the Merit Systems Protection Board rely on a consistent standard for "clear and convincing evidence" as the burden of proof that must be met to sustain an agency's affirmative defense (that it would have taken the same personnel action independent of an employee's protected conduct). Under the amendment, "clear and convincing evidence" would be defined as "evidence indicating that the matter to be proved is highly probable or reasonably certain." The amendment is debatable for 10 minutes.

Rep. Platts (R-PA) The amendment (#2) would clarify that an otherwise-protected disclosure cannot be disqualified because of the forum in which it is communicated. In addition, the amendment would extend equal burdens of proof and individual rights of action to those serving as witnesses in Inspector General or Special Counsel investigations, as well as to those who allege retaliation for refusing to violate the law. The amendment is debatable for 10 minutes.

Rep. Sali (R-ID) The amendment (#5) would remove the provision that would make influencing federally funded scientific research a prohibited personnel practice. The amendment is debatable for 10 minutes.

Rep. Tierney (D-MA) The amendment (#10) will give members of the Department of Homeland Security intelligence components the same whistleblower process as the Federal Bureau of Investigation and other members of the Intelligence Community.

Background

Protections for federal whistleblowers were first formally introduced by provisions in the Civil Service Reform Act of 1978, which created various federal personnel offices, including the Office of the Special Counsel (OSC). In 1989, Congress passed the Whistleblower Protection Act, which was designed to strengthen protections for federal whistleblowers and formalize a system for federal employees to report waste, fraud, abuse, illegality, and corruption without fear of reprisal.

The OSC is charged with receiving and investigating allegations from whistleblowers and ensuring that federal whistleblowers are protected from retaliation.

The heads of U.S. agencies are required by U.S.C. Title 5, Sec. 2302, to ensure all federal employees in their agency are informed of their rights including how to report waste, fraud, abuse, illegality, and corruption.

The Office of the Special Counsel maintains a disclosure unit to receive and evaluate whistleblower disclosures from federal employees, former employees, and federal job applicants. Whistleblowers are guaranteed anonymity, and the OSC has the authority to order the head of an agency to investigate and report on any disclosures. The OSC then sends both the whistleblower's disclosure and the report from the agency head to the President and the appropriate Congressional Oversight Committees.

The Merit Systems Protection Board ensures that Federal employees are protected against abuses by agency management, that Executive Branch agencies make employment decisions in accordance with the merit systems principles, and that Federal merit systems are kept free of prohibited personnel practices.

Views

"However, the Administration strongly opposes House passage of H.R. 985 because it could compromise national security, is unconstitutional, and is overly burdensome and unnecessary. Rather than promote and protect genuine disclosures of matters of real public concern, it would likely increase the number of frivolous complaints and waste resources. If H.R. 985 were presented to the President, his senior advisors would recommend that he veto the bill." - Statement of Administration Policy release on March 13, 2007.

CBO Estimate

CBO estimates that implementing H.R. 985 would cost $5 million a year and about $25 million over the 2008-2012 period, assuming appropriation of the necessary amounts.

Enacting the legislation could affect direct spending, but we estimate any amounts would not be significant in any year. Enacting the bill would not affect revenues.

Staff Contact
For questions or further information contact Chris Vieson at (202) 226-2302.