

Department of Legislative Services
Maryland General Assembly
2003 Session

FISCAL AND POLICY NOTE

Senate Bill 608
Finance

(Senator McFadden, *et al.*) (Joint Audit Committee)

Maryland Whistleblower Laws

This bill expands the scope of the State Whistleblower Law to include judicial and legislative branch employees and requires specified protections and remedies for those employees, as well as employees of State contractors.

The bill is effective July 1, 2003 and applies retroactively to January 1, 2003 for any personnel action taken as a reprisal against any State government or contractor employee who discloses information about an abuse of authority, gross mismanagement or waste of money, a substantial specific danger to public health or safety, or a violation of law that occurred on or after January 1, 2003.

Fiscal Summary

State Effect: Potentially minimal increase in general fund expenditures to the extent that the bill allows damage awards and may require additional administrative hearings. Expenditures could also decrease to the extent that the bill encourages additional disclosure of misuse of State funds. Any such efforts cannot be verifiably estimated at this time.

Local Effect: None.

Small Business Effect: Potentially meaningful. Small businesses that are State contractors or subcontractors would be affected to the extent that they would be required to pay damages to employees as specified by the bill.

Analysis

Bill Summary: The bill extends the protections provided against reprisals under the Maryland Whistleblower Law so that an employer who is a State contractor may not take any personnel action against an employee who discloses information he or she reasonably believes is: (1) an abuse of authority, gross mismanagement, or gross waste of money; (2) a substantial and specific danger to public health or safety; or (3) a violation of law. Reprisals are also prohibited if the employee objects to or refuses to participate in an activity or policy that violates the law, if the employee has a reasonable, good faith belief that the employer has been or still is engaged in an illegal activity, practice, or policy. The employer must give its employees written notice of the protections and remedies provided by the bill.

The bill defines an employer as a person engaged in a profession or trade that contracts with the State for goods or services that includes agents, contractors, or subcontractors of an employer but excludes a unit of State government. An employee under the bill is any individual who performs services for, or under the control of, an employer for wages or other remuneration.

An employee who is subject to a reprisal may institute a civil action in the county where the violation occurred or where the employee resides or the employer's principal office is located. However, the lawsuit must be brought within one year of the alleged violation or within one year that the employee first became aware of it. The bill authorizes the court to take any of the following steps as a remedy if it determines that a violation occurred:

- issue an injunction to restrain continued violation;
- reinstate the employee to the same or equivalent position held before the reprisal;
- remove any adverse entries on the employee's personnel record;
- reinstate full fringe benefits and seniority rights;
- require compensation for lost wages, benefits, and other remuneration;
- award court costs, including attorney fees, to the prevailing complainant; and
- award any other appropriate damages or relief.

The bill also expands the scope of the Whistleblower Law to include employees and employment applicants in all units of the executive, judiciary, and legislative branches, and clarifies that any unit with an independent personnel system is also covered. It applies the corrective actions required under the Whistleblower Law to these employees. Judicial and legislative employees may elect to file a grievance under their respective personnel policies, and after all available remedies under those policies are exhausted,

may bring a civil action in circuit court in the county where they live or where the violation occurred.

The bill authorizes the court to: (1) issue an injunction to restrain continued violation; (2) require remedial action; (3) award court costs and attorney fees; and (4) award any other appropriate damages and relief.

Current Law: The General Assembly passed the Maryland Whistleblower Act in 1980 (Chapter 850) to protect executive branch employees from retaliation for reporting violations of State law, following passage of similar federal legislation in 1978. Under the Maryland Act, a supervisor, appointing authority, or head of a principal unit cannot take personnel action as a reprisal against an employee who discloses information regarding: (1) an abuse of authority, gross mismanagement, or waste of money; (2) a substantial specific danger to public health or safety; or (3) a violation of law.

The law applies only to an employee in an executive branch, including a unit with an independent personnel system. State entities that have independent personnel systems include the Department of Transportation, the University System of Maryland, and three colleges outside the University System. Employees of the University System of Maryland or Morgan State University must choose whether to file a grievance under the Whistleblower Act or through the procedures provided in the Education Article.

Employees or employment applicants must file a complaint within one year after the date that they were aware of the violation. Upon a complaint by an employee that a reprisal occurred, the Secretary of Budget and Management may eliminate any detrimental material from the employee's personnel file that was inserted as a retaliatory action or require the head of the principal unit to: (1) hire, reinstate, promote, or terminate the employee's suspension; (2) award back pay to the date of the violation; (3) grant leave or seniority; (4) take appropriate disciplinary action against anyone who caused the violation; and (5) take any other necessary action.

The employee may appeal the Secretary's decision to the Office of Administrative Hearings (OAH), which must conduct a hearing and issue a decision within 45 days of the hearing. OAH may award appropriate relief to the prevailing complainant, including the costs of litigation and attorney fees and any remedial action that the Secretary is authorized to take. OAH's decision is final.

Employees in the judicial and legislative branches are not covered by the Whistleblower Act; however, State law prohibits reprisals (as well as discrimination, coercion, interference, or restraint) against State employees of all branches during any stage of an employee's complaint, grievance, or other administrative or legal action. This provision does not require any corrective action. State employees of all branches may file a lawsuit

asserting a retaliatory discharge for whistleblowing under the First Amendment or the 1871 Civil Rights Act (42 U.S.C 1983).

Background: Both judiciary and legislative branch employees have nonstatutory grievance procedures that apply to certain complaints. Legislative grievances cannot pertain to layoffs, budgetary actions, department policies, salary plans, or an oral reprimand or counseling. Similarly, judiciary employees cannot grieve over wage patterns, fringe benefits, seniority status, position classification, and other broad areas of financial management.

Both procedures involve filing a complaint in writing and requiring an attempt to resolve the issue with an immediate supervisor. Legislative complainants can appeal a supervisor's decision to the Executive Director of the Department of Legislative Services (DLS) and ultimately to the Speaker of the House of Delegates and the President of the Senate. Judiciary employees can appeal a supervisor's decision to the Clerk of the Court or the Administrative Office of the Courts' Unit Director and, ultimately, to the State Court Administrator.

Thirty-nine states (including Maryland) have whistleblowing laws that vary in scope and protections. According to the Attorney General's review of a sample of those states, one state (North Carolina) restricts coverage to executive branch employees. Several other states, including California, Connecticut, Kentucky, and Texas, extend whistleblowing protections to all state employees.

State Expenditures: The Administrative Office of the Courts advises that its grievance policy already allows an employee to bring whistleblower actions and that no successful claims of reprisal or retaliation arising out of a whistleblowing complaint have been made recently. It further advises that two provisions of the bill – the authorization of awards for damages and the potential need for a separate civil trial if internal remedies for an employee's appeal are exhausted – could increase the judicial branch's costs but neither can be accurately estimated at this time. It further notes that out of nine whistleblowing complaints filed by executive branch employees in 2002, none had probable cause.

The bill is not likely to have a fiscal impact on the department or the Maryland General Assembly. DLS observes that State law affords some protections to both legislative and judicial branch employees and that the bill is unlikely to significantly increase costs for either branch unless major damages are awarded to an employee.

To the extent that the bill would encourage additional disclosure of waste or mismanagement of State funds, expenditures could decrease. It is not known what type of funds (general, special, federal, or other) would be affected.

Additional Comments: This bill could have a significant impact on the private sector by extending the requirements of the Whistleblower Law to State contractors and subcontractors.

Additional Information

Prior Introductions: None.

Cross File: HB 403 (Delegate Rosenberg, *et al.*) – Appropriations.

Information Source(s): Judiciary (Administrative Office of the Courts), University System of Maryland, Department of Budget and Management, Department of Legislative Services

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