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Director of Legal Services Neil A.G. McPhie, Esq. says new law changes the game for whistleblower reprisal claims

WPEA changes the game on whistleblower reprisal case outcomes.

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There has been little question among my colleagues who practice federal employment law that the Whistleblower Protection Enhancement Act of 2012 is going to vastly change the disposition track record of the Merit Systems Protection Board (MSPB) when it comes to whistleblower reprisal claims. While only time will tell just how much more beneficial this act will be among appellants, compared to those covered only by the Whistleblower Protection Act of 1988 (WPA), the MSPB recently supplied interesting data that could serve as a benchmark against which that change could be measured.As required by the WPEA, the MSPB included in its Annual Performance Report for Fiscal Year 2013 detailed data on the first year in which the WPEA was in effect. The MSPB's annual reports have regularly detailed the number of individual right of action (IRA) appeals, which whistleblowers can only file after the Office of Special Counsel (OSC) declines to pursue corrective action or fails to act on their complaint within 120 days. However, as the new report illustrates, this IRA data only provides half of the picture, as it excludes whistleblower reprisal-influenced "otherwise appealable actions" (OAAs), such as suspensions of more than 14 days, demotion and removal. For personnel actions not appealable to the MSPB, such

as suspensions less than 15 days, whistleblowers must go the OSC-IRA route.In fiscal year 2013, MSPB regional and field offices decided on 232 OAA cases with whistleblower reprisal claims and on 288 IRA cases. That same fiscal year, the MSPB received 239 OAA cases with whistleblower reprisal claims and 418 IRA appeals. IRA cases decided were up 30 percent from fiscal year 2009, which was the last year I served as chairman of the Board, and that number will only get bigger. The MSPB in its performance report continued warning that it expects the WPEA to result in an increase in OAA and IRA appeals.I'd like to point out that I do not regard OAA cases as true whistleblowing cases. On these cases, whistleblowing is an affirmative defense to the adverse personnel action. The case may be decided on the personnel action and never reach the whistleblowing defense. Consequently, it is important to be cognizant of the difference between OAA appeals with claims of whistleblowing reprisal and OAA appeals in which the MSPB decided on the whistleblowing defense. The report also provides data on the resolution of whistleblower reprisal claims in OAA appeals. IRA cases, on the other hand, are true whistleblower cases.Most interesting in this report is the data on the outcomes of IRA and OAA appeals. At the initial appeal level, 70 percent of IRA appeals resulted in dismissals in fiscal year 2013, but only 48 percent of OAA appeals saw the same outcome. In future years, the MSPB expects to see fewer dismissals due to "the [WPEA's] expanded definition of a protected disclosure." That "expanded definition" covers researchers and scientists at research-centric agencies who report "censorship related to research, analysis, or technical information" and employees who disclose, among other things, previously revealed information or information related to old events.While most of the whistleblower reprisal appeals the MSPB decided on in fiscal year 2013 were filed prior to the WPEA's effective date, that anticipated dismissal decline trend played out, to an extent, in some cases. In Day v. Department of Homeland Security (2013), the MSPB found that section 101 of the WPEA, which clarified several types of disclosures that are protected (e.g., disclosures made to wrongdoers or in the normal course of duty, disclosures not made in writing or while not on duty, and disclosures concerning previously revealed information or incidents that occurred long ago), can be applied retroactively to cases that were pending when the act took effect in late December 2012.The Day

decision later prompted the Board in Heath v. Department of the Army (2013) to remand the case after an MSPB judge had improperly denied the appellant corrective action under the WPA. The appellant, an animal health technician, had blown the whistle on unauthorized actions during a surgical procedure on goats, a gross waste of funds and gross mismanagement. The MSPB judge based the denial on the fact that the appellant's disclosures were made in the normal course of duty and to a wrongdoer. On remand, however, the MSPB judge earlier this year ordered the agency to provide the appellant, who had been stripped of his supervisory duties, with corrective relief.Another type of outcome at the initial appeal level I expect to change is the settlement rate. In fiscal year 2013, 53 percent of the OAA appeals with whistleblower claims that were not dismissed were settled, and 66 percent of IRA appeals that were not dismissed were settled. With the WPEA making uncapped compensatory damages available to whistleblowers, as I have discussed in an earlier article, I would not be surprised to see these settlement rates rise in the coming years. Agencies are going to increasingly find themselves weighing whether it is more cost effective to negotiate a settlement amount or to risk having the MSPB order it to pay a likely even greater sum by awarding compensatory damages.