

AMENDMENT NO. \_\_\_\_\_ Calendar No. \_\_\_\_\_

Purpose: In the nature of a substitute.

**IN THE SENATE OF THE UNITED STATES—116th Cong., 1st Sess.**

**H. R. 135**

To amend the Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002 to strengthen Federal antidiscrimination laws enforced by the Equal Employment Opportunity Commission and expand accountability within the Federal Government, and for other purposes.

Referred to the Committee on \_\_\_\_\_ and  
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended  
to be proposed by Mr. JOHNSON

Viz:

1 Strike all after the enacting clause and insert the fol-  
2 lowing:

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Elijah E. Cummings  
5 Federal Employee Antidiscrimination Act of 2019”.

6 **SEC. 2. SENSE OF CONGRESS.**

7 Section 102 of the Notification and Federal Em-  
8 ployee Antidiscrimination and Retaliation Act of 2002 (5  
9 U.S.C. 2301 note) is amended—

1           (1) by striking paragraph (4) and inserting the  
2 following:

3           “(4) accountability in the enforcement of the  
4 rights of Federal employees is furthered when Fed-  
5 eral agencies agree to take appropriate disciplinary  
6 action against Federal employees who are found to  
7 have intentionally committed discriminatory (includ-  
8 ing retaliatory) acts;” and

9           (2) in paragraph (5)(A)—

10           (A) by striking “nor is accountability” and  
11 inserting “accountability is not”; and

12           (B) by inserting “for what, by law, the  
13 agency is responsible” after “under this Act”.

14 **SEC. 3. NOTIFICATION OF VIOLATION.**

15           Section 202 of the Notification and Federal Em-  
16 ployee Antidiscrimination and Retaliation Act of 2002 (5  
17 U.S.C. 2301 note) is amended by adding at the end the  
18 following:

19           “(d) NOTIFICATION OF FINAL AGENCY ACTION.—

20           “(1) IN GENERAL.—Not later than 90 days  
21 after the date on which an event described in para-  
22 graph (2) occurs with respect to a finding of dis-  
23 crimination (including retaliation), the head of the  
24 Federal agency subject to the finding shall provide  
25 notice—

1           “(A) on the public internet website of the  
2 agency, in a clear and prominent location linked  
3 directly from the home page of that website;

4           “(B) stating that a finding of discrimina-  
5 tion (including retaliation) has been made; and

6           “(C) which shall remain posted for not less  
7 than 1 year.

8           “(2) EVENTS DESCRIBED.—An event described  
9 in this paragraph is any of the following:

10           “(A) All appeals of a final action by a Fed-  
11 eral agency involving a finding of discrimination  
12 (including retaliation) prohibited by a provision  
13 of law covered by paragraph (1) or (2) of sec-  
14 tion 201(a) have been exhausted.

15           “(B) All appeals of a final decision by the  
16 Equal Employment Opportunity Commission  
17 involving a finding of discrimination (including  
18 retaliation) prohibited by a provision of law cov-  
19 ered by paragraph (1) or (2) of section 201(a)  
20 have been exhausted.

21           “(C) A court of jurisdiction issues a final  
22 ruling involving a finding of discrimination (in-  
23 cluding retaliation) prohibited by a provision of  
24 law covered by paragraph (1) or (2) of section  
25 201(a).

1           “(3) CONTENTS.—A notification provided under  
2 paragraph (1) with respect to a finding of discrimi-  
3 nation (including retaliation) shall—

4           “(A) identify the date on which the finding  
5 was made, the date on which each discrimina-  
6 tory act occurred, and the law violated by each  
7 such discriminatory act; and

8           “(B) advise Federal employees of the  
9 rights and protections available under the provi-  
10 sions of law covered by paragraphs (1) and (2)  
11 of section 201(a).”.

12 **SEC. 4. REPORTING REQUIREMENTS.**

13 (a) **ELECTRONIC FORMAT REQUIREMENT.**—

14           (1) **IN GENERAL.**—Section 203(a) of the Notifi-  
15 cation and Federal Employee Antidiscrimination and  
16 Retaliation Act of 2002 (5 U.S.C. 2301 note) is  
17 amended, in the matter preceding paragraph (1)—

18           (A) by inserting “Homeland Security and”  
19 before “Governmental Affairs”;

20           (B) by striking “on Government Reform”  
21 and inserting “on Oversight and Reform”; and

22           (C) by inserting “(in an electronic format  
23 prescribed by the Director of the Office of Per-  
24 sonnel Management),” after “an annual re-  
25 port”.

1           (2) EFFECTIVE DATE.—The amendment made  
2           by paragraph (1)(C) shall take effect on the date  
3           that is 1 year after the date of enactment of this  
4           Act.

5           (3) TRANSITION PERIOD.—Notwithstanding the  
6           requirements of section 203(a) of the Notification  
7           and Federal Employee Antidiscrimination and Retal-  
8           iation Act of 2002 (5 U.S.C. 2301 note), the report  
9           required under such section 203(a) may be sub-  
10          mitted in an electronic format, as prescribed by the  
11          Director of the Office of Personnel Management,  
12          during the period beginning on the date of enact-  
13          ment of this Act and ending on the effective date in  
14          paragraph (2).

15          (b) REPORTING REQUIREMENT FOR DISCIPLINARY  
16 ACTION.—Section 203 of the Notification and Federal  
17 Employee Antidiscrimination and Retaliation Act of 2002  
18 (5 U.S.C. 2301 note) is amended by adding at the end  
19 the following:

20          “(c) DISCIPLINARY ACTION REPORT.—Not later  
21 than 120 days after the date on which a Federal agency  
22 takes final action, or a Federal agency receives a final de-  
23 cision issued by the Equal Employment Opportunity Com-  
24 mission, involving a finding of discrimination (including  
25 retaliation) in violation of a provision of law covered by

1 paragraph (1) or (2) of section 201(a), as applicable, the  
2 applicable Federal agency shall submit to the Commission  
3 a report stating—

4 “(1) whether disciplinary action has been pro-  
5 posed against a Federal employee as a result of the  
6 violation; and

7 “(2) the reasons for any disciplinary action pro-  
8 posed under paragraph (1).”.

9 **SEC. 5. DATA TO BE POSTED BY EMPLOYING FEDERAL**  
10 **AGENCIES.**

11 Section 301(b) of the Notification and Federal Em-  
12 ployee Antidiscrimination and Retaliation Act of 2002 (5  
13 U.S.C. 2301 note) is amended—

14 (1) in paragraph (9)—

15 (A) in subparagraph (A), by striking  
16 “and” at the end;

17 (B) in subparagraph (B)(ii), by striking  
18 the period at the end and inserting “, and”;  
19 and

20 (C) by adding at the end the following:

21 “(C) with respect to each finding described  
22 in subparagraph (A)—

23 “(i) the date of the finding;

24 “(ii) the affected Federal agency;

25 “(iii) the law violated; and

1                   “(iv) whether a decision has been  
2                   made regarding disciplinary action as a re-  
3                   sult of the finding.”; and

4                   (2) by adding at the end the following:

5                   “(11) Data regarding each class action com-  
6                   plaint filed against the agency alleging discrimina-  
7                   tion (including retaliation), including—

8                   “(A) information regarding the date on  
9                   which each complaint was filed;

10                  “(B) a general summary of the allegations  
11                  alleged in the complaint;

12                  “(C) an estimate of the total number of  
13                  plaintiffs joined in the complaint, if known;

14                  “(D) the current status of the complaint,  
15                  including whether the class has been certified;  
16                  and

17                  “(E) the case numbers for the civil actions  
18                  in which discrimination (including retaliation)  
19                  has been found.”.

20 **SEC. 6. DATA TO BE POSTED BY THE EQUAL EMPLOYMENT**  
21 **OPPORTUNITY COMMISSION.**

22                  Section 302(b) of the Notification and Federal Em-  
23                  ployee Antidiscrimination and Retaliation Act of 2002 (5  
24                  U.S.C. 2301 note) is amended by striking “(10)” and in-  
25                  serting “(11)”.

1 **SEC. 7. NOTIFICATION AND FEDERAL EMPLOYEE ANTI-**  
2 **DISCRIMINATION AND RETALIATION ACT OF**  
3 **2002 AMENDMENTS.**

4 (a) NOTIFICATION REQUIREMENTS.—Title II of the  
5 Notification and Federal Employee Antidiscrimination  
6 and Retaliation Act of 2002 (5 U.S.C. 2301 note) is  
7 amended by adding at the end the following:

8 **“SEC. 207. COMPLAINT TRACKING.**

9 “Not later than 1 year after the date of enactment  
10 of the Elijah E. Cummings Federal Employee Anti-  
11 discrimination Act of 2019, each Federal agency shall es-  
12 tablish a system to track each complaint of discrimination  
13 arising under section 2302(b)(1) of title 5, United States  
14 Code, and adjudicated through the Equal Employment  
15 Opportunity process from the filing of a complaint with  
16 the Federal agency to resolution of the complaint, includ-  
17 ing whether a decision has been made regarding discipli-  
18 nary action as the result of a finding of discrimination.

19 **“SEC. 208. NOTATION IN PERSONNEL RECORD.**

20 “If a Federal agency takes an adverse action covered  
21 under section 7512 of title 5, United States Code, against  
22 a Federal employee for an act of discrimination (including  
23 retaliation) prohibited by a provision of law covered by  
24 paragraph (1) or (2) of section 201(a), the agency shall,  
25 after all appeals relating to that action have been ex-  
26 hausted, include a notation of the adverse action and the

1 reason for the action in the personnel record of the em-  
2 ployee.”.

3 (b) PROCESSING AND REFERRAL.—The Notification  
4 and Federal Employee Antidiscrimination and Retaliation  
5 Act of 2002 (5 U.S.C. 2301 note) is amended by adding  
6 at the end the following:

7 **“TITLE IV—PROCESSING AND**  
8 **REFERRAL**

9 **“SEC. 401. PROCESSING AND RESOLUTION OF COMPLAINTS.**

10 “Each Federal agency shall—

11 “(1) be responsible for the fair and impartial  
12 processing and resolution of complaints of employ-  
13 ment discrimination (including retaliation) prohib-  
14 ited by a provision of law covered by paragraph (1)  
15 or (2) of section 201(a); and

16 “(2) establish a model Equal Employment Op-  
17 portunity Program that—

18 “(A) is not under the control, either struc-  
19 turally or practically, of the agency’s Office of  
20 Human Capital or Office of the General Coun-  
21 sel (or the equivalent);

22 “(B) is devoid of internal conflicts of inter-  
23 est and ensures fairness and inclusiveness with-  
24 in the agency; and

1           “(C) ensures the efficient and fair resolu-  
2           tion of complaints alleging discrimination (in-  
3           cluding retaliation).

4   **“SEC. 402. NO LIMITATION ON ADVICE OR COUNSEL.**

5           “Nothing in this title shall prevent a Federal agency  
6   or a subcomponent of a Federal agency, or the Depart-  
7   ment of Justice, from providing advice or counsel to per-  
8   sonnel of that agency (or subcomponent, as applicable) in  
9   the resolution of a complaint.

10   **“SEC. 403. HEAD OF PROGRAM SUPERVISED BY HEAD OF**  
11           **AGENCY.**

12           “The head of each Federal agency’s Equal Employ-  
13   ment Opportunity Program shall be under the immediate  
14   supervision of the head of the agency.

15   **“SEC. 404. REFERRALS OF FINDINGS OF DISCRIMINATION.**

16           “(a) EEOC FINDINGS OF DISCRIMINATION.—

17           “(1) IN GENERAL.—Not later than 30 days  
18   after the date on which the Equal Employment Op-  
19   portunity Commission (referred to in this section as  
20   the ‘Commission’) receives, or should have received,  
21   a Federal agency report required under section  
22   203(c), the Commission may refer the matter to  
23   which the report relates to the Office of Special  
24   Counsel if the Commission determines that the Fed-

1       eral agency did not take appropriate action with re-  
2       spect to the finding that is the subject of the report.

3           “(2) NOTIFICATIONS.—The Commission shall—

4               “(A) notify the applicable Federal agency  
5               if the Commission refers a matter to the Office  
6               of Special Counsel under paragraph (1); and

7               “(B) with respect to a fiscal year, include  
8               in the Annual Report of the Federal Workforce  
9               of the Commission covering that fiscal year—

10               “(i) the number of referrals made  
11               under paragraph (1) during that fiscal  
12               year; and

13               “(ii) a brief summary of each referral  
14               described in clause (i).

15       “(b) REFERRALS TO SPECIAL COUNSEL.—The Office  
16       of Special Counsel shall accept and review a referral from  
17       the Commission under subsection (a)(1) for purposes of  
18       pursuing disciplinary action under the authority of the Of-  
19       fice against a Federal employee who commits an act of  
20       discrimination (including retaliation).

21       “(c) NOTIFICATION.—The Office of Special Counsel  
22       shall notify the Commission and the applicable Federal  
23       agency in a case in which—

24               “(1) the Office of Special Counsel pursues dis-  
25       ciplinary action under subsection (b); and

1           “(2) the Federal agency imposes some form of  
2           disciplinary action against a Federal employee who  
3           commits an act of discrimination (including retalia-  
4           tion).

5           “(d) SPECIAL COUNSEL APPROVAL.—A Federal  
6           agency may not take disciplinary action against a Federal  
7           employee for an alleged act of discrimination (including  
8           retaliation) referred by the Commission under this section,  
9           except in accordance with the requirements of section  
10          1214(f) of title 5, United States Code.”.

11          (c) CONFORMING AMENDMENTS.—The table of con-  
12          tents in section 1(b) of the Notification and Federal Em-  
13          ployee Antidiscrimination and Retaliation Act of 2002 (5  
14          U.S.C. 2301 note) is amended—

15                 (1) by inserting after the item relating to sec-  
16          tion 206 the following:

“Sec. 207. Complaint tracking.  
“Sec. 208. Notation in personnel record.”; and

17                 (2) by adding at the end the following:

“TITLE IV—PROCESSING AND REFERRAL

“Sec. 401. Processing and resolution of complaints.  
“Sec. 402. No limitation on advice or counsel.  
“Sec. 403. Head of Program supervised by head of agency.  
“Sec. 404. Referrals of findings of discrimination.”.

18          **SEC. 8. NONDISCLOSURE AGREEMENT LIMITATION.**

19          Section 2302(b)(13) of title 5, United States Code,  
20          is amended—

1           (1) by striking “agreement does not” and in-  
2           serting the following: “agreement—

3                     “(A) does not”;

4           (2) in subparagraph (A), as so designated, by  
5           inserting “or the Office of Special Counsel” after  
6           “Inspector General”; and

7           (3) by adding at the end the following:

8                     “(B) prohibits or restricts an employee or  
9           applicant for employment from disclosing to  
10          Congress, the Special Counsel, the Inspector  
11          General of an agency, or any other agency com-  
12          ponent responsible for internal investigation or  
13          review any information that relates to any viola-  
14          tion of any law, rule, or regulation, or mis-  
15          management, a gross waste of funds, an abuse  
16          of authority, or a substantial and specific dan-  
17          ger to public health or safety, or any other  
18          whistleblower protection; or”.