MILITARY WHISTLEBLOWER PROTECTION ACT

OFFICE OF THE WHISTLEBLOWER OMBUDS
COACHING THE HOUSE ON BEST PRACTICES

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OVERVIEW

The Military Whistleblower Protection Act (**10 U.S.C. § 1034**) prohibits retaliation against a service member who makes, or is perceived as making, a protected disclosure to an authorized government recipient, or who engages in protected conduct. It also prohibits restricting a service member from lawfully communicating with an inspector general or Congress.

Individuals considering blowing the whistle should do so under advisement of a whistleblower attorney.

SCOPE OF COVERAGE

The Act Covers:

- Regular and Reserve officers (commissioned and warrant) and enlisted members of the Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard — whether on active duty or serving in any Reserve or National Guard federal duty or training status
- Cadets and midshipmen at the U.S. military service academies (Army, Air Force, Navy), who are considered active-duty under 10 U.S.C. § 101(d) while enrolled
- Officers of the **U.S. Public Health Service Commissioned Corps** (**42 U.S.C. § 213a(18)**)
- Officers of the National Oceanic and Atmospheric Administration (NOAA) Commissioned Corps (**33 U.S.C. §3071(a)(8)**)

The Act Does Not Cover:

- Civilians working for the Department of Defense or military services (covered under the **Whistleblower Protection Act**)
- Federal contractors or grantees (covered under **federal contractor whistleblower protections**)
- National Guard members on State Active Duty or training status with no nexus to federal funds
- Students enrolled in ROTC programs or attending private military preparatory or boarding schools (not considered active-duty or reserve service members)

Protected Disclosures and Conduct

The Military Whistleblower Protection Act prohibits retaliation against service members under several circumstances:

- When they **make a protected communication**
- When they **communicate lawfully** with designated government entities
- When they **engage in certain protected conduct**

Protected Communications

A protected communication under the Act is any disclosure made to or prepared for an authorized recipient that the service member **reasonably believes** evidences:

- A violation of law or regulation, including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct in violation of the Uniform Code of Military Justice, sexual harassment, or unlawful discrimination
- Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety
- A threat by another member of the armed forces or employee of the Federal Government that indicates a determination or intent to kill or cause serious bodily injury to members of the armed forces or civilians or damage to military, Federal, or civilian property

The **Authorized recipients** include:

- Congress
- An inspector general
- A member of a Department of Defense audit, inspection, investigation, or law enforcement organization
- Any person or organization in the individual's chain of command
- A court-martial proceeding
- Any other person or organization designated pursuant to regulations or other established administrative procedures for such communications

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Lawful Communications with the Inspector General or Congress

A **lawful communication** to an inspector general or Congress is protected under the Act regardless of whether it rises to the level of a "protected communication" as described above. It is unlawful to restrict these lawful communications or retaliate against service members who make them.

The **relevant inspectors general** are the Department of Defense Inspector General; the Department of Homeland Security Inspector General for issues involving the Coast Guard; and service-level and command-level inspectors general of the military branches. For U.S. Public Health Service and NOAA Commissioned Corps officers, the relevant offices of inspectors general are those of the Department of Health and Human Services and the Commerce Department, respectively.

Protected Conduct

The Act also prohibits retaliation against covered service members who:

- Engage in related testimony
- Participate or assist in a related investigation or proceeding
- File, cause to be filed, participate in, or otherwise assist in an action brought under the Act

Military Intelligence Community Whistleblowing

Some service members may be assigned to one of the 18 elements of the intelligence community (IC) and must follow separate protocols for making protected disclosures. These service members may seek related guidance from the relevant inspector general. Note that these service member whistleblowers are still covered under the Military Whistleblower Protection Act, while civilian IC employees are covered under **a separate patchwork of federal laws and policies**.

Inspector General Investigation into the Disclosures

While the Military Whistleblower Protection Act primarily focuses on investigations into retaliatory personnel actions, the Act also requires the inspector general to conduct a simultaneous investigation into allegations of misconduct in certain situations (10 U.S.C. §1034(d)).

PROHIBITED RETALIATION

It is unlawful for those with authority to **restrict** a covered service member from communicating lawfully with a Member of Congress or an inspector general. It is also unlawful to take or threaten an unfavorable personnel action, or withhold or threaten to withhold a favorable personnel action, **in retaliation for** a covered service member who exercises their rights as described above. Violators may face punishment by court-marshal.

ENFORCEMENT OF RIGHTS

Service members who believe they have experienced a violation of their rights under the Act may file a formal complaint with an office of inspector general within **one year**. If the service member misses that deadline, the IG may still investigate depending on the circumstances.

When service-level or command-level OIGs receive disclosures, they are required by law to report to the DoD IG at certain stages of their investigation. Further, complaints that are sent to the DoD IG may be referred to the relevant service-level OIG for investigation, though the DoD IG still reviews the results of the investigation.

Investigation Process

The inspector general receiving a whistleblower complaint of alleged retaliation or restriction first decides whether they have sufficient evidence to warrant an investigation. If they do, the investigation proceeds.

Once an investigation begins, the inspector general is required by statute to provide **updates every six months** on its status and an estimated time of completion. A final investigative report must be sent to the secretary of defense, the secretary of the whistleblower's military service (or DHS where appropriate), and to the whistleblower.

While there are time limits both in statute and regulations, GAO has found that investigations often exceed the time mandate.

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Substantiation of a Whistleblower Retaliation or Restriction Complaint

An IG's investigative report will either substantiate or not substantiate a whistleblower's claim of unlawful retaliation or restriction. For retaliation claims, the IG considers:

- Whether there was a **protected disclosure**
- Whether the whistleblower faced a **personnel action** identified in the statute
- Whether those who were responsible for the personnel action had **knowledge** of the protected disclosure, and
- Whether there was sufficient **causation** between the protected disclosure and the personnel action

For restriction claims, the IG considers whether the subject of the investigation engaged in behavior that would have deterred the average service member from speaking out.

When evaluating a retaliation claim, the MWPA applies a lower burden of proof to the employer than what is applied in civilian retaliation cases. It is therefore inherently more difficult for a service member whistleblower to win their case. Of note, substantiation rates for military reprisal and restriction claims are between two and four percent according to the Congressional Research Service.

Decisions and Appeals

After the investigating IG sends their investigative report to the secretary of the relevant military service, that secretary decides whether to order corrective and/or disciplinary action. A whistleblower may seek to file an appeal of that decision with the Board for the Correction of Military Records (BCMR) to challenge an unfavorable outcome. Following BCMR proceedings, the secretary of the military service involved either orders relief for the whistleblower or declines to.

A final administrative appeal may be made to the Secretary of Defense.

Service members may challenge a final agency decision in federal court under the Administrative Procedure Act, but courts apply a narrow, highly deferential standard. Further, judges do not re-decide the case; they only ask whether the agency's decision was reasonable and properly explained.

ADDITIONAL RESOURCES

Congressional Reports:

- Congressional Research Service: **Protecting Military Whistleblowers**
- Government Accountability Office: **Analysis of DOD's Actions to Improve Case Timeliness and Safeguard Confidentiality**
- Government Accountability Office: **Information on Selected National Guard Management Issues**
- Government Accountability Office: **Military Inspectors General: Opportunities Exist to Strengthen Processes for Administrative Investigations and Training**

Department of Defense Guidance for Whistleblowers:

- Department of Defense Office of Inspector General: **Guide to Filing a Military Whistleblower Reprisal Complaint**
- Department of Defense Office of Inspector General: **Whistleblower Protection Military Personnel (Presentation)**
- Department of Defense: **Sexual Assault Prevention and Response Annual Report on Sexual Assault in the Military**

Implementing Military Regulations:

- Department of Defense: **Directive 7050.06 Military Whistleblower Protection**
- Department of Defense: **Instruction 7050.09: Uniform Standards for Evaluating and Investigating Military Reprisal or Restriction Complaints**
- 33 CFR Part 53 — PART 53: **Coast Guard Whistleblower Protection**

Other:

- Government Accountability Project: **Truth-Telling in the Military: A Guide for Service Member Whistleblowers**
- National Guard Bureau: **Fact Sheet on National Guard Duty Statuses**