

## Legislative Changes Impacting Retaliation

FY05 §591 (PL 108-375, Oct 28, 2004)	<b>Requires Protection of Armed Forces Personnel from Retaliatory Actions for Communications made through the Chain of Command</b>	Amends Section 1034(b)(1)(B) of title 10 U.S.C. to include protection of Armed Forces personnel from retaliatory actions for communications made through the chain of command.	Oct 28, 2004
FY13 §572 (PL 112-239, Jan 2, 2013)	<b>Additional Elements in Comprehensive DoD Policy on Sexual Assault Prevention and Response</b>  (Amends FY11 §1602)	(a)(1): Requires creation of a <b>record of disposition of all unrestricted reports</b> of sexual assault involving member of the Armed Forces. (a)(2): All Service members convicted of a covered offense who are not punitively discharged will be processed for an administrative discharge. (a)(3): Requires command climate survey to be conducted within 120 days of assuming command. (a)(4): Requirement to post and widely disseminate information on resources available to victims of sexual assault and establish hotline number. (a)(5): Educational campaign to notify service members regarding correction of their records if they are the victim of retaliatory personnel action for making a report of sexual assault or harassment.	Revised policy due in 180 Days (Jul 3, 2013)
FY13 §578 (PL 112-239, Jan 2, 2013)	<b>General or Flag Officer Review of Separation of Members Making an Unrestricted Report of Sexual Assault</b>	Requires SecDef to develop a policy (submitted to SASC & HASC) to require a general or flag officer to review the circumstances of, and grounds for, the proposed involuntary separation of any Service member who made an Unrestricted Report of Sexual Assault within one year of involuntary separation action if requested by the Service member.	Policy due 180 days (July 3, 2013)
* FY14 §1709(c) (PL 113-66, Dec 26, 2013)	<b>Report on Separate Punitive Article for Retaliation</b>	Requires SecDef to submit report to SASC and HASC setting forth recommendations regarding whether chapter 47 of 10 U.S.C. should be amended to add a new punitive article to prohibit retaliation against an alleged victim or other Service member who reports a criminal offense.	Report due in 180 days (June 26, 2014)
* FY14 §1709	<b>Prohibition on Retaliation Against Service Members for Reporting a Criminal Offense</b>	Services are directed to prescribe regulations prohibiting retaliation against any victim or other Service member who reports a criminal offense. The regulation must state that any such retaliation is punishable under Art. 92 UCMJ	120 days (Apr 26, 2014)
**FY14 §1714	<b>Protected Communications and Prohibition of Retaliatory Personnel Actions</b>	Expands prohibited retaliatory personnel actions to include making or threatening to make a significant change in the duties or responsibilities of a member not commensurate with the member's grade. No person may take or threaten to take unfavorable personnel action as a reprisal against a member for making or preparing or being perceived as making a communication to a Member of Congress, an IG, law enforcement, any person in chain-of-command or a court martial.	Immediate (Dec 26, 2013)
FY14 §1715	<b>IG Investigations of Retaliatory Actions Made Against Members Because of Communications Regarding Sexual Misconduct</b>	Expands investigations IG must conduct to include retaliatory actions made against members whose communications were made to personnel or agencies regarding rape, sexual assault, or other sexual misconduct and sexual harassment.	Immediate (Dec 26, 2013)

\* 1714 FY14 NDAA section 1709 can be found on page 3 of this document.

\*\* 10 USC section 1034, The Military Whistleblower Act, amended by the FY14 NDAA section can be found on page 4-8.

## Legislative Changes Pertaining to Expedited Transfers

<p>FY10 §567(c)(2) (PL 111-84, Oct 28, 2009)</p>	<p><b>Report on Military Protective Order (MPO) Triggering a Transfer Option for Service Member Protected by Order</b></p>	<p>Requires SecDef to submit to HASC and SASC a report explaining the measures being taken to ensure that when a MPO is issued, the member of the Armed Forces who is protected by the order is informed in a timely manner, of the member's option to request transfer from the command to which the member is assigned.</p>	<p>Report due in 180 days (Apr 28, 2010)</p>
<p>FY12 §582 (PL 112-81, Dec 31, 2011)</p>	<p><b>Consideration of Expedited Transfer Option for Victims of Sexual Assault or Related Offense</b></p>	<p>Requires Service Secretaries to issue regulations to carry out timely consideration for a request for a change of station by an active duty service member who is a victim of a sexual assault. Must be approved or disapproved by member's commanding officer within 72 hours of request and member may request review by the first general or flag officer in chain of command and that decision must be made within 72 hours of requested review.</p>	<p>Immediate (Dec 31, 2011)</p>
<p>FY14 §1712</p>	<p><b>Extending Expedited Transfer to Members of the U.S. Coast Guard</b></p>	<p>Extends requirement to allow requests for expedited transfers for victims of sexual assault in the U.S. Coast Guard.</p>	<p>Immediate (Dec 26, 2013)</p>
<p>FY14 §1713</p>	<p><b>Temporary Administrative Reassignment or Removal of a Service Member Accused of committing a Sex-Related Offense</b></p>	<p>SecDef may provide guidance for commanders regarding their authority to reassign members alleged to have committed offenses under Arts 120, 120a, 120b, 120c, 125 and attempts to commit such offenses. (In Aug 14, 2013 Memorandum, SecDef directed Services to implement a policy allowing administrative reassignment or transfer of alleged offenders of sexual assault by Jan 1, 2014)</p>	<p>Immediate (Dec 26, 2013)</p>

**SEC. 1709. PROHIBITION OF RETALIATION AGAINST MEMBERS OF THE ARMED FORCES FOR REPORTING A CRIMINAL OFFENSE.**

10 USC 113 note.

(a) **REGULATIONS ON PROHIBITION OF RETALIATION.—**

(1) **REGULATIONS REQUIRED.—**The Secretary of Defense shall prescribe regulations, or require the Secretaries of the military departments to prescribe regulations, that prohibit retaliation against an alleged victim or other member of the Armed Forces who reports a criminal offense. The regulations shall prescribe that a violation of the regulations is an offense punishable under section 892 of title 10, United States Code (article 92 of the Uniform Code of Military Justice).

(2) **DEADLINE.—**The regulations required by this subsection shall be prescribed not later than 120 days after the date of the enactment of this Act.

(b) **RETALIATION AND PERSONNEL ACTION DESCRIBED.—**

(1) **RETALIATION.—**For purposes of the regulations required by subsection (a), the Secretary of Defense shall define retaliation to include, at a minimum—

(A) taking or threatening to take an adverse personnel action, or withholding or threatening to withhold a favorable personnel action, with respect to a member of the Armed Forces because the member reported a criminal offense; and

(B) ostracism and such of acts of maltreatment, as designated by the Secretary of Defense, committed by peers of a member of the Armed Forces or by other persons because the member reported a criminal offense.

(2) **PERSONNEL ACTIONS.—**For purposes of paragraph (1)(A), the Secretary of Defense shall define the personnel actions to be covered by the regulations.

(c) **REPORT ON SEPARATE PUNITIVE ARTICLE.—**Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report setting forth the recommendations of the Secretary regarding whether chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), should be amended to add a new punitive article to subchapter X of such chapter to prohibit retaliation against an alleged victim or other member of the Armed Forces who reports a criminal offense.

## 10 U.S.C.

ARMED FORCES Subtitle A - General

Military Law PART II - PERSONNEL

CHAPTER 53 - MISCELLANEOUS RIGHTS AND BENEFITS

Sec. 1034 - Protected communications; prohibition of retaliatory personnel actions

### **§1034. Protected communications; prohibition of retaliatory personnel actions**

(a) Restricting Communications With Members of Congress and Inspector General Prohibited.—

- (1) No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General.
- (2) Paragraph (1) does not apply to a communication that is unlawful.

(b) Prohibition of Retaliatory Personnel Actions.—

(1) No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing or being perceived as making or preparing—

(A) a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted;

(B) a communication that is described in subsection (c)(2) and that is made (or prepared to be made) to—

(i) a Member of Congress;

(ii) an Inspector General (as defined in subsection (i)) or any other Inspector General appointed under the Inspector General Act of 1978;

(iii) a member of a Department of Defense audit, inspection, investigation, or law enforcement organization;

(iv) any person or organization in the chain of command;

(v) a court-martial proceeding; or

(vi) any other person or organization designated pursuant to regulations or other established administrative procedures for such communications; or

(C) testimony, or otherwise participating in or assisting in an investigation or proceeding related to a communication under subparagraph (A) or (B), or filing, causing to be filed, participating in, or otherwise assisting in an action brought under this section.

(2) Any action prohibited by paragraph (1) (including the threat to take any unfavorable action, or making or threatening to make a significant change in the duties or responsibilities of a member of the armed forces not commensurate with the member's grade, and the withholding or threat to withhold any favorable action) shall be considered for the purposes of this section to be a personnel action prohibited by this subsection.

(c) Inspector General Investigation of Allegations of Prohibited Personnel Actions.—

(1) If a member of the armed forces submits to an Inspector General an allegation that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in paragraph (2), the Inspector General shall take the action required under paragraph (4).

(2) A communication described in this paragraph is a communication in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of, any of the following:

(A) A violation of law or regulation, including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct in violation of sections 920 through 920c of this title (articles 120 through 120c of the Uniformed Code of Military Justice), sexual harassment or unlawful discrimination.

(B) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(C) 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.

- (3) A communication described in paragraph (2) shall not be excluded from the protections provided in this section because—
- (A) the communication was made to a person who participated in an activity that the member reasonably believed to be covered by paragraph (2);
  - (B) the communication revealed information that had been previously disclosed;
  - (C) of the member’s motive for making the communication;
  - (D) the communication was not made in writing;
  - (E) the communication was made while the member was off duty; and
  - (F) the communication was made during the normal course of duties of the member.
- (4)(A) An Inspector General receiving an allegation as described in paragraph (1) shall expeditiously determine, in accordance with regulations prescribed under subsection (h), whether there is sufficient evidence to warrant an investigation of the allegation.
- (B) If the Inspector General receiving such an allegation is an Inspector General within a military department, that Inspector General shall promptly notify the Inspector General of the Department of Defense of the allegation. Such notification shall be made in accordance with regulations prescribed under subsection (h).
- (C) If an allegation under paragraph (1) is submitted to an Inspector General within a military department and if the determination of that Inspector General under subparagraph (A) is that there is not sufficient evidence to warrant an investigation of the allegation, that Inspector General shall forward the matter to the Inspector General of the Department of Defense for review.
- (D) Upon determining that an investigation of an allegation under paragraph (1) is warranted, the Inspector General making the determination shall expeditiously investigate the allegation. In the case of a determination made by the Inspector General of the Department of Defense, that Inspector General may delegate responsibility for the investigation to an appropriate Inspector General within a military department.
- (E) In the case of an investigation under subparagraph (D) within the Department of Defense, the results of the investigation shall be determined by, or approved by, the Inspector General of the Department of Defense (regardless of whether the investigation itself is conducted by the Inspector General of the Department of Defense or by an Inspector General within a military department).
- (5) Neither an initial determination under paragraph (3)(A) nor an investigation under paragraph (3)(D) is required in the case of an allegation made more than one year after the date on which the member becomes aware of the personnel action that is the subject of the allegation.
- (6) The Inspector General of the Department of Defense, or the Inspector General of the Department of Homeland Security (in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy), shall ensure that the Inspector General conducting the investigation of an allegation under this subsection is one or both of the following:
- (A) Outside the immediate chain of command of both the member submitting the allegation and the individual or individuals alleged to have taken the retaliatory action.
  - (B) At least one organization higher in the chain of command than the organization of the member submitting the allegation and the individual or individuals alleged to have taken the retaliatory action.
- (d) Inspector General Investigation of Underlying Allegations.—Upon receiving an allegation under subsection (c), the Inspector General receiving the allegation shall conduct a separate investigation of the information that the member making the allegation believes constitutes evidence of wrongdoing (as described in subparagraph (A), (B), or (C) of subsection (c)(2)) if there previously has not been such an investigation or if the Inspector General determines that the original investigation was biased or otherwise inadequate. In the case of an allegation received by the Inspector General of the Department of Defense, the Inspector General may delegate that responsibility to the Inspector General of the armed force concerned.

(e) Reports on Investigations.—

(1) After completion of an investigation under subsection (c) or (d) or, in the case of an investigation under subsection (c) by an Inspector General within a military department, after approval of the report of that investigation under subsection (c)(4)(E), the Inspector General conducting the investigation shall submit a report on the results of the investigation to the Secretary of Defense and the Secretary of the military department concerned (or to the Secretary of Homeland Security in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) and shall transmit a copy of the report on the results of the investigation to the member of the armed forces who made the allegation investigated. The report shall be transmitted to such Secretaries, and the copy of the report shall be transmitted to the member, not later than 30 days after the completion of the investigation or, in the case of an investigation under subsection (c) by an Inspector General within a military department, after approval of the report of that investigation under subsection (c)(4)(E).

(2) In the copy of the report transmitted to the member, the Inspector General shall ensure the maximum disclosure of information possible, with the exception of information that is not required to be disclosed under section 552 of title 5. However, the copy need not include summaries of interviews conducted, nor any document acquired, during the course of the investigation. Such items shall be transmitted to the member, if the member requests the items, with the copy of the report or after the transmittal to the member of the copy of the report, regardless of whether the request for those items is made before or after the copy of the report is transmitted to the member.

(3) If, in the course of an investigation of an allegation under this section, the Inspector General determines that it is not possible to submit the report required by paragraph (1) within 180 days after the date of receipt of the allegation being investigated, the Inspector General shall provide to the Secretary of Defense and the Secretary of the military department concerned (or to the Secretary of Homeland Security in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) and to the member making the allegation a notice—

- (A) of that determination (including the reasons why the report may not be submitted within that time); and
- (B) of the time when the report will be submitted.

(4) The report on the results of the investigation shall contain a thorough review of the facts and circumstances relevant to the allegation and the complaint or disclosure and shall include documents acquired during the course of the investigation, including summaries of interviews conducted. The report may include a recommendation as to the disposition of the complaint.

(f) Action in case of violations—

(1) Not later than 30 days after receiving a report from the Inspector General under subsection (e), the Secretary of Homeland Security or the Secretary of the military department concerned, as applicable, shall determine whether there is sufficient basis to conclude whether a personnel action prohibited by subsection (b) has occurred.

(2) If the Secretary concerned determines under paragraph (1) that a personnel action prohibited by section (b) has occurred, the Secretary shall—

(A) order such action as is necessary to correct the record of a personnel action prohibited by subsection (b); and

(B) take any appropriate disciplinary action against the individual who committed such prohibited personnel action.

- (3) If the Secretary concerned determines under paragraph (1) that an order for corrective or disciplinary action is not appropriate, not later than 30 days after making the determination, such Secretary shall—
  - (A) provide to the Secretary of Defense and the member or former member a notice of the determination and the reasons for not taking action; and
  - (B) when appropriate, refer the report to the appropriate board for the correction of military records for further review under subsection (g).
- (g) Correction of Records When Prohibited Action Taken.—
  - (1) A board for the correction of military records acting under section 1552 of this title, in resolving an application for the correction of records made by a member or former member of the armed forces who has alleged a personnel action prohibited by subsection (b), on the request of the member or former member or otherwise, may review the matter.
  - (2) In resolving an application described in paragraph (1), a correction board—
    - (A) shall review the report of the Inspector General submitted under subsection (e)(1);
    - (B) may request the Inspector General to gather further evidence; and
    - (C) may receive oral argument, examine and cross-examine witnesses, take depositions, and, if appropriate, conduct an evidentiary hearing.
  - (3) If the board holds an administrative hearing, the member or former member who filed the application described in paragraph (1)—
    - (A) may be provided with representation by a judge advocate if—
      - (i) the Inspector General, in the report under subsection (e)(1), finds that there is probable cause to believe that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in subsection (c)(2);
      - (ii) the Judge Advocate General concerned determines that the member or former member would benefit from judge advocate assistance to ensure proper presentation of the legal issues in the case; and
      - (iii) the member is not represented by outside counsel chosen by the member; and
    - (B) may examine witnesses through deposition, serve interrogatories, and request the production of evidence, including evidence contained in the investigatory record of the Inspector General but not included in the report submitted under subsection (e)(1).
  - (4) The Secretary concerned shall issue a final decision with respect to an application described in paragraph (1) within 180 days after the application is filed. If the Secretary fails to issue such a final decision within that time, the member or former member shall be deemed to have exhausted the member's or former member's administrative remedies under section 1552 of this title.
  - (5) The Secretary concerned shall order such action, consistent with the limitations contained in sections 1552 and 1553 of this title, as is necessary to correct the record of a personnel action prohibited by subsection (b).
  - (6) If the Board determines that a personnel action prohibited by subsection (b) has occurred, the Board may recommend to the Secretary concerned that the Secretary take appropriate disciplinary action against the individual who committed such personnel action.
- (h) Review by Secretary of Defense.—Upon the completion of all administrative review under subsection (f), the member or former member of the armed forces (except for a member or former member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) who made the allegation referred to in subsection (c)(1), if not satisfied with the disposition of the matter, may submit the matter to the Secretary of Defense. The Secretary shall make a decision to reverse or uphold the decision of the Secretary of the military department concerned in the matter within 90 days after receipt of such a submittal.

- (i) Regulations.—The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, shall prescribe regulations to carry out this section.
- (j) Definitions.—In this section:
  - (1) The term “Member of Congress” includes any Delegate or Resident Commissioner to Congress.
  - (2) The term “Inspector General” means any of the following:
    - (A) The Inspector General of the Department of Defense.
    - (B) The Inspector General of the Department of Homeland Security, in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy.
    - (C) Any officer of the armed forces or employee of the Department of Defense who is assigned or detailed to serve as an Inspector General at any level in the Department of Defense.
  - (3) The term “unlawful discrimination” means discrimination on the basis of race, color, religion, sex, or national origin.