



## MILITARY WHISTLEBLOWER PROTECTION ACT

### OVERVIEW

The Military Whistleblower Protection Act ([10 U.S.C. § 1034](#)) prohibits **retaliation** against a member of the U.S. armed forces who makes, or is perceived as making, a protected disclosure within the scope of the law to an authorized government recipient. It also prohibits **restricting** a service member from lawfully communicating with an inspector general or a Member of Congress.

The Act's application within the Department of Defense (DoD) and the military branches is guided by [DoD Directive 7050.06](#). For the Coast Guard, see [33 C.F.R. Part 53](#).

### SCOPE OF COVERAGE (WHO CAN DO AND SAY WHAT UNDER THE LAW)

The Act covers uniformed service members when they:

- Make or prepare (or are perceived as making or preparing) a protected disclosure, or
- Engage in certain protected activities, outlined below.

### DEFINING "SERVICE MEMBER"

[DoD Directive 7050.06](#), which implements the law for the DoD military branches, specifies that covered service members are:

- A Regular or Reserve Component officer (commissioned and warrant) or enlisted member of the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard (when operating as a Service in the Navy) on active duty.
- A Reserve Component officer (commissioned and warrant) or enlisted member in any duty or training status, including officers and enlisted members of the National Guard.

The Department of Homeland Security implements the law for the **Coast Guard** (when it is not operating as a service in the Navy) pursuant to [33 C.F.R. Part 53](#).

- [§53.5](#) specifies that covered Coast Guard service members are "any past or present Coast Guard uniformed personnel, officer or enlisted, regular or reserve," including cadets of the Coast Guard Academy.

Officers of the [U.S. Public Health Service Commissioned Corps](#) are also covered under the law pursuant to [42 U.S.C. § 213a\(18\)](#). Similarly, officers of the National Oceanic and Atmospheric Administration (NOAA) Commissioned Corps are covered under the law pursuant to [33 U.S.C. §3071\(a\)\(8\)](#).

NOTE: The Act **does not apply to civilians** who may work for the DoD or one of the branches of the armed forces, nor does it cover federal contractors or grantees of those entities. Instead, those employees may be covered under the [Whistleblower Protection Act](#), or [federal contractor whistleblower protections](#), respectively.

## PROTECTED DISCLOSURES AND CONDUCT

The Military Whistleblower Protection Act prohibits retaliation against service members under several circumstances:

- When they **make a protected communication** as defined under the Act (requires a specific government audience, see below)
- When they **communicate lawfully** with designated government entities (including Congress or a relevant inspector general)
- When they **engage in certain protected conduct** such as participating in an investigation or providing testimony

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## PROTECTED COMMUNICATIONS

A protected communication under the Act is any disclosure made or prepared for a protected audience that the service member **reasonably believes** evidences:

- A violation of law or regulation, including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct in violation of the Uniform Code of Military Justice, sexual harassment, or unlawful discrimination.
- Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.
- A threat by another member of the armed forces or employee of the Federal Government that indicates a determination or intent to kill or cause serious bodily injury to members of the armed forces or civilians or damage to military, Federal, or civilian property.

To be protected within the scope of the act, the **audience** for a protected communication must be any of the following:

- Congress
- An inspector general
- A member of a Department of Defense audit, inspection, investigation, or law enforcement organization
- Any person or organization in the individual's chain of command
- A court-martial proceeding
- Any other person or organization designated pursuant to regulations or other established administrative procedures for such communications

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## LAWFUL COMMUNICATIONS WITH A RELEVANT INSPECTOR GENERAL OR MEMBER OF CONGRESS

A **lawful communication**, made to the relevant inspector general or a Member of Congress, is protected under the Act regardless of whether it rises to the level of a "protected communication" as described above. It is unlawful to restrict these lawful communications or retaliate against service members who make them.

The **relevant inspectors general** are the Department of Defense Inspector General, the Department of Homeland Security Inspector General for issues involving the Coast Guard, and component and service inspectors general. ([10 USC § 1034\(j\)\(2\)](#)).

**Note:** For U.S. Public Health Service and NOAA Commissioned Corps officers, the relevant offices of inspectors general are those of the Department of Health and Human Services and the Commerce Department, respectively.

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## PROTECTED ACTIVITY

In addition to protecting disclosures, the Act also prohibits retaliation against covered service members who:

- Engage in related **testimony**
- Participate or assist in a **related investigation or proceeding**
- File, cause to be filed, participate in, or otherwise assist in **an action brought under the Act**. (In other words, the act of seeking to enforce their rights).

## INVESTIGATION INTO ALLEGED MISCONDUCT

While the Military Whistleblower Protection Act primarily focuses on investigations into retaliatory personnel actions, the Act also requires the inspector general to conduct a **simultaneous investigation into the misconduct** that whistleblowers bring to light, if there isn't an investigation already in place or if the inspector general determines the investigation was biased or inadequate. ([10 U.S.C. § 1034\(d\)](#)).

Note that the DoD IG may delegate this investigation to the branch IG concerned.

## PROHIBITED CONDUCT

- It is unlawful to **restrict** a covered service member from communicating lawfully with a Member of Congress or a relevant inspector general. ([10 U.S.C. § 1034\(a\)](#)).
- It is also unlawful to take or threaten an unfavorable personnel action, or withhold or threaten to withhold a favorable personnel action, **in retaliation for** a covered service member making, preparing, or being perceived as making or preparing (even if mistaken):
  - A protected communication as described above
  - A lawful communication with an inspector general or Member of Congress
  - Testimony or any other protected activity as described above

NOTE: **Personnel actions** are defined in [10 U.S.C. § 1034\(b\)\(2\)\(A\)](#). Note that the list includes “retaliatory investigations” which are investigations “requested, directed, initiated, or conducted for the primary purpose of punishing, harassing, or ostracizing a member of the armed forces for making a protected communication.”

## ENFORCEMENT OF RIGHTS AGAINST RETALIATION AND RESTRICTION

Covered service members who wish to enforce their rights to challenge unlawful retaliation or restriction may seek relief **within one year** of when the service member became aware of the alleged retaliation or restriction.

While the IG is not required under the Act to investigate after the 1-year statute of limitations has passed, the IG **may still investigate** based on unique circumstances such as if the service member was “actively misled regarding [their] rights.” ([DoD Directive 7050.06\(3\)\(e\)\(1\)-\(3\)](#)).

## THE ROLE OF THE INSPECTORS GENERAL IN INVESTIGATING RETALIATION AND RESTRICTION

Service members who believe they have experienced a violation of their rights under the Act and want to enforce those rights must file a complaint with the relevant office of inspector general.

For issues involving the Coast Guard when it is not operating as a service of the Navy, complaints go to the DHS IG. Otherwise, service members may file their complaint either the relevant service IG or the DoD IG. Note that the DHS and DoD IGs are subject to Senate confirmation and that their independence is statutorily mandated under the Inspector General Act at [5 U.S.C. App.](#)

When service IGs receive disclosures, they are required by law to report to the DoD IG at certain stages of their investigation. Further, complaints that are sent to the DoD IG may be referred to the relevant branch IG for investigation, though the DoD IG still reviews the results of the investigation. See the [DoD Directive](#) for a detailed overview of the role of each entity.

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## INVESTIGATION PROCESS

The inspector general receiving a whistleblower complaint of alleged retaliation or restriction is required to make an initial determination about whether the IG has sufficient evidence to warrant an investigation. If they decide that they have enough evidence, the investigation proceeds. ([10 U.S.C. §1034\(c\)\(4\)\(A\)-\(D\)](#)). Under the DoD policy, **this initial determination should be made within 30 days**.

Once an investigation begins, the inspector general is required by statute to provide **updates every six months** on its status and an estimated time of completion. These estimates are required to go to the whistleblower, the secretary of defense, and the branch involved (or DHS where appropriate).

The result of the IG's investigation will be a report on their findings. That report must be sent within **30 days** to the secretary of defense, the secretary of the whistleblower's military branch (or DHS where appropriate), and to the whistleblower, who may request copies of documents obtained in the course of the investigation.

**Note:** While there are time limits both in statute and regulations, [GAO has found](#) that investigations often exceed the time mandate.

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## SUBSTANTIATION OF A WHISTLEBLOWER RETALIATION OR RESTRICTION COMPLAINT

An IG's investigative report will either substantiate or not substantiate a whistleblower's claim of unlawful retaliation or restriction.

To make this determination where it pertains to retaliation, the IG will determine:

- Whether there was a **protected disclosure**
- Whether the whistleblower faced a **personnel action** identified in the statute
- Whether those who were responsible for the personnel action had **knowledge** of the protected disclosure, and
- Whether there was sufficient **causation** between the protected disclosure and the personnel action

Note that the **evidentiary standard** in cases under the Act is a preponderance of the evidence, as highlighted in [this 2003 GAO report](#) (See footnote 3 on page 32). By contrast, the Whistleblower Protection Act places a higher evidentiary standard on the agency-- requiring clear and convincing evidence--to prove that it did not unlawfully retaliate. ([5 U.S.C. § 1221\(e\)\(2\)](#)).

## DECISIONS AND APPEALS

After the investigating IG sends their investigative report to the head of the relevant agency, **that agency head decides** whether to order corrective and/or disciplinary action.

A whistleblower may seek to file an appeal with the **Board of Correction of Military Records (BCMR)** to challenge an unfavorable outcome. Following BCMR proceedings, the secretary of the military branch involved either orders relief for the whistleblower or declines to.

A final administrative appeal may be made to the DoD's **under secretary of defense for personnel and readiness**, who acts on behalf of the secretary of defense.

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## A NOTE ON SUBSTANTIATION RATES

Of note, substantiation rates for military reprisal and restriction claims are between **two and four percent** according to research conducted by the Congressional Research Service. [See Tables one and two of this report.](#)

## RESOURCES

[2020 CRS report on the military whistleblower protection act](#)

[DoD OIG brief on military whistleblower protections](#)

[DoD Military Whistleblower Protection Act one pager](#) and [Guide to Filing a Retaliation Complaint](#)

[2019 GAO report on military whistleblower investigations for timeliness and confidentiality](#)

[DoD Sexual Assault Prevention and Response Annual Report on Sexual Assault in the Military](#)

[2003 GAO study on National Guard whistleblowing, highlighting burden of proof standard](#)

[Army Regulation 20-1: Inspector General Activities and Procedures](#)