WHISTLEBLOWING AND EEO MATTERS

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OVERVIEW

There is often overlap between traditional whistleblowing and an individual's disclosures around violations of **equal employment opportunity** (EEO) laws. These laws prohibit, and allow workers to challenge, unlawful discrimination in the workplace.

For example, an employee may speak out against disability-related discrimination that they experienced in the workplace while also disclosing the broader, systemic discrimination that underpinned their individual experience. Further, that same employee may face workplace retaliation for filing their discrimination complaint and for blowing the whistle on systemic abuse. Multiple laws and adjudicating bodies could become relevant as that employee seeks to enforce their rights.

This document explores overlap of the two areas of law and identifies the roles of key enforcement offices. Individuals considering blowing the whistle should do so under advisement of a whistleblower attorney.

EEO LAWS AND THEIR ANTI-RETALIATION PROTECTIONS

EEO laws prohibit employment discrimination based on protected classes such as race, color, religion, national origin, sex, pregnancy, age, disability, and genetic information. Most employees, former employees, and job applicants in the public and private sectors are covered by EEO laws, though enforcement processes vary.

Many EEO laws also make it **illegal to retaliate** against an employee who speaks out against discrimination, files a charge of discrimination, or participates in an employment discrimination investigation or lawsuit. For example, **Title VII of the Civil Rights Act of 1964**, as amended, allows covered employees to seek relief from workplace retaliation they may face after speaking out.

Role of the EEOC

In private sector and many state and local employer matters, the **U.S. Equal Employment Opportunity Commission (EEOC)** can investigate discrimination and retaliation, make findings, and seek settlement under **several federal EEO laws**. If settlement fails, the EEOC may file suit to enforce the law. Given their broad jurisdiction, EEOC field offices are located throughout the United States.

State and Local Fair Employment Laws

Many states and localities have laws prohibiting discrimination and retaliation, enforced by **Fair Employment Practices Agencies**. Through "dual filing," the EEOC contracts with these state and local agencies to intake complaints and conduct a single investigation for alleged violations falling under local and federal law.

EXECUTIVE BRANCH: EEO AND WHISTLEBLOWER PROTECTIONS

Executive branch employees are **covered** by federal EEO and other unique anti-discrimination laws and executive orders prohibiting discrimination. For example, individuals are also protected against discrimination related to marital or parental status or political affiliation.

Rather than filing initially with the EEOC like most private sector employees, executive branch complainants first take their discrimination charges **to their agency's unique EEO office**. The EEOC may still play a significant role in holding a related hearing following an agency investigation or in hearing appeals of final agency decisions.

"Mixed" Cases: When EEO and MSPB Jurisdiction Overlaps

Executive branch employees have overlapping rights under the Civil Service Reform Act of 1978 (CSRA) with unique redress: When the employee challenges a personnel action that can be appealed directly to the **Merit Systems Protection Board** (MSPB), and where the alleged basis for that personnel action is unlawful discrimination, it is known as a **"mixed case" complaint or appeal**. (See **5 U.S.C § 7702**). Note that only **certain employment actions**—such as a termination—can be appealed directly to the MSPB. Conversely, a hostile work environment is not directly appealable.

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The Office of Special Counsel (OSC) also administers enforcement of the CSRA and has **jurisdiction** to investigate **Prohibited Personnel Practices**, or PPPs (adverse personnel actions based on unlawful discrimination or whistleblower retaliation, for example). OSC generally defers allegations involving discrimination to agency EEO offices or to the EEOC to avoid duplicate investigations, per its **memorandum of understanding** with EEOC. OSC does review claims involving discrimination for marital status and political affiliation as those claims are outside of the EEOC's jurisdiction.

Blowing the Whistle on Discrimination

The **Whistleblower Protection Act** (WPA) is the primary federal law that protects most executive branch whistleblowers. It protects, among other things, disclosures evidencing violations of laws, rules, or regulations; gross mismanagement; and abuses of authority. Such misconduct could be central in discrimination-related disclosures.

Given this overlap, employees may also want to enforce their whistleblower rights when they face reprisal for speaking out. However, the MSPB's jurisdiction to hear appeals of discrimination-based challenges under the WPA is limited under case law.

RELATED MSPB PRECEDENT

The MSPB has clarified when EEO-related retaliation claims can also be brought under federal whistleblower law.

The distinction is narrow but important: EEO-related allegations are generally not protected disclosures under 5 U.S.C. § 2302(b)(8), which focuses on the subject of the disclosure. However, certain EEO-related activities may still be protected under § 2302(b)(9)(C). That provision protects cooperating with or providing information to an office of inspector general, the Office of Special Counsel, or an agency component responsible for internal investigation or review, which may include an EEO office. So, even when the underlying allegation is not a protected disclosure under (b)(8), the act of providing that information may still be protected under (b)(9)(C).

The applicable rights, procedures, and forum will depend on the facts of the individual case.

Note that this is distinct from the mixed-case appeals described above. In "mixed cases" an employee is using the CSRA to challenge unlawful discrimination as a prohibited personnel practice before the MSPB. The precedent discussed above clarifies MSPB jurisdiction under the WPA for individuals seeking relief for discrimination-related whistleblowing.

LEGISLATIVE BRANCH RIGHTS

The Congressional Accountability Act (CAA) provides workplace protections for **legislative branch employees**, including **anti-discrimination provisions**. It includes **anti-retaliation rights** for reporting violations or seeking to enforce one's rights. The CAA is enforced by the Office of Congressional Workplace Rights (OCWR) and the House Office of Employee Advocacy can provide free legal representation for House employees.

JUDICIAL BRANCH RIGHTS

Employees of the **judicial branch** are not covered by the major anti-discrimination laws. However, rights are incorporated through judicial branch policies, including anti-retaliation rights.

ADDITIONAL RESOURCES

Congressional Research Service: **Merit Systems Protection Board (MSPB): A Legal Overview**

U.S. Equal Employment Opportunity Commission: **Overview Of Federal Sector EEO Complaint Process**

U.S. Equal Employment Opportunity Commission: **Time Limits For Filing a Charge**

U.S. Equal Employment Opportunity Commission: **Interagency Memoranda of Understanding (MOUs)**