EMPLOYMENT PROTECTIONS FOR FEDERAL HEALTH AND SAFETY WHISTLEBLOWERS

FOR AFGE LOCAL 17, 2022-10-25

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FEDERAL SECTOR PROTECTIONS

Federal Employee Whistleblowers

- Whistleblower Protection Act
  - Disclosures
  - Participation
- OSH Act
- Intelligence Community
- FLRA

WHISTLEBLOWER PROTECTION ACT (WPA)

"It is critical that employees know that the protection for disclosing wrongdoing is extremely broad and will not be narrowed retroactively by future MSPB or court opinions. Without that assurance, whistleblowers will hesitate to come forward."

S. REP. 112-155, * 5, 2012 WL 1377618, 2012 U.S.Code Cong. & Admin.News 589, 593

The WPA protects:

- Disclosures
- Participation
- Refusals to violate law, rules or regulations

PROTECTED DISCLOSURES

At 5 U.S.C. § 2302(b)(8), the WPA protects:

- Lawful disclosures to anyone of
  - Violations of law, rule or regulation
  - Gross mismanagement, gross waste, abuse of authority
  - Substantial and specific danger to public health or safety

- Disclosures are lawful if they do not violate a law passed by Congress or an Executive Order "in the interest of national defense"
  - Violation of a regulation does not make a disclosure unlawful. *Dep't of Homeland Sec. v. MacLean*, 135 S.Ct. 913 (2015)
- Not all protections are created equal.

SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC HEALTH OR SAFETY

Federal Circuit analyzes several factors, including:

(1) the likelihood of harm resulting from the danger;

(2) when the alleged harm may occur; and

(3) the nature of the harm, i.e., the potential consequences.

Chambers v. Dep't of Interior, 515 F.3d 1362, 1369 (Fed. Cir. 2008).

…the disclosure of a danger only potentially arising in the future is not a protected disclosure. *Herman v. Dep't of Justice,* 193 F.3d 1375, 1379 (Fed.Cir.1999). Rather, the danger must be substantial and specific.

SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC HEALTH OR SAFETY

"Public" can include a subset, such as a limited number of federal employees.

Woodworth v. Dep't of the Navy, 105 M.S.P.R. 456, 463-64 (2007) (perceived danger to a limited number of government personnel and not to the public at large).

Acting Special Counsel ex rel. Finkel v. Dep't of Labor, 93 M.S.P.R. 409, 413-14 (2003)

SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC HEALTH OR SAFETY

Protected:

1. Cooling system of a nuclear reactor is inadequate. S.Rep. No. 95-969, at 21 (1978), U.S.Code Cong. & Admin.News 1978, pp. 2723, 2743
2. National Park Service Police have inadequate funding (Chambers)
3. Failing to test inspectors for possible exposure to beryllium where test was inexpensive and exposure could lead to fatal lung ailment. Acting Special Counsel ex rel. Finkel v. Dep't of Labor, 93 M.S.P.R. 409, 413-14 (2003)

SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC HEALTH OR SAFETY

Protected:

4. TSA grounding air marshals during an alert of terrorist plans to hijack airplanes.

   MacLean v. Dep't of Homeland Sec., 714 F.3d 1301, 1311 (Fed. Cir. 2013), aff'd, 574 U.S. 383, 135 S. Ct. 913, 190 L. Ed. 2d 771 (2015) (it remains to be determined whether Mr. MacLean reasonably believed that the content of his disclosure evidenced a substantial and specific danger to public health or safety). On remand, the MSPB ordered DHS to restore Mr. MacLean to his employment position as of April 11, 2006, to award him back pay and interest, and to provide him appropriate consequential relief. MacLean v. Dep't of Homeland Sec., 2017 MSPB LEXIS 3176, at *11–13 (M.S.P.B. July 18, 2017) (initial decision); affirmed on other grounds, MacLean v. Dep't of Homeland Sec., 754 F. App'x 950, 952 (Fed. Cir. 2018)

SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC HEALTH OR SAFETY

Not Protected:

1. EPA is not doing enough to protect the environment. S.Rep. No. 95-969, at 21 (1978), U.S.Code Cong. & Admin.News 1978, pp. 2723, 2743
2. *Disclosure by psychologist that prison did not comply with* "the suicide watch room requirements." *Herman v. Dep't of Justice*, 193 F.3d 1375, 1379 (Fed.Cir.1999) (WPA was "was not intended to apply to disclosure of trivial or *de minimis* matters.")
3. Reassignment of certain staff members' duties and site location had a "negative impact" on the Army's health care mission. Hansen v. Merit Sys. Prot. Bd., 746 F.App'x 976, 978, 981 (Fed. Cir. 2018) ("a dispute with a supervisor's discretionary authority that a disinterested observer could not reasonably believe evidence wrongdoing"; disclosure did not specify "quantifiable harm")

SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC HEALTH OR SAFETY

Not Protected:

4. A deficit in needed medical services in the mental health unit for homeless veterans. *Griesbach v. Dep't of Veterans Affairs*, 705 F. App'x 962, 963 (Fed. Cir. 2017).

5. Nuclear detonations go undetected due to inadequate satellite coverage. *Standley v. Merit Sys. Prot. Bd.*, 715 F. App'x 998, 1002-03 (Fed. Cir. 2017) ("Standley's allegations amount to a policy dispute, and the record demonstrates that a disinterested observer could not reasonably believe Mr. Standley's disclosures evidenced either a violation of law [§ 1065 of the National Defense Authorization Act of 2008 ("2008 NDAA"),] or a danger to public health and safety." "Standley had not alleged quantifiable potential harm or likelihood of harm and, therefore, did not meet his burden to show 'that such an occurrence is more than a possibility occurring at an undefined point in the future.'")

VIOLATION OF LAW, RULE OR REGULATION

What is a "rule?"

- *Rusin v. Dep't of the Treasury*, 92 M.S.P.R. 298, 305-07 (2002)
  - "the determination of whether or not something is a 'rule' for purposes of the Whistleblower Protection Act (WPA) cannot be based merely on its title" and a "more substantive examination" is required.
  - "[A]n established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation; or a prescribed guide for action or conduct, regulation or principle." *Id.*, at 305-307 (citing Black's Law Dictionary 1330 (7th ed. 1999) and Barron's Law Dictionary 427 (3rd ed. 1991).
  - The instructions pertaining to using government credit cards was possibly protected.
- 5 U.S.C. § 551(4):
  - (4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;
- for the purposes of this appeal only, we will assume that the SPP Directive is a rule. *See* 5 U.S.C. § 551(4) (1994) (defining a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy ..."). *Herman v. Dep't of Justice*, 193 F.3d 1375, 1380 (Fed. Cir. 1999)
- Department of State's Foreign Affairs Manual. See 3 FAM 4542 (intoxication on duty prohibited) is a rule. *Drake v. Agency for Int'l Dev.*, 543 F.3d 1377, 1379 (Fed. Cir. 2008)

POTENTIAL PUBLIC POLICY SOURCES IN COVID-19 CONTEXT

1. Federal Regulations
2. State/Local Regulations
3. Federal Agency Guidance or Recommendations
4. State/Local Orders or Recommendations

REASONABLE BELIEF

What is a "reasonable belief?"

- *Ward v. Dep't of the Army*, 67 M.S.P.R. 482, 485-486 (1995); *Russell v. Dep't of Justice*, 68 M.S.P.R. 337, 342 (1995).
  - "The [whistleblower] need not prove that the condition reported established any of the situations detailed under 5 U.S.C. § 2302(b)(8)(A)(i) or (ii), but he [or she] must come forth with such proof, either in the form of testimony or documentary evidence, as will establish that the matter reported was one that a reasonable person in the employee's position would believe to evidence one of the situations specified at 5 U.S.C. § 2302(b)(8)."
- Reasonable belief is also used in other whistleblower laws
  - Subjective and objective components. *Sylvester v. Parexel Int'l LLC,* ARB 07-123, 2011 WL 2517148 (ARB May 25, 2011)
  - Objective reasonableness "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009).
  - The reasonable belief standard requires an examination of the reasonableness of an employee's beliefs, but *not* whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities. *See, e.g., Knox v. U.S. Dep't. of Labor,* 434 F.3d 721, 725 (4th Cir. 2006) (Clean Air Act case).
  - "[O]bjective reasonableness is a mixed question of law and fact" and thus subject to resolution as a matter of law "if the facts cannot support a verdict for the non-moving party." *Welch v. Chao*, 536 F.3d 269, 278 (4th Cir. 2008) (SOX case).

OTHER PROTECTED ACTIVITIES "(b)(9)"

5 U.S.C. 2302(b)(9) protects:

- (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—
  - (i) with regard to remedying a violation of paragraph (8); or
  - (ii) other than with regard to remedying a violation of paragraph (8);
- (B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);
- (C) cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law; or
- (D) refusing to obey an order that would require the individual to violate a law, rule, or regulation
- No "reasonable belief" required for "participation claims."

ELECTION OF REMEDIES

5 adverse actions are directly appealable to the MSPB:

- Removal
- Suspension over 14 days
- Demotion
- WIGI denial
- Furlough

Then beware of elections of remedies. Under 5 U.S.C. § 7121(d) and 5 C.F.R. § 1201.3. Employee is limited to remedies and procedures first filed among:

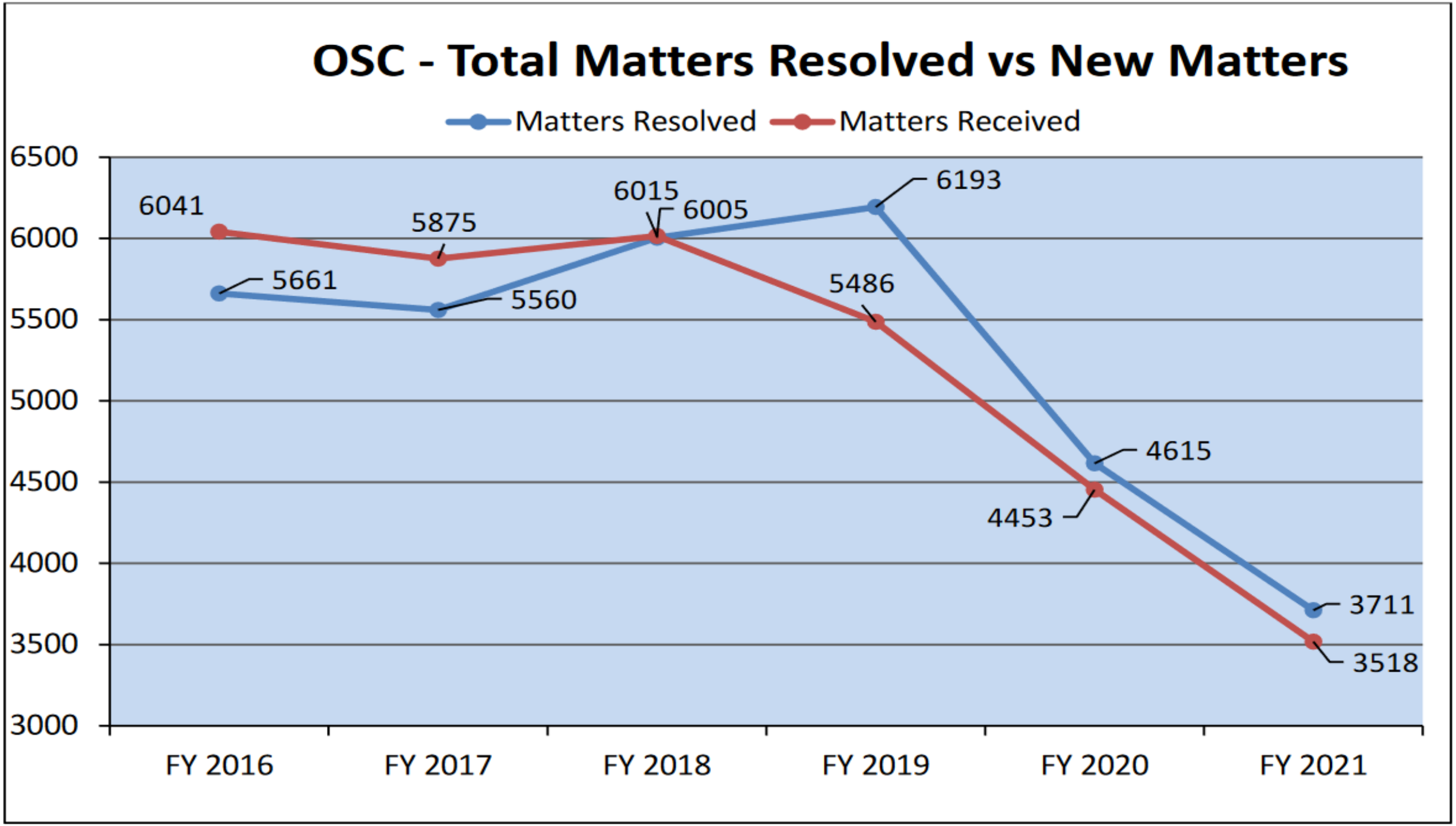
1. Grievance under CBA
2. MSPB appeal, or
3. OSC complaint.

These actions can also be brought as "mixed cases" if there is a discrimination claim. 5 U.S.C. §7702

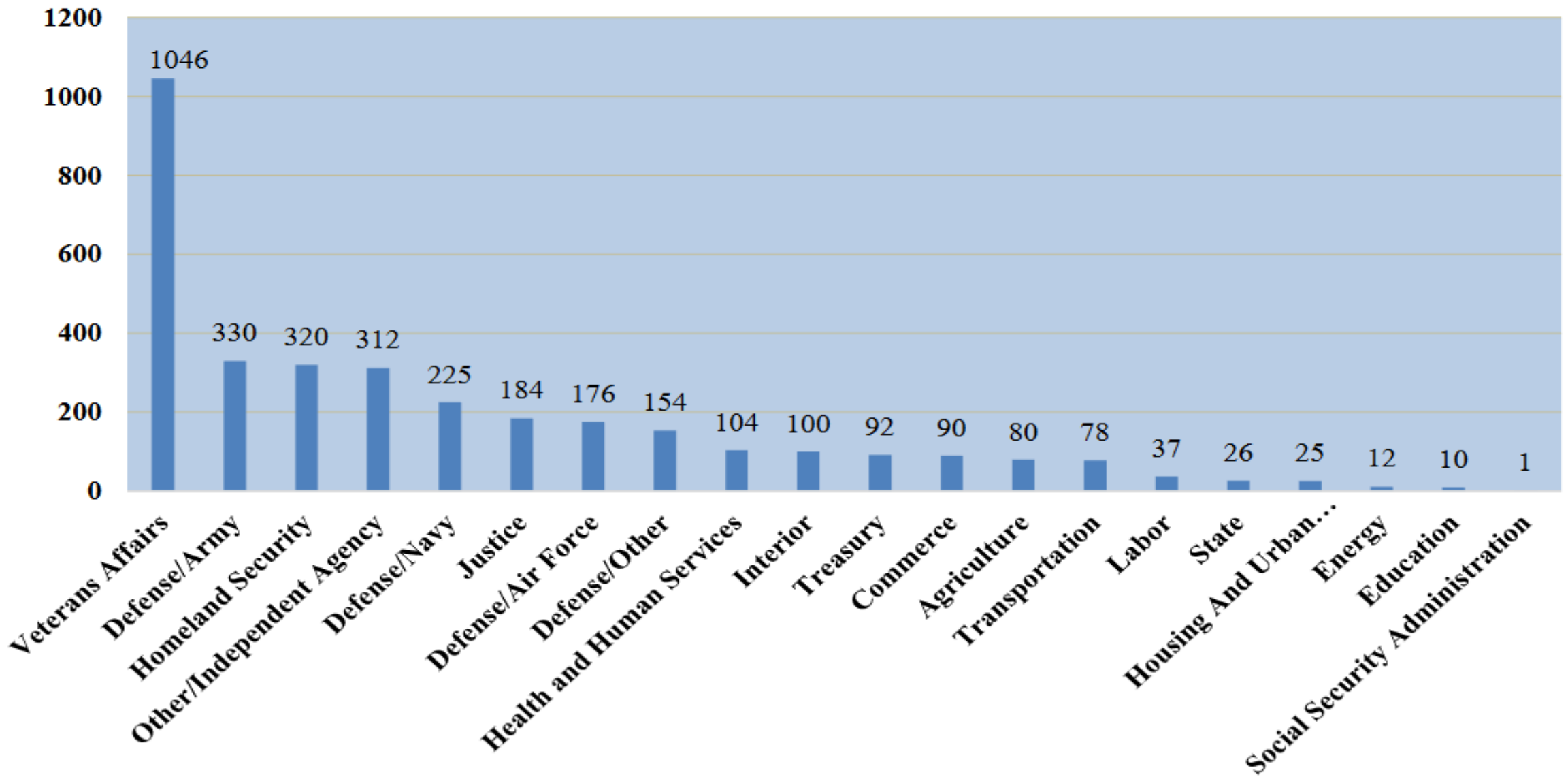
OSC COMPLAINTS MUST BE FILED WITH FORM 14

5 CFR § 1800.1(c)(1) requires:

- The Form OSC-14 must be used to file all such complaints (except those limited to an allegation or allegations of a Hatch Act violation - see paragraph (d) of this section for information on filing Hatch Act complaints).
- Can be filed on-line: osc.gov/File a Complaint
  - https://osc.gov/Pages/File-Complaint.aspx
- Must be filed within 3 years of first learning about the adverse action. 5 U.S.C. §1214(a)(6)(A)(iii)
- Amendments and supplements can be made by email or other means.
  - *Edwards v. Dep't of Air Force*, 120 M.S.P.R. 307, 317 (2013); *Lewis v. Dep't of Def.*, 123 M.S.P.R. 255, 260 (2016) ("The appellant also may submit his own letters to OSC to demonstrate the scope of the complaints he has exhausted with that agency.");
  - *McCarthy v. MSPB*, 809 F.3d 1365, 1374 (Fed. Cir. 2016) (considering "written correspondence concerning [the employee's] allegations.").


OSC - Total Matters Resolved vs New Matters
Matters Resolved
Matters Received
6500
6000
5500
5000
4500
4000
3500
3000
6041
5875
6015
6005
6193
5661
5560
5486
4615
4453
3711
3518
FY 2016
FY 2017
FY 2018
FY 2019
FY 2020
FY 2021

Total Agencies Providing Casework - FY 2021
(includes all types of OSC cases)



OSC CLOSE-OUT PROCEDURE

OSC can decline to investigate if:

- It was already investigated. 5 U.S.C. §1214(a)(6)(A)(i)
- Filed with the MSPB. 5 U.S.C. §1214(a)(6)(A)(ii)
- More than 3 years from when the employee "knew or should have known" of the PPP. 5 U.S.C. §1214(a)(6)(A)(iii)

Otherwise, OSC must issue a Preliminary Determination Letter (PDL, or "13-day letter") 5 U.S.C. §1214(a)(1)(D)

- 13-days can be extended
- Last chance to "exhaust" protected activities and new adverse actions. Good time to list them all.

OSC CLOSE-OUT LETTERS

OSC issues 2 letters

- One is the "IRA" letter with a statement of appeal rights to MSPB. This should list the protected activities and adverse actions.
  - Makes a good exhibit for the IRA appeal to the MSPB to show exhaustion
- The other "close-out" letter explains the reasons.
  - Can request not to receive this letter
  - If you do receive it, you do not have to disclose it to the Agency or MSPB.
  - 5 U.S.C. §1214(a)(2)(B): A written statement under subparagraph (A) may not be admissible as evidence in any judicial or administrative proceeding, without the consent of the person who received such statement under subparagraph (A).

INDIVIDUAL RIGHT OF ACTION (IRA APPEALS)

5 U.S.C. 1221(a) permits whistleblowers:

- 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.
- Expanded beyond 2302(b)(8) by 2012 WPEA
- MSPB appeals can be filed on-line from mspb.gov under "appeals" or "Electronic Filing" and "New Appeal."
- Permitted after 120 days from filing at OSC
- Required withing 65 days of OSC close-out, 5 C.F.R. §1209.5(a)(1)
- Can request a hearing

MSPB PROCEDURE: JURISDICTIONAL ORDER

- Jurisdictional memo
  - Due in 10 days; can make a motion to extend time
  - Need to prove "exhaustion" through OSC
    - 5 U.S.C. § 1221(a): Employee "may, **with respect to any personnel action taken, or proposed to be taken**, … seek corrective action from" the MSPB
    - Still, AJs want to see exhaustion of each protected activity
    - So, save your original OSC complaint and emails to OSC. Can make a FOIA to OSC ***after*** case is closed.
  - Need to allege:
    - Protected activity
    - Agency knowledge of protected activity
    - Adverse personnel action, 5 U.S.C. §2302(a)(2)
    - Protected activity was a "contributing factor" in the adverse action
    - For the merits, allegations are sufficient, don't need affidavits or exhibits. *Perry v. MSPB*, 137 S. Ct. 1975, 1984 (2017)

WPA CAUSATION STANDARD: EMPLOYEE'S

- Contributing factor
  - 5 U.S.C. §1221(e)(1); 5 C.F.R. 1209.4(d)
  - a factor that, alone or in connection with other factors, tended to affect the employer's decision to take an adverse action in any way. *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)
  - Normally established with the knowledge/timing test. 5 U.S.C. §1221(e)(1)
    - 1-2 years.
  - Other indicators:
    - First opportunity
    - Direct evidence
    - Animus
    - Pattern of antagonism
    - Deviation from normal practices
  - By enacting this amendment to the WPA, Congress "substantially reduc[ed]" a whistleblower's burden and sent "a strong, clear signal to whistleblowers that Congress intends that they be protected from any retaliation related to their whistleblowing." 135 Cong. Rec. 5033 (1989)

WPA CAUSATION STANDARD: AGENCY'S BURDEN

- Agency's burden: clear and convincing evidence
  - 5 U.S.C. §1221(e)(2), " the agency demonstrates ***by clear and convincing evidence*** that it ***would have taken the same personnel action*** in the absence of such disclosure."
  - ***Clear and convincing evidence*** is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. 5 C.F.R. 1209.4(e)
  - "For employers, this is a tough standard, and not by accident. Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves." *Stone & Webster Eng. Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997)
  - It is not sufficient for the employer to show that it ***could have*** taken the same action. Agency must show it would have taken the ***exact same action***.
  - *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999):
    1. the strength of the agency's evidence in support of its personnel action;
    2. the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and
    3. any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.
  - *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012)
  - *Miller v. Dep't of Justice*, 842 F.3d 1252 (Fed. Cir. 2016)

MSPB DISCOVERY

- Discovery
  - Can include
    - Interrogatories
    - Requests for documents
    - Requests for admissions
    - Depositions (up to 10)
    - Can request issuance of subpoenas
    - Each request must specify the time for response and the date and place of each deposition
  - Must be commenced on time
    - Within 30 days of "Ack Order" 5 CFR § 1201.73(d)(1)
    - Responses are due within 20 days. 5 CFR § 1201.73(d)(2). Parties can agree to extensions
    - Motions to compel must be filed within 10 days of each objection. 5 CFR § 1201.73(d)(3). Must include statement of good faith efforts.
    - Follow-up discovery is due within 10 days of each response

MSPB PROCEDURE: PRE-HEARING SUBMISSION

- Pre-hearing submission
  - Must include a Statement of All Issues to be Decided
    - Not limited to those in the original IRA appeal, 5 CFR § 1201.24(b)
    - Claims must be exhausted
    - Can include request for sanctions for non-compliance with orders to compel
  - Must include all hearing exhibits
    - Except those already filed with jurisdictional response, motions
  - Must list all hearing witnesses
    - With a summary of the topics to be covered in their testimony
    - Need to show that each witness has unique and relevant information
  - Must object on time to AJ orders

MSPB HEARING

- Must be requested on time
  - Typically in IRA appeal
- Hearing can be postponed
  - Request in writing by motion
  - AJs have time limits, but cases can be suspended or Dismissed WithOut Prejudice (DWOP), 5 CFR §§1201.28, 1201.29
- Hearing request can be withdrawn
  - With a hearing, AJ makes credibility decisions
  - If there is no hearing, then there are no AJ assessments of witness credibility
  - If withdrawn, then parties submit briefs
- Hearings are open to the public, 5 CFR §1201.52

EMPLOYER KNOWLEDGE AND "REVEALMENT"

A common defense is to deny knowledge of the protected activity

- *It is harder to deny if the whistleblower has made a written disclosure to the manager.*
- *"Revealment letters" arose in union organizing*
- *A request for official time can serve the same purpose:*
  - I request _____ hours of official time to meet and confer with an attorney about making disclosures to the Inspector General and the Office of Special Counsel. I make this request pursuant to 5 C.F.R. Section 5.4. Please let me know if you will approve this request for official time. Thank you.
- *For federal sector EEO cases, cite 29 CFR Section 1614.605(b)*

OCCUPATIONAL SAFETY AND HEALTH ACT (OSH ACT)

Applies to federal agencies

- 29 U.S.C. § 668 (excluding USPS which is treated as a private sector employer)
- General duty clause (29 U.S.C. § 654) does NOT apply but specific safety standards do.

  § 668(a) The head of each agency shall (after consultation with representatives of the employees thereof)— (1) "provide safe and healthful places and conditions of employment, consistent with the standards set under section 655 of this title;")

Federal sector general duty:

- The head of each agency shall develop and support organized safety promotion to reduce accidents and injuries among employees of his [or her] agency, encourage safe practices, and eliminate work hazards and health risks. 5 U.S.C. § 7902(d)

FEDERAL SECTOR OSHA REGULATIONS

OSHA requires that:

- The head of each federal agency "must assure safe and healthful working conditions for his/her employees." 29 C.F.R. § 1960.1(g)
- *"The head of each [federal] agency shall furnish to each employee employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 C.F.R. § 1960.8(a)*

FEDERAL SECTOR PPE REGULATION

OSHA requires that:

- The head of each agency shall acquire, maintain, and require the use of approved personal protective equipment, approved safety equipment, and other devices necessary to protect employees. 29 C.F.R. § 1960.8(d).
- Federal agencies cannot require employees to pay for their own PPE, and they must pay for an employee's time put on and take off specialized PPE required for the safe performance of their duties.

INTELLIGENCE COMMUNITY PROTECTIONS AGAINST RETALIATION

- **Intelligence Authorization Act of 2014**

  50 U.S.C. § 3234

    PPD-19; ICD-120; DOD, Directive-Type Memorandum 13-008

  Same definition of protected disclosures. 50 U.S.C. § 3234(b)

  Covers employees of contractors. 50 U.S.C. § 3234(c)

  Agency-specific procedures

  Final decision-making by DNI and agency heads

  Security clearance retaliation is covered by 50 U.S.C. § 3341(j) (90 days to file a complaint)

FEDERAL LABOR RELATIONS ACT (FLRA)

- Protection from unfair labor practices. 5 U.S.C. § 7116.
- Collective bargaining agreements (CBA) may provide for grievances and arbitration.
- If an employee
  - (1) is in a bargaining unit, subject to a CBA, and
  - (2) suffers an adverse action that is directly appealable to the MSPB (termination, suspension over 14 days, demotion, etc.)

PRIVATE SECTOR PROTECTIONS

Health and Safety Whistleblowers

- OSH Act
- NLRA
- Industry Specific
- State Law

RETALIATION PROTECTIONS UNDER OSH ACT

- Procedure for claim
  - File a retaliation complaint with the U.S. Department of Labor (DOL)
  - 30 days statute of limitations.
  - DOL will then institute an investigation as it deems appropriate and, if it determines that a violation has occurred, will bring an action in any appropriate U.S. district court.
- No private right of action has resulted in no meaningful recourse.
  - According to National Employment Law Project:
    - It normally takes OSHA more than a year, and closer to two years, to process retaliation cases.
    - In 2018, OSHA received 1,870 section 11(c) complaints.
      - It found 20 had merit and settled 490 cases;
      - 870 complaints were dismissed and
      - The rest were withdrawn.
- OSH Retaliation During COVID
  - Since the start of the COVID crisis, DOL has not issued any statements suggesting it has initiated litigation on any worker's behalf
  - A public record search does not reveal any OSH Act lawsuits filed by the Department of Labor since the pandemic began.

OSH ACT PROVIDES NO MEANINGFUL REMEDY.

FLENKER V. WILLAMETTE INDUSTRIES, INC., 967 P.2D 295, 298 (KAN. 1998).

WHAT ARE THE OTHER OPTIONS FOR HEALTH AND SAFETY WHISTLEBLOWERS?

THERE MAY BE INDUSTRY-SPECIFIC RETALIATION PROTECTIONS

AIR21

FEDERAL MINE SAFETY AND HEALTH ACT

TSCA

FEDERAL WHISTLEBLOWER PROTECTIONS

Environmental (30 day statute of limitations)

Airline (90 day SOL)

Other transportation (180 days)

Sarbanes-Oxley (SOX)

Consumer, Financial, Consumer Products, Food, Auto parts

Find lists at:

https://kcnfdc.com/most-legal-claims-have-time-limits/

https://www.whistleblowers.gov/statutes

HIPAA PERMITS CERTAIN WHISTLEBLOWER DISCLOSURES

(j) Standard: Disclosures by whistleblowers and workforce member crime victims - …

(i) The workforce member or business associate believes in good faith that the covered entity has engaged in conduct that is unlawful or otherwise violates professional or clinical standards, or that the care, services, or conditions provided by the covered entity potentially endangers one or more patients, workers, or the public; and

(ii) The disclosure is to: (A) A health oversight agency or public health authority authorized by law to investigate or otherwise oversee … or to an appropriate health care accreditation organization …; or

(B) An attorney retained by or on behalf of the workforce member … for the purpose of determining the legal options of the workforce member … with regard to the conduct described in paragraph (j)(1)(i) of this section.

45 C.F.R. § 164.502(j)(1)

BEYOND WHISTLEBLOWER RETALIATION

Don't forget these other COVID-related protections:

- Family Medical Leave Act, as amended by Families First Coronavirus Response Act
- Americans with Disabilities Act
- Title VII – disparate treatment based on protected characteristics
- Section 1981 – disparate treatment based on race
- State-level EEO laws

Akers v. Kindred Nursing Centers Ltd. Partnership, No. 2:03–CV–0327 JDT–WGH, 2004 WL 1629733 (S.D. Ind. May 18, 2004)

- Held: Motion to dismiss denied.
  - "[T]he Indiana legislature has stated its public policy of requiring professionals to adhere to standards set by the Board regulating the profession. Ind. Code § 25–1–9–4 places a duty on professionals to conduct their practice 'in accordance with the standards established by the board regulating the profession in question.' The Indiana State Board of Nursing regulates Ms. Akers' profession, and requires licensed practical nurses to 'notify, in writing, the appropriate party ... of any unprofessional conduct which may jeopardize patient/client safety.' Ind. Admin. Code tit. 848 r. 2–3–3(13). **Insufficient staffing by a long term care facility may jeopardize patient safety**, as evidenced by 42 C.F.R. § 483.30. If Ms. Akers failed to notify the proper party of the understaffing of the nursing home, Ms. Akers could have been subject to disciplinary sanctions. Moreover, denying Ms. Akers legal recourse would encourage both LPNs and their employers to violate the law." *Id.* at *6 (emphasis added).

Other Helpful Citations

- ***Falcon v. Leger*, 816 N.E.2d 1010, 1019 (Mass. App. Ct. 2004)** (affirming wrongful discharge verdict for employee in quality control department at wire and cable manufacturing plant, and noting that, "[w]here [the plaintiff's] claims are grounded in regulations directly bearing on public safety, we will give weight to the statement of public policy that such regulations represent.").
- ***Tudor v. Charleston Area Medical Center, Inc.*, 506 S.E.2d 554, 567-68 (W.Va. 1997)** (upholding wrongful discharge verdict for registered nurse who reported concerns re: understaffing to hospital/employer, and noting that "it does not take an in-depth analysis" to recognize the substantial public policy underlying West Virginia's regulations governing the licensure of hospitals and requiring adequate staffing to ensure proper patient care).
- ***Hobson v. McLean Hospital Corp.*, 522 N.E.2d 975, 977 (Mass. 1988)** (denying motion to dismiss hospital employee's wrongful discharge claim, under which the employee alleged that she was fired in retaliation for attempting to enforce state regulations governing food service and patient care).

In Practice: *Cusick v. MedStar Health, Inc. & Washington Hospital Center Corp.*, D.C. Superior Court Case No. 2020 CA 002531 B (López, J.)

- Federal Sources of Public Policy:
  - 42 C.F.R. § 482.42 (regulations on "infection control services" issued by the U.S. Department of Health and Human Services);
  - 29 C.F.R. § 1910.132(a) (Department of Labor, OSHA regulations governing Personal Protective Equipment); and
  - U.S. Department of Health & Human Services, Centers for Disease Control and Prevention, *Interim Infection Prevention and Control Recommendations for Patients with Suspected or Confirmed Coronavirus Disease 2019 (COVID-19) in Healthcare Settings*, CDC.GOV (issued January 31, 2020; subsequently updated), https://www.cdc.gov/coronavirus/2019-ncov/infection-control/control-recommendations.html.

HHS REGULATIONS: 42 C.F.R. § 482

- The Social Security Act of 1935, as amended, states that all hospitals participating in the Medicare program must meet certain requirements enumerated in that statute, and that the HHS Secretary may impose additional requirements deemed necessary to ensure the health and safety of hospital patients receiving Medicare benefits.
- On that basis, HHS has implemented regulations governing the minimum health and safety standards for hospitals participating in Medicare. 42 C.F.R. § 482.
- Under these regulations, participating hospitals "must have active hospital-wide programs for the surveillance, prevention, and control of HAIs [health care-associated infections] and other infectious diseases," and the "programs must demonstrate adherence to nationally recognized infection prevention and control guidelines." 42 C.F.R. § 482.42.

HHS REGULATIONS: 42 C.F.R. § 482

- Argument: The CDC's COVID-19 recommendations are nationally recognized infection prevention and control guidelines that express significant public policies aimed at protecting the health and safety of patients and health care personnel and curbing the transmission of COVID-19.
  - This guidance sets forth, *inter alia*, detailed recommendations to protect health care personnel, to "[i]solate symptomatic patients as soon as possible," and to "[l]imit how germs can enter the facility," including by rescheduling nonemergent appointments, using telemedicine and limiting points of entry to medical facilities. *See* U.S. Department of Health & Human Services, Centers for Disease Control and Prevention, *Interim Infection Prevention and Control Recommendations for Patients with Suspected or Confirmed Coronavirus Disease 2019 (COVID-19) in Healthcare Settings*, CDC.GOV, https://www.cdc.gov/coronavirus/2019-ncov/infection-control/control-recommendations.html.

DISTRICT OF COLUMBIA REGULATIONS

- D.C. regulations state that D.C. hospitals are responsible for:
  - "Establishing visitation policies which are in the best interest of patients, including, but not limited to, protection from communicable diseases," D.C. MUN. REGS. tit. 22, § 22-B2014.2(o);
  - "[M]ak[ing] provisions for isolating patients with infectious diseases," D.C. MUN. REGS. tit. 22, § 22-B2035.13(a); and
  - "[E]stablish[ing] and implement[ing] procedures to ensure that patient care and treatment, safety and well-being are maintained during and following instances of natural disasters, disease outbreaks, or other similar situations," D.C. MUN. REGS. tit. 22, § 22-B2037.1.
- D.C. regulations also require all hospital facilities to comply with "*The Food Code*, Title 25 of the District of Columbia Municipal Regulations." D.C. MUN. REGS. tit. 22, § 22-B2035.1(b).
  - *The Food Code* states that food must be "protected from contamination that may result from a factor or source" not otherwise specified in *The Food Code*, i.e., a pandemic. D.C. MUN. REGS. tit. 25, § 824.1.

KCNF CASES

- Government shutdown cases
  - Seeking liquidated damages for essential employees required to work through government shutdowns without timely payment of wages.
  - December 7, 2020, was the deadline to join for the 2018 shutdown
    - https://www.afge.org/article/urgent-shutdown-lawsuit-notice-deadline-nov.-20-2020/
    - Miss the deadline? Please still sign up. We have asked the court to include those who joined late:
    - https://2018governmentshutdown.com/
- COVID Hazard Pay Case
  - Seeking hazard pay for federal employees whose duties required them to be exposed to COVID
  - https://www.hazardpaylawsuit.com/

QUESTIONS?