

that information be kept secret in the interest of national defense or the conduct of foreign affairs.

(Added Pub. L. 101–12, §3(a)(13), Apr. 10, 1989, 103 Stat. 29; Pub. L. 115–91, div. A, title X, §1097(h)(2), Dec. 12, 2017, 131 Stat. 1624.)

#### Editorial Notes

##### AMENDMENTS

2017—Subsec. (a)(1). Pub. L. 115–91 amended par. (1) generally. Prior to amendment, par. (1) read as follows: “a list of noncriminal matters referred to heads of agencies under subsection (c) of section 1213, together with reports from heads of agencies under subsection (c)(1)(B) of such section relating to such matters;”.

#### SUBCHAPTER III—INDIVIDUAL RIGHT OF ACTION IN CERTAIN REPRISAL CASES

##### § 1221. Individual right of action in certain reprisal cases

(a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), seek corrective action from the Merit Systems Protection Board.

(b) This section may not be construed to prohibit any employee, former employee, or applicant for employment from seeking corrective action from the Merit Systems Protection Board before seeking corrective action from the Special Counsel, if such employee, former employee, or applicant for employment has the right to appeal directly to the Board under any law, rule, or regulation.

(c)(1) Any employee, former employee, or applicant for employment seeking corrective action under subsection (a) may request that the Board order a stay of the personnel action involved.

(2) Any stay requested under paragraph (1) shall be granted within 10 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date the request is made, if the Board determines that such a stay would be appropriate.

(3)(A) The Board shall allow any agency which would be subject to a stay under this subsection to comment to the Board on such stay request.

(B) Except as provided in subparagraph (C), a stay granted under this subsection shall remain in effect for such period as the Board determines to be appropriate.

(C) The Board may modify or dissolve a stay under this subsection at any time, if the Board determines that such a modification or dissolution is appropriate.

(d)(1) At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (a), the Board shall issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that the testimony or pro-

duction requested is not unduly burdensome and appears reasonably calculated to lead to the discovery of admissible evidence.

(2) A subpoena under this subsection may be issued, and shall be enforced, in the same manner as applies in the case of subpoenas under section 1204.

(e)(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure or protected activity described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—

(A) the official taking the personnel action knew of the disclosure or protected activity; and

(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.

(2) Corrective action under paragraph (1) may not be ordered if, after a finding that a protected disclosure was a contributing factor, the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

(f)(1) A final order or decision shall be rendered by the Board as soon as practicable after the commencement of any proceeding under this section.

(2) A decision to terminate an investigation under subchapter II may not be considered in any action or other proceeding under this section.

(3) If, based on evidence presented to it under this section, the Merit Systems Protection Board determines that there is reason to believe that a current employee may have committed a prohibited personnel practice, the Board shall refer the matter to the Special Counsel to investigate and take appropriate action under section 1215.

(g)(1)(A) If the Board orders corrective action under this section, such corrective action may include—

(i) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

(ii) back pay and related benefits, medical costs incurred, travel expenses, any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs).

(B) Corrective action shall include attorney’s fees and costs as provided for under paragraphs (2) and (3).

(2) If an employee, former employee, or applicant for employment is the prevailing party before the Merit Systems Protection Board, and the decision is based on a finding of a prohibited personnel practice, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred.

(3) If an employee, former employee,<sup>1</sup> or applicant for employment is the prevailing party in an appeal from the Merit Systems Protection Board, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred, regardless of the basis of the decision.

(4) Any corrective action ordered under this section to correct a prohibited personnel practice may include fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

(h)(1) An employee, former employee, or applicant for employment adversely affected or aggrieved by a final order or decision of the Board under this section may obtain judicial review of the order or decision.

(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

(i) Subsections (a) through (h) shall apply in any proceeding brought under section 7513(d) if, or to the extent that, a prohibited personnel practice as defined in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) is alleged.

(j) In determining the appealability of any case involving an allegation made by an individual under the provisions of this chapter, neither the status of an individual under any retirement system established under a Federal statute nor any election made by such individual under any such system may be taken into account.

(k) If the Board grants a stay under subsection (c) and the employee who is the subject of the action is in probationary status, the head of the agency employing the employee shall give priority to a request for a transfer submitted by the employee.

(Added Pub. L. 101-12, §3(a)(13), Apr. 10, 1989, 103 Stat. 29; amended Pub. L. 103-424, §§4, 8(b), Oct. 29, 1994, 108 Stat. 4363, 4365; Pub. L. 112-199, title I, §§101(b)(1)(A), (2)(A), 104(c)(2), 107(b), 114(b), Nov. 27, 2012, 126 Stat. 1465, 1468, 1469, 1472; Pub. L. 115-73, title I, §102(b), Oct. 26, 2017, 131 Stat. 1236; Pub. L. 115-91, div. A, title X, §1097(c)(3)(B), Dec. 12, 2017, 131 Stat. 1619.)

### Editorial Notes

#### AMENDMENTS

2017—Subsec. (k). Pub. L. 115-91 added subsec. (k) and struck out former subsec. (k) which read as follows: "If the Merit Systems Protection Board grants a stay to an employee in probationary status under subsection (c), the head of the agency employing the employee shall give priority to a request for a transfer submitted by the employee."

<sup>1</sup> So in original. Probably should be "employee."

Pub. L. 115-73 added subsec. (k).

2012—Subsec. (a). Pub. L. 112-199, §101(b)(1)(A), inserted "or section 2302(b)(9)(A)(i), (B), (C), or (D)" after "section 2302(b)(8)".

Subsec. (e)(1). Pub. L. 112-199, §101(b)(1)(A), (2)(A), inserted "or section 2302(b)(9)(A)(i), (B), (C), or (D)" after "section 2302(b)(8)" in two places and inserted "or protected activity" after "disclosure" wherever appearing.

Subsec. (e)(2). Pub. L. 112-199, §114(b), inserted ":", after a finding that a protected disclosure was a contributing factor," after "ordered if".

Subsec. (g)(1)(A)(ii). Pub. L. 112-199, §107(b), substituted "any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs)." for "and any other reasonable and foreseeable consequential changes."

Subsec. (g)(4). Pub. L. 112-199, §104(c)(2), added par. (4).

Subsec. (i). Pub. L. 112-199, §101(b)(1)(A), inserted "or section 2302(b)(9)(A)(i), (B), (C), or (D)" after "section 2302(b)(8)".

1994—Subsec. (d)(1). Pub. L. 103-424, §4(a), added par. (1) and struck out former par. (1) which read as follows: "At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (a), the Board may issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that such subpoena is necessary for the development of relevant evidence."

Subsec. (e)(1). Pub. L. 103-424, §4(b), which directed the amendment of section 1221(e)(1), without specifying the Code title to be amended, by inserting at end "The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—

"(A) the official taking the personnel action knew of the disclosure; and

"(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.", was executed to subsec. (e)(1) of this section to reflect the probable intent of Congress.

Subsec. (f)(3). Pub. L. 103-424, §4(c), added par. (3).

Subsec. (g). Pub. L. 103-424, §8(b), added par. (1) and redesignated former pars. (1) and (2) as (2) and (3), respectively.

### Statutory Notes and Related Subsidiaries

#### EFFECTIVE DATE OF 2012 AMENDMENT

Amendment by Pub. L. 112-199 effective 30 days after Nov. 27, 2012, see section 202 of Pub. L. 112-199, set out as a note under section 1204 of this title.

#### EFFECTIVE DATE

Subchapter effective 90 days following Apr. 10, 1989, see section 11 of Pub. L. 101-12, set out as an Effective Date of 1989 Amendment note under section 1201 of this title.

### § 1222. Availability of other remedies

Except as provided in section 1221(i), nothing in this chapter or chapter 23 shall be construed to limit any right or remedy available under a provision of statute which is outside of both this chapter and chapter 23.

(Added Pub. L. 101-12, §3(a)(13), Apr. 10, 1989, 103 Stat. 31.)

### CHAPTER 13—SPECIAL AUTHORITY

Sec.	
1301.	Rules.
1302.	Regulations.