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MEMORANDUM FOR EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Henry J. Kerner, Special Counsel
U.S. Office of Special Counsel (OSC)

SUBJECT: Updated Legal Requirements Regarding Agency Training and Discipline

The President recently signed into law two pieces of legislation changing the requirements that apply to agencies on issues surrounding prohibited personnel practices. Accordingly, this memorandum outlines some of those changes, found in the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017¹ and Office of Special Counsel Reauthorization Act of 2017, passed as part of the National Defense Authorization Act for Fiscal Year 2018 (NDAA).²

By law, the head of each agency is responsible for preventing prohibited personnel practices and for complying with, and enforcing, applicable civil service laws, rules, and regulations and other aspects of personnel management.³ OSC stands ready to assist with this responsibility.

Over 90% of federal agencies are currently certified and/or registered under OSC's previous 5 U.S.C. § 2302(c) Certification Program (Certification Program), and these agencies have already complied with previous requirements, such as, training supervisors and providing information to new employees on whistleblower laws. Accordingly, in conjunction with this letter, OSC is also notifying all its current Certification Program contacts about the new requirements and a few steps that certified agencies can take to come into compliance with the new legislation and to maintain certification. Should you have questions regarding the recent changes in law or anything in these memoranda, please contact OSC at 202-804-7163 or certification@osc.gov.

New Prohibited Personnel Practice

Pursuant to the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, it is now a prohibited personnel practice to "access the medical record of another employee or an applicant

¹ Pub. L. No. 115-73 (Oct. 26, 2017).

² Pub. L. No. 115-91 (Dec. 12, 2017).

³ See Pub. L. No. 115-91 § 1097(b)(1)(B) (2017) (codified at 5 U.S.C. § 2302(c)(2)(a) and (b)).

for employment as a part of, or otherwise in furtherance of, any conduct described in paragraphs (1) through (13)” of 5 U.S.C. § 2302(b).⁴

Accessibility of Information Regarding Whistleblower Protections

The head of each agency shall, on the public website of the agency and on any online portal that is accessible only by employees of the agency, make available information regarding the whistleblower protections that apply to employees of the agency.⁵

Education Requirements

New Employees

The previous 5 U.S.C. § 2302(c), with its accompanying OSC Certification Program, is redesignated under 2302(d). In its place, the new section requires that the head of each agency ensure, in consultation with OSC and the inspector general of the agency, that employees of the agency are informed of the rights and remedies available under § 2302 and chapter 12 of Title 5.⁶ The agency must provide this information to each new employee no later than 180 days after the date on which the new employee is appointed.⁷

Supervisors

The head of each agency, in consultation with OSC and the inspector general of the agency (or senior ethics official if the agency has no inspector general), shall provide annual training to supervisors regarding how to respond to complaints alleging a violation of whistleblower protections.⁸ Additionally, the agency shall provide such training to new supervisors.⁹

Supervisors’ Performance Appraisals

The head of each agency, in consultation with the Director of the Office of Personnel Management and OSC, must develop criteria that promote the protection of whistleblowers as a critical element for establishing the job duties of all supervisory employees.¹⁰ The criteria must include principles for the protection of whistleblowers, such as the degree to which supervisory employees respond constructively when employees make protected disclosures, how supervisors take responsible actions to resolve these disclosures, and ways in which the supervisors foster an environment in which employees of the agency feel comfortable making such disclosures.

⁴ Pub. L. No. 115-73 § 103 (2017) (codified at 5 U.S.C. § 2302(b)(14)).

⁵ Pub. L. No. 115-91 § 1097(b)(1)(B) (2017) (codified at 5 U.S.C. § 2302(c)(4)).

⁶ Pub. L. No. 115-91 § 1097(b)(1)(B) (2017) (codified at 5 U.S.C. § 2302(c)(2)).

⁷ Pub. L. No. 115-91 § 1097(b)(1)(B) (2017) (codified at 5 U.S.C. § 2302(c)(3)).

⁸ Pub. L. No. 115-73 § 106 (2017).

⁹ *Id.*

¹⁰ Pub. L. No. 115-91 § 1097(d)(1) (2017) (codified at 5 U.S.C. § 4302(b)); § 1097(d)(2) (2017) (codified at 5 U.S.C. § 4313(6)).

Additionally, each agency must submit an annual report to Congress detailing the number of annual performance appraisals which determined that an agency employee failed to meet the standards for protecting whistleblowers.¹¹ The annual report must also include the reasons for the failing determination, and each performance-based or corrective action the agency took in response.¹²

Required Discipline

Both new laws establish required discipline for supervisors found to have committed a prohibited personnel action which is defined as the taking or failing to take an action in violation of 5 U.S.C. §§ 2302(b)(8), (b)(9) or (b)(14).¹³ The new provision states:

Subject to section 1214(f),¹⁴ if the head of the agency in which a supervisor is employed, an administrative law judge, the Merit Systems Protection Board, the Special Counsel, a judge of the United States, or the Inspector General of the agency in which a supervisor is employed has determined that the supervisor committed a prohibited personnel action, the head of the agency in which the supervisor is employed, consistent with the procedures required under paragraph (2)—

(A) for the first prohibited personnel action committed by the supervisor—

- (i) shall propose suspending the supervisor for a period that is not less than 3 days; and
- (ii) may propose an additional action determined appropriate by the head of the agency, including a reduction in grade or pay; and

(B) for the second prohibited personnel action committed by the supervisor, shall propose removing the supervisor.¹⁵

¹¹ Pub. L. No. 115-91 § 1097(d)(3) (2017).

¹² *Id.*

¹³ Pub. L. No. 115-91 § 1097(e) (2017) (codified at 5 U.S.C. § 7515); *cf.* Pub. L. No. 115-73 § 104 (2017).

¹⁴ 5 U.S.C. § 1214(f) states: “During any investigation initiated under this subchapter, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel.”

¹⁵ 5 U.S.C. § 7515(b)(1).