

## **A VA Doctor's Suicide Results in New Whistleblower Protections**

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On October 26, 2017, a new law went into effect, aimed at ramping up protections for federal employees who report waste, fraud, or abuse in the federal government and ensuring accountability for supervisors who retaliate against them. The Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, named for a whistleblower who committed suicide, will amend existing federal whistleblower law in light of his death. The Senate Committee on Homeland Security and Governmental Affairs conducted a number of hearings and investigations into whistleblower retaliation following Dr. Kirkpatrick's death, the findings of which influenced the new legislation and are summarized in the Committee's [report](#) to accompany the new legislation. The law will, among other things, create added protection for probationary workers who blow the whistle; impose mandatory disciplinary proceedings for supervisors who retaliate; beef up training and resources for employees; and safeguard against new methods of retaliation.

Dr. Kirkpatrick was a clinical psychologist for a U.S. Department of Veterans Affairs (VA) hospital who blew the whistle on over-prescription of medication to patients. As a result, he was disciplined and ultimately terminated. On the day that he was terminated, he killed himself. The VA never conducted an investigation of the suicide. Dr. Kirkpatrick's brother later testified to the Senate Committee that, in addition to the retaliation for his whistleblowing, Dr. Kirkpatrick faced additional strain at work. He had a heavy case load of patients and had expressed a desire for a better support system to help him and other clinicians treating veterans with post-traumatic stress disorder handle the emotional stress of their jobs. One of Dr. Kirkpatrick's patients had also threatened him with bodily harm; although Dr. Kirkpatrick reported the threat to his union, the VA later said that it was never aware of the threat.

In direct response to the Senate Committee's findings, the WPA has implemented changes that will affect all federal employees and some changes specific to the VA. The amended WPA requires the heads of federal agencies to report suicides by any agency employee who had made any whistleblower disclosure and then experienced an adverse personnel action. The Office of Special Counsel must then investigate to determine whether the personnel action was in reprisal for the employee's whistleblowing. The new law also requires the VA to establish an outreach program to inform employees of any available mental health services and to ensure effective protocols to address threats by patients against VA workers.

Federal employees who have entered into a new role with a "probationary period" have limited appeal rights if their employing agency decides not to offer them a permanent appointment. Employees who report wrongdoing during their probationary period have little recourse if they experience reprisal because of their whistleblowing activities. The WPA amendment has called for the Comptroller General to conduct a study of whistleblower retaliation against employees on probationary status. In the meantime, Congress concluded that one way to encourage probationary employees to speak up about abuses is to ensure that, if they face retaliation, they will be able to transfer to another position while a whistleblower investigation is underway. Thus, the WPA now requires a probationary employee's agency to give priority to a transfer request submitted by a

whistleblower employee.

The new law also implements mandatory disciplinary proceedings against supervisory employees who retaliate against whistleblowers. The head of the relevant federal agency commences discipline by determining whether the supervisor has committed a specific “prohibited personnel action,” i.e., a retaliatory act against an employee reporting waste, fraud, or abuse, and if so then must propose disciplinary action. At a minimum, the agency must propose at least a 3-day suspension for a first-time offense and removal for a supervisor’s second offense. The supervisor employee then has the opportunity to respond to the proposed discipline and furnish evidence on his or her own behalf. The head of the agency then determines whether the evidence is sufficient to reverse the proposed action and, if not, implements the disciplinary action. While these new provisions aim to ensure consistent accountability, it is not yet clear how consistent the application will be in practice. The agency head alone determines whether to initiate disciplinary proceedings at all by determining whether the supervisor committed a prohibited personnel practice, and that role cannot be delegated.

In addition to implementing more stringent discipline of retaliators, the WPA amendment also strives to ensure that both employees and managers are aware of whistleblowers’ rights. The new law requires agencies to train all new supervisors and conduct annual trainings on how to respond to complaints. Agencies must also disseminate information to all new employees about available whistleblower protections within the first six months of their appointment.

The new law also responds to the Senate Committee’s findings of new methods of retaliation, particularly in the VA. In many cases, VA officials accessed the medical records of whistleblowers without authorization and used their medical information to discredit the whistleblower. In response to this, the new law amends the definition of “prohibited personnel practice” to include “access[ing] the medical record of another employee or applicant for employment” as a part of or in furtherance of retaliatory conduct. Moreover, the VA must develop and report on a plan to prevent unauthorized access to employee medical records, including contemplating any circumstances in which a VA employee who is not a health care provider could appropriately access another employee’s medical records and contemplating use of new and existing technologies to secure medical files from unauthorized access.

While the new law is a welcome step toward shoring up deficiencies in existing federal whistleblower protections, some federal whistleblowers have [expressed skepticism](#) about whether there will be meaningful change until there is a significant overhaul to a workplace culture that, despite lip service, remains hostile to whistleblowers. In particular, the effectiveness of one of the law’s most significant changes—the “mandatory” discipline provisions—has yet to be seen. These provisions could easily be rendered ineffective if they are not actually utilized by the agency, which has discretion in initiating the disciplinary proceedings and, depending on the circumstance, may very well have an interest in maintaining its status quo.