



May 2020

# WHISTLEBLOWERS

## Office of Special Counsel Should Require Information on the Probationary Status of Whistleblowers

## Why GAO Did This Study

Federal employee whistleblowers—individuals who report allegations of wrongdoing—potentially help to safeguard the government from fraud, waste, and abuse. OSC was created to help protect whistleblowers. Probationary employees—generally those with less than 1 or 2 years of federal service—can be especially vulnerable to reprisal because they have fewer protections from adverse personnel actions, including termination.

A 2017 law included a provision for GAO to examine retaliation against whistleblowers in their probationary period. This report examines (1) the extent to which probationary employees filed whistleblower disclosures or reprisal complaints, (2) termination rates of complainants, and (3) OSC procedures related to probationary employees.

GAO used complaint data and workforce data to identify the probationary status of employees who filed claims with OSC from fiscal year 2014 to 2018 (the most recent full years of available data); estimated the number of instances where claimants were terminated; and reviewed OSC procedures.

## What GAO Recommends

GAO recommends that OSC require claimants to identify their status as permanent or probationary employees. OSC disagreed with GAO's recommendation. GAO continues to believe the recommendation is valid, as discussed in the report.

View [GAO-20-436](#). For more information, contact Yvonne D. Jones at (202) 512-2717 or [jonesy@gao.gov](mailto:jonesy@gao.gov).

## WHISTLEBLOWERS

### Office of Special Counsel Should Require Information on the Probationary Status of Whistleblowers

## What GAO Found

GAO found that existing data are not sufficient to determine if the rates of filing whistleblower disclosures, retaliation complaints, or both vary by probationary status. The average annual number of probationary and permanent federal employees from fiscal years 2014 to 2018 was approximately 1.9 million employees. Over this time frame, an average of approximately 2,800 employees—about 0.15 percent—filed complaints each year. Existing data were not sufficient to determine probationary status of employees for over 18 percent of each year's complaints. Therefore, it is not possible to determine whether probationary employees file at lower, comparable, or higher rates than their prevalence in the overall employee population. Specifically, probationary employees represented about 13.5 percent, on average, of the federal workforce, and GAO estimates that they filed from 6.6 percent to 18.2 percent of complaints.

GAO estimates suggest that both permanent and probationary employees who filed complaints were consistently terminated at higher rates than federal employees government-wide. For example, in fiscal year 2018, the termination rate for probationary employees government-wide was 1.1 percent, while the lowest estimated rate of termination among probationary employees who filed a complaint was 10.1 percent. For permanent employees, the overall termination rate was 0.3 percent, while the lowest estimated rate for filers was 2.9 percent.

GAO estimates also suggest that probationary employees who filed complaints were terminated at higher rates than permanent employees who did the same. For example, in fiscal year 2018:

- The lowest estimated termination rate for probationary employees who filed whistleblower disclosures (10.1 percent) exceeded the maximum estimated rate for permanent employees who did the same (5.2 percent).
- The lowest estimated termination rate for probationary employees who filed retaliation complaints (17.4 percent) exceeded the maximum estimated rate for permanent employees who did the same (9.9 percent).
- The lowest estimated termination rate for probationary employees who filed both types (14.1 percent) exceeded the maximum estimated rate for permanent employees who did the same (13.2 percent).

The Office of Special Counsel's (OSC) complaint form allows but does not require complainants to identify whether they are probationary or permanent employees when filing a whistleblower disclosure or retaliation complaint. OSC officials said they try to limit mandatory data fields to the information that is necessary for processing a case, and that they have no plans to do any analysis of employees in their probationary period who file claims. However, the higher rates of termination GAO found for filers generally, and probationary employees specifically, suggests that there could be a risk of unequal treatment. Without first identifying probationary employees who file whistleblower claims, OSC would lack complete data should it decide at some point to analyze the effect of probationary status on filers. Collecting and maintaining such data on every claimant would provide OSC or other entities the ability to analyze termination rates or other issues related to a whistleblower's probationary status.

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Figure

Figure 1: Probationary and Permanent Employees Filing  
Whistleblower Disclosures and Retaliation Complaints,  
Fiscal Year 2018

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**Abbreviations**

eCMS	electronic Case Management System
EHRI	Enterprise Human Resources Integration
MSPB	Merit Systems Protection Board
OPM	Office of Personnel Management
OSC	Office of Special Counsel

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May 28, 2020

The Honorable Ron Johnson  
Chairman  
The Honorable Gary C. Peters  
Ranking Member  
Committee on Homeland Security and Governmental Affairs  
United States Senate

The Honorable Carolyn B. Maloney  
Chair  
The Honorable Jim Jordan  
Ranking Member  
Committee on Oversight and Reform  
House of Representatives

Federal employee whistleblowers—individuals who report allegations of wrongdoing such as a violation of law, abuse of authority, or gross mismanagement—potentially help to safeguard the government from fraud, waste, and abuse. Their willingness to come forward may also help improve government operations. However, whistleblowers risk reprisals from their agencies for their disclosures, including possible demotion, reassignment, or termination. Federal laws are in place to help protect federal employees from workplace retaliation for whistleblowing. The Civil Service Reform Act of 1978 provided the first protections for whistleblower disclosures and created the Office of Special Counsel (OSC) to help protect federal whistleblowers.

More recently, the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 provided additional protections, applicable to most federal employees who experience retaliation for disclosing waste, fraud, or abuse in the federal government. The act is named in honor of Dr. Chris Kirkpatrick, a whistleblower who questioned excessive prescription practices at the Department of Veterans Affairs Medical Center in Tomah, Wisconsin. Dr. Kirkpatrick took his own life after being terminated from that medical center. The act included a provision for us to examine retaliation against whistleblowers who are in the probationary period of their employment with the federal government. Probationary employees—generally those with less than 1 or 2 years of federal service—can be

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especially vulnerable to reprisal because they have fewer protections from adverse personnel actions.<sup>1</sup>

This report (1) analyzes the extent to which employees who filed whistleblower disclosures and retaliation complaints were in a probationary status, (2) analyzes the extent to which these filings were associated with differences in termination rates, and (3) examines OSC procedures related to probationary employees.

To address these objectives, we interviewed relevant OSC officials concerning OSC procedures and responsibilities for collecting and maintaining whistleblower data and also reviewed OSC whistleblower disclosure and retaliation complaint processes and forms used to collect whistleblower data. We also used data from the Office of Special Counsel's OSC 2000 database and data from the Office of Personnel Management's (OPM) Enterprise Human Resources Integration (EHRI) database to create a matching key to identify the probationary status of employees who filed certain complaints with OSC.<sup>2</sup> The matching key is based on variables such as first name, last name, and agency.

The key allowed us to match 82 percent of the OSC complainant records from fiscal year 2014 through 2018 (the most recent full fiscal year available at the time of our analysis). We refer to that group as matched employees. We refer to the 18 percent group we could not match as unmatched employees. Because it is not possible to determine the probationary status for unmatched complaints, the rates of filing among matched complaints may not precisely reflect the overall rates for all probationary employees. To account for this uncertainty, we estimated minimum and maximum rates of filing for permanent and probationary employees. Further, we calculated the number of instances in which matched employees who filed either a whistleblower disclosure or a retaliation complaint were terminated from federal employment. As we did with filing rates, we also estimated minimum and maximum termination rates to account for the uncertainty introduced by unmatched complaints. While other indicators, such as transfers could represent a potential retaliatory action, we focus on terminations because this is the most

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<sup>1</sup>When an individual enters the competitive service, he or she is put on a probationary period which lasts for 1 year. 5 U.S.C. § 3321(a)(1) and 5 C.F.R. §315.801(a). Individuals entering the excepted service may serve a trial period, often for 2 years.

<sup>2</sup>EHRI is an electronic database established by OPM that houses a collection of human resources, payroll, and training data that is used to provide human resources and demographic information on each federal civilian employee.

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serious adverse action for which probationary employees have little protection and because OSC officials indicated that cases with terminations are prioritized.

Importantly, we did not determine (1) whether the disclosures and complaints filed had merit, (2) whether the termination actions were justified, or (3) whether the termination actions were before or after the filing of the whistleblower disclosure or retaliation complaint. Further, we did not assess OSC's review of the filed disclosures and complaints. Because our estimates do not consider these factors, they do not represent proof of a causal relationship between filing and terminations, but rather one indicator of potential risk. For a more detailed description of our methodology see appendix I.

We assessed the reliability of the OSC 2000 data by reviewing relevant documentation, interviewing knowledgeable OSC officials, and electronically testing the data to identify obvious errors or outliers. We assessed the reliability of the EHRI data by reviewing our past analyses that used EHRI data, coordinating with OPM officials knowledgeable about the data, and conducting electronic testing of EHRI to assess the accuracy and completeness of the data used in our analyses. We determined that OSC's data were sufficiently reliable to present the number of complaints filed by type. With regard to probationary status, the data were not available in OSC 2000. As a result, probationary status and termination rates were drawn from EHRI, which we found to be sufficiently reliable for this purpose.

We conducted this performance audit from January 2019 to May 2020 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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## Background

### Whistleblower Protections

OSC is an independent federal investigative and prosecutorial agency. Its primary mission is to safeguard the merit system in federal employment by protecting employees and applicants for federal employment from prohibited personnel practices, especially reprisal for whistleblowing. OSC reviews disclosures of wrongdoing within the federal government

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from current federal employees, former employees, and applicants for federal employment. These individuals, known as whistleblowers, make disclosures of alleged wrongdoing to OSC that the employee reasonably believes evidences either (1) a violation of law, rule, or regulation; (2) gross mismanagement; (3) gross waste of funds; (4) abuse of authority; (5) a substantial and specific danger to public health or safety; or (6) censorship related to research, analysis, or technical information. If a whistleblower believes his or her agency took, threatened to take, or did not take a personnel action because of a protected disclosure, the whistleblower may file a retaliation complaint with OSC.<sup>3</sup> An employee may file a retaliation complaint with OSC even if the protected disclosure was made to another body such as an Inspector General's office rather than OSC.<sup>4</sup>

Various statutory provisions have established protections for federal employee whistleblowers over the years. The Civil Service Reform Act of 1978 provided the first statutory whistleblower protections for disclosures of violations of laws, mismanagement, or gross waste of funds for federal employees, former employees, and applicants for employment.<sup>5</sup> The 1978 act established both the Merit Systems Protection Board (MSPB) and OSC and placed OSC within MSPB.<sup>6</sup> Under the act, OSC was authorized to review allegations of wrongdoing within federal agencies, to investigate and obtain corrective action over allegations of prohibited personnel practices, including whistleblower retaliation, and to initiate disciplinary actions against employees who commit prohibited personnel practices, among other things.

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<sup>3</sup>5 U.S.C. §1214.

<sup>4</sup>Whistleblowers have many options on where to go to disclose wrongdoing, including but not limited to an Inspector General, OSC, a supervisor or someone higher up in management, or a member of Congress or congressional committee. However, to be protected from adverse personnel actions, disclosures involving information that is classified or otherwise protected from public release must be limited to confidential channels, such as Inspectors General, OSC, or Congress.

<sup>5</sup>Pub. L. No. 96-454, 92 Stat. 111 (1978).

<sup>6</sup>MSPB is an independent, quasi-judicial agency that serves the interests of prompt, procedurally simple dispute resolution. MSPB carries out its statutory responsibilities and authorities primarily by adjudicating individual employee appeals and by conducting merit systems studies.



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Later, to strengthen protections for those who claim whistleblower retaliation, Congress passed the Whistleblower Protection Act of 1989.<sup>7</sup> The 1989 act separated OSC from MSPB, making OSC an independent agency. The act also created the individual right of action, allowing whistleblowers to bring their appeals to MSPB after exhausting remedies at OSC. In 2012, the Whistleblower Protection Enhancement Act clarified the scope of protected whistleblowing under the Whistleblower Protection Act and mandated broader outreach to inform federal employees of their whistleblower rights, among other things.<sup>8</sup> Further, the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, among other items, enhanced disciplinary penalties for supervisors who retaliate against whistleblowers.<sup>9</sup>

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## Probationary Status Employees

Federal employees in the civil service are required to serve a period of probation when they begin serving initial appointments. These periods are typically for 1 to 2 years, and they allow an agency to evaluate the employee before the appointment becomes final. Our prior work notes that the probationary period provides a way for agencies to dismiss poorly performing employees or those engaging in misconduct before the process to do so becomes more complex and lengthy.<sup>10</sup> In particular, we concluded that the probationary period could be more effectively used by agencies, which in turn could help agencies deal with poor performers more effectively. According to MSPB, the probationary period, if used fully, is one of the most helpful assessment tools available for supervisors

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<sup>7</sup>Pub. L. No. 101-12, 103 Stat. 16 (1989).

<sup>8</sup>Pub. L. No. 112-199, 126 Stat. 1465 (2012).

<sup>9</sup>Pub. L. 115-73, 131 Stat. 1235 (2017). For the first offense, the proposed adverse action is to have not less than a 3-day suspension plus any additional supplemental discipline the head of the agency deems appropriate. For the second offense, the proposed adverse action is removal. Codified, as amended, at 5 U.S.C. § 7515. The subsequent reauthorization of OSC included technical corrections to this and other provisions contained in the Dr. Chris Kirkpatrick Whistleblower Protection Act and further supported whistleblowers by requiring agencies (in consultation with OSC and the OPM) to develop criteria to promote the protection of whistleblowers for use in evaluating the performance of supervisory employees, among other things. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, div. A, title X, § 1097(d)(1), 131 Stat. 1283, 1619-20. Codified at 5 U.S.C. § 4302(b).

<sup>10</sup>GAO, *Federal Employee Misconduct: Actions Needed to Ensure Agencies Have Tools to Effectively Address Misconduct*, [GAO-18-48](#) (Washington, D.C.: July 16, 2018) and *Federal Workforce: Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance*, [GAO-15-191](#) (Washington, D.C.: Feb. 6, 2015).

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to determine an individual's potential to fulfill the requirements of the specific position.

During the probationary period, the employee is still technically considered an applicant for employment. As such, probationary employees do not have the same protections against adverse personnel actions as other employees. Prior to firing a probationary employee for poor job performance or misconduct, an agency does not need to afford the same procedural protections required before removing a non-probationary employee. Therefore, it is reasonable to expect that probationary employees will be terminated at higher rates than permanent employees. Probationary employees also lack the same rights to appeal adverse actions, such as demotions or removals, to the MSPB that other federal employees have.

However, probationary employees do have some legal protections. For example, probationary employees may file a complaint with OSC if they believe a personnel action such as reassignment, demotion, or removal was retaliation for whistleblowing. If OSC determines there are reasonable grounds to believe that retaliation has occurred, it may seek corrective action, including filing a petition with the MSPB. Additionally, a probationary employee who has filed a complaint with OSC may subsequently file an individual right of action with MSPB.<sup>11</sup>

Probationary employees also may appeal to MSPB if they believe they have been fired for partisan political reasons or because of discrimination based on their marital status.<sup>12</sup> Probationary employees also have the right to file a complaint of discrimination with their agencies and subsequently file an appeal of a final agency decision with the Equal Employment Opportunity Commission or a civil action in federal district court if they believe that they have been discriminated against based on

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<sup>11</sup>A probationary employee may file with the MSPB within 60 days after notification that OSC has terminated its investigation into the alleged retaliation or 120 days after the employee filed a case with OSC where OSC has not notified the employee that it will seek corrective action on behalf of the employee. 5 U.S.C. §§ 1214 and 1221.

<sup>12</sup>A probationary employee, whose termination is based (in whole or in part) on conditions arising before appointment, also may appeal to the MSPB on the ground that the termination was not carried out in accordance with procedural requirements for such terminations. These appeal rights extend only to probationary employees in the competitive service. 5 C.F.R. § 315.806.

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their race, color, religion, sex, national origin, age, disability, or genetic information.<sup>13</sup>

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**Existing Data are  
Insufficient to  
Determine if the Rate  
of Filing  
Whistleblower  
Disclosures or  
Retaliation  
Complaints Varies by  
Probationary Status**

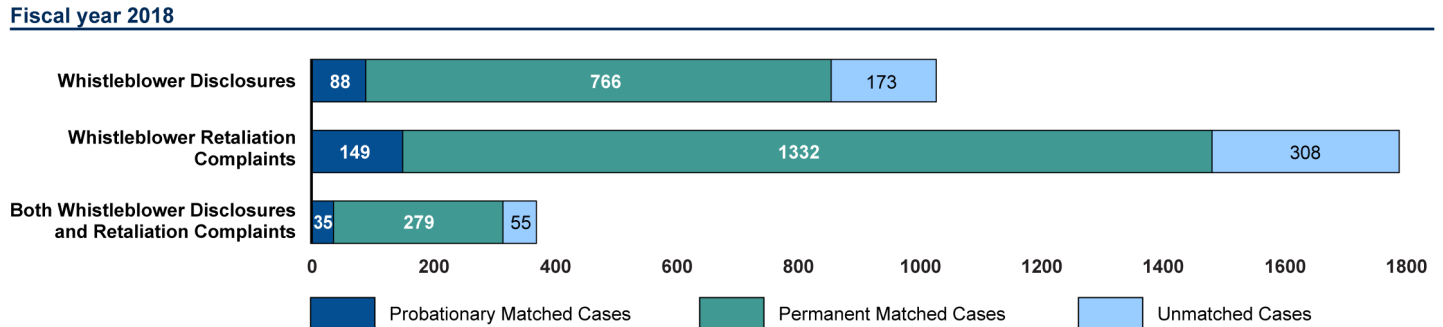
The average annual total of probationary and permanent federal employees from fiscal years 2014 through 2018 was approximately 1.9 million. During the same time period, 14,043 federal employees filed whistleblower disclosures, whistleblower retaliation complaints, or both. That is, an average of roughly 2,800 employees—about 0.15 percent of the federal workforce—filed complaints each year.

For whistleblower disclosure complaints, whistleblower retaliation complaints, or both over this 5-year period, we estimate that probationary employees filed between 6.6 percent and 18.2 percent of complaints, while permanent employees filed between 76.8 percent and 93.4 percent of complaints. Because existing data are insufficient to determine probationary status of employees for more than 18 percent of each year's complaints, it is not possible to determine whether probationary employees file at lower, comparable, or higher rates than their prevalence (about 13.5 percent, on average, across this time period) in the overall employee population. Figure 1 shows how many employees we could determine through matching were in probationary and permanent status when they filed whistleblower disclosure or retaliation complaints, along with the numbers of unmatched complaints for fiscal year 2018. The pattern is similar for the other years we examined; estimates for each year are available in appendix II.

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<sup>13</sup>For allegations of age discrimination, a complainant can forego the administrative process and file a civil action in federal district court after giving the Equal Employment Opportunity Commission notice of intent to do so.

**Figure 1: Probationary and Permanent Employees Filing Whistleblower Disclosures and Retaliation Complaints, Fiscal Year 2018**



Source: GAO analysis of data from the Office of Special Counsel and Office of Personnel Management. | GAO-20-436

We used data from the Office of Special Counsel's (OSC) OSC 2000 database and data from the Office of Personnel Management's (OPM) Enterprise Human Resources Integration (EHRI) database to create a matching key to identify the probationary status of employees who filed certain complaints with OSC. The matching key is based on variables such as first name, last name, and agency. The key allowed us to match 82 percent of the OSC complainant records from fiscal year 2014 to 2018. We refer to that group as matched employees. We refer to the 18 percent group we could not match as unmatched employees. EHRI is an electronic database established by OPM that houses a collection of human resources, payroll, and training data that is used to provide human resources and demographic information on each federal civilian employee.

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## Estimates Suggest Probationary Employees Who Filed Complaints Were Consistently Terminated at Higher Rates than Permanent Employees Who Filed, and at Higher Rates than Employees Government-wide

Overall, probationary employees—whether or not they have filed a complaint with OSC—are terminated at a higher rate than permanent employees, which is consistent with expectations that determining the suitability of employees for the particular position is a major purpose of the probationary period. In fiscal year 2018, 1.1 percent of probationary employees were terminated, regardless of whether they filed a whistleblower disclosure or retaliation complaint. In the same year, 0.3 percent of permanent employees were terminated, regardless of filing status.<sup>14</sup> These percentages were consistent across the years we studied. As discussed below, estimated termination rates for permanent and probationary employees who filed either or both types of complaints we examined consistently exceeded these government-wide rates. Specifically, among permanent employees who filed, estimated termination rates could be anywhere from 1.7 to 17.1 percentage points higher than the 0.4 percent average for all permanent employees over this period. Among probationary employees who filed, estimated termination rates could be from 5.3 to 72.6 percentage points higher than the 1.3% average for these employees government-wide.<sup>15</sup>

**Whistleblower disclosures.** Estimated termination rates among employees who filed whistleblower disclosures from fiscal years 2014 to 2018 were higher than termination rates among all federal employees. This applies to both probationary and permanent employees. Specifically, estimated termination rates for probationary employees who filed were higher than estimated termination rates for permanent employees who filed. For example, as shown in table 1, in fiscal year 2018:

- The lowest estimated rate (minimum) of termination among probationary employees who filed whistleblower disclosures was 10.1

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<sup>14</sup>We use terminations as one example of an adverse employment action that could potentially signal retaliation. These government-wide termination rates reflect a useful baseline for terminations that occur among employees who file. As such, differences in termination rates among filers represent one potentially proxy for retaliation risk. While other indicators, such as transfers, could represent a potential retaliatory action, we focus on terminations because this is the most serious adverse action for which probationary employees have little protection and because OSC officials indicated that complaints with terminations are prioritized.

<sup>15</sup>While these differences demonstrate that termination rates are higher among employees who file, and suggest that this difference may be more pronounced for probationary employees, they should be interpreted with caution. Specifically, because these estimates do not consider the timing or merit of terminations, or other factors potentially associated with terminations, they do not represent proof of a causal relationship between filing and terminations, but rather one indicator of potential risk.

percent, compared to the overall 1.1 percent termination rate for all probationary employees.

- The lowest estimated rate (minimum) of termination among permanent employees who filed whistleblower disclosures was 2.9 percent, compared to the overall 0.3 percent termination rate for all permanent employees.
- Taking unmatched complaints into account, we estimated that the termination rate for probationary employees who filed whistleblower disclosures could be any percentage from 10.1 to 46.9 percent.
- Taking unmatched complaints into account, we estimated that the termination rate for permanent employees who filed whistleblower disclosures could be any percentage from 2.9 to 5.2 percent.
- The minimum estimated termination rate for probationary employees (10.1 percent) who filed whistleblower disclosures exceeds the maximum estimated rate for permanent employees who filed whistleblower disclosures (5.2 percent).

**Table 1: Estimated Termination Rates for Permanent and Probationary Employees Who Filed Whistleblower Disclosures**

Fiscal year	Estimated Minimum Termination Rate of Permanent Employees Who Filed Whistleblower Disclosures	Termination Rate of Matched <sup>a</sup> Permanent Employees Who Filed Whistleblower Disclosures	Estimated Maximum Termination Rate of Permanent Employees Who Filed Whistleblower Disclosures	Estimated Minimum Termination Rate of Probationary Employees Who Filed Whistleblower Disclosures	Termination Rate of Matched <sup>a</sup> Probationary Employees Who Filed Whistleblower Disclosures	Estimated Maximum Termination Rate of Probationary Employees Who Filed Whistleblower Disclosures
2014	2.1%	3.0%	5.2%	6.6%	17.3%	44.5%
2015	2.9%	3.7%	5.8%	9.8%	19.8%	45.1%
2016	2.9%	3.8%	6.0%	8.8%	21.9%	54.7%
2017	2.6%	3.2%	4.9%	11.2%	21.8%	48.6%
2018	2.9%	3.5%	5.2%	10.1%	20.5%	46.9%

Source: GAO analysis of Office of Special Counsel and Office of Personnel Management data. | GAO-20-436

<sup>a</sup>We used data from the Office of Special Counsel's (OSC) OSC 2000 database and data from the Office of Personnel Management's (OPM) Enterprise Human Resources Integration (EHRI) database to create a matching key to identify the probationary status of employees who filed certain complaints with OSC. The matching key is based on variables such as first name, last name, and agency. The key allowed us to match 82 percent of the OSC complainant records from fiscal year 2014 to 2018. We refer to that group as matched employees. We refer to the 18 percent group we could not match as unmatched employees. EHRI is an electronic database established by OPM that houses a collection of human resources, payroll, and training data that is used to provide human resources and demographic information on each federal civilian employee

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**Whistleblower retaliation complaints.** We found that the lowest possible rates (minimums) of termination for employees who filed whistleblower retaliation complaints were higher than termination rates among all federal employees, both for probationary and permanent employees. Specifically, estimated termination rates for probationary employees who filed were higher than estimated termination rates for permanent employees who filed. For example, as shown in table 2, in fiscal year 2018:

- The lowest estimated rate (minimum) of termination for probationary employees who filed retaliation complaints was 17.4 percent, compared to the overall 1.1 percent termination rate for all probationary employees.
- The lowest estimated rate (minimum) of termination for permanent employees who filed retaliation complaints was 5.5 percent, compared to the overall 0.3 percent termination rate for all permanent employees.
- Taking unmatched complaints into account, we estimated that the termination rate for probationary employees who filed whistleblower retaliation complaints could be any percentage from 17.4 to 69.4 percent.
- Taking unmatched complaints into account, we estimated that the termination rate for permanent employees who filed retaliation complaints could be any percentage from 5.5 to 9.9 percent.
- The minimum estimated termination rate for probationary employees who filed retaliation complaints (17.4 percent) exceeds the maximum estimated rate for permanent employees who filed retaliation complaints (9.9 percent).

**Table 2: Estimated Termination Rates of Permanent and Probationary Employees Who Filed Retaliation Complaints**

Fiscal year	Estimated Minimum Termination Rate of Permanent Employees Who Filed Retaliation Complaints	Termination Rate of Matched <sup>a</sup> Permanent Employees Who Filed Retaliation Complaints	Estimated Maximum Termination Rate of Permanent Employees Who Filed Retaliation Complaints	Estimated Minimum Termination Rate of Probationary Employees Who Filed Retaliation Complaints	Termination Rate of Matched <sup>a</sup> Probationary Employees Who Filed Retaliation Complaints	Estimated Maximum Termination Rate of Probationary Employees Who Filed Retaliation Complaints
2014	4.3%	5.8%	9.5%	13.5%	34.1%	73.9%
2015	4.4%	5.7%	8.8%	12.7%	26.9%	62.7%
2016	5.5%	7.1%	11.1%	12.3%	27.0%	63.9%
2017	4.7%	5.9%	9.0%	15.6%	33.3%	68.8%
2018	5.5%	6.8%	9.9%	17.4%	36.2%	69.4%

Source: GAO analysis of OSC and OPM data. | GAO-20-436

<sup>a</sup>We used data from the Office of Special Counsel's OSC 2000 database and data from the Office of Personnel Management's (OPM) Enterprise Human Resources Integration (EHRI) database to create a matching key to identify the probationary status of employees who filed certain complaints with OSC. The matching key is based on variables such as first name, last name, and agency. The key allowed us to match 82 percent of the OSC complainant records from fiscal year 2014 to 2018. We refer to that group as matched employees. We refer to the 18 percent group we could not match as unmatched employees. EHRI is an electronic database established by OPM that houses a collection of human resources, payroll, and training data that is used to provide human resources and demographic information on each federal civilian employee.

**Both whistleblower disclosures and retaliation complaints.** For the category of employees who filed both whistleblower disclosures and retaliation complaints, termination rates were higher than termination rates among all federal employees, both for probationary and permanent employees. Specifically, estimated termination rates for probationary employees who filed were higher than estimated termination rates for permanent employees who filed. For example, as shown in table 3, in fiscal year 2018:

- The lowest estimated rate (minimum) of terminations among probationary employees who filed both whistleblower disclosures and retaliation complaints was 14.1 percent, compared to the overall 1.1 percent termination rate for all probationary employees.
- The lowest estimated rate (minimum) of terminations among permanent employees who filed both types of complaints was 7.8 percent, compared to the overall 0.3 percent termination rate for all permanent employees.
- Taking unmatched complaints into account, we estimated that the termination rate for probationary employees who filed both types of complaints could be any percentage from 14.1 to 56.3 percent.



- Taking unmatched complaints into account, we estimated that the termination rate for permanent employees who filed both types of complaints could be any percentage from 7.8 to 13.2 percent.
- The minimum estimated termination rate for probationary employees who filed both a whistleblower disclosure and a retaliation complaint (14.1 percent) exceeds the maximum estimated rate for permanent employees who, filed both types of complaints (13.2 percent).

**Table 3: Estimated Termination Rates of Permanent and Probationary Employees Who Filed Both Whistleblower Disclosures and Retaliation Complaints**

<b>Fiscal year</b>	<b>Estimated Minimum Termination Rate of Permanent Employees Who Filed Both Whistleblower Disclosures and Retaliation Complaints</b>	<b>Termination Rate of Matched<sup>a</sup> Permanent Employees Who Filed Both Whistleblower Disclosures and Retaliation Complaints</b>	<b>Estimated Maximum Termination Rate of Permanent Employees Who Filed Both Whistleblower Disclosures and Retaliation Complaints</b>	<b>Estimated Minimum Termination Rate of Probationary Employees Who Filed Both Whistleblower Disclosures and Retaliation Complaints</b>	<b>Termination Rate of Matched<sup>a</sup> Probationary Employees Who Filed Both Whistleblower Disclosures and Retaliation Complaints</b>	<b>Estimated Maximum Termination Rate of Probationary Employees Who Filed Both Whistleblower Disclosures and Retaliation Complaints</b>
2014	9.5%	11.7%	17.5%	23.1%	40.9%	66.7%
2015	5.7%	7.0%	10.2%	14.3%	27.5%	61.0%
2016	4.7%	5.7%	8.3%	18.7%	29.8%	56.0%
2017	5.5%	6.5%	9.2%	20.0%	32.5%	58.5%
2018	7.8%	9.3%	13.2%	14.1%	25.7%	56.3%

Source: GAO analysis of OSC and OPM data. | GAO-20-436

<sup>a</sup>We used data from the Office of Special Counsel's OSC 2000 database and data from the Office of Personnel Management's (OPM) Enterprise Human Resources Integration (EHRI) database to create a matching key to identify the probationary status of employees who filed certain complaints with OSC. The matching key is based on variables such as first name, last name, and agency. The key allowed us to match 82 percent of the OSC complainant records from fiscal year 2014 to 2018. We refer to that group as matched employees. We refer to the 18 percent group we could not match as unmatched employees. EHRI is an electronic database established by OPM that houses a collection of human resources, payroll, and training data that is used to provide human resources and demographic information on each federal civilian employee.

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As previously discussed, probationary employees being terminated at a higher rate than permanent employees is consistent with expectations, given that determining the suitability of employees for the particular position is a major purpose of the probationary period. However, the higher rate of termination for filers generally, and the higher estimated rates for probationary employees specifically, suggests a potential relationship between filing and terminations that may disproportionately impact probationary employees. As stated earlier, we did not determine whether the disclosures and complaints filed had merit, whether termination actions were justified, or whether the terminations occurred before or after the filing of the whistleblower disclosure or retaliation complaint. As such, further examination would be needed to fully understand these relationships.

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## OSC Does Not Require Filers to Identify Probationary Status

OSC requires federal employees to use OSC Form-14 to submit a complaint alleging a prohibited personnel practice or a disclosure. Complainants begin the process by selecting a checkbox based on their particular complaint or disclosure. Depending on their selections, complainants are asked to provide additional information. Data fields on the form that are marked with an asterisk are mandatory. OSC instructions state that the agency cannot process forms lacking necessary information.

OSC Form-14 includes a non-mandatory data field that asks whether the complainant is currently a probationary employee.<sup>16</sup> Because it is not a required field, complainants may choose not to provide that information. According to OSC, it has designated only a limited amount of requested information as mandatory. OSC officials said that to avoid creating impediments for employees to file complaints, mandatory fields are limited to the information that is necessary for processing a complaint.

In August 2019, according to OSC officials, OSC transitioned to a new electronic Case Management System (eCMS). This new system's electronic version of the complaint form includes a data field as part of the question about employee status. Here employees can check off probationary status for OSC to capture and input complainants' probationary status. According to OSC, when complainants provide this information, the agency is able to track the information in eCMS. OSC officials estimated that a number of filers voluntarily provide information

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<sup>16</sup>OSC lacks data on how often employees provide this information. OSC, with its new case processing system now has the capability to collect this information electronically..

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on probationary status; however, the officials could not specify to what extent filers provide that information in their initial filings, or the extent to which this data is collected during processing of the case.

OSC's mission is to "safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing." Additionally, OSC's 2017-2022 strategic plan includes an objective to ensure agencies provide timely and appropriate outcomes for referred whistleblower disclosures. One of the agency's strategies to help achieve that objective is to monitor all whistleblower disclosures and referrals to agencies to identify trends or systemic challenges. Further, *Standards for Internal Control in the Federal Government* states that management should use quality information to achieve the entity's objectives. OSC officials stated that OSC's routine administration of disclosures and complaints allow them to identify trends. However, this process does not consistently use standard, structured data to identify trends, but rather relies on the personal experience of investigators. Without consistent quality information, including information on probationary status, OSC cannot have reasonable assurance that it is adequately identifying trends and challenges.

OSC told us that because of limited resources it currently has no plans to conduct data studies or analyses of employees in their probationary period who file whistleblower claims. As previously discussed, the higher rates of termination we found for complainants, and in particular for probationary employees, suggests a potential relationship that warrants further examination. However, without consistent identification of probationary employees who file whistleblower claims, OSC will continue to lack complete data that would enable this analysis and support OSC's goal of identifying trends and systemic challenges. Collecting and maintaining such information on every claimant, which could now be more easily done under eCMS, would provide OSC or other entities the ability to analyze termination rates or other issues related to a whistleblower's probationary status. Having more complete information on trends and challenges could help OSC to ensure that its current level of resources are being distributed to support its mission.

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## Conclusions

Probationary employees, by definition, are relatively new to their positions and are thus uniquely vulnerable to retaliation from employers due to the limited protections afforded them. Our estimates demonstrate that employees who file whistleblower disclosures and complaints of retaliation are terminated at a higher rates than employees government-

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wide, and suggest that these differences may be more pronounced for probationary employees. OSC has roles and responsibilities related to understanding key trends and challenges for whistleblowers, and could potentially further investigate whether these differences indicate a particular risk for probationary employees. However, they are not collecting data on probationary status that would enable them to do so. Without consistent information on probationary status, OSC is unable to properly analyze the effect of that status on those who file whistleblower disclosures, retaliation complaints, or both; and thus, cannot have reasonable assurance there is equal treatment of probationary employees.

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## Recommendation for Executive Action

The Office of Special Counsel should require federal employees who are filing whistleblower disclosures or retaliation complaints to identify on their complaint forms their status as a permanent or probationary employee.

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## Agency Comments and Our Evaluation

We provided a draft of this report to OSC for review and comment. In its written comments, reproduced in appendix III, OSC disagreed with our conclusions and recommendation. While we continue to believe that our conclusions and recommendation are fully supported by the evidence—as discussed below—we made minor clarifications to our report to more clearly state the nature of our findings in response to OSC’s comments. OSC also provided technical comments, which we incorporated as appropriate.

In its written comments, OSC expressed a concern that our report overreaches. OSC stated that our report appears to draw its conclusions based on correlative instead of causative data. Specifically, OSC stated that our report appears to connect the expected greater rate of termination of probationary employees to whistleblower retaliation, based on correlative data and without taking into account key factors such as justification for the termination, timing in relation to the disclosure or the filing of a complaint, or the merit of the individual’s complaint. Absent this type of crucial, detailed analysis that could help determine causation, OSC stated that few, if any, conclusions can be drawn regarding alleged retaliation experienced by probationary employees.

As stated in our draft report, and noted by OSC, our estimates demonstrate that employees who file whistleblower disclosures and complaints of retaliation are terminated at higher rates than employees government-wide, and the estimates suggest that these differences may

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be more pronounced for probationary employees. Our draft report acknowledged that we did not assess certain factors: (1) whether the disclosures and complaints filed had merit, (2) whether the termination actions were justified, or (3) whether the termination actions occurred before or after the filing of the whistleblower disclosure or retaliation complaint. Because we did not control for these factors, we did not speculate about what caused these differences to occur or make causal claims about the relationship between probationary status and whistleblower retaliation.

Instead, we stated that further examination and analysis would be needed to fully understand this indicator of potential risk. As we noted in the report, such analysis would require complete and accurate data on probationary status—data which OSC does not currently collect. Therefore, we recommended that OSC collect more complete data so that OSC could, if it chose, do exactly the type of crucial, detailed analysis that it says could help determine causation. Accordingly, we continue to believe that our recommendation for OSC to collect complete and accurate data on probationary status is warranted as such analysis is not possible without it.

OSC also expressed a concern that our report appears to suggest that it perhaps may not be doing enough to protect probationary employees. OSC asserted that it already has reasonable assurance that it is appropriately protecting probationary employees from unlawful retaliation. We did not assess OSC's review of the filed disclosures and complaints, and we made no claims or implications about whether OSC's protection of whistleblowers is adequate or appropriate. Our report uses one specific outcome (terminations) as an example of an adverse employment action that could potentially signal retaliation. We did not present any findings about whether terminations were warranted, whether employees were appropriately protected, or any other information related to OSC's handling of cases. We continue to believe, however, that OSC's ability to run relevant data reports is constrained when the necessary data are not collected for the total population of filers. Without consistent quality information, including information on probationary status of all filers, OSC cannot have reasonable assurance that it is adequately identifying trends and challenges.

Lastly, OSC stated that making employment status fields mandatory is onerous and unnecessary and that singling out probationary status from the list seems arbitrary and incomplete. The agency stated that the form includes the option for the individual to self-identify as a probationary

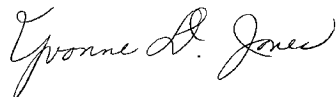
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employee, which OSC believes is sufficient. We do not believe that changing a field from optional to mandatory would place an undue burden on filers or OSC.

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We are sending copies of this report to relevant congressional committees, the Special Counsel and other interested parties. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-2717 or [jonesy@gao.gov](mailto:jonesy@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix IV.



Yvonne D. Jones  
Director

Strategic Issues

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# Appendix I: Objectives, Scope, and Methodology

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Our objectives were to (1) analyze the extent to which employees who filed whistleblower disclosures and retaliation complaints were in a probationary status, (2) analyze the extent to which these filings were associated with differences in termination rates, and (3) examine Office of Special Counsel (OSC) procedures related to probationary employees.

We reviewed the Office of Special Counsel's OSC 2000 database design documentation and submitted questions to OSC officials to determine what data were available. OSC does not collect or maintain data that identify whistleblowers and retaliation complaints filed by employees in probationary status in OSC 2000. In late August of 2019 OSC officials state that in late August of 2019 OSC launched a new system called the electronic Case Management System (eCMS) to replace OSC 2000. We submitted a series of questions pertaining to how OSC will collect and maintain probationary status information of employees filing complaints in eCMS. These questions pertained to the functionality of and reporting capability of eCMS in addition to OSC's ability to conduct analysis of complainants who are in probationary status using eCMS.

We obtained all closed whistleblower disclosure case data and closed prohibited personnel practices complaint data with allegations related to whistleblower retaliation from 2014 to 2018 from OSC's previous electronic case management system (OSC 2000). We also requested and obtained 2014 to 2018 OPM Enterprise Human Resources Integration (EHRI) data. OSC 2000 is a case management system, so it was necessary to use combinations of variables associated with complaints filed, such as first name, last name, agency, email address, and job series to identify individual employees. We analyzed employees from federal agencies that submit human resources information to OPM. Factors such as complaints filed anonymously, name changes, and spelling variations could affect the precision of these counts of employees. However, because we are presenting these data in broad ranges throughout the report, these limitations do not likely affect our overall findings and message.

After identifying employees in the OSC 2000 data, we then matched OSC 2000 data to OPM's EHRI data. This was necessary because the OSC 2000 database does not include the probationary status of people filing complaints with OSC. We started by matching unique name and agency combinations. If that was not sufficient, we attempted to match using variables such as state, job series, and employee work email address. We matched OSC 2000 data to EHRI data using case data from OSC 2000 and federal probationary status as of the end of the fiscal year date

from EHRI. We acknowledge that matching using these dates may not be precise, but because we present our results in ranges, we do not believe a more precise matching of dates would have resulted in substantive differences in the results overall.

We matched 82 percent of the complaints in OSC 2000 to employees in EHRI. . Because it is not possible to determine the probationary status for unmatched cases, the rates of filing among matched cases may not precisely reflect the overall rates for all probationary employees. To account for this uncertainty, we estimated minimum and maximum rates of filing for permanent and probationary employees, and present these ranges in addition to the specific matched rates. Further, we calculated the number of instances in which matched employees who filed either a whistleblower disclosure or a retaliation complaint were terminated from federal employment. As we did with filing rates, we also estimated minimum and maximum termination rates to account for the uncertainty introduced by unmatched cases. Terminations were used because they represent adverse consequences for employees which could indicate retaliation. While other indicators, such as transfers could represent a potential retaliatory action, we focus on terminations because this is the most serious adverse action for which probationary employees have the little protection, and because OSC officials indicated that complaints with termination are prioritized. We did not determine (1) whether the disclosures or complaints had merit, (2) whether the termination actions were justified, or (3) whether the termination actions were before or after the filing of the whistleblower disclosure or retaliation complaint. Because these estimates do not consider the timing or merit of terminations, or other factors potentially associated with terminations, they do not represent proof of a causal relationship between filing and terminations, but rather one indicator of potential risk.

To produce reasonably conservative estimates, we made certain assumptions in estimating the minimum and maximum rates in our ranges. Specifically, for unmatched cases we assumed that unknown characteristics, including probationary status and termination rate could be as much as 3.5 times their observed rate in known data. We believe these assumptions are reasonably conservative. While it is not impossible for this small group of unmatched complaints to be even more skewed, there is no evidence to suggest such an extreme assumption would be warranted.

We assessed the reliability of the OSC 2000 and EHRI databases for the purposes of using limited data from these databases for our own analysis.

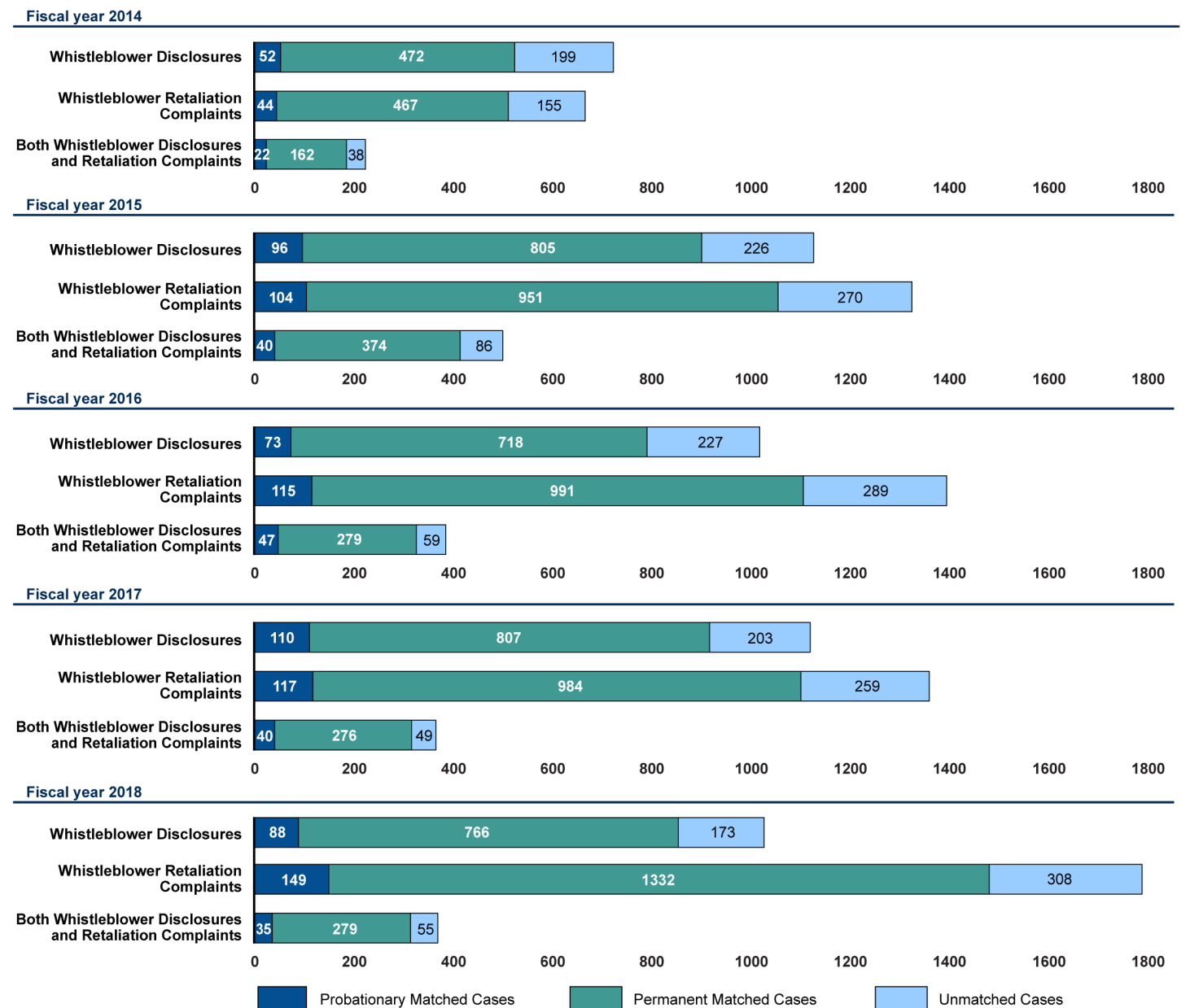


We reviewed agency documents, electronically tested data for missing data and outliers, and submitted questions to agency officials about these databases. These two databases are the only sources of data that can be compared to determine the probationary status of individuals filing complaints with OSC. We determined that OSC's data were sufficiently reliable to present the number of complaints filed by type. With regard to probationary status, the data were not available in OSC 2000. As a result, probationary status and termination rates were drawn from EHRI, which we found to be sufficiently reliable for this purpose.

We conducted this performance audit from January 2019 to May 2020 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

# Appendix II: Employees Filing Whistleblower Disclosures and Retaliation Complaints, Fiscal Years 2014-2018

The figure shown below details the distribution of probationary matched, permanent matched, and unmatched complaints for fiscal years 2014-2018.



Source: GAO analysis of data from the Office of Special Counsel and Office of Personnel Management. | GAO-20-436

Note: We used data from the Office of Special Counsel's OSC 2000 database and data from the Office of Personnel Management's (OPM) Enterprise Human Resources Integration (EHRI) database

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**Appendix II: Employees Filing Whistleblower  
Disclosures and Retaliation Complaints, Fiscal  
Years 2014-2018**

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to create a matching key to identify the probationary status of employees who filed certain complaints with OSC. The matching key is based on variables such as first name, last name, agency, and other variables. The key allowed us to match 82 percent of the OSC complainant records from fiscal year 2014 to 2018. We refer to that group as matched employees. We refer to the 18 percent group we could not match as unmatched employees. EHRI is an electronic database established by OPM that houses a collection of human resources, payroll, and training data that is used to provide human resources and demographic information on each federal civilian employee

# Appendix III: Comments of the Office of Special Counsel



The Special Counsel

U.S. OFFICE OF SPECIAL COUNSEL  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

April 20, 2020

Yvonne D. Jones  
Director  
Strategic Issues Team  
U.S. Government Accountability Office  
441 G St. NW  
Washington, D.C. 20226

**VIA ELECTRONIC MAIL**

Dear Ms. Jones:

As the premier whistleblower protection agency for the federal government, the Office of Special Counsel (OSC) welcomes analysis and findings that serve to underscore and strengthen protections for whistleblowers. Accordingly, I thank the Government Accountability Office (GAO) team for their hard work in assessing the relationship between probationary status and whistleblower retaliation. GAO's effort to analyze the number of individuals who fall into this special category is complementary to OSC's redesign of its own electronic complaint form to include a "permanent or probationary status" identifier. GAO's analysis shows that individuals who blow the whistle, and help to identify waste, fraud, abuse, mismanagement, or dangers to public health and safety, come forward regardless of their employment status. Unfortunately, I was disappointed to see that GAO's report appears to draw its conclusions based on correlative instead of causative data, resulting in diminished utility of the report and its findings for policymakers.

GAO's report rightly recognizes that probationary status, by design, limits an employee's civil service protections to allow federal employers an opportunity to assess individuals prior to committing to permanent status. Although their civil service protections are limited, probationary employees are still provided protections from whistleblower retaliation, and OSC works diligently to prevent and remedy any such retaliation. Indeed, GAO's data and analysis show that probationary employees are aware of these protections and do indeed file with OSC. Beyond this core data on how many probationary employees seek OSC's assistance, however, I am concerned that GAO's report overreaches. The report appears to conclude that probationary employees who file complaints are terminated at significantly higher rates than permanent employees. This is hardly surprising. Probationary employees, by the very nature of their non-permanent status in the civil service design structure, will be terminated at greater rates than permanent employees. As discussed earlier, and as GAO expressly states in both the current and a number of earlier reports, this is an intentional feature (and valuable tool when used appropriately) of the civil service system. In fact, the report refers directly to a prior GAO report finding that agencies could more effectively use the probationary period to deal with poor performers.

In this report, however, GAO appears to connect the expected greater rate of termination of probationary employees instead to whistleblower retaliation, based on correlative data and without taking into account key factors such as justification for the termination, timing in relation to the disclosure or the filing of a complaint, or merit of the individual's complaint. Absent this type of crucial, detailed analysis that could help determine causation, I believe few, if any, conclusions can be drawn regarding any alleged retaliation experienced by probationary employees.

Disappointingly, the report also appears to suggest that OSC perhaps may not be doing enough to protect probationary employees. That is incorrect. Of the nearly 6,000 cases that OSC receives each year from all types of federal employees, the vast majority are closed after review or investigation for lack of jurisdiction, absence of merit, or deferral to another remedial scheme. The same holds true for probationary employee filings because OSC uses the same evidentiary standards and procedures to assess allegations regardless of employment status. Therefore, only a small percentage of the already comparatively small number of probationary employee filings that OSC receives merit further action. Furthermore, a key factor in analyzing a retaliation claim is the temporal relationship between the disclosure or complaint and the personnel action. Absent consideration of the three factors discussed above, the conclusion risks significantly overstating the connection between probationary status and whistleblower retaliation.

Based on its questionable conclusions, GAO's report recommends that OSC require individuals to identify their probationary or permanent status on its electronic complaint form. For the reasons stated above, OSC does not believe GAO's findings justify the recommendation. As GAO's report indicates, OSC limited the number of mandatory fields in its complaint form to only that information that is absolutely necessary to process an individual's case. This was purposeful so as to avoid requiring lengthy forms or otherwise creating impediments for federal workers to file complaints. The civil service system is a complex scheme comprised of different categories of employees, multiple hiring authorities, and various pay structures. For example, the employment status question on the complaint form has 22 options broken down into four separate categories including Competitive Service, Excepted Service, Senior Executive Service or Executive Level, and Other. Making all of these fields mandatory is onerous and unnecessary, and singling out probationary status from the list seems arbitrary and incomplete. Furthermore, the form does include the option for the individual to self-identify as a probationary employee, which OSC believes is sufficient to identify such individual filers.

Irrespective of identifying the probationary status of a filer on the complaint form, OSC already has reasonable assurance that it is appropriately protecting probationary employees from unlawful retaliation. First, as described above, OSC provides equal treatment in its review and assessment of cases regardless of an individual's employment status. Second, given its small and specialized staff, OSC has developed regular mechanisms to identify and analyze trends in our workload. For example, management meets monthly to discuss common issues arising in prohibited personnel practice cases. Because of this regular communication, OSC is able to examine systemic issues in real time, run relevant data reports, and respond quickly and consistently to address any areas of concern. In addition, with OSC's new electronic complaint

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**Appendix III: Comments of the Office of  
Special Counsel**

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form, the agency will be able to better understand the precise percentage and number of probationary employees who seek OSC's assistance.

GAO undertook the important and difficult task of reviewing the overlap of whistleblower retaliation and probationary status for federal employees. I again wish to thank them for their efforts in this review. I am nonetheless concerned that GAO drew unfounded conclusions in its review as a result of an incomplete consideration of such factors as the justification for a probationary employee's termination, the timing in relation to disclosure or complaint, and the merit of the complaint filed by the probationary employee. GAO's reports can, and often do, result in legislative proposals and changes. As a result, GAO must provide reasonable assurance that its findings are based on the full set of data and incorporate all relevant factors. Regrettably, the critical omissions in this report severely diminish the value and veracity of the conclusions drawn and recommendations made in the report.

Kind regards,

A handwritten signature in black ink, appearing to read "Henry J. Kerner", with a stylized flourish at the end.

Henry J. Kerner  
*Special Counsel*

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# Appendix IV: GAO Contact and Staff Acknowledgments

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## GAO Contact

Yvonne D. Jones at (202) 512-2717 or [jonesy@gao.gov](mailto:jonesy@gao.gov)

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## Staff Acknowledgments

In addition to the contact named above, Clifton G. Douglas Jr. (Assistant Director), Katherine Wulff (Analyst-In-Charge), Michael Bechetti, Karin Fangman, Steven Flint, Robert Gebhart, Steven Putansu and Wesley Sholtes made key contributions to this report.

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