

U.S. Office of Special Counsel (OSC) Information Sheet



Discrimination – 5 U.S.C. § 2302(b)(1)

PURPOSE

This information sheet provides general guidance and background information on **5 U.S.C. § 2302(b)(1)**. This document does not serve as legal advice and should not be cited as legal authority. Rather, the statute and current case law control with respect to matters discussed here.

WHAT IS (b)(1)?

Section 2302(b)(1) makes it a prohibited personnel practice to discriminate against any employee or applicant for employment based on: 1) ***race, color, nationality, religion, age, sex*** (including pregnancy), ***handicapping condition*** (or disability); 2) ***marital status*** (must be some indication that the treatment is related to employee's status); or 3) ***political affiliation*** (based on affiliation with a party or candidate, not a political issue).

Note: It is OSC's policy to not review complaints involving discrimination based on race, color, religion, sex (including pregnancy), national origin, age, or disability (or handicapping condition). Instead, OSC notifies the complainant that they may utilize the Equal Employment Opportunity (EEO) process available at their respective agency. There are instances of egregious or widespread discrimination where OSC may divert from its policy and accept a complaint for investigation or initiate its own investigation.

WHAT IS PROHIBITED?

Examples of section 2302(b)(1) violations include:

- A hiring official asks an applicant about their marital status, and the applicant responds that they are single. The applicant is then not selected for the job. Subsequently, the hiring official reveals that they only hire married applicants, believing that marital status indicates stability and commitment.
- A supervisor has an employee who is Muslim and leaves their desk five times a day for prayer. The supervisor asserts that these breaks are distracting and moves the employee's desk to a secluded area of the office, away from their colleagues.
- An employee who has never disclosed their political affiliation has a "GOP" sticker on their car. Their supervisor notices the sticker and presumes that the employee is a member of the GOP. As a result, the supervisor begins assigning the employee irrelevant tasks and busy work, deliberately excluding them from important projects.

TIPS AND RECOMMENDATIONS

1. Educate and train employees on anti-discrimination policies.
2. Provide clear guidance on the avenues available to employees if they feel that they have experienced discrimination or retaliation for EEO activities.
3. Include political affiliation and marital status discrimination in your agency's anti-discrimination policies. Clearly state that discrimination based on partisan political affiliation and marital status is prohibited.
4. Use clear, objective criteria for performance evaluations, promotions, and assignments to avoid bias based on protected class, marital status, or political affiliation.

For more information on filing a complaint or making a disclosure: call 202-804-7000, 800-872-9855 or submit a question at info@osc.gov.

Please note that OSC may not provide advice regarding merit of a complaint or whether the allegation meets the statutory definitions.

Updated and detailed information on OSC and its procedures can be found on OSC's website at <https://osc.gov>.

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Improper Recommendations – 5 U.S.C. § 2302(b)(2)

PURPOSE

This information sheet provides general guidance and background information on **5 U.S.C. § 2302(b)(2)**. This document does not serve as legal advice and should not be cited as legal authority. Rather, the statute and current case law control with respect to matters discussed here.

WHAT IS (b)(2)?

Section 2302(b)(2) prohibits an official with the authority to take or influence a personnel action from soliciting or considering any employment recommendation from a senator or congressperson unless the recommendation is based on personal knowledge or records and consists of an evaluation of the work performance, ability, aptitude, general qualifications or character/suitability of the candidate. Although the language of section 2302(b)(2) appears to cover any recommendation or statement, including those from agency officials or coworkers, the Merit Systems Protection Board has interpreted the law more narrowly, holding that the legislative intent is to prevent the use of political influence to secure positions or promotions.

WHAT IS PROHIBITED?

Examples of section 2302(b)(2) violations include:

- A hiring official receiving and considering a recommendation from a senator to promote a specific individual to a senior position and, the recommendation is not based on personal knowledge. The recommendation is based on the individual's political affiliation, family connections, or political contributions to the senator's campaign, rather than on the individual's qualifications or job performance.
- A hiring official receiving and considering a recommendation from a congressperson for a veteran where the congressperson has no personal knowledge of the veteran's qualifications. Instead, the recommendation is based solely on the veteran's military service and the congressperson's desire to help veterans secure employment.

TIPS AND RECOMMENDATIONS

1. Agencies should establish and strictly enforce merit-based hiring processes that focus on evaluating candidates' qualifications, experience, and ability to perform the job. Recommendations, whether from a senator, congressperson, or other source, should be considered only to the extent that they align with the merit-based selection criteria.
2. Implement clear criteria and transparent processes for all hiring, promotions, and other personnel decisions, ensuring they are based on merit, qualifications, and job-related factors, not personal biases or political connections.
3. Use objective standards and standardized performance evaluations. Require decision-makers to document their rationale for hiring, promotion, or disciplinary actions to ensure that they are consistent with the agency's policies and merit-based principles.

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Coercing Political Activity – 5 U.S.C. § 2302(b)(3)

PURPOSE

This information sheet provides general guidance and background information on **5 U.S.C. § 2302(b)(3)**. This document does not serve as legal advice and should not be cited as legal authority. Rather, the statute and current case law control with respect to matters discussed here.

WHAT IS 2302(b)(3)?

Section 2302(b)(3) prohibits an official with the authority to take or influence a personnel action from coercing any person to engage in political activity (including providing a political contribution or service) or from taking any action against an employee or applicant in retaliation for their refusal to engage in political activity.

WHAT IS PROHIBITED?

Depending on the particular facts, the following may violate section 2302(b)(3):

- A Contracting Officer Technical Representative using their government email to send fundraiser emails to federal contractors who they exercised control over based on their influence over the contract.
- A supervisor suggesting that an employee should donate a portion of their annual bonus to the supervisor's preferred candidate in an upcoming local election.
- A supervisor reassigning an employee after the employee refuses to donate their time to canvassing for the supervisor who is running in a nonpartisan election for the county schoolboard.
- A team lead asking an employee to buy tickets for a political fundraiser.
- A member of a hiring panel informing an applicant that they will be overlooked for promotion if they do not vote for a certain candidate.

TIPS AND RECOMMENDATIONS

1. Educate employees on their First Amendment rights and the Hatch Act. For free training on the Hatch Act from the Office of Special Counsel, please contact certification@osc.gov.
2. Ensure respect for individuals' personal privacy concerning political views, while recognizing and upholding their First Amendment rights to freedom of speech and expression.
3. Establish clear policies that explicitly prohibit any form of coercion or retaliation related to political activity.

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Obstructing Right to Compete – 5 U.S.C. § 2302(b)(4)

PURPOSE

This information sheet provides general guidance and background information on **5 U.S.C. § 2302(b)(4)**. This document does not serve as legal advice and should not be cited as legal authority. Rather, the statute and current case law control with respect to matters discussed here.

WHAT IS (b)(4)?

Section 2302(b)(4) prohibits an official with the authority to take or influence a personnel action from deceiving or willfully obstructing any person's right to compete for employment. There must be evidence of a deliberate effort to prevent someone from competing. This right to compete also extends to details that are competed, temporary promotional opportunities, and permanent promotional opportunities.

WHAT IS PROHIBITED?

Examples of section 2302(b)(4) violations include:

- Intentionally and falsely lowering an employee's performance rating to make them a less desirable candidate for an open promotional opportunity.
- Giving a candidate false information about the application process or job requirements, such as telling them that they are ineligible or that the position has been filled when it has not.
- Intentionally failing to contact a candidate with a job offer and falsely telling the selecting official that the candidate was no longer interested in the position.
- Modifying or adding qualifications that were not included in the original job posting to prevent certain candidates from applying or qualifying, such as requiring a specific certification after the application period has already started.
- Intentionally deleting a candidate's application materials to prevent them from being considered for an opportunity.

TIPS AND RECOMMENDATIONS

1. Use objective standards and standardized performance evaluations. Require decision-makers to document their rationale for hiring, promotion, or disciplinary actions to ensure that they are consistent with the agency's policies and merit-based principles.
2. Ensure that vacancy announcements clearly outline the required qualifications, skills, and experience needed for a position. Avoid adding qualifications after the position is posted.
3. Implement fair interview practices by ensuring that interviews are structured and based on job-related questions.
4. Monitor and audit hiring practices periodically to ensure that candidates are not unlawfully obstructed.

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Influencing Withdrawal from Competition – 5 U.S.C. § 2302(b)(5)

PURPOSE

This information sheet provides general guidance and background information on **5 U.S.C. § 2302(b)(5)**. This document does not serve as legal advice and should not be cited as legal authority. Rather, the statute and current case law control with respect to matters discussed here.

WHAT IS (b)(5)?

Section 2302(b)(5) prohibits an official with the authority to take or influence a personnel action from attempting to influence someone to withdraw from competition *for the purpose of improving or injuring the employment prospects* of any person. There must be evidence of intent to encourage the withdrawal, and the official must make a statement or take an action aimed at influencing that decision.

Even if no withdrawal occurs, attempting to influence someone to withdraw is still prohibited under section 2302(b)(5). Additionally, the Merit Systems Protection Board has determined that making truthful statements with the intent to encourage a withdrawal may also constitute a violation.

WHAT IS PROHIBITED?

Examples of section 2302(b)(5) violations include:

- A veteran's resume is moved to the top of the list of eligible applicants due to their qualifications and point preference, placing the veteran ahead of a preferred non-veteran candidate. In response, the hiring official makes statements to the veteran with the intent to encourage them to withdraw, telling the veteran that they were unqualified and suggesting that the more qualified preferred applicant should take the position.
- An agency official intentionally and disproportionately emphasizes negative aspects of a role, informing an applicant that the position requires extensive travel at moment's notice or that moving expenses will not be paid, because the official wants to dissuade the applicant and proceed with hiring a preferred candidate.
- An official informs an applicant for a promotional opportunity that the applicant need not go through the application process because the position "is not for them."

TIPS AND RECOMMENDATIONS

1. Ensure that hiring decisions are based on a candidate's qualifications, skills, and experience.
2. Familiarize yourself with veterans' preference and other legal hiring authorities.
3. Managers should be upfront about job demands but avoid intentionally framing them in a way to dissuade candidates from proceeding with the application process.
4. Provide consistent information and communicate to all candidates in a fair and equal manner.
5. Let the hiring process unfold naturally and be mindful of informal remarks, such as suggesting to the candidate that "the role may not be a good fit" or that another candidate is the optimal choice for an open opportunity.

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U.S. Office of Special Counsel (OSC) Information Sheet



Granting an Unauthorized Preference – 5 U.S.C. § 2302(b)(6)

PURPOSE

This information sheet provides general guidance and background information on **5 U.S.C. § 2302(b)(6)**. This document does not serve as legal advice and should not be cited as legal authority. Rather, the statute and current case law control with respect to matters discussed here.

WHAT IS (b)(6)?

Section 2302(b)(6) prohibits an official with the authority to take or influence a personnel action from granting any preference or advantage not authorized by law, rule, or regulation to any applicant *for the purpose of improving or injuring the prospects* of any person. The provision does not require that the unauthorized action result in an actual advantage; it only requires that the intent be to provide one.

ELEMENTS NECESSARY TO ESTABLISH A (b)(6) VIOLATION

The elements necessary to establish a violation are: (1) a preference or advantage was granted; (2) the official who granted the advantage or preference had personnel action authority; (3) the preference or advantage was not authorized by civil service law, rule, or regulation; and, (4) the official who granted the preference or advantage did so purposefully and for the specific intent of improving the prospects of an applicant or injuring the prospects of an applicant.

WHAT IS PROHIBITED?

Examples of section 2302(b)(6) violations include:

- A hiring official giving preferential treatment to a candidate because they are a close friend or previous business associate, even though the candidate does not meet the minimum qualifications or have the experience required for the position.
- Including selective placement factors in a vacancy announcement to target and preferentially refer a preferred candidate.
- Re-advertising a position to give an individual who missed the initial vacancy announcement the chance to apply.
- A hiring manager deliberately changing the qualifications or job description to favor a particular candidate they have in mind, even though this change is not based on the job's true needs or requirements.
- Changing the area of consideration or grade level for which a position is normally advertised to ensure that a particular individual can apply and be selected.
- Delaying the recruitment process to ensure that a preferred candidate can apply for the position.

TIPS AND RECOMMENDATIONS

1. Base hiring decisions on the qualifications, experience, and skills required for the position, rather than personal relationships or preferences that are not grounded in law, rule, or regulation.
2. Establish and follow a clear and consistent recruitment and selection process. Ensure that job announcements, candidate evaluations, and selection criteria are standardized and objective.
3. If uncertain about the application of a preference or hiring decision, consult with local experts.

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Nepotism – 5 U.S.C. § 2302(b)(7)

PURPOSE

This information sheet provides general guidance and background information on **5 U.S.C. § 2302(b)(7)**. This document does not serve as legal advice and should not be cited as legal authority. Rather, the statute and current case law control with respect to matters discussed here.

WHAT IS (b)(7)?

Section 2302(b)(7) prohibits appointing, employing, promoting, advancing or advocating for the appointment, employment, promotion, or advancement of a relative.

“Relative” is defined by law as father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half-brother or half-sister. 5 U.S.C. § 3110.

WHAT IS PROHIBITED?

Examples of section 2302(b)(7) violations include:

- A supervisor informs a subordinate that their son-in law, a hardworking individual, will be interviewing for an open position and that the subordinate should seriously consider hiring the son-in-law.
- A hiring official serves on the interview panel for a position where their nephew is one of the candidates. The hiring official does not disclose the familial relationship nor recuse themselves from the decision-making process.
- A supervisor selects their cousin for a prestigious detail.
- A senior manager supervises their sibling’s performance in the workplace. The sibling is given lenient evaluations and special treatment not afforded to other employees.

TIPS AND RECOMMENDATIONS

1. Ensure that you are fully aware of your agency’s policies on nepotism, conflict of interest, and merit-based hiring.
2. It is okay to share open vacancy announcements with a relative. However, being involved in the hiring process, including serving as a reference or providing a recommendation is prohibited.
3. Relatives must recuse themselves from participating in hiring actions in which a relative is an applicant.
4. It is not prohibited for two covered relatives to work at the same agency or within the same work division. Exercise diligence in ensuring that no relative exercises personnel action authority over another.
5. Establish clear guidelines regarding family members or close relationships in the workplace. For example, define how these relationships should be disclosed and handled during recruitment, promotions, or assignments.

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U.S. Office of Special Counsel (OSC) Information Sheet



Retaliation for Making a Protected Disclosure – 5 U.S.C. § 2302(b)(8)

PURPOSE

This information sheet provides general guidance and background information on **5 U.S.C. § 2302(b)(8)**. This document does not serve as legal advice and should not be cited as legal authority. Rather, the statute and current case law control with respect to matters discussed here.

WHAT IS 2302(b)(8)?

Section 2302(b)(8) is a key provision of the Whistleblower Protection Act, prohibiting an official with the authority to take or influence a personnel action from taking or failing to take, or threatening to take or fail to take, a personnel action with respect to any employee or applicant for employment for disclosing information that the employee ***reasonably believes*** evidences:

1. A violation of a law, rule, or regulation;
2. Gross mismanagement;
3. A gross waste of funds;
4. An abuse of authority;
5. A substantial and specific danger to public health or safety; or
6. Censorship related to scientific integrity or research if censorship falls into one of the other categories of wrongdoing.

Protected disclosures may be made to numerous entities including supervisors; senior leaders; the agency's Inspector General (IG); OSC; Congress; or outside the agency. For disclosures involving classified national security information or other information protected from public release by law, individuals must use confidential channels such as an IG or OSC to be protected from personnel actions related to their disclosures. Also, certain Members of Congress are authorized to receive disclosures of classified information.

WHAT IS PROHIBITED?

Depending on the particular facts, the following may violate section 2302(b)(8):

- Shortly after an employee reports mismanagement of contract funds to their second line supervisor, their first line suspends them for arriving late by a few minutes even though similar infractions by other employees have been routinely ignored.
- After an employee discloses workplace safety violations to agency leadership, their supervisor contacts the hiring official for a promotional opportunity that the employee applied to and provides a negative reference specifically intended to undermine the employee's candidacy.

TIPS AND RECOMMENDATIONS

1. Be consistent and objective when managing employee performance and conduct. Apply the same standards to all employees and ensure whistleblowers are treated neutrally, not favorably or unfavorably.
2. Knowledge is your first line of defense! Familiarize yourself with the Whistleblower Protection Act and related laws. OSC provides free training on whistleblower retaliation and the best practices for responding to disclosures of wrongdoing and allegations of retaliation. For free training, please contact certification@osc.gov.

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U.S. Office of Special Counsel (OSC) Information Sheet



Retaliation for Engaging in Protected Activity – 5 U.S.C. § 2302(b)(9)

PURPOSE

This information sheet provides general guidance and background information on **5 U.S.C. § 2302(b)(9)**. This document does not serve as legal advice and should not be cited as legal authority. Rather, the statute and current case law control with respect to matters discussed here.

WHAT IS 2302(b)(9)?

Section 2302(b)(9) prohibits an official with the authority to take or influence a personnel action from taking or failing to take, or threatening to take or fail to take, a personnel action with respect to any employee or applicant for employment for engaging in any of the following protected activity:

1. Filing a complaint, grievance, or appeal;
2. Testifying for or helping someone else with these activities;
3. Cooperating with or disclosing information to OSC, an Inspector General (IG), or any other agency component responsible for internal investigation or review; or
4. Refusing to obey an order that would require the individual to violate a law, rule, or regulation.

WHAT IS PROHIBITED?

Depending on the particular facts, the following may violate section 2302(b)(9):

- A supervisor directs the geographic reassignment of an employee after learning that the employee filed a complaint with the IG.
- After cooperating with an OSC investigation, an employee is denied the ability to attend a training that is required for advancement at the agency. The denial blocks the employee from qualifying for an upcoming promotional opportunity.
- After appealing a performance rating that the employee believes was lowered in retaliation for raising concerns about a supervisor's abuse of authority, the employee is removed from a high-profile position and reassigned to a marginal position with vague duties, effectively sidelining them and limiting future advancement.

TIPS AND RECOMMENDATIONS

1. Supervisors should not take complaints or disclosures personally. Supporting the ability of employees to report misconduct and be shielded from retaliation builds trust and protects the integrity of the federal government.
2. Be consistent and objective when managing employee performance and conduct. Apply the same standards to all employees and ensure whistleblowers are treated neutrally, not favorably or unfavorably.
3. Knowledge is your first line of defense! Familiarize yourself with the Whistleblower Protection Act and related laws. OSC provides free training on whistleblower retaliation and the best practices for responding to disclosures of wrongdoing and allegations of retaliation. For free training, please contact certification@osc.gov.

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Discrimination – 5 U.S.C. § 2302(b)(10)

PURPOSE

This information sheet provides general guidance and background information on **5 U.S.C. § 2302(b)(10)**. This document does not serve as legal advice and should not be cited as legal authority. Rather, the statute and current case law control with respect to matters discussed here.

WHAT IS (b)(10)?

Section 2302(b)(10) makes it a prohibited personnel practice to discriminate against employees or applicants for employment based on “conduct which does not adversely affect the performance of the employee or applicant, or the performance of others.”

An agency bears a significant burden to demonstrate that any employment action is justified by a clear nexus between the employee's conduct—whether on-duty or off-duty—and the efficiency of the service.

WHAT IS PROHIBITED?

Examples of section 2302(b)(10) violations *might* include:

- An employee shares with his coworkers that he has purchased new guns for hunting. The supervisor, who supports extensive gun control and feels uncomfortable with this information, reassigns the employee to a shift with fewer opportunities for interaction with colleagues.
- An applicant is denied the opportunity to fairly compete for a promotional opportunity based on their status as a parent of three small children.
- An applicant who lives in Iowa applies for a position located in Illinois and is placed at the top of the list of best qualified candidates. Assuming that the applicant does not have any local ties to the area or an intent to move to Illinois, the hiring manager declines to provide the applicant with an opportunity to interview for the position.
- Rachel informs her supervisor Jenny that she is pregnant. Shortly thereafter, Jenny restricts Rachel to teleworking one day a week because she believes that pregnancy will limit Rachel's ability to do her job and wants to be able to observe Rachel performing her duties.

TIPS AND RECOMMENDATIONS

1. Discern the mission impact(s) before taking any employment action based on an employee's conduct.
2. Educate employees and managers on maintaining professionalism and avoiding discrimination based on non-job-related behavior.
3. Apply disciplinary actions consistently and fairly.
4. Maintain thorough documentation of all disciplinary actions and their rationale to ensure transparency and accountability.

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Violating Veterans' Preference – 5 U.S.C. § 2302(b)(11)

PURPOSE

This information sheet provides general guidance and background information on **5 U.S.C. § 2302(b)(11)**. This document does not serve as legal advice and should not be cited as legal authority. Rather, the statute and current case law control with respect to matters discussed here.

WHAT IS (b)(11)?

Section 2302(b)(11) prohibits an official with the authority to take or influence a personnel action from taking or failing to take, recommend, or approve a personnel action if the official knows that doing so would violate a veterans' preference requirement. For corrective action, employees should file with the U.S. Department of Labor [Veterans' Employment and Training Service](#).

WHAT IS PROHIBITED?

Examples of section 2302(b)(11) violations include:

- A hiring manager deliberately ignores a qualified veteran's eligibility for veterans' preference during the selection process.
- A supervisor informs a qualified veteran applicant that veterans' preference does not apply to a position that is open under competitive procedures.
- A hiring official intentionally disregards required documentation, such as a DD-214 form or disability documentation, from a veteran to avoid applying the preference.
- A hiring manager intentionally removes a veteran's name from a referral list or disqualifies a veteran candidate from consideration because they do not want to give them the preference they are legally entitled to.

TIPS AND RECOMMENDATIONS

1. Provide ongoing training for all hiring managers, human resources personnel, and relevant decision-makers on veterans' preference laws, including how to properly assess veterans' eligibility and apply the preference.
2. Establish clear, documented procedures for how veterans' preference should be implemented and ensure compliance in all hiring and promotion decisions.
3. Encourage veterans to self-identify during the application process to ensure that their eligibility for veterans' preference is recognized early.
4. Advertise positions broadly and ensure that veterans have equal access to job opportunities. Encourage veteran participation in recruitment events and outreach programs.
5. Conduct periodic audits and reviews of hiring and promotion decisions to ensure that veterans' preference is being applied correctly.

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Violating Merit System Principles – 5 U.S.C. § 2302(b)(12)

PURPOSE

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WHAT IS 2302(b)(12)?

Section 2302(b)(12) prohibits an official with the authority to take or influence a personnel action from doing so in violation of any law, rule, or regulation that implements or directly concerns the merit system principles defined at 5 U.S.C. § 2301. While the merit system principles are not directly enforceable on their own, this provision prohibits an official from taking or failing to take an unlawful personnel action that conflicts with the principles and does not fall into one of the other categories of prohibited personnel practices.

WHAT IS PROHIBITED?

Depending on the particular facts, the following may violate section 2302(b)(12):

- Failure to provide an annual performance appraisal.
- Permitting an employee to remain on a detail to a higher grade for more than 120 days without competition.
- Failure to provide an adequate notice of appeal rights when taking an adverse action.
- Subverting the standard hiring process by using a non-competitive hiring authority to reach a preferred candidate who did not have the status (i.e., lacks time in grade) to compete through the regular process. **NOTE:** This is also a potential section 2302(b)(6) violation.

TIPS AND RECOMMENDATIONS

1. Any violation of (b)(12) is, by definition, also a violation of an underlying law, rule, or regulations, so full legal compliance with relevant laws, rules, or regulations will avoid any violation of (b)(12). Consult your local experts. Proactively engage and collaborate with human resources and agency counsel when taking a personnel action, ensuring agency compliance with applicable laws, regulations, and policy.
2. When taking a personnel action, document the rationale for the decision.
3. Educate employees on their rights and responsibilities by providing regular training on the merit system principles and prohibited personnel practices.

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U.S. Office of Special Counsel (OSC) Information Sheet



Nondisclosure Forms, Policies & Agreements – 5 U.S.C. § 2302(b)(13)

PURPOSE

This information sheet provides general guidance and background information on **5 U.S.C. § 2302(b)(13)**. This document does not serve as legal advice and should not be cited as legal authority. Rather, the statute and current case law control with respect to matters discussed here.

WHAT IS 2302(b)(13)?

Section 2302(b)(13) prohibits an official with the authority to take or influence a personnel action from implementing or enforcing a non-disclosure form, policy, or agreement that fails to include a specific statutory notice clarifying that the agency (or supervisor's) restrictions are superseded by the employee's statutory whistleblower rights. This provision also bars any form, policy, agreement, email, or other communication that prohibits or restricts protected disclosures or protected activity.

WHAT IS PROHIBITED?

Depending on the particular facts, the following may violate section 2302(b)(13):

- A supervisor requiring all employees in their program to sign a non-disclosure agreement that prohibits the employees from discussing the program and fails to notify employees of their right to make disclosures.
- Chilling whistleblowing by telling employees that contacting the Occupational Health and Safety Administration is like an act of sabotage against the unit and will be punished accordingly.
- Disciplining an employee for failing to follow the chain of command based on the employee making a disclosure during an all-hands meeting.

TIPS AND RECOMMENDATIONS

- 1) Remind employees of their right to make protected disclosures (those not prohibited by law or classified) and engage in protected activity. Whistleblowers play a vital role in keeping the Federal Government honest and accountable.
- 2) Remember that protected disclosures may be made to *anyone*, including outside of the agency, and employees are not required to follow the chain of command.
- 3) Add the following statutory language to any written form, policy, agreement, email, or other communication that includes a nondisclosure provision:

“These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General or the Office of Special Counsel of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.”

- 4) Remember that supervisory instructions can serve as informal policies. If instructing employees to refrain from disclosing information, the communication must include the statutory section 2302(b)(13) language.

For more information on filing a complaint or making a disclosure: 202-804-7000, 800-872-9855, or submit a question at info@osc.gov.

Please note that OSC may not provide advice regarding merit of a complaint or whether the allegation meets the statutory definitions.

Updated and detailed information on OSC and its procedures can be found on OSC's website at <https://osc.gov>.

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U.S. Office of Special Counsel (OSC) Information Sheet



Accessing Medical Records – 5 U.S.C. § 2302(b)(14)

PURPOSE

This information sheet provides general guidance and background information on **5 U.S.C. § 2302(b)(14)**. This document does not serve as legal advice and should not be cited as legal authority. Rather, the statute and current case law control with respect to matters discussed here.

WHAT IS 2302(b)(14)?

Established by the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, section 2302(b)(14) prohibits an official with the authority to take or influence a personnel action from accessing the medical record of an employee or applicant, as part of, or in furtherance of the prohibited conduct described in sections 2302(b)(1) through (b)(13). An OSC finding that an official violated section 2302(b)(14) triggers a requirement for the agency to propose discipline in accordance with 5 U.S.C. § 7515.

WHAT IS PROHIBITED?

Depending on the particular facts, the following may violate section 2302(b)(14):

- A supervisor accessing an employee's medical records and disclosing information about the employee having an autoimmune disorder to a prospective employer to obstruct the employee's right to compete for employment under section 2302(b)(4).
- An employee takes medical leave under the Family and Medical Leave Act (FMLA) for a serious health condition. A few months after the employee returns from leave, the employee discloses concerns about the supervisor violating federal contracting regulations when awarding contracts. In response, the supervisor accesses the employee's FMLA documentation and reassigns the employee to another position in violation of section 2302(b)(8).

TIPS AND RECOMMENDATIONS

1. Safeguard employee medical information and privacy by training employees on medical confidentiality under the Health Insurance Portability and Accountability Act, the Rehabilitation Act, and the Family Medical Leave Act.
2. Establish clear policies to limit access to medical records to authorized personnel only. For example, as a best practice, supervisors should not be privy to an employee's medical records during the reasonable accommodation (RA) process. Instead, supervisors should rely on the Disability Program Manager or RA Coordinator to assess whether the employee's medical condition qualifies for accommodation, ensuring confidentiality.
3. Ensure that employee medical records are stored securely and kept separate from any supervisory or personnel files.
4. Implement regular audits of access to medical records to ensure that only authorized individuals are accessing sensitive information and there is no abuse or unauthorized access.

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