



March 23, 2015

VIA e-mail to lterry@osc.gov

Lisa V. Terry, Esq.
General Counsel
Office of General Counsel
U.S. Office of Special Counsel
1730 M Street, NW, Suite 218
Washington, DC 20036

Re: Notice of Proposed Rulemaking, 80 Fed.Reg. 3,182-3,184

Dear Ms. Terry:

The National Employment Lawyers Association (NELA) respectfully submits the following comments in response to the Office of Special Counsel (OSC) Notice of Proposed Rulemaking, published in the Federal Register on January 22, 2015, 80 Fed.Reg. 3,182-3,184.

NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws, as well as undertaking other advocacy actions on behalf of workers throughout the United States. NELA members represent whistleblowing employees, and thus we have an interest in OSC's proposed regulations for whistleblower disclosures under the National Defense Authorization Act of 2013 (NDAA) pilot program.

NELA appreciates the opportunity to offer suggestions concerning OSC's proposed regulations for whistleblower disclosures under the NDAA. In general, NELA strongly favors providing employee whistleblowers with as many protected avenues as possible to blow the whistle on wrongdoing. NELA further applauds OSC's efforts to raise public awareness of the existence of the NDAA pilot program. Regrettably, to date this has not been publicized sufficiently. While the statutory terms of the NDAA pilot program do not vest OSC with the same authority over whistleblower reprisal complaints that OSC has for federal employee whistleblower reprisal claims under 5 U.S.C. § 2302(b)(8), it is important for OSC to set the example of a robust model for investigation of these whistleblower disclosures, since other governmental bodies will look to OSC as the standard of practice for whistleblower-related programs. *See, e.g.,* U.S. Government Accountability Office Report GAO-15-112, *Whistleblower Protection: Additional Actions*

Needed to Improve DOJ's Handling of FBI Retaliation Complaints, January 2015, available at <http://www.gao.gov/assets/670/668055.pdf>, at 3.

NELA is concerned about one aspect of the discussion for the Notice of Proposed Rulemaking, which appears to be inconsistent with NDAA pilot program's statutory text. Specifically, the notice of proposed rulemaking notes:

On the other hand, if a contractor's situation differs greatly from that of a Federal employee, it is less likely that OSC will be able to find that the contractor has credible information about government wrongdoing needed to make a substantial likelihood finding. For example, an off-site contractor, or one not working under Federal line supervision, is much less likely to directly encounter government wrongdoing and, therefore, may not have sufficiently reliable information. For that reason, to meet the "substantial likelihood" threshold, he or she may be required to produce compelling documentary information establishing government wrongdoing.

80 Fed.Reg. at 3,183. This text assumes that the NDAA pilot program limits itself to claims of "government misconduct." No such limitation appears in the statute. Instead, the scope of whistleblowing in the statute covers "evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant." *See* 41 U.S.C. § 4712(a)(1). This text does not limit the scope of "wrongdoing [...] cognizable under 41 U.S.C. 4712" to misconduct by government agencies and employees. To the contrary, the plain text of the statute states that "an employee who initiates or provides evidence of contractor, subcontractor, or grantee misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Federal contract or grant shall be deemed to have made a disclosure covered by" the statute. *See* 41 U.S.C. § 4712(a)(3)(A).

The text referenced above is clear and is consistent with the legislative history of the NDAA pilot program. Section 4712 of the statute (41 U.S.C. § 4712) was created by NDAA Section 828, which was accepted ultimately by the Conference Committee based on the Senate Amendment to the statute. *See* H.R.REP. 112-705 at 805. The Senate provision, in turn, was originally designed as an amendment to 10 U.S.C. § 2409. *See* S.REP. 112-173 at 145-46. This lineage is apparent based upon a comparison of the two statutes, whose terms closely track each other. *Compare* 41 U.S.C. § 4712 to 10 U.S.C. § 2409. In 10 U.S.C. § 2409, the statute is focused on *contractor* misconduct, not *government* misconduct. Thus, given that 41 U.S.C. § 4712—is the progeny of 10 U.S.C. § 2409 and in light of its legislative history—it cannot plausibly be read as solely focusing on "government wrongdoing." *See, e.g.*, 10 U.S.C. § 2409(a)(1)(A, B); S.REP. 112-173 at 146 (noting purpose of amendment was to expand the scope of covered whistleblowing).

Further, NELA objects to the counterfactual assumption that an “off-site contractor, or one not working under Federal line supervision, is much less likely to directly encounter government wrongdoing and, therefore, may not have sufficiently reliable information.” Based on the experience of many NELA members, the location of the whistleblower’s worksite is irrelevant to their ability to discover wrongdoing. Indeed, such wrongdoing is often discovered, for example, by auditors and others who examine written records off-site. Further, making such a distinction runs counter to the text of the statute. Accordingly, NELA strongly believes that placing a higher *per se* evidentiary burden requiring off-site contractors to produce “compelling documentary information” is inconsistent with the overall legislative purpose of facilitating whistleblower disclosures and bringing wrongdoing regarding government contracting and grants, to light. In deciding when to investigate, NELA urges OSC to apply the same standard to all categories of covered disclosure.

Fixing these issues will not require a substantive modification of the proposed rules themselves, as proposed 5 C.F.R. § 1800.2(a) correctly refers to the scope of covered disclosures as “disclosures of wrongdoing [...] cognizable under 41 U.S.C. 4712” and no provision of the proposed rules sets a “compelling documentary information” standard. To avoid improper rejection of whistleblower disclosures of contractor, subcontractor and grantee wrongdoing, however, NELA urges that OSC’s final rule include clarification noting the correct, expansive scope of wrongdoing covered by the NDAA pilot program, and correcting the language that would apply a special burden to disclosures from off-site contractors.

Although 41 U.S.C. § 4712(d) places some responsibility upon government agencies to ensure that their contractors, subcontractors and grantees educate their employees about the NDAA pilot program, NELA believes that OSC has a role to play in this regard. This is especially relevant in relation to employees who take advantage of OSC’s avenue for making protected whistleblowing disclosures under the proposed rules. Because of the manifest risks of retaliation for any whistleblower disclosures, whistleblowers need to be aware of their protections from reprisal. This is information which may be hard to come by given the dearth of public notice of the NDAA pilot program. Further, since OSC does not have whistleblower reprisal jurisdiction under the NDAA pilot program as presently constituted, NELA anticipates that whistleblowers who made protected disclosures to OSC under the proposed rules, and then who suffer retaliation, might incorrectly attempt to file their reprisal complaints at OSC instead of the relevant Office of Inspector General, resulting in confusion and additional administrative burden for OSC.

To address the problem set out above, NELA recommends that OSC create an information sheet providing a plain-language explanation of protections from whistleblower reprisal under the NDAA pilot program. OSC should issue copies of this information sheet to individuals when they make protected disclosures to OSC under the proposed rule. The document should explain the protections from whistleblower reprisal to which an individual whistleblower is entitled under the NDAA pilot program, the procedures for filing such whistleblower reprisal complaints, and should provide contact information for the relevant Offices of Inspector General. This information should be posted on the OSC webpage.

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Finally, NELA notes that 41 U.S.C. § 4712 potentially has significant overlap with certain other whistleblower reprisal statutes, in particular the *qui tam* statutes. Specifically, 31 U.S.C. § 3430(h), the *qui tam* reprisal statute, could in practice cover reprisal for disclosure of many of the forms of wrongdoing also covered by the whistleblower reprisal sections of 41 U.S.C. § 4712. Similarly, many of the forms of wrongdoing that a whistleblower could bring to OSC under the NDAA pilot program and the proposed rules could also give rise to a *qui tam* complaint. NELA also recommends that in addition to the inclusion of educational materials on the NDAA pilot program on the OSC website, the website should note the existence of both *qui tam* claims and the *qui tam* reprisal mechanism. This will allow potential whistleblowers to make an informed decision as to which mechanism they wish to employ in disclosing possible wrongdoing.

NELA appreciates the opportunity to comment on the Notice of Proposed Rulemaking, and we thank OSC for its attention and consideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Terisa E. Chaw". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Terisa E. Chaw
Executive Director