



## *The Perceived Incidence of Prohibited Personnel Practices*

June 2019

### *In Brief*

The prohibited personnel practices (PPPs), codified in the Civil Service Reform Act (CSRA) of 1978 at 5 U.S.C. § 2302, are a set of 14 behaviors that Federal agency officials are not permitted to engage in when they consider taking personnel actions. The U.S. Merit Systems Protection Board (MSPB) has a nearly 40-year history of conducting surveys to track perceptions of the frequency of these PPPs. In 2016, we conducted a Merit Principles Survey (MPS) to track employee perceptions of whether these PPPs had occurred. This publication provides a brief summary of those MPS results with a comparison set of data from the 2010 MPS where available. For each individual PPP that was measured in both surveys, the data show that the percentage of employees who believe that the PPP had occurred has increased, although the size of that increase varies greatly by PPP. They also show that the number of individuals reporting that they either observed or were personally affected by a PPP increased, from 34 percent of MPS respondents in 2010 to 46 percent in 2016.

In this same time period, PPP complaints to the U.S. Office of Special Counsel (OSC) increased, from 2,415 to 4,124. This appears to support the MPS data's implications that the percentage of employees who perceive that they have experienced or observed a PPP has increased from 2010 to 2016. The data cannot tell us why perceptions increased. However, to put that increase in context, perceptions in 2010 were at their lowest level in years. Furthermore, in the period between 2010 and 2016, OSC and many employing agencies made a strong effort to ensure employees were educated about the PPPs. It is possible that this increased education resulted in a better ability by employees to recognize PPPs, and therefore report them. MSPB currently plans to ask questions about the PPPs again on our next MPS, using the 2016 results as a new baseline.

In our 2011 report, [\*Prohibited Personnel Practices: Employee Perceptions\*](#), we illustrated the business case for preventing PPPs by showing the relationship between PPP perceptions and other important workforce perceptions, such as levels of engagement. The 2016 MPS results similarly show that employees are less likely to be engaged or to view other aspects of their jobs or employers positively if they report observing or experiencing PPPs.

The 2011 report on the PPPs recommended that:

1. Agencies educate their workforces, and in particular their executives, managers, supervisors, human capital staff, and equal employment opportunity advisors, about the PPPs.
2. Agencies investigate allegations that a PPP has occurred, correct any improper personnel actions, and “consider taking disciplinary action to address the misconduct” of the offender. Agencies were also advised to address any root causes that permitted the PPP to occur.
3. Where there are perceptions of PPPs, but the agency concludes that PPPs have not occurred, agencies should seek to do a better job of explaining to employees the reasons behind management decisions so that employees can better understand the merit-based reasons for a particular outcome and avoid misperceptions in the future.

A workplace free of PPPs, as envisioned by the CSRA, requires more than avoiding and investigating clear violations. It also involves active efforts to adhere to the merit system principles (MSPs) and to comply with the intent, and not merely the letter, of laws and policies that implement those MSPs.

In our 2016 report, [\*The Merit System Principles: Guiding the Fair and Effective Management of the Federal Workforce\*](#), we recommended that agencies ensure that all employees receive training on the MSPs, tailored to their level of responsibility, delivered by experts. We further recommended that agencies hold supervisors, managers, and executives accountable through internal agency mechanisms for adhering to the MSPs and avoiding PPPs.

In the absence of a Board quorum, we are unable to issue new recommendations to Congress and the President on behalf of the Board.<sup>1</sup> However, there is nothing to indicate these recommendations would change, beyond the possible addition of recommendations to promote compliance with the requirements of the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 (codified at 5 U.S.C. § 7515). Our 2011 recommendation was that agencies *consider* taking disciplinary action, while the 2017 law requires that under certain circumstances, disciplinary action must be *proposed* against an official who has committed a PPP. The Office of Personnel Management (OPM) has indicated it intends to issue regulations to help agencies to implement this statute.

## *Methodology*

The 2016 MPS was divided into three versions (“paths”) to support distinct areas of study. The 2016 MPS path containing the questions about the PPPs discussed in this publication was offered to 37,397 Federal employees with 14,473 respondents, for a response rate of 38.7 percent. Not all respondents chose to answer every question about the PPPs. Employees from 24 agencies took part in the 2016 MPS. Administration began in July 2016 and closed in September 2016. Responses were weighted to ensure representativeness of the overall surveyed population.<sup>2</sup>

Some PPPs are dependent upon a triggering event. For example, a perception of retaliation based upon whistleblowing activity requires a belief that someone engaged in whistleblowing. Likewise, manipulating a recruitment action to the advantage of a person would require a belief that there was a recruitment action. Additionally, some employees may not feel they would be aware if a particular PPP had occurred. All PPP questions included a response option for “don’t know/NA.” Except when stated otherwise, data in this brief only reflects responses from those who expressed they were in a position to form a view that: (1) they were personally affected by the PPP in question; (2) they observed the PPP without being personally affected; or (3) the PPP did not occur.

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<sup>1</sup> By law, the Board is to be led by three members, no more than two of whom can adhere to the same political party. The Board currently has no members. The 2011 report, [\*Prohibited Personnel Practices: Employee Perceptions\*](#), was issued with the approval of all three Board members.

<sup>2</sup> We also spoke with representatives from nine Federal agencies to discuss possible explanations for the increase in perceptions. For more on the methodology for the 2016 MPS, please visit MSPB’s Freedom of Information Act electronic reading room (e-FOIA), at [www.mspb.gov](http://www.mspb.gov). The electronic version of the 2010 MPS was offered to 70,675 employees, with 41,680 respondents, for a response rate of 59 percent. The paper version of the 2010 MPS was mailed to 1,295 employees from the Federal Aviation Administration, with 340 respondents, for a response rate of 26 percent.

## *The PPPs Abbreviated*

The prohibited personnel practices listed below are adapted from the statutory language that appears in [section 2302 of title 5](#), United States Code. It is a prohibited personnel practice to:

1. Discriminate on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation;
2. Solicit or consider any personnel recommendation or statement not based on personal knowledge or records of performance, ability, aptitude, general qualifications, character, loyalty, or suitability;
3. Coerce an employee's political activity;
4. Deceive or obstruct any person with respect to such person's right to compete for employment;
5. Influence a person to withdraw from competition;
6. Grant any preference or advantage not authorized by law, regulation, or rule;
7. Employ or promote a relative;
8. Retaliate or threaten to retaliate against a whistleblower, whether an employee or an applicant;
9. Retaliate or threaten to retaliate against employees or applicants who exercise their appeal, complaint, or grievance rights; testify for or assist an individual in doing so; cooperate with an inspector general or the Special Counsel, or refuse to violate a law, rule or regulation;
10. Discriminate based on actions not adversely affecting performance;
11. Knowingly violate veterans' preference requirements;
12. Violate any law, rule, or regulation implementing or directly concerning the merit principles;
13. Implement a nondisclosure policy or agreement that does not comport with the laws regarding whistleblower protection and disclosures to Congress or Inspectors General; or
14. Access the medical record of an employee or applicant as part of the commission of any conduct described above.

For a more in-depth discussion of the meaning of the first 12 PPPs, which were enacted prior to 2011, please see our 2011 report, [Prohibited Personnel Practices: Employee Perceptions](#).

## *Overall Increase in PPP Perceptions*

In our 2011 report on PPPs, we stated that “perceptions of PPPs occurring have declined over the past 18 years, and were almost uniformly less common in 2010 compared to earlier years[.]”<sup>3</sup> In

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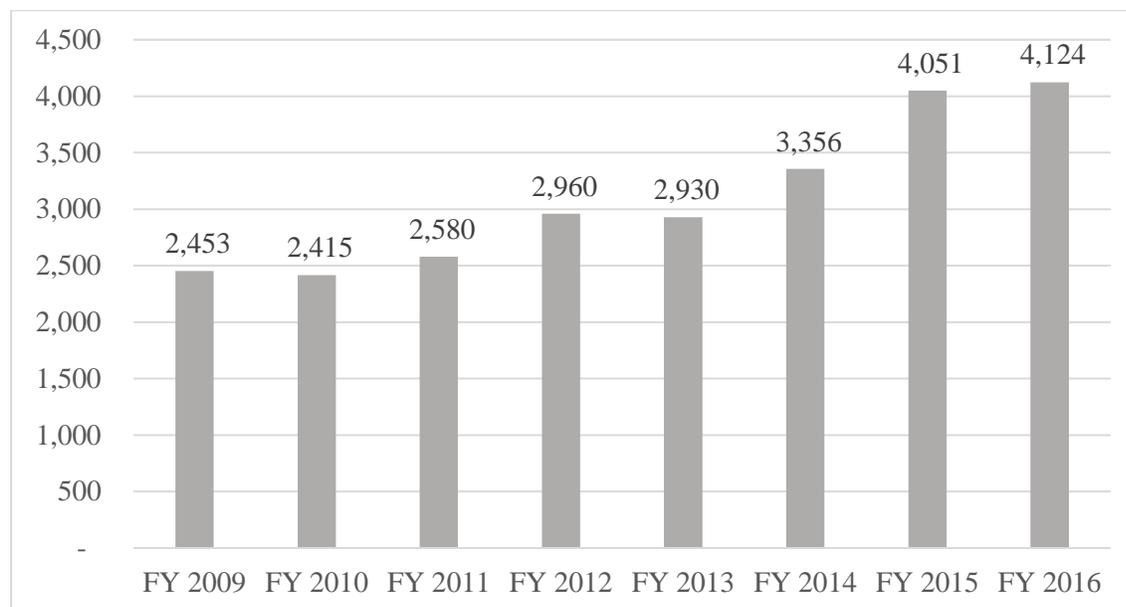
<sup>3</sup> U.S. Merit Systems Protection Board, *Prohibited Personnel Practices: Employee Perceptions* (2011), at 26, available at [www.mspb.gov/studies](http://www.mspb.gov/studies).

2010, 34 percent of MPS respondents reported that they either observed or experienced one or more of the PPPs itemized in that survey. In 2016, 46 percent of employees said that they either observed or experienced one or more of the PPPs, even though there were slightly fewer PPP items on the survey.

OSC has a statutory responsibility to process complaints that PPPs have occurred. As shown in Chart 1, OSC received an increased number of complaints alleging a PPP in the period between 2010 and 2016.

While we cannot make direct comparisons between survey perceptions and PPP complaints filed with OSC, the increase in cases submitted to OSC—from 2,415 in FY 2010 to 4,124 in FY 2016—may be further evidence that perceptions of PPPs increased in this period. However, there could be many reasons for an increase in perceptions. It is possible more PPPs are occurring. However, it is also possible that employees have become better at recognizing and reporting PPPs as a result of increased efforts to educate them about the PPPs. Several agencies informed us that they believed their workforces had become much better educated about the PPPs. As a result, 2016 may serve as a better baseline for comparison to our next MPS than 2010 did for the 2016 data.

**Chart 1: PPP Cases Received by OSC (FY 2009–FY 2016)**



### *Increase in Individual PPP Perceptions*

The extent to which perceptions of each individual PPP measured on the MPS increased varied greatly by PPP. Below we address each PPP individually. Appendix A contains a table providing separate data for those who stated they were personally affected by the PPP versus those who stated they observed the PPP without being personally affected or did not perceive the PPP at all.

#### *Perceptions of Discrimination*

As shown in Table 1, sex-based discrimination had the largest increase in the number of respondents perceiving it compared to any other type of discrimination. It nearly overtook race-based perceptions (19.9 percent versus 20.6 percent) as the most perceived type of discrimination.

**Table 1: Perceptions of Discrimination (2010 and 2016)**

Change in Perceptions (Percentage Points) ↓				
Observed (Including Those Affected) – 2016 Survey ↓				
Observed (Including Those Affected) – 2010 Survey ↓				
In the past 2 years, an agency official (e.g., supervisor, manager, senior leader, etc.) in my work unit has discriminated in favor or against someone in a personnel action based upon...	race	13.7%	20.6%	+ <b>6.9%</b>
	age	11.5%	17.6%	+ <b>6.1%</b>
	religion	3.3%	5.1%	+ <b>1.8%</b>
	sex	11.7%	19.9%	+ <b>8.2%</b>
	national origin	5.5%	7.7%	+ <b>2.2%</b>
	disabling condition	7.1%	12.4%	+ <b>5.3%</b>
	marital status	4.2%	5.3%	+ <b>1.1%</b>
	political affiliation	3.2%	4.1%	+ <b>0.9%</b>

In 2010, 11.2 percent of women and 11.8 percent of men reported they observed or experienced sex-based discrimination. In 2016, 21.7 percent of women and 18.4 percent of men reported they had observed or experienced this. For both men and women, the percentage of respondents who said it was a personal experience increased as well as those who said it was an observation of the treatment of others. Also, in both years, men were less likely than women to say they had personally experienced it, and more likely to say they had observed it without experiencing it.

While sex-based perceptions increased the most, perceptions of discrimination based upon race, age, and disability each increased by more than five percentage points. The overall pattern, in which all enumerated section 2302(b)(1) perceptions increased, may speak to a larger issue of perceptions about discrimination in the workplace.

#### *Perceptions of Improper Recommendations*

The second PPP prohibits an official from considering recommendations regarding personnel actions unless the person providing the recommendation has personal knowledge or possesses records that form the basis for the recommendation. Table 2 shows that the overall perception rate for this PPP increased by 3.7 percentage points. Most of the increase is attributable to a greater number of respondents reporting that they were personally affected (an increase from 3.7 percent to 6.4 percent).

**Table 2: Perceptions of Improper Recommendations (2010 and 2016)**

Change in Perceptions (Percentage Points) ↓			
Observed (Including Those Affected) – 2016 Survey ↓			
Observed (Including Those Affected) – 2010 Survey ↓			
...solicited or considered improper employment recommendations	13.2%	16.9%	+ <b>3.7%</b>

#### *Perceptions of Political Coercion*

The third PPP prohibits an official from coercing anyone's political activity or retaliating for someone's refusal to engage in a political activity. As Table 3 shows, this has historically been one of the less common perceptions. However, protecting the merit system from being used as a "political machine" was the reason why the merit-based civil service was established in 1883 and why, in 1939, Congress enacted the Hatch Act, which restricts partisan political activities by

Federal civil servants.<sup>4</sup> For the civil service to operate effectively, and for the American people to have faith in the Government, it is absolutely crucial that political coercion not be tolerated and that both employees and the general public perceive that it is not permitted.

**Table 3: Historical Perceptions by Federal Employees of Coercion of Political Activity**

	1992	1996	2000	2005	2007	2010	2016
Percentage of respondents who reported a perception that they experienced coercion related to political activity in the preceding 2 years.	0.5%	1.0%	0.6%	*	1.9%	0.7%	*

Due to a technical error, this PPP was not included on the 2005 or 2016 MPS. However, as shown in the last row of Table 1, perceptions of discrimination based on political affiliation increased between 2010 and 2016.

*Perceptions of Obstruction of Competition*

The fourth PPP prohibits an official from using deception or otherwise willfully acting to obstruct someone’s right to compete for employment. As shown in Table 4, perceptions of this PPP increased by about a third of the 2010 level. As with improper recommendations (the second PPP), much of this increase came from an increase in employees responding that they personally experienced it (an increase from 4.8 percent to 7.6 percent).

**Table 4: Perceptions of Obstruction of Competition (2010 and 2016)**

In the past 2 years, an agency official (e.g., supervisor, manager, senior leader, etc.) in my work unit has...			
Change in Perceptions (Percentage Points) ↓			
Observed (Including Those Affected) – 2016 Survey ↓			
Observed (Including Those Affected) – 2010 Survey ↓			
...obstructed someone’s right to compete for employment	13.6%	18.1%	+ <b>4.5%</b>

*Perceptions of Influencing a Withdrawal from Competition*

The fifth PPP focuses on attempts to influence an individual to withdraw from competition. As Table 5 shows, perception rates for this PPP more than doubled between 2010 and 2016. Also noteworthy was the extent to which rates of perceptions increased that the individual survey respondent was personally affected by this PPP—an increase from 2.2 percent in 2010 to 6.0 percent in 2016.

**Table 5: Perceptions of Influencing a Withdrawal from Competition (2010 and 2016)**

In the past 2 years, an agency official (e.g., supervisor, manager, senior leader, etc.) in my work unit has...			
Change in Perceptions (Percentage Points) ↓			
Observed (Including Those Affected) – 2016 Survey ↓			
Observed (Including Those Affected) – 2010 Survey ↓			
...tried to influence someone to withdraw from competition for a position for the purpose of helping or injuring someone else's chances	7.0%	15.4%	+ <b>8.4%</b>

<sup>4</sup> The Supreme Court has explained that “enactment of the Hatch Act in 1939 reflected the conviction that the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine.” *United States v. National Treasury Employees Union*, 513 U.S. 454, 471 (1995) (internal punctuation and citations omitted). For a discussion of the political patronage spoils system prior to the Pendleton Act of 1883, see U.S. Merit Systems Protection Board, *What is Due Process in Federal Civil Service Employment?* (2015), at 3-6, available at [www.mspb.gov/studies](http://www.mspb.gov/studies).

### Perceptions of Granting an Improper Advantage

The sixth PPP prohibits an official from providing any advantage to a candidate, unless there is a law, rule, or regulation that authorizes the advantage. In order for an action to be covered by the 6th PPP, the official must be acting “for the purpose of improving or injuring the prospects of any particular person for employment[.]” As the Board has explained, for this PPP, it is not the personnel action itself that violates the law, but, instead, the intent behind the action.<sup>5</sup> Across more than 20 years of MPS administrations, the sixth PPP has consistently been the most widely perceived PPP. As shown in Table 6, approximately 31 percent of respondents perceived this PPP in 2016.

**Table 6: Perceptions of Granting an Improper Advantage (2010 and 2016)**

In the past 2 years, an agency official (e.g., supervisor, manager, senior leader, etc.) in my work unit has...			
Change in Perceptions (Percentage Points) ↓			
Observed (Including Those Affected) – 2016 Survey ↓			
Observed (Including Those Affected) – 2010 Survey ↓			
...tried to define the scope or manner of a recruitment action, or the qualifications required, for the purpose of improving the chances of a particular person’s right to compete for employment	22.0%	30.6%	+ <b>8.6%</b>

### Perceptions of Nepotism

The seventh PPP prohibits an official from acting to appoint, employ, promote, or advance a relative, or to advocate for such an act. “Relative” is specifically defined in the statute, which can help eliminate confusion about where the law draws the line. A “relative” means “an individual who is related to the public official as father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister.”<sup>6</sup> Our 2016 report, [Preventing Nepotism in the Federal Civil Service](#), discusses this issue in greater depth and includes recommendations for agencies, employees, and applicants to help limit such offenses. As shown in Table 7, perceptions of nepotism increased slightly between 2010 and 2016.

**Table 7: Perceptions of Nepotism (2010 and 2016)**

In the past 2 years, an agency official (e.g., supervisor, manager, senior leader, etc.) in my work unit has...			
Change in Perceptions (Percentage Points) ↓			
Observed (Including Those Affected) – 2016 Survey ↓			
Observed (Including Those Affected) – 2010 Survey ↓			
...advocated for the appointment, employment, promotion, or advancement of a relative	12.2%	14.0%	+ <b>1.8%</b>

In both the 2010 and 2016 MPS, we also included a question that asked about perceptions that an official had “advocated for the appointment, employment, promotion, or advancement of a personal friend of the agency official.” It was our hope that this would help focus the respondents’ attention on the distinction between nepotism and favoritism. In 2010, 21.1 percent

<sup>5</sup> *Special Counsel v. Lee*, 114 M.S.P.R. 57, ¶ 21 (2010) (citing *Special Counsel v. Byrd*, 59 M.S.P.R. 561, 570 (1993)), *rev’d in part on other gds. sub nom. Beatrez v. Merit Systems Protection Board*, 413 F. App’x 298 (Fed. Cir. 2011).

<sup>6</sup> 5 U.S.C. § 3110(a)(3).

of respondents reported they either observed or were personally affected by such favoritism. In 2016, the number increased slightly to 22.9 percent.

In an effort to confirm that respondents were truly distinguishing between nepotism and favoritism, the 2016 MPS asked a follow-on question, inquiring about the exact nature of the relationship between the official who they thought had most recently committed nepotism and the beneficiary of the nepotism. The most common answer, child, was given by 32.1 percent of those who reported nepotism, while 17.0 percent said spouse, 8.7 percent said sibling, 5.6 percent said niece or nephew, 1.8 percent said cousin, and 19.2 percent said it was another “relative by blood or marriage.” Yet, 15.6 percent acknowledged that it was a “non-relative.” Thus, it appears that at least some of the data that purports to be about nepotism may, in fact, be capturing favoritism instead.

While non-merit based favoritism is also problematic, and a violation of a merit principle, it is not technically nepotism (a violation of the prohibition contained in 5 U.S.C. § 2302(b)(7) and 5 U.S.C. § 3110) unless it favors a relative. However, that most of the perceived beneficiaries of “nepotism” were identified as individuals covered by the nepotism statute indicates that nepotism—as defined in law—is perceived as actually occurring.

Our 2016 MPS also asked respondents to identify the rank of the alleged offender. Nearly a quarter (24 percent) of respondents who perceived nepotism reported that it was an executive or a person in an equivalent position, while 43.9 percent reported that it was a manager and 16.8 percent reported that it was a first line supervisor. (The remainder said that it was either a non-supervisor in human resources or another position.) If perceptions were spread representationally, we would expect supervisors to be suspected nearly twice as often as managers, and executives to comprise less than five percent of the suspected population. Instead, the data shows managers, and particularly executives, are disproportionately believed to be committing acts of nepotism. Our 2016 report, *Preventing Nepotism in the Federal Service*, discusses reasons why higher-ranking officials are more often perceived as committing nepotism and steps agencies should consider to reduce perceptions and limit opportunities for such offenses to occur.

**Perceptions of Retaliation for Whistleblowing**

The eighth PPP prohibits an official from taking or failing to take (or threatening to take or fail to take) a personnel action because of an individual’s whistleblowing activity. As shown in Table 8, perceptions of reprisal for disclosing wrongdoing nearly doubled between 2010 and 2016.

**Table 8: Perceptions of Retaliation for Whistleblowing (2010 and 2016)**

In the past 2 years, an agency official (e.g., supervisor, manager, senior leader, etc.) in my work unit has...			
			Change in Perceptions (Percentage Points) ↓
Observed (Including Those Affected) – 2016 Survey ↓			
Observed (Including Those Affected) – 2010 Survey ↓			
...took or threatened to take a personnel action against an employee because the employee disclosed a violation of law, rules, or regulations or reported fraud, waste, or abuse	8.1%	14.3%	+ <b>6.2%</b>

Employees need to believe that they can safely disclose wrongdoing, and this is less likely to occur if they believe they have seen others experience retaliation for it, or if they feel that

disclosures they made in the past led to retaliation by agency officials.<sup>7</sup> As explained in our 2011 report, *Blowing The Whistle: Barriers to Federal Employees Making Disclosures*, the most important step that agencies can take to prevent wrongdoing may be the creation of a culture that supports whistleblowing.

### *Perceptions of Retaliation for Other Lawful Activities*

The ninth PPP prohibits officials from making reprisals against an employee or applicant for:

- (A) The exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;
- (B) Testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in part A;
- (C) Cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or
- (D) Refusing to obey an order that would require the individual to violate a law, rule, or regulation.

To keep matters simple (a necessity for a multiple-choice survey covering a wide range of issues) the MPS only asked about reprisal for “exercising a grievance or appeal right.” As shown in Table 9, perception rates increased sharply for this type of retaliation. The purpose of appeal and grievance rights is not just to protect the employee in question, but also to promote management’s adherence to laws and merit principles. If fears of retaliation hinder the exercise of complaint, grievance, or appeal rights, that could have serious consequences—not just for individual employees, but for the ability of the civil service to operate based upon merit.

**Table 9: Perceptions of Other Retaliation (2010 and 2016)**

In the past 2 years, an agency official (e.g., supervisor, manager, senior leader, etc.) in my work unit has...			
Change in Perceptions (Percentage Points) ↓			
Observed (Including Those Affected) – 2016 Survey ↓			
Observed (Including Those Affected) – 2010 Survey ↓			
...took or threatened to take a personnel action against an employee because the employee filed an appeal or grievance	11.1%	18.9%	+ <b>7.8%</b>

### *Perceptions of Discrimination Based on Employee Conduct Irrelevant to Performance*

The 10th PPP prohibits discrimination “for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others[.]”

In our report, *Sexual Orientation and the Federal Workplace*, we noted that both OPM and OSC had interpreted section 2302(b)(10) to include a prohibition on discrimination based on sexual orientation because of the lack of relationship between the conduct associated with such orientation and performance on the job.<sup>8</sup> However, neither MSPB nor its reviewing court has ever explicitly agreed or disagreed with this interpretation in a precedential decision.

<sup>7</sup> See U.S. Merit Systems Protection Board, *Blowing The Whistle: Barriers to Federal Employees Making Disclosures* (2011), at 17 (explaining the extent to which various concerns affect employee decisions to report wrongdoing), available at [www.mpsb.gov/studies](http://www.mpsb.gov/studies).

<sup>8</sup> U.S. Merit Systems Protection Board, *Sexual Orientation and the Federal Workplace* (2014), at 19-20, 46, available at [www.mspb.gov/studies](http://www.mspb.gov/studies).

Our 2016 MPS did not ask about discrimination based on off-duty conduct in general. Instead, we specifically asked whether the respondent had been discriminated against on the basis of sexual orientation. As shown in Table 10, perception rates increased.

**Table 10: Perceptions of Discrimination Based on Sexual Orientation (2010 and 2016)**

In the past 2 years, an agency official (e.g., supervisor, manager, senior leader, etc.) in my work unit has...			
Change in Perceptions (Percentage Points) ↓			
Observed (Including Those Affected) – 2016 Survey ↓			
Observed (Including Those Affected) – 2010 Survey ↓			
...discriminated in favor or against someone in a personnel action based upon sexual orientation	4.4%	6.3%	+ <b>1.9%</b>

### *Perceptions of Deliberate Violations of Veterans Preference*

This PPP is particularly hard to measure with perception data because section 2302(b)(11) focuses on an official knowingly violating an individual’s veterans’ rights. This means that the survey respondent must make assumptions about the nature of those rights, the official’s knowledge, and the official’s motives. Therefore, survey data of perceptions by observers should not be seen as definitive evidence of wrongdoing. However, such data can be a sign that actions should be scrutinized to determine if the perceptions are faulty or if wrongdoing is occurring.

Table 11 contains the survey results from 2010 and 2016 regarding violations of veterans’ preference. We also asked a related question—whether the respondent was personally affected by an official inappropriately favoring a veteran. In 2016, where only 7.0 percent of respondents reported that a knowing violation of preference had occurred (personal experience and observations combined), 11.5 percent reported an official had inappropriately favored a veteran. Agencies should be vigilant to ensure that the only preferential treatment being granted is that which is authorized by law.

**Table 11: Perceptions of Veterans Preference Violations (2010 and 2016)**

In the past 2 years, an agency official (e.g., supervisor, manager, senior leader, etc.) in my work unit has...			
Change in Perceptions (Percentage Points) ↓			
Observed (Including Those Affected) – 2016 Survey ↓			
Observed (Including Those Affected) – 2010 Survey ↓			
...knowingly violated a lawful form of veterans’ preference or protection laws	4.5%	7.0%	+ <b>2.5%</b>

### *Perceptions of Other PPPs*

We cannot report on changes in perceptions of the other PPPs at this time. The 12th PPP applies to personnel actions that violate “any law, rule, or regulation implementing, or directly concerning, the merit system principles[.]” Because this PPP does not lend itself to an informed multiple choice question or a short series of questions, perception data for this PPP is not directly captured by the 2016 MPS. For a discussion of perceptions related to the individual merit system principles, please see [The Merit System Principles: Guiding the Fair and Effective Management of the Federal Workforce](#) and the 2013 report [Managing Public Employees in the Public Interest: Employee Perspectives on Merit Principles in Federal Workplaces](#). Both discuss 2010 MPS responses to 25 questions related to the merit system principles.

Because the 13th PPP was enacted after the 2010 MPS, we have no longitudinal data to offer on that PPP at this time. In order to explore the new PPP in greater depth, this PPP received more questions on the 2016 MPS than other PPPs. The next section discusses that data.

The 14th PPP is relatively recent and was enacted after the administration of the 2016 MPS. We therefore have no survey data to offer on that PPP at this time.

### *Nondisclosure Agreements and Policies*

The 13th PPP says that it is illegal to “implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain” the specific language set forth in the statute at [5 U.S.C. § 2302\(b\)\(13\)](#).<sup>9</sup> By statute, a nondisclosure agreement (NDA) or nondisclosure policy (NDP) must state (among other things) that it does not supersede the right to report wrongdoing to an Inspector General and does not supersede whistleblower protections.

As OSC has not yet filed charges with MSPB alleging a violation of section 2302(b)(13), we can offer no case law interpreting the meaning or applicability of this PPP. (Our 2011 report offers case law for many of the other PPPs.) However, that OSC has not filed any charges for disciplinary or corrective actions regarding section 2302(b)(13) should not be interpreted as a lack of findings on their part regarding violations of this PPP. Rather, OSC has resolved a number of such matters through negotiated agreements.<sup>10</sup>

As shown in Table 12 on the following page, the NDAs—and to a lesser extent the NDPs—may be missing the required language about protecting rights. Approximately half of those who signed an NDA did not recall if the agreement promised they could still blow the whistle or be protected if they blew the whistle. Of those who could recall, the responses were nearly evenly divided between those who recalled that the protective language was there and those who recalled it being absent.<sup>11</sup>

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<sup>9</sup> This PPP was added to section 2302 by the Whistleblower Protection Enhancement Act (WPEA) of 2012. The history of this PPP can be traced back to 1988, when, “Senator Grassley sponsored an amendment to the Treasury, Postal and General Government Appropriations bill, which is referred to as the ‘anti-gag’ provision. This provision [was] included in appropriations legislation every year since then [until the passage of WPEA].” S. Rep. 112-155, at 62-64 (112 U.S.C.C.A.N. 589) (Apr. 19, 2012).

<sup>10</sup> See, e.g., “OSC’s Enforcement of the Anti-Gag Order Provision in Whistleblower Law,” Press Release, Jan. 25, 2017, available at <https://osc.gov/News/pr17-03.pdf> (“To date, OSC has obtained 33 corrective actions addressing violations of the anti-gag provision. Typically, these corrective actions require agency management to revise their communication to employees to include language explicitly stating that employees have the right to blow the whistle.” At least one of these cases involved an explicit finding by OSC that the required language was missing from the employing agency’s nondisclosure agreements.)

<sup>11</sup> We typically remove the “not sure” or “don’t know” categories from discussions of data because the greatest value usually lies in discussing perceptions that have been formed, whether positive or negative. However, there are situations where a respondent’s lack of certainty about events is noteworthy. Our 2010 MPS asked employees what effect a particular consequence might have on their willingness to disclose wrongdoing. Sixty-two percent reported that protection from reprisal would be important to their decision-making process. Therefore, it is pertinent if an employee is aware of an NDP or NDA, but is not aware of retention of the right to: (1) blow the whistle; or (2) be protected for blowing the whistle.

**Table 12: Perceptions of Provisions in Nondisclosure Policies and Agreements (2016)**

	Yes	No	Not Sure
In the past two years, has your agency asked you to enter into a nondisclosure agreement?	10.5%	70.4%	19.1%
If you were asked to enter into such an agreement— Did the nondisclosure agreement state that the provisions did not supersede or alter your right to <b>blow the whistle</b> on wrongdoing?	24.6%	28.7%	46.7%
Did the non-disclosure agreement state that the provisions did not supersede or alter your right to <b>whistleblower protections</b> if you made a disclosure of wrongdoing?	24.2%	25.8%	50.0%
In the past two years, has your agency informed you of a nondisclosure policy?	11.0%	57.8%	31.2%
If you were informed about such a policy— Did the communication about the nondisclosure policy include that the policy did not supersede or alter your right to <b>blow the whistle</b> on wrongdoing?	47.0%	14.9%	38.0%
Did the communication about the nondisclosure policy include that the policy did not supersede or alter your right to <b>whistleblower protections</b> if you made a disclosure of wrongdoing?	44.0%	14.7%	41.4%

In contrast, more respondents recalled the content of the NDP. Among those who recalled communications about the policy regarding the right to blow the whistle, approximately three out of every four respondents said the communication informed them that they could report wrongdoing (47 percent vs. 15 percent). While this is far better than responses to the mirror question for NDAs, there is still room for improvement.

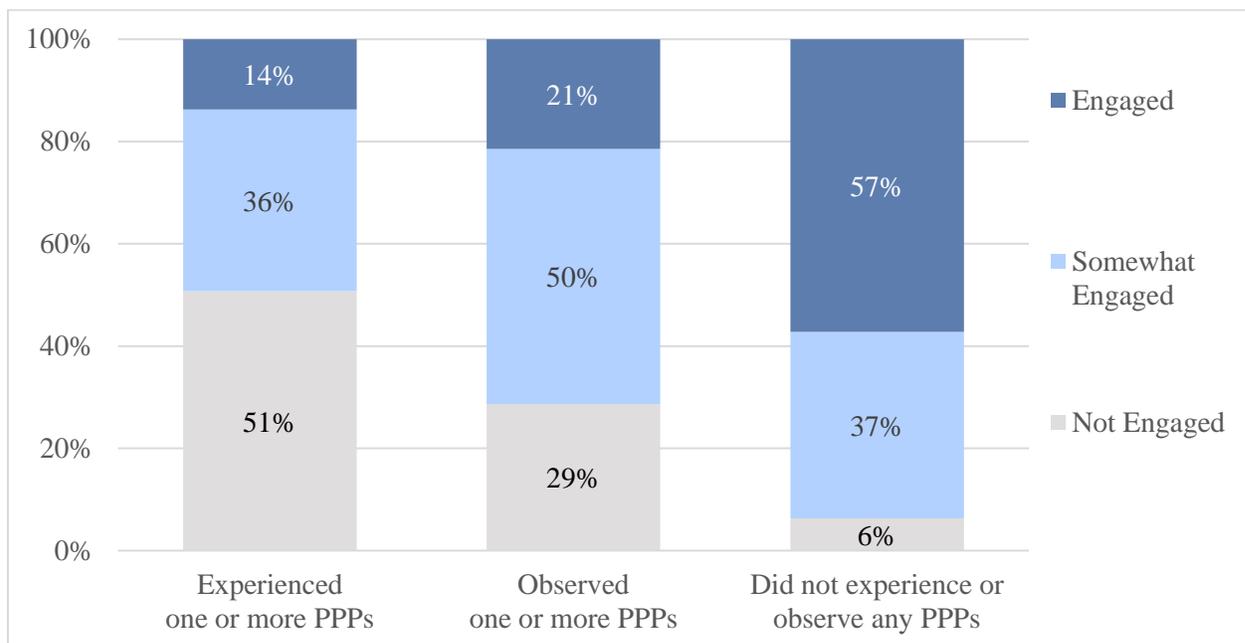
Similarly, for those who recalled communications about NDPs and protections if they blew the whistle, approximately three out of every four respondents said the communication included that they would have such protections (44 percent vs. 15 percent). Again, this is far better than the mirror question for NDAs.

### *The Effect of PPPs*

Officials who desire that their workplaces run efficiently and effectively should take steps to ensure that PPPs do not occur and that the workforce perceives their officials as complying with these rules.

In recent years, MSPB, OPM, and others have emphasized the importance of engagement in the effective operation of the civil service. Our 2008 report, [The Power of Federal Employee Engagement](#), explained that, among other things, employee engagement had a relationship to agency performance results, reduced use of sick leave, and reduced workplace injuries.

Our 2011 report on the PPPs noted that employees who reported they had observed or experienced a PPP were less likely to be highly engaged. As shown in Chart 2, that finding remains true for the 2016 MPS data as well.

**Chart 2: Relationship Between Engagement and PPP Perceptions (2016)**

While 57 percent of those respondents who neither saw nor experienced a PPP were engaged, only 21 percent of those who observed a PPP (without experiencing one) were engaged, and only 14 percent of those who reported being personally affected by a PPP were engaged.

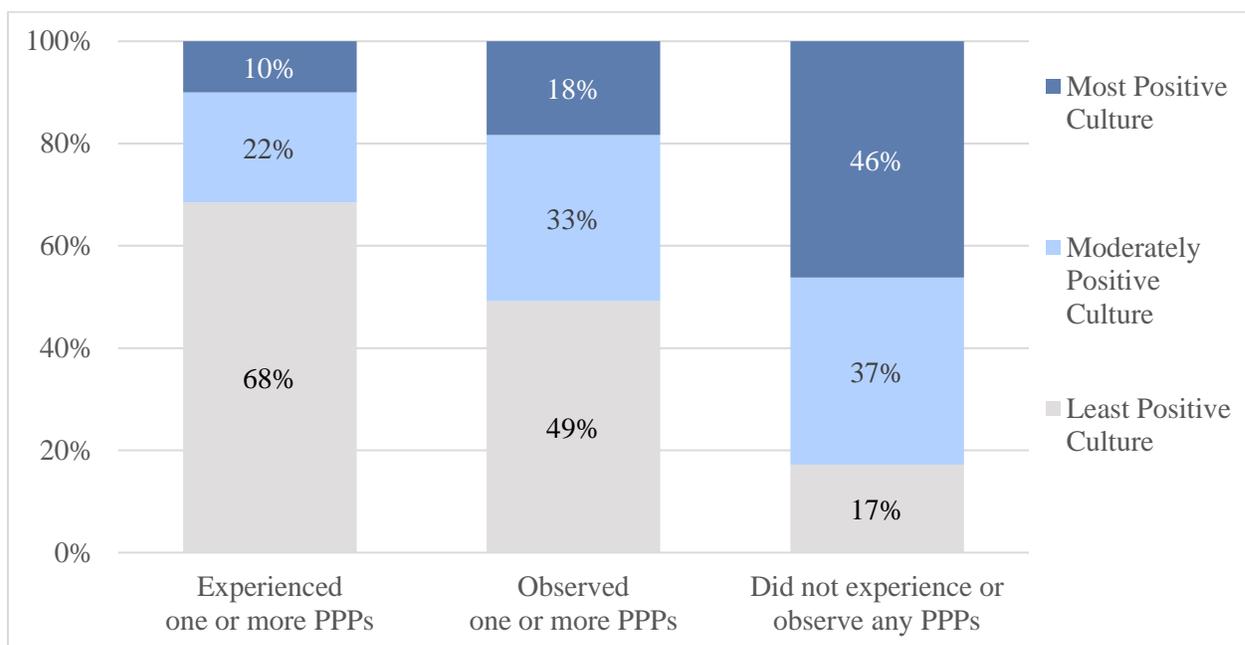
Research has shown that a workplace’s culture can cause an individual to “bring themselves into or remove themselves from particular task behaviors.”<sup>12</sup> If you want an employee to bring all of himself or herself to the performance of a duty (e.g., creativity, energy, and commitment to excellence), then the workplace culture matters.

Our 2016 MPS asked respondents a series of questions about their workplace culture. The relationship between PPP perceptions and the individual workplace culture survey items can be seen in Appendix B. To aid discussion, we combined responses to the 19 workplace culture questions into a single measure and assigned respondents to 3 categories of approximately equal size (“most positive,” “moderately positive,” and “least positive”) based on that measure.

As shown in Chart 3, only 10 percent of those who experienced one or more PPPs, and 18 percent of those who observed one or more PPPs (without experiencing any), reported a workplace culture in the “most positive” category. That contrasts with 46 percent among the respondents who did not experience or observe a PPP.

The data cannot establish whether observing a PPP increases the likelihood of an employee perceiving the workplace culture negatively, or whether perceptions of a poor culture increase the likelihood that management actions will be negatively interpreted as the commission of a PPP. Similarly, the data cannot establish whether observing a PPP increases the likelihood of an employee feeling disengaged, or whether disengagement increases the likelihood that management actions will be negatively interpreted as the commission of a PPP. However, none of these scenarios are good for the merit systems or an effective and efficient civil service.

<sup>12</sup> William A. Kahn, “Psychological Conditions of Personal Engagement and Disengagement at Work,” *Academy of Management Journal* (Dec. 1990), Vol. 33, No. 4, at 692, 700-01.

**Chart 3: Relationship Between Culture and PPP Perceptions (2016)**

Given the comparatively negative workplace culture in work units where PPPs are perceived, it is unsurprising that PPP perceptions also coincided with perceptions that there were barriers to employees doing their best work. On our 2016 MPS, we asked respondents if they agreed with the statement, “My work unit produces high-quality products and services.” Of those employees who reported they neither saw nor experienced any PPPs, 90 percent agreed with the statement about their work unit producing high-quality products and services. But, of those who reported they experienced a PPP, only 59 percent agreed the work unit’s products and services were high-quality. Of those who reported they observed at least one PPP—while personally experiencing no PPPs—only 71 percent agreed the products and services were high-quality. In other words, there was a nearly 20 percentage point drop between those in a workplace without visible PPPs and those in a workplace where PPPs were seen, and another 12 point drop beyond that for those who perceived they experienced one or more PPPs.

It is important to recognize that these views about products and services are perceptions, and it is possible for perceptions to be in error. However, it is problematic that employees in the work units, who would—presumably—be in a good position to judge what the work units were producing, would have these views.

Also worrisome is the negative relationship between PPP perceptions and perceptions that creativity and innovation would be rewarded. For those who neither saw nor experienced PPPs, 59 percent of respondents agreed that creativity and innovation are rewarded. But, for those who observed at least one PPP—while experiencing none—the agreement rate dropped by more than half, to 25 percent. For those who experienced at least one PPP, only 16 percent agreed.

The Government has become increasingly dependent on knowledge-based work and relies on innovative ideas for improvement. For those who observed or experienced a PPP, the low agreement levels that creativity and innovation are rewarded are especially problematic. Human capital is the Government’s most valuable resource and the American people cannot afford to have the value of that resource so greatly diminished.

The Government also needs to be able to recruit high-quality employees. Yet, employees who perceive PPPs are much less likely to recommend their agency as a place to work. Among those who did not observe or experience a PPP, 81 percent agreed that they would recommend their agency as a place to work. For those who observed one or more PPPs, the agreement rate dropped to 51 percent, while those who reported personally experiencing one or more PPPs had only 36 percent of respondents agree.

The 2016 MPS asked respondents if there was a spirit of trust in their work unit. While 74 percent of those who reported observing or experiencing none of the listed PPPs agreed there was a spirit of trust, only 38 percent of those who observed a PPP and 29 percent of those who experienced a PPP reported there was a spirit of trust. (The relationship between PPP perceptions and more workplace culture survey items can be seen in Appendix B.)

Personnel decisions can be subjective, with reasonable people disagreeing on the best approach. This can produce an opportunity for suspicion about motives and therefore perceptions that a personnel action is based on a prohibited practice. The perception alone is not proof of an impropriety, but such a perception can, nevertheless, have a negative effect on the work unit.

As the data has shown, employees perceiving that their agency engages in PPPs has a strong relationship to how employees view their work unit and agency as a whole. In addition to being a violation of law, the commission of a PPP is simply a bad business practice with real-world costs for the organizations that are seen as permitting them to occur.

## *Conclusion*

In 2012, Congress established in statute a requirement that NDAs and NDPs contain language informing employees that they retained their whistleblowing rights. With respect to NDPs, the data indicates that nearly four years later, less than half of those operating under such policies recalled being told of their whistleblower rights. The data is even more disturbing for NDAs, where only a quarter of employees under such agreements recalled being told, despite the legal requirement. The data indicate that agencies need to do more to ensure that employees operating under NDAs and NDPs understand their whistleblowing rights and abilities.

Every PPP that was included in both the 2016 and 2010 surveys showed higher levels of perception in 2016 compared to 2010. In some cases the increase was minor, in others it was more dramatic. This pattern in which all showed some degree of increase is, perhaps, a greater source of concern than the increase in any one PPP, as it may speak to a larger cultural issue. Agencies must not permit PPPs to occur, and yet nearly half of surveyed employees perceived that at least one has.

Both employees who felt personally affected by a PPP and employees who reported seeing a PPP without being personally affected reported a less positive workplace culture overall and lower levels of engagement than those who did not perceive PPPs occurring. If the Government is to have an effective, efficient, merit-based civil service then agencies need to take PPPs seriously.

Taking PPPs seriously means communicating the importance of sound personnel management practices at all levels of an agency, ensuring that supervisory employees are educated concerning the PPPs, monitoring the workplace to detect PPPs, and holding employees accountable when a PPP has been committed. But “taking PPPs seriously” does not end there. It also encompasses taking the MSPs seriously. From both management and legal perspectives, it is far better to do the right thing than to merely refrain from doing the wrong thing. Adhering to the MSPs involves,

among other things, establishing personnel policies and practices that promote merit-based hiring, compensation, development, and management of employees. It involves training supervisors and managers to exercise personnel authority wisely, and not merely legally. And, most important, it involves treating people as assets rather than costs or burdens, and treating policies and practices designed to implement the MSPs as tools for managing people fairly and effectively.

## Appendix A: 2016 PPPs (Personally Experienced, Observed, or Did Not Occur)

In the past 2 years, an agency official (e.g., supervisor, manager, senior leader, etc.) in my work unit has...			
This has NOT Occurred in my work unit ↓			
This has occurred in my work unit, but I was not personally affected by this ↓			
I was personally affected by this ↓			
...discriminated in favor or against someone in a personnel action based upon race	7.8%	12.8%	79.4%
...discriminated in favor or against someone in a personnel action based upon age	7.0%	10.7%	82.4%
...discriminated in favor or against someone in a personnel action based upon religion	2.0%	3.1%	94.9%
...discriminated in favor or against someone in a personnel action based upon sex	6.8%	13.1%	80.1%
...discriminated in favor or against someone in a personnel action based upon national origin	2.6%	5.1%	92.3%
...discriminated in favor or against someone in a personnel action based upon disabling condition	4.7%	7.6%	87.6%
...discriminated in favor or against someone in a personnel action based upon marital status	2.1%	3.2%	94.7%
...discriminated in favor or against someone in a personnel action based upon political affiliation	1.4%	2.7%	95.9%
...solicited or considered improper employment recommendations	6.4%	10.6%	83.1%
...obstructed someone's right to compete for employment	7.6%	10.5%	81.9%
...tried to influence someone to withdraw from competition for a position for the purpose of helping or injuring someone else's chances	6.0%	9.4%	84.6%
...tried to define the scope or manner of a recruitment action, or the qualifications required, for the purpose of improving the chances of a particular person's right to compete for employment	8.5%	22.1%	69.4%
...advocated for the appointment, employment, promotion, or advancement of a relative	2.8%	11.2%	86.0%
...took or threatened to take a personnel action against an employee because the employee disclosed a violation of law, rules, or regulations or reported fraud, waste, or abuse for employment	6.0%	8.3%	85.7%
...took or threatened to take a personnel action against an employee because the employee filed an appeal or grievance	5.9%	13.0%	81.1%
...knowingly violated a lawful form of veterans' preference or protection laws	2.8%	4.2%	93.0%

\* Row totals may not equal 100% due to rounding.

## Appendix B: PPPs and Individual Workplace Culture Items

The table below contains the individual workplace culture questions that were combined into a single item for discussion in the research brief and illustrates how differently each question was seen by those who experienced one or more PPPs, those who observed one or more PPPs without experiencing any, and those who neither experienced nor observed any PPPs.

Workplace Culture Question	PPP Exposure	Agree	Neither Agree nor Disagree	Disagree
I feel fully appreciated at work	Experienced PPP(s)	23%	21%	55%
	Observed PPP(s)	40%	26%	33%
	Neither Experienced nor Observed	71%	18%	11%
I am able to share my true thoughts and feelings at work	Experienced PPP(s)	23%	23%	54%
	Observed PPP(s)	38%	27%	36%
	Neither Experienced nor Observed	69%	19%	12%
I feel encouraged to try new things in my work	Experienced PPP(s)	24%	26%	51%
	Observed PPP(s)	41%	27%	32%
	Neither Experienced nor Observed	67%	21%	12%
There is a culture of openness and support for new or different perspectives in my work unit	Experienced PPP(s)	26%	19%	55%
	Observed PPP(s)	38%	24%	38%
	Neither Experienced nor Observed	71%	17%	11%
I feel cared about personally at work	Experienced PPP(s)	28%	25%	47%
	Observed PPP(s)	41%	28%	31%
	Neither Experienced nor Observed	72%	18%	9%
I have an opportunity to develop my character in my organization	Experienced PPP(s)	28%	33%	39%
	Observed PPP(s)	37%	38%	25%
	Neither Experienced nor Observed	68%	25%	7%
I am able to openly express my concerns at work	Experienced PPP(s)	29%	20%	51%
	Observed PPP(s)	44%	21%	36%
	Neither Experienced nor Observed	77%	14%	9%
There is a spirit of trust in my work unit	Experienced PPP(s)	29%	19%	52%
	Observed PPP(s)	38%	22%	40%
	Neither Experienced nor Observed	74%	16%	10%
I thrive at work	Experienced PPP(s)	33%	36%	32%
	Observed PPP(s)	40%	38%	22%
	Neither Experienced nor Observed	70%	23%	7%
I feel valued at work	Experienced PPP(s)	34%	21%	45%
	Observed PPP(s)	50%	23%	27%
	Neither Experienced nor Observed	81%	12%	7%

\* Row totals may not equal 100% due to rounding.

Workplace Culture Question	PPP Exposure	Agree	Neither Agree nor Disagree	Disagree
I feel comfortable talking to my supervisor about the things that matter to me at work	Experienced PPP(s)	36%	17%	47%
	Observed PPP(s)	50%	17%	32%
	Neither Experienced nor Observed	82%	10%	8%
There is a culture of helping and supporting one another in my work unit	Experienced PPP(s)	36%	20%	44%
	Observed PPP(s)	52%	20%	28%
	Neither Experienced nor Observed	81%	11%	8%
I am empowered to do my work the way I see best	Experienced PPP(s)	40%	21%	39%
	Observed PPP(s)	55%	19%	26%
	Neither Experienced nor Observed	79%	13%	7%
I feel comfortable being myself at work	Experienced PPP(s)	43%	23%	34%
	Observed PPP(s)	63%	20%	17%
	Neither Experienced nor Observed	84%	12%	5%
There is a spirit of friendship and camaraderie in my work unit	Experienced PPP(s)	43%	19%	38%
	Observed PPP(s)	57%	20%	23%
	Neither Experienced nor Observed	81%	12%	7%
My perspective is sought on important work matters	Experienced PPP(s)	45%	17%	37%
	Observed PPP(s)	55%	21%	24%
	Neither Experienced nor Observed	78%	15%	7%
I like the quality of relationships I have with my coworkers	Experienced PPP(s)	47%	28%	24%
	Observed PPP(s)	61%	26%	13%
	Neither Experienced nor Observed	81%	15%	5%
I feel needed and depended on at work	Experienced PPP(s)	51%	21%	28%
	Observed PPP(s)	64%	19%	16%
	Neither Experienced nor Observed	84%	12%	4%
My judgment is trusted and relied on at work	Experienced PPP(s)	52%	18%	30%
	Observed PPP(s)	67%	17%	16%
	Neither Experienced nor Observed	87%	9%	4%

\* Row totals may not equal 100% due to rounding.