

**How Does D.C. Law**

**Protect Whistleblowers?**

*The Council finds and declares that the public interest is served when employees*

 *of the District government are free to report waste, fraud, abuse of authority,*

*violations of law, or threats to public health or safety without fear of retaliation or reprisal.*[[1]](#endnote-1)

**What is the WHISTLEBLOWER PROTECTION ACT?**

The D.C. Whistleblower Protection Act[[2]](#endnote-2) (Act or WPA) helps safeguard the rights of government **employees** who make **protected disclosures** or refuse to comply with **illegal orders**. District employees who face certain **adverse actions** after informing the D.C. Council or other public bodies about mismanagement, waste, abuse, or unlawful conduct may seek **relief** in court or in an administrative review, arbitration, or adjudication.

Each of the terms highlighted above are explained in greater detail below.

**Who is an EMPLOYEE?**

The Act protects District employees. The statute defines an employee as any former or current D.C. employee, or applicant for employment by the D.C. government, including:

* Subordinate agencies
* Independent agencies (e.g., Office of the Chief Financial Officer)
* The Board of Trustees of the University of D.C.
* The D.C. Housing Authority
* The Metropolitan Police Department

However, the WPA does *not* afford protection to employees of the D.C. Council.

A separate law protects employees of contractors from reprisal if they make certain protected disclosures. See D.C. Code § 2.223.01-.07.

**What is a PROTECTED DISCLOSURE?**

A protected disclosure is anydisclosure of information, not specifically prohibited by statute, that reveals one or more of the following:

* Gross mismanagement
* Gross misuse or waste of public resources or funds
* Abuse of authority in connection with the administration of a public program or the execution of a public contract
* A violation of a federal, state, or local law, rule, or regulation, or of a term of a contract between the District government and a District government contractor which is not of a merely technical or minimal nature
* A substantial and specific danger to the public health and safety

Such a disclosure must be made to a supervisor or to a “public body,” such as the D.C. Council, the Inspector General, the U.S. Congress, any state legislature, the D.C. Office of the Inspector General, the Office of the D.C. Auditor, including any employee or member of one of these bodies. This is not an exhaustive list; for a full list of public bodies, refer to D.C. Code § 1‑615.52(a)(7).

*Note that the law does not protect employees who disclose information to the press or other nongovernmental entity.*

**Who can benefit or face penalties under the law?**

District employees are “required to make protected disclosures as soon as the employee becomes aware of the violation or misuse of resources” and supervisors must take appropriate action.

Those who fail to act immediately upon an employee’s protected disclosure may face administrative action, including termination. Additionally, supervisors may also be fined up to $10,000 if found in a judicial proceeding to have engaged in retaliation against an employee who made a protected disclosure.

Regardless whether an adverse action is taken, if an employee’s protected disclosure assists in recovering or prevents the loss of more than $100,000 in public funds, the Mayor may grant the employee between $5,000 and $50,000 as a reward. This reward must be recommended by the Inspector General, the D.C. Auditor, or other law enforcement authority.

**What is an ILLEGAL ORDER?**

The WPA defines illegal order as “a directive to violate or to assist in violating a federal, state or local law, rule, or regulation.”

**What ADVERSE ACTIONS by supervisors are prohibited?**

If an employee makes a protected disclosure or refuses to comply with an illegal order, the employee’s supervisor may not take, or threaten to take, any of following adverse actions[[3]](#endnote-3) in response:

* Recommended, threatened, or actual termination, demotion, suspension, or reprimand
* Involuntary transfer, reassignment, or detail
* Referral for psychiatric or psychological counseling
* Failure to promote or hire or take other favorable personnel action
* Retaliating in any other manner against an employee

Retaliation includes launching an investigation of an employee or applicant because she made a protected disclosure.

It is also unlawful to interfere with or deny the right of employees to furnish information to the D.C. Council, a Council committee, or a Councilmember.

**What RELIEF is available to whistleblowers?**

***Civil Action (lawsuit in D.C. Superior Court)***

If any of the above adverse actions are taken against an employee, she may seek relief from the courts by bringing a civil action against both the District and any District employee, supervisor, or official who was involved in the prohibited personnel action.

The employee must file the action “within 3 years after the violation occurred or within one year after the employee first becomes aware of the violation, whichever occurs first.”

Possible damages include:

* Injunction (for example, a court prohibits a supervisor from following through on a threat to fire a whistleblower)
* Reinstatement to the same position held before the prohibited personnel action or to an equivalent position
* Reinstatement of the employee’s seniority rights
* Restoration of lost benefits
* Back pay and interest on back pay
* Compensatory damages (for example, costs associated with searching for a new job or seeking treatment for emotional distress)
* Reasonable costs and attorney fees

An employee who sues the District must prove by a “preponderance of the evidence” (that is, a likelihood greater than 50 percent) that her protected disclosure or refusal to comply with an illegal order was a *contributing factor* in the adverse action.

If the employee succeeds in doing so, the burden of proof shifts to the D.C. Government. The government must prove by “clear and convincing evidence” (a higher standard) that the adverse action was not retaliatory, but would have occurred for legitimate, independent reasons even if the employee had not made a protected disclosure or refused an illegal order.

The “clear and convincing” standard of proof requires the government to show it’s highly probable or probably certain they would have acted against the employee anyway, regardless of the disclosure. A jury gets to decide if their evidence shows that so strongly.[[4]](#endnote-4)

***Administrative Challenge (within D.C. government)***

Alternatively, an employee may challenge a supervisor’s adverse action in an administrative review, arbitration, or adjudication of that action in front of the D.C. Office of Employee Appeals or from an arbitrator pursuant to an employment contract. However, this option may *not* be exercised if the employee initiates a civil action in court before the Office of Employee Appeals or an arbitrator has made a final determination on the same matter. Thus, employees who plan to seek solutions both administratively and judicially should wait until the employee appeals process is completed before filing a lawsuit.

**What should an employee consider before making a disclosure?**

The District’s whistleblower protection law is considered among the strongest of its kind in the nation, in its level of protection for an employee claiming to be a whistleblower. Even so, the law ***does not guarantee protection for an employee***.

In determining whether the WPA may provide legal protection for a proposed or past disclosure, employees should consider the following:

***Are you an employee?***

The WPA protects D.C. employees and applicants for employment only. Federal workers do not qualify for protection under the District’s whistleblower laws. Employees of the D.C. Council also do not qualify. Contractor employees may be protected under separate laws not discussed here. See D.C. Code § 2.223.01-.07.

***Is the disclosure actually protected?***

If an employee is considering whether to make a disclosure or not, the employee first should be certain that such a disclosure would be considered by a *reasonable person with access to the same information* to be a protected disclosure under the law.[[5]](#endnote-5) This means that (a) the employee believes that the information falls into one of the five categories outlined above, and (b) a reasonable person with knowledge of the essential facts would agree. Disagreement over policy, by itself, does not justify a disclosure.

To illustrate, a D.C. Water and Sewer Authority (WASA) employee’s disclosure to the Council that WASA’s practice of replacing qualified employees with unqualified individuals amounted to gross mismanagement was found *not* to be protected.[[6]](#endnote-6) The court reached this conclusion after finding that the employee “had, at most, a subjective belief of misconduct in WASA’s hiring practices—not an objective one, as required by statute.” Therefore, it didn’t satisfy the criterion that another reasonable person with access to the same essential facts would agree that this was gross mismanagement.

***Is the order illegal?***

The law is not always black and white, and sometimes it can be difficult—especially in the heat of the moment—to determine whether an order from a supervisor is within the bounds of the law. Fortunately for whistleblowers, “[t]he eligibility of a disclosure for protection under the [WPA] thus hinges not upon whether the conduct of the D.C. government agency was ultimately determined to be illegal, but whether [the employee] reasonably believed it was illegal . . . .”[[7]](#endnote-7) In other words, the WPA protects an employee who refuses to comply with a *legal* order, so long as she reasonably believes that the order is *illegal*. Again, the “reasonableness” of an employee’s belief is determined using an objective standard, not a subjective one.

***Has the statute of limitations (deadline for challenge) passed?***

Lawsuits concerning unlawful adverse actions must be filed within three years after the violation or within one year after the employee first learns of it, whichever comes first. Employees who delay filing their court challenge until after the applicable deadline lose their opportunity to sue for damages.

Filing sooner rather than later is usually a good goal. Delay increases the possibility that evidence such as supporting documents or favorable testimony may not be available. Less evidence obviously makes successful legal action less likely.

Administrative appeals are generally required to be filed within 30 days of the adverse action. The Office of Employee Appeals website doesn’t discuss whistleblower cases but staff there say they accept them. Details are here: <https://oea.dc.gov/service/file-employee-appeal>.

***Which avenue would be most advantageous for your case?***

An employee can challenge reprisal either at the D.C. Office of Employee Appeals or in D.C. Superior Court, but if you go to court first you can’t go back and then try at the Office of Employee Appeals.

If you consider filing with the Employee Appeals office first, note that you must do so within 30 days of the adverse action. That requires fast action, but even so might be advantageous for several reasons. That step can be cheaper and faster than a lawsuit in court; such litigation will take months or years (see the dates in the examples at the end) and almost certainly require costly legal help to win. Even if you lose before the Employee Appeals office, you can still file a lawsuit in court (and you will have the benefit of learning the government’s position in the course of the administrative challenge).

On the other hand, if you go to court first, before any administrative appeal, that ends the possibility of seeking administrative review.

Employees who are considering their options should weigh the pros and cons of either approach before deciding.

***Was the protected disclosure really the cause of an adverse action?***

Sometimes adverse actions are justified given the circumstances. For example, if an employee who made some protected disclosures also consistently arrives to work late, her supervisor may rightfully decide on adverse action (discipline) for the lateness. In whistleblower lawsuits, government officials may succeed in their defense if they can convince the court that the adverse action they undertook would have occurred regardless whether the employee made a protected disclosure or refused to comply with an illegal order.

Demonstrating that the adverse action was taken because of a protected disclosure is often done by introducing circumstantial rather than direct evidence. For example, a termination that happened soon after a protected disclosure can be circumstantial evidence that one caused the other (called “temporal proximity”). Such reasoning is much harder with the passage of time. An adverse action eight months or more after a protected disclosure will be given little weight in any court.

**Where did the D.C. law come from?**

Whistleblower protection was added to the District’s personnel laws in 1998, nine years after the original federal law. The Council acted to “enhance the rights of District employees to challenge the actions or failures of their agencies and to express their views without fear of retaliation through appropriate channels within the agency.”

Along with laws assuring public access to records (the D.C. Freedom of Information Act), meetings (the Open Meetings Act) and data (Mayor’s Order 2017-115), the whistleblower law adds protection for actions causing some kinds of “involuntary transparency” when employees bring bad actions of government to light through channels. (It does not protect leaks.)

After ten years of experience, the D.C. Council amended the law in 2009 to incorporate interpretations from some court cases.

* The amended law protects an employee’s disclosure “without restriction to time, place, form, motive, context, forum, or prior disclosure made to any person . . . .”

This change eliminated the old rule which required that an employee’s communication be an original disclosure in order to qualify for protection. Now an employee may be protected when disclosing information already disclosed by another employee, with or without her knowledge.

* The 2009 amendments also made clear that disclosures are protected including where made in the course of performing job duties, such as by auditors and investigators.[[8]](#endnote-8) They also added more kinds of prohibited retaliatory actions including requiring a mental health examination for a whistleblower.

**What kinds of disclosures have led to D.C. court cases?**

* **Reporting pressure to break contracting rules** - a former contracting director in the office of the Chief Financial Officer sued in 2010 claiming he was terminated from his job for refusing orders to take unlawful actions cancelling award of a $228 million lottery contract (to benefit well-connected companies that had lost in competition) and reporting the high-level pressure to investigators. After years of litigation including a favorable jury victory, the whistleblower settled for $3.53 million in 2017.[[9]](#endnote-9)
* **Reporting discrimination on the job** – a case filed in 2006 ended in 2010 with a jury verdict that D.C. MPD supervisors unlawfully retaliated (with undesirable reassignments) against five African American officers for filing federal and D.C. complaints of unlawful discrimination within their workplace. The jury awarded them $900,000, plus legal fees.[[10]](#endnote-10)
* **Reporting orders to lie about agency handling of FOIA requests** – pending in D.C. Superior Court is a suit filed in 2018 by an agency FOIA officer against the Department of Consumer and Regulatory Affairs (DCRA) for adverse actions after she refused and reported an order to disregard FOIA request timelines and “submit fraudulent affidavits attesting to record searches” that were not conducted. DCRA officials penalized her for challenging the unlawful direction, she alleges—superiors cancelled her telework agreement, refused to consider her for vacant positions, refused to recommend her for the Certified Public Manager Program, withdrew or cancelled positions for which she submitted applications, unduly scrutinized her work and terminated her employment (although it was later reinstated). The case is pending in the D.C. Superior Court.[[11]](#endnote-11)

**Where can I find out more about whistleblowing?\***

General advice from D.C. Government about whistleblower protections is on the website of the D.C. Office of Human Resources. See here: <https://dchr.dc.gov/page/whistleblower-protections-and-obligations>.

Online search will show attorneys and law firms offering to represent government employees seeking whistleblower protection. Look for Washington, D.C., expertise, as federal law and the laws in other states vary greatly.

In addition, several nonprofit organizations advertise education and assistance:

* Whistleblowers of America -- a national nonprofit organization assisting whistleblowers with (i) education and training in understanding whistleblower retaliation and hostile work environment prevention, (ii) peer-to-peer support for whistleblowers who experienced retaliation, (iii) mediation services between employees and employers, and (iv) engagement with the media in a public advocacy campaign on behalf of whistleblowers. *See* <https://whistleblowersofamerica.org/>.
* The National Whistleblower Center, located in D.C., describes itself as “a non-profit, tax-exempt, non-partisan organization, [that] is the leading whistleblower legal advocacy organization with an almost 30-year history of protecting the right of individuals to report wrongdoing without fear of retaliation.” It is affiliated with The National Whistleblower Legal Defense and Education Fund, a nonprofit law firm that provides services to the NWC and whistleblowers around the world. The NWC’s website offers numerous resources. *See* <https://www.whistleblowers.org/>.

The Center’s founder and director, D.C. attorney Stephen Kohn, is the author of *The New Whistleblower’s Handbook* (3rd ed. 2017). He also led the research and advocacy to get congressional recognition so that July 30 is now National Whistleblower Day. Kohn found that whistleblowing in the United States dates back to the very founding of our nation. In 1777, ten sailors and marines met to blow the whistle on the commander of the Continental Navy, Commodore Esek Hopkins, for his mistreatment of enemy British prisoners. Their reports led the Continental Congress to pass America’s first whistleblower law on July 30, 1778. After Kohn’s discovery, the U.S. Senate, led by Chairman of the bipartisan Senate Whistleblower Protection Caucus Senator Charles Grassley, enacted a resolution to mark July 30 as National Whistleblower Appreciation Day. The resolution calls on all U.S. agencies to recognize whistleblowers annually and celebrate National Whistleblower Appreciation Day. Kohn’s Ted Talk on his research is here: <https://www.youtube.com/watch?v=4BCBhu-UOCY>. His Handbook is here: <https://www.whistleblowers.org/book/know-your-rights/>.

\* References to organizations and websites do not imply endorsement. The D.C. Open Government Coalition has not verified any information provided on others’ websites. As always, for advice on a specific D.C. situation, consult an attorney qualified to practice in the District.

1. **REFERENCES:**

 D.C. Code § 1-615.51. [↑](#endnote-ref-1)
2. For the full text of the Whistleblower Protection Act, visit <https://code.dccouncil.us/dc/council/code/titles/1/chapters/6/subchapters/XV-A/>. [↑](#endnote-ref-2)
3. *Id.* at § 1-615.53; *see also Coleman v. District of Columbia*, 794 F.3d 49, 53 (D.C. Cir. 2015) (“[T]he ordered fitness-for-duty examination . . . constitute[s] the type[] of adverse employment action[] that implicate[s] the Whistleblower Act’s protections.”). [↑](#endnote-ref-3)
4. *See Coleman*, 794 F.3d at 53(holding “the Whistleblower Act imposes a rigorous burden on [the District] to establish by clear and convincing evidence the legitimate reasons for an adverse action”). The employee ultimately couldn’t persuade a jury and lost at trial. *Coleman v. District of Columbia*, No. 1:09-CV-00050 (RCL), 2016 WL 7496247 (D.D.C. Sept. 28, 2016). [↑](#endnote-ref-4)
5. *See Coleman*, 794 F.3d at 53 (“Sometimes, however, a workplace complaint is just a workplace complaint. To qualify as protected whistleblowing, the complaint must disclose ‘such serious errors by the agency that a conclusion the agency erred is not debatable among reasonable people.’” (quoting *Wilburn v. District of Columbia*, 957 A.2d 921, 925 (D.C. 2008). *See also* Nat’l Whistleblower Legal Def. & Educ. Fund, *DC Federal Court Upholds Jury Verdict for Fraud Whistleblower*, Whistleblower Protection Blog (Sept. 17, 2009), https://www.whistleblowersblog.org/2009/09/articles/false-claims-qui-tam/dc-federal-court-upholds-jury-verdict-for-fraud-whistleblower/ (citing *Kakeh v. United Planning Org., Inc.*, 655 F. Supp. 2d 107 (D.D.C. 2009) (“Plaintiff was not obligated to use ‘magic words’ to trigger the protections of the [Whistleblower Protection Act] . . . [A] disclosure is protected if the employee ‘reasonably believes’ that he is revealing a gross misuse of public funds or a violation of a law, rule, regulation, or contract term.”)). [↑](#endnote-ref-5)
6. *Harris v. D.C. Water & Sewer Auth.*, 172 F. Supp. 3d 253, 262 (D.D.C. 2016) (dismissing D.C. employee’s whistleblower complaint due to lack of protected disclosure). [↑](#endnote-ref-6)
7. *Id.* at 261 (quoting *Freeman v. District of Columbia*, 60 A.3d 1131, 1141 (D.C. 2012) (internal quotation marks omitted)). [↑](#endnote-ref-7)
8. *Id.* (citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (holding that when public employees make statements pursuant to their official duties the Constitution’s protections of free speech do not insulate their communications from employer discipline). [↑](#endnote-ref-8)
9. Spencer S. Hsu and Aaron C. Blake, “D.C. to settle whistleblower case for $3.53 million.” *Washington Post* (June 2, 2017), available at: <https://www.washingtonpost.com/local/dc-politics/dc-to-settle-whistleblower-case-for-353-million/2017/06/02/2bdc5468-47b5-11e7-bcde-624ad94170ab_story.html>. [↑](#endnote-ref-9)
10. Spencer S. Hsu, “Jury orders District to pay $900,000 to 4 police officers in retaliation case,” *Washington Post* (July 10, 2010), available at:<https://www.washingtonpost.com/wp-dyn/content/article/2010/07/19/AR2010071904938.html>. [↑](#endnote-ref-10)
11. Complaint & Demand for Jury Trial, *Genet Amare v. District of Columbia Gov’t*, No. 2018 CA 005787 B (D.C. Super. Ct, Aug. 10, 2018). [↑](#endnote-ref-11)