

Congress Passes Bill to Protect Whistleblowers in Criminal Antitrust Cases

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On December 8, the U.S. House of Representatives passed the Criminal Antitrust Anti-Retaliation Act, which prohibits employers from retaliating against employees who report antitrust violations.^[1] The bill unanimously passed the Senate in October 2019 and is expected to be signed into law by the President.

Scope of the Statute

The bill provides new whistleblower protections to employees, contractors, subcontractors, or agents of private employers (“covered individuals”) who report conduct related to a suspected criminal antitrust violation to either 1) the federal government; 2) a person with supervisory authority over the covered individual; or 3) a person working for the employer with investigative authority.^[2] The bill also protects covered individuals who assist the federal government with an investigation or proceeding related to suspected criminal antitrust violations.^[3]

A whistleblower who faces retaliation—including discharge, demotion, suspension, threats, or harassment—will be authorized to file a complaint with the U.S. Department of Labor within 180 days.^[4] If the Secretary of Labor has not issued a final decision within 180 days of receiving the complaint, the whistleblower may bring an action in federal district court subject to de novo review.^[5]

Prevailing whistleblowers are entitled to relief to make them whole, including reinstatement with the same seniority status but for the discrimination; back pay, with interest; and compensation for special damages including litigation costs, expert witness fees, and reasonable attorney’s fees.^[6] Notably, the bill does not protect individuals who planned or participated in the alleged criminal conduct, or obstructed any Department of Justice (DOJ) investigation.^[7]

The statute does not specifically state whether, or to what extent, the anti-retaliation protections apply to individuals outside of the United States. However, the language suggests that the retaliatory conduct must have occurred in the United States to trigger the statute’s provisions for seeking relief from the Department of Labor or the court.

Purpose and Background

The impetus behind the bill was a 2011 Government Accountability Office (GAO) report which found widespread support among stakeholders, including antitrust plaintiffs' and defense attorneys, in extending civil whistleblower protections to the reporting of criminal antitrust violations.^[8] The report noted that the lack of a civil remedy under current law may cause hesitation for whistleblowers to come forward, especially as "past reported cases suggest retaliation occurs in this type of situation."^[9] The GAO did not, however, find consensus among key stakeholders on providing a whistleblower reward for successfully reporting violations, which may be why the legislature opted not to include this extra incentive.^[10]

The bill's main sponsors, Senators Patrick Leahy (D-Vt.) and Chuck Grassley (R-Iowa), previously sought to enact near-identical legislation in 2013, 2015, and 2017, but the House of Representatives failed to vote on each occasion.^[11] The Senators' renewed push to enact civil whistleblower protections for reporting criminal antitrust conduct follows the DOJ's collection of criminal fines and civil damages in a bid-rigging case against South Korean petroleum and refinery companies, which initiated from a whistleblower hotline tip and an anonymous *qui tam* lawsuit.^[12]

Takeaways

It has long been considered best practice for companies to offer an anonymous hotline for employees to report potential antitrust violations to the company legal department. In addition to establishing confidential channels to encourage internal reporting, companies should ensure that reports will be independently investigated and that genuine complaints lead to company action to cease the conduct and report it to the authorities where appropriate. Companies also need to build into their HR, legal, and compliance structures mechanisms to ensure that innocent whistleblowers do not face any forms of retaliation for bringing information to their supervisors, the company legal department, or the government.

It is also considered good compliance practice to have a system for disciplining employees who violate company antitrust compliance policies, and the statute expressly preserves this ability for any employees who direct or participate in an antitrust violation or who obstruct a government investigation.

^[1] Criminal Antitrust Anti-Retaliation Act of 2019, S. 2258, 116th Cong. (2019), *available at* <https://www.congress.gov/bill/116th-congress/senate-bill/2258/text>.

^[2] Specifically, covered individuals are protected from reporting information related to "any act or omission the covered individual reasonably believes to be a violation of, the antitrust laws . . . [or] another criminal law committed in conjunction with a potential violation of the antitrust laws or in conjunction with an investigation by the Department of Justice of a potential violation of the antitrust laws." *Id.* § 216(a)(1)(A)(i)-(ii), § 216(a)(1)(B)(i)-(ii), § 216(a)(3)(B). "Antitrust laws" under the bill include section 1 or 3 of the Sherman Act (15 U.S.C. §§ 1 and 3). *Id.* § 216(a)(3)(A).

^[3] *Id.* § 216(a)(1)(B)(i)-(ii).

^[4] *Id.* § 216(b)(1)(A) & § 216(b)(2)(D).

^[5] *Id.* § 216(b)(1)(B).

^[6] *Id.* § 216(c).

^[7] *Id.* § 216(a)(2).

^[8] U.S. Gov't Accountability Office, GAO 11-619, Report to Congressional Committees: Criminal Cartel Enforcement: Stakeholder Views On Impact of 2004 Antitrust Reform Are Mixed, but Support Whistleblower Protection, (2011), *available at* <http://www.gao.gov/assets/330/321794.pdf>.

^[9] *Id.* at Highlights.

^[10] *Id.* at 36-45.

[11] See S. 42, 113th Cong, 1st Sess., 159 Cong. Rec. S7799-7800 (Nov. 4, 2013) (passed with an amendment by unanimous consent); S. 1599, 114th Cong, 1st Sess., 161 Cong. Rec. S5474-75 (July 22, 2015) (passed with an amendment by unanimous consent); S. 807, 115th Cong, 163 Cong. Rec. S7266-67 (Nov. 15, 2017) (passed without amendment by unanimous consent).

[12] Press Release, Dep't of Justice, "Three South Korean Companies Agree to Plead Guilty and to Enter into Civil Settlements for Rigging Bids on United States Department of Defense Fuel Supply Contracts" (Nov.14, 2018), *available at* <https://www.justice.gov/opa/pr/three-south-korean-companies-agree-plead-guilty-and-enter-civil-settlements-rigging-bids>.

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