

112TH CONGRESS  
1ST SESSION

# S. 241

To expand whistleblower protections to non-Federal employees whose disclosures involve misuse of Federal funds.

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IN THE SENATE OF THE UNITED STATES

JANUARY 31, 2011

Mrs. MCCASKILL (for herself and Mr. WEBB) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

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## A BILL

To expand whistleblower protections to non-Federal employees whose disclosures involve misuse of Federal funds.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Non-Federal Employee  
5 Whistleblower Protection Act of 2011”.

6 **SEC. 2. PROTECTING STATE AND LOCAL GOVERNMENT AND**  
7 **CONTRACTOR WHISTLEBLOWERS.**

8 (a) REPEAL.—Section 4705 of title 41, United States  
9 Code, is hereby repealed.

1 (b) ENHANCED PROTECTION FOR STATE AND LOCAL  
 2 GOVERNMENT AND CONTRACTOR WHISTLEBLOWERS.—  
 3 Chapter 47 of division C of title 41, United States Code,  
 4 is amended by inserting after section 4704 the following  
 5 new section:

6 **“§ 4705. Whistleblower protection for State and local**  
 7 **government and contractor whistle-**  
 8 **blowers**

9 “(a) PROHIBITION OF REPRISALS.—An employee of  
 10 any non-Federal employer receiving covered funds may not  
 11 be discharged, demoted, or otherwise discriminated  
 12 against as a reprisal for initiating or participating in any  
 13 proceeding related to the misuse of any Federal funds,  
 14 reasonably opposing the misuse of any Federal funds, or  
 15 disclosing, including a disclosure made in the ordinary  
 16 course of an employee’s duties, to an inspector general,  
 17 the Comptroller General of the United States, the Attor-  
 18 ney General, a member of Congress, a State or Federal  
 19 regulatory or law enforcement agency, a person with su-  
 20 pervisory authority over the employee (or such other per-  
 21 son working for the employer who has the authority to  
 22 investigate, discover, or terminate misconduct), a court or  
 23 grand jury, the head of a Federal agency, or their rep-  
 24 resentatives information that the employee reasonably be-  
 25 lieves is evidence of—

1           “(1) gross mismanagement of an agency con-  
2           tract or grant relating to covered funds;

3           “(2) a gross waste of covered funds;

4           “(3) a substantial and specific danger to public  
5           health or safety related to the implementation or use  
6           of covered funds;

7           “(4) an abuse of authority related to the imple-  
8           mentation or use of covered funds; or

9           “(5) a violation of law, rule, or regulation re-  
10          lated to an agency contract (including the competi-  
11          tion for or negotiation of a contract), subcontract, or  
12          grant, awarded or issued relating to covered funds.

13          “(b) INVESTIGATION OF COMPLAINTS.—

14                 “(1) IN GENERAL.—A person who believes that  
15                 the person has been subjected to a reprisal prohib-  
16                 ited by subsection (a) may submit a complaint re-  
17                 garding the reprisal to the appropriate inspector  
18                 general. Except as provided under paragraph (3),  
19                 unless the inspector general determines that the  
20                 complaint is frivolous, does not relate to covered  
21                 funds, or another Federal or State judicial or ad-  
22                 ministrative proceeding has previously been invoked  
23                 to resolve such complaint, the inspector general shall  
24                 investigate the complaint and, upon completion of  
25                 such investigation, submit a report of the findings of

1 the investigation to the person, the person's em-  
2 ployer, and the head of the appropriate agency.

3 “(2) TIME LIMITATIONS FOR ACTIONS.—

4 “(A) IN GENERAL.—Except as provided  
5 under subparagraph (B), the inspector general  
6 shall, not later than 180 days after receiving a  
7 complaint under paragraph (1)—

8 “(i) make a determination that the  
9 complaint is frivolous, does not relate to  
10 covered funds, or another Federal or State  
11 judicial or administrative proceeding has  
12 previously been invoked to resolve such  
13 complaint; or

14 “(ii) submit a report under paragraph  
15 (1).

16 “(B) EXTENSIONS.—

17 “(i) VOLUNTARY EXTENSION AGREED  
18 TO BETWEEN INSPECTOR GENERAL AND  
19 COMPLAINANT.—If the inspector general is  
20 unable to complete an investigation under  
21 this section in time to submit a report  
22 within the 180-day period specified under  
23 subparagraph (A) and the person submit-  
24 ting the complaint agrees to an extension  
25 of time, the inspector general shall submit

1 a report under paragraph (1) within such  
2 additional period of time as shall be agreed  
3 upon between the inspector general and  
4 the person submitting the complaint.

5 “(ii) EXTENSION GRANTED BY IN-  
6 SPECTOR GENERAL.—If the inspector gen-  
7 eral is unable to complete an investigation  
8 under this section in time to submit a re-  
9 port within the 180-day period specified  
10 under subparagraph (A), the inspector  
11 general may extend the period for not  
12 more than 180 days without agreeing with  
13 the person submitting the complaint to  
14 such extension, provided that the inspector  
15 general provides a written explanation  
16 (subject to the authority to exclude infor-  
17 mation under paragraph (4)(C)) for the  
18 decision, which shall be provided to both  
19 the person submitting the complaint and  
20 the non-Federal employer.

21 “(iii) SEMI-ANNUAL REPORT ON EX-  
22 TENSIONS.—The inspector general shall in-  
23 clude in semi-annual reports to Congress a  
24 list of those investigations for which the in-  
25 spector general received an extension.

1           “(3) DISCRETION NOT TO INVESTIGATE COM-  
2           PLAINTS.—

3                   “(A) IN GENERAL.—The inspector general  
4           may decide not to conduct or continue an inves-  
5           tigation under this section upon providing to  
6           the person submitting the complaint and the  
7           non-Federal employer a written explanation  
8           (subject to the authority to exclude information  
9           under paragraph (4)(C)) for such decision.

10                   “(B) ASSUMPTION OF RIGHTS TO CIVIL  
11           REMEDY.—Upon receipt of an explanation of a  
12           decision not to conduct or continue an inves-  
13           tigation under subparagraph (A), the person  
14           submitting a complaint shall immediately as-  
15           sume the right to a civil remedy under sub-  
16           section (c)(3) as if the 210-day period specified  
17           under such subsection has already passed.

18                   “(C) SEMI-ANNUAL REPORT.—The inspec-  
19           tor general shall include in semi-annual reports  
20           to Congress a list of those investigations the in-  
21           spector general decided not to conduct or con-  
22           tinue under this paragraph.

23                   “(4) ACCESS TO INVESTIGATIVE FILE OF IN-  
24           SPECTOR GENERAL.—

1           “(A) IN GENERAL.—The person alleging a  
2           reprisal under this section shall have access to  
3           the investigation file of the appropriate inspec-  
4           tor general in accordance with section 552a of  
5           title 5 (commonly referred to as the ‘Privacy  
6           Act’). The investigation of the inspector general  
7           shall be deemed closed for purposes of disclo-  
8           sure under such section when an employee files  
9           an appeal to an agency head or a court of com-  
10          petent jurisdiction.

11          “(B) CIVIL ACTION.—In the event the per-  
12          son alleging the reprisal brings suit under sub-  
13          section (c)(3), the person alleging the reprisal  
14          and the non-Federal employer shall have access  
15          to the investigative file of the inspector general  
16          in accordance with the Privacy Act.

17          “(C) EXCEPTION.—

18                 “(i) IN GENERAL.—The inspector gen-  
19                 eral may exclude from disclosure—

20                         “(I) information protected from  
21                         disclosure by a provision of law; and

22                         “(II) any additional information  
23                         the inspector general determines dis-  
24                         closure of which would impede a con-  
25                         tinuing investigation, provided that

1           such information is disclosed once  
2           such disclosure would no longer im-  
3           pede such investigation, unless the in-  
4           spector general determines that disclo-  
5           sure of law enforcement techniques,  
6           procedures, or information could rea-  
7           sonably be expected to risk circumven-  
8           tion of the law or disclose the identity  
9           of a confidential source.

10           “(ii) LIMITATION.—Notwithstanding  
11           clause (i)(II), the inspector general may  
12           not withhold information from the em-  
13           ployee which would otherwise be subject to  
14           disclosure under section 552 of title 5  
15           (commonly referred to as the Freedom of  
16           Information Act) or the Privacy Act.

17           “(5) PRIVACY OF INFORMATION.—An inspector  
18           general investigating an alleged reprisal under this  
19           section may not respond to any inquiry or disclose  
20           any information from or about any person alleging  
21           such reprisal, except in accordance with the provi-  
22           sions of section 552a of title 5 or as required by any  
23           other applicable Federal law.

24           “(c) REMEDY AND ENFORCEMENT AUTHORITY.—

25           “(1) BURDEN OF PROOF.—



1                   “(A) DISCLOSURE AS CONTRIBUTING FAC-  
2                   TOR IN REPRISAL.—

3                   “(i) IN GENERAL.—A person alleging  
4                   a reprisal under this section shall be  
5                   deemed to have affirmatively established  
6                   the occurrence of the reprisal if the person  
7                   demonstrates that a disclosure described in  
8                   subsection (a) was a contributing factor in  
9                   the reprisal.

10                  “(ii) USE OF CIRCUMSTANTIAL EVI-  
11                  DENCE.—A disclosure may be dem-  
12                  onstrated as a contributing factor in a re-  
13                  prisal for purposes of this paragraph by  
14                  circumstantial evidence, including—

15                         “(I) evidence that the official un-  
16                         dertaking the reprisal knew of the dis-  
17                         closure;

18                         “(II) evidence that the reprisal  
19                         occurred within a period of time after  
20                         the disclosure such that a reasonable  
21                         person could conclude that the dislo-  
22                         sure was a contributing factor in the  
23                         reprisal; or

1                   “(III) evidence that the protected  
2                   disclosure was well founded in fact or  
3                   law.

4                   “(B) OPPORTUNITY FOR REBUTTAL.—The  
5                   head of an agency may not find the occurrence  
6                   of a reprisal with respect to a reprisal that is  
7                   affirmatively established under subparagraph  
8                   (A) if the non-Federal employer demonstrates  
9                   by clear and convincing evidence that the non-  
10                  Federal employer would have taken the action  
11                  constituting the reprisal in the absence of the  
12                  disclosure. An employee may rebut this affirma-  
13                  tive defense by direct or circumstantial evi-  
14                  dence, including the evidence described in sub-  
15                  paragraph (A).

16                  “(2) AGENCY ACTION.—Not later than 30 days  
17                  after receiving an inspector general report under  
18                  subsection (b), the head of the agency concerned  
19                  shall determine whether there is sufficient basis to  
20                  conclude that the non-Federal employer has sub-  
21                  jected the complainant to a reprisal prohibited by  
22                  subsection (a) and shall either issue an order deny-  
23                  ing relief in whole or in part or shall take 1 or more  
24                  of the following actions:

1           “(A) Order the employer to take affirma-  
2           tive action to abate the reprisal.

3           “(B) Order the employer to reinstate the  
4           person to the position that the person held be-  
5           fore the reprisal, together with the compensa-  
6           tion (including back pay), compensatory dam-  
7           ages, employment benefits, and other terms and  
8           conditions of employment that would apply to  
9           the person in that position if the reprisal had  
10          not been taken.

11          “(C) Order the employer to pay the com-  
12          plainant an amount equal to the aggregate  
13          amount of all costs and expenses (including at-  
14          torneys’ fees and expert witnesses’ fees) that  
15          were reasonably incurred by the complainant  
16          for, or in connection with, bringing the com-  
17          plaint regarding the reprisal, as determined by  
18          the head of the agency or a court of competent  
19          jurisdiction.

20          “(D) Where appropriate, order the posting  
21          of the decision of the inspector general in a  
22          manner in which every employee of the em-  
23          ployer will have notice of the decision and oth-  
24          erwise require a reasonable compliance program

1 to ensure that no further retaliation is com-  
2 mitted by the employer.

3 “(E) In the case of a finding that the re-  
4 prisal was willful, wanton, or malicious, pay the  
5 employee no more than 10 times the amount of  
6 all lost wages and other compensatory damages.

7 “(3) CIVIL ACTION.—If the head of an agency  
8 issues an order denying relief in whole or in part  
9 under paragraph (1), has not issued an order within  
10 210 days after the submission of a complaint under  
11 subsection (b), or in the case of an extension of time  
12 under subsection (b)(2)(B)(i), within 30 days after  
13 the expiration of the extension of time, or decides  
14 under subsection (b)(3) not to investigate or to dis-  
15 continue an investigation, and there is no showing  
16 that such delay or decision is due to the bad faith  
17 of the complainant, the complainant shall be deemed  
18 to have exhausted all administrative remedies with  
19 respect to the complaint, and the complainant may  
20 bring a de novo action at law or equity against the  
21 employer to seek compensatory damages and all  
22 other relief available under this section in the appro-  
23 priate district court of the United States, which  
24 shall have jurisdiction over such an action without  
25 regard to the amount in controversy. Such an action

1 shall, at the request of either party to the action, be  
2 tried by the court with a jury.

3 “(4) JUDICIAL ENFORCEMENT OF ORDER.—

4 Whenever a person fails to comply with an order  
5 issued under paragraph (2), the head of the agency  
6 shall file an action for enforcement of such order in  
7 the United States district court for a district in  
8 which the reprisal was found to have occurred. In  
9 any action brought under this paragraph, the court  
10 may grant appropriate relief, including injunctive re-  
11 lief, compensatory and exemplary damages, and at-  
12 torneys’ fees and costs. The person upon whose be-  
13 half an order was issued may also file such an action  
14 or join in an action filed by the head of the agency.

15 “(5) JUDICIAL REVIEW.—Any person adversely

16 affected or aggrieved by an order issued under para-  
17 graph (2) may obtain review of the order’s conform-  
18 ance with this subsection, and any regulations issued  
19 to carry out this section, in the United States court  
20 of appeals for a circuit in which the reprisal is al-  
21 leged in the order to have occurred. No petition  
22 seeking such review may be filed more than 60 days  
23 after issuance of the order by the head of the agen-  
24 cy. Review shall conform to chapter 7 of title 5. Fil-  
25 ing such an appeal shall not act to stay the enforce-

1       ment of the order of a head of an agency or the  
2       judgment of a district court.

3               “(6) EXHAUSTION OF ADMINISTRATIVE REM-  
4       EDIES.—Regardless of any other time limit set forth  
5       in this section, after 360 days an employee shall be  
6       deemed to have exhausted his or her administrative  
7       remedies and may file a civil action or amend a  
8       claim under this section to any other pending civil  
9       action filed by the employee.

10              “(d) NONENFORCEABILITY OF CERTAIN PROVISIONS  
11       WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBI-  
12       TRATION OF DISPUTES.—

13               “(1) WAIVER OF RIGHTS AND REMEDIES.—Ex-  
14       cept as provided under paragraph (3), the rights and  
15       remedies provided for in this section may not be  
16       waived by any agreement, policy, form, or condition  
17       of employment, including by any predispute arbitra-  
18       tion agreement.

19               “(2) PREDISPUTE ARBITRATION AGREE-  
20       MENTS.—Except as provided under paragraph (3),  
21       no predispute arbitration agreement shall be valid or  
22       enforceable if it requires arbitration of a dispute  
23       arising under this section.

24               “(3) EXCEPTION FOR COLLECTIVE BARGAINING  
25       AGREEMENTS.—Notwithstanding paragraphs (1)

1 and (2), an arbitration provision in a collective bar-  
2 gaining agreement shall be enforceable as to dis-  
3 putes arising under the collective bargaining agree-  
4 ment.

5 “(e) REQUIREMENT TO POST NOTICE OF RIGHTS  
6 AND REMEDIES.—Any employer receiving covered funds  
7 shall post notice of the rights and remedies provided under  
8 this section.

9 “(f) RULES OF CONSTRUCTION.—

10 “(1) NO IMPLIED AUTHORITY TO RETALIATE  
11 FOR NON-PROTECTED DISCLOSURES.—Nothing in  
12 this section may be construed to authorize the dis-  
13 charge of, demotion of, or discrimination against an  
14 employee for a disclosure other than a disclosure  
15 protected by subsection (a) or to modify or derogate  
16 from a right or remedy otherwise available to the  
17 employee.

18 “(2) RELATIONSHIP TO STATE LAWS.—Nothing  
19 in this section may be construed to preempt, pre-  
20 clude, or limit the protections provided for public or  
21 private employees under State whistleblower laws.

22 “(g) DEFINITIONS.—In this section:

23 “(1) ABUSE OF AUTHORITY.—The term ‘abuse  
24 of authority’ means an arbitrary and capricious ex-  
25 ercise of authority by a contracting official or em-

1        ployee that adversely affects the rights of any per-  
 2        son, or that results in personal gain or advantage to  
 3        the official or employee or to preferred other per-  
 4        sons.

5            “(2) COVERED FUNDS.—The term ‘covered  
 6        funds’ means any contract, grant, or other payment  
 7        received by any non-Federal employer if the Federal  
 8        Government provides any portion of the money or  
 9        property that is provided, requested, or demanded.

10           “(3) EMPLOYEE.—The term ‘employee’—

11            “(A) except as provided under subpara-  
 12        graph (B), means an individual performing  
 13        services on behalf of an employer or a con-  
 14        tractor, subcontractor, or agent of an employer;  
 15        and

16            “(B) does not include any Federal em-  
 17        ployee or member of the uniformed services (as  
 18        that term is defined in section 101(a)(5) of title  
 19        10).

20           “(4) NON-FEDERAL EMPLOYER.—The term  
 21        ‘non-Federal employer’—

22            “(A) means—

23            “(i) any employer—

24            “(I) with respect to covered  
 25        funds—



1           “(aa) the contractor, sub-  
2 contractor, grantee, or recipient,  
3 as the case may be, if the con-  
4 tractor, grantee, or recipient is  
5 an employer; and

6           “(bb) any professional mem-  
7 bership organization, certification  
8 or other professional body, any  
9 agent or licensee of the Federal  
10 government, or any person acting  
11 directly or indirectly in the inter-  
12 est of an employer receiving cov-  
13 ered funds; or

14           “(II) with respect to covered  
15 funds received by a State or local gov-  
16 ernment, the State or local govern-  
17 ment receiving the funds and any con-  
18 tractor or subcontractor of the State  
19 or local government; and

20           “(ii) any corporation or person who  
21 receives any Federal funds; and

22           “(B) does not mean any department, agen-  
23 cy, or other entity of the Federal Government.

24           “(5) STATE OR LOCAL GOVERNMENT.—The  
25 term ‘State or local government’ means—

1           “(A) the government of each of the several  
2 States, the District of Columbia, the Common-  
3 wealth of Puerto Rico, Guam, American Samoa,  
4 the Virgin Islands, the Commonwealth of the  
5 Northern Mariana Islands, or any other terri-  
6 tory or possession of the United States; or

7           “(B) the government of any political sub-  
8 division of a government listed in subparagraph  
9 (A).”.

10 (c) APPLICABILITY.—

11           (1) PENDING CLAIMS.—Section 4705 of title  
12 41, United States Code, as added by subsection (b),  
13 shall apply to complaints submitted pursuant to  
14 such section on or after the date of the enactment  
15 of this Act.

16           (2) NEW CLAIMS.—Section 4705 of title 41,  
17 United States Code, as in effect on the day before  
18 the date of the enactment of this Act shall apply to  
19 claims submitted pursuant to such section before  
20 such date of enactment.

○