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Legal Overview of P.L. 107-174, the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002

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Summary

In the Notification and Federal Employee Antidiscrimination and Retaliation Act, (No FEAR Act), P.L. 107-174, Congress found that federal agencies lacked accountability for enforcement of federal anti-discrimination and whistleblower statutes since any monetary judgment against an agency was paid from the Judgment Fund of the U.S. Department of Justice, rather than the agency's own operating budget. The Act addresses the problem by requiring agencies to reimburse the Treasury for any judgment or settlement of federal employee discrimination or whistleblower reprisal claims. In addition, individual agencies and the Equal Employment Opportunity Commission must post annual statistics on their websites, setting forth the numbers of complaints filed, pending, and resolved; the amount paid out on such claims; the number of employees disciplined for discrimination, retaliation, or harassment; and an examination of any trends in those statistics, including a causal analysis, the practical knowledge obtained in the process, and any planned or completed improvements made to the complaint resolution procedures of each agency.

President Bush signed P.L. 107-174, popularly known as the "No FEAR Act," into law on May 15, 2002. The new law, which applies only to the federal sector, grew out of hearings before the House Judiciary Committee, focusing on "chronic problems of discrimination and retaliation" against federal employees and a lack of employing agency accountability. Of particular concern were "several recent class action suits based on discrimination brought against federal agencies" and a substantial jury award in favor of a senior social scientist for the Environmental Protection Agency who had been retaliated against "for disagreeing with that agency on a matter of science."¹ As a response, the Act seeks to make federal agencies more accountable for prohibited personnel practices. First, any future settlements or judgments in federal employee discrimination and whistleblower actions must be paid directly from the budget of the employing agency. Formerly,

¹ See Findings, P.L. 107-174, § 101.

such costs were disbursed from the Judgment Fund, a permanent and indefinite appropriations to pay settlements and judgments against the federal government.² Congress created the Fund to avoid the necessity for specific appropriations to cover government legal costs and, in theory, to allow for prompt payment. According to U.S. General Accounting Office (GAO) testimony, however, the Judgment Fund

discourages accountability by being a disincentive to agencies to resolve matters promptly in the administrative processes; by not pursuing resolution, an agency could shift the cost of resolution from its budget to the Judgment Fund and escape scrutiny that would accompany a request for a supplemental appropriation.³

In addition, the legislation requires each agency to file with Congress an annual report detailing the number of discrimination or whistle-blower cases filed with it, how the cases were resolved, the amount of any settlements, and the number of agency employee disciplines for discrimination or harassment. The Act's major provisions are considered in greater detail below.

Payment of settlements and judgments. After October 1, 2003, agencies are required to reimburse the Judgment Fund out of their annual appropriations for the payment of judgments, awards, and settlements attributable to employee claims of discrimination, reprisals for whistleblowing, or for the exercise of appeal rights.⁴ As a background matter, federal law provides executive branch employees with three levels of review for such complaints of discrimination or reprisal. The first resides in the employing agency, after which administrative review may be had before outside investigative and adjudicatory bodies. Finally, the matter may be appealed to the federal courts.

In cases alleging discrimination based on race, color, religion sex, national origin, age, or disability, the Equal Employment Opportunity Commission (EEOC) hears complaints filed by employees with their agencies and reviews agency decisions on those complaints.⁵ In addition to applicable civil rights laws, the Civil Service Reform Act of 1978 (CSRA) establishes merit system principles for fair and nondiscriminatory treatment of the federal workforce and defines prohibited personnel practices, including reprisal for whistleblowing.⁶ In the case of an employee who alleges that discrimination or retaliation was the motive for serious personnel actions, such as dismissal or suspension for more than 14 days, the employee can request a hearing before the Merit Systems Protection Board (MSPB). MSPB's decision on such cases may then be reviewed by EEOC.⁷

For federal employees who believe that they have been subject to whistleblower reprisal, the Office of Special Counsel (OSC) will investigate their complaints and seek

² 31 U.S.C. § 1304.

³ S. Rep. No. 703-143, p. 3 (2002).

⁴ P.L. 107-174, § 201.

⁵ 29 C.F.R. § 1614.401 et seq. (2003).

⁶ 5 U.S.C. § 2302.

⁷ 29 C.F.R. § 1614.303 (2003).

corrective action where appropriate.⁸ If the agency fails to take necessary corrective action, OSC or the employee may appeal the case to MSPB for resolution. Alternatively, an employee may file a reprisal complaint directly with MSPB, if the personnel action taken against the person is itself appealable to MSPB.⁹ Remedies available under the 1994 Whistleblower Protection Act amendments include placing the individual in the position he would have been in had the prohibited personnel practice not occurred, as well as back pay and related benefits and any other “reasonable and foreseeable consequential damages.”¹⁰ In addition, under certain environmental laws and the Energy Reorganization Act, employees may ask the Department of Labor and Nuclear Regulatory Commission to investigate their complaints. If dissatisfied with the outcome of a whistleblower reprisal complaint, the employee can file an appeal for review by a federal appeals court. An employee may seek *de novo* review in federal district court of any adverse decision by the EEOC or MSPB on an employee’s discrimination complaint.¹¹

As noted, federal agencies did not previously shoulder all payments made to complainants and their lawyers in discrimination or whistleblowing cases. Administrative settlements reached via internal agency procedures were generally paid out of current operating funds. But any monetary relief awarded after commencement of judicial proceedings was usually drawn from the government-wide Judgment Fund. In addition to attorney fees and expenses, payments to complainants may include backpay, compensatory damages, and lump sum payments. In fiscal year 2000, agencies made payments totaling about \$26 million for discrimination complaint settlements and judgments. That same year, agencies were relieved of paying almost \$43 million due to the existence of the Judgment Fund.¹² Under the “No FEAR Act,” agencies must reimburse the fund for the amount of any claim, final judgment, award, or compromise settlement paid to any current or former federal employee or applicant in connection with specified anti-discrimination or whistleblower protection complaints. Because some judgments might deprive agencies of needed funds, however, the law allows for a

⁸ 5 U.S.C. § 1221.

⁹ The Whistleblower Protection Act creates a right of prompt investigation conducted by OSC and a hearing before the MSPB. 5 U.S.C. §§ 1201- 1222. The Act’s 1994 Amendments provide that MSPB shall order corrective action if an employee can show that whistleblowing activities were a “contributing factor” in personnel actions against her. *Id.* at § 1221(e)(1). The MSPB can order corrective action unless “the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.” *Id.* at § 1221(e)(2).

¹⁰ 5 U.S.C. § 1221 (g)(2).

¹¹ Employees who belong to collective bargaining units represented by unions can also file grievances over discrimination and reprisal claims under the terms of collective bargaining agreements. In those situations, the employee must choose to seek relief either under the statutory procedures discussed above or under the negotiated grievance procedure, but not both. If an employee files a grievance alleging discrimination under the negotiated grievance procedure, the Federal Labor Relations Authority (FLRA) can review any resulting arbitrator’s decision. A grievant may appeal the final decision of the agency, the arbitrator, or FRLA to EEOC. 29 C.F.R. § 1614.301 (2003).

¹² Statement of J. Christopher Mihm of the General Accounting Office, before the House Committee on the Judiciary, May 9, 2001.

“reasonable time” to reimburse the Judgment Fund and provides that the repayments may be extended over several years to avoid layoffs or furloughs.

Employee Notification and Training. Agencies must give their employees, former employees, and applicants for employment written notification of federal anti-discrimination and whistleblower protection laws. Such notification must include posting the information on the agency’s web site.¹³ Agencies are also required to provide their employees with training as regards the rights and remedies available to them under these laws. And federal managers “should” be trained “in the management of a diverse workforce and in dispute resolution and other essential communication skills.”¹⁴ Responsibility for ensuring that agencies inform and educate employees on whistleblower protection rests with OSC, the independent agency charged by Congress with investigating and prosecuting the eleven prohibited personnel practices specified in the CSRA.

Annual Reporting. Agencies are required to file annual reports with designated congressional officers and committees, the EEOC, and the Attorney General including:

- the number and status of cases filed against them by employees under federal antidiscrimination and whistleblower protection laws
- the amount of money required to be reimbursed in connection with each case
- agency policy relating to disciplinary actions against employees who discriminate or commit other prohibited personnel practices
- the number of employees disciplined
- year-end statistical data on the number and type of all complaints filed, the processing time for complaints, the number and type of final agency action involving a finding of discrimination, and related matters
- an analysis of all such information¹⁵

The Act also requires GAO to study the effect of eliminating the requirement that federal employees exhaust administrative remedies before filing complaints with the EEOC and the effects on federal agency operations of the reimbursement requirements of the No FEAR Act and the Contract Disputes Act of 1978.¹⁶

¹³ P.L. 107-174, § 202.

¹⁴ Id. at § 102(5)(B).

¹⁵ Id. at § 203.

¹⁶ Id. at § 206.

Posting of EEO Complaint Data. Each federal agency must post on its public website summary statistical data relating to EEO complaints filed against the agency.¹⁷ Data for the current fiscal year is to be posted on a cumulative basis (year- to- date information), updated quarterly. Agencies must also post year-end data for the five previous fiscal years for comparison purposes. The EEOC is required to post government-wide, summary statistical data pertaining to hearing requested under 29 C.F.R. Part 1614 and appeals filed with the EEOC.¹⁸ The posting of EEO data on agency public web sites is intended to assist Congress, the agencies, and the public assess the extent of agency compliance with their EEO responsibilities.

¹⁷ Id. at § 301.

¹⁸ Id. at § 302.

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