

HOUSE BILL 1099

P4

2lr2582

By: **Delegate Bagnall**

Introduced and read first time: February 10, 2022

Assigned to: Appropriations

A BILL ENTITLED

1 AN ACT concerning

2 **State Personnel – Whistleblower Law – Procedures and Remedies**
3 **(First Amendment and Public Employee Protection Act)**

4 FOR the purpose of altering the prohibition on reprisal against certain employees for
5 certain disclosures and actions under the Maryland Whistleblower Law in the
6 Executive Branch of State Government; altering certain procedures and remedies
7 relating to whistleblower complaints; and generally relating to protections,
8 procedures, and remedies under the Maryland Whistleblower Law in the Executive
9 Branch of State Government.

10 BY repealing and reenacting, without amendments,
11 Article – State Personnel and Pensions
12 Section 5–301 through 5–303, 5–306 through 5–308, 5–313, and 5–314
13 Annotated Code of Maryland
14 (2015 Replacement Volume and 2021 Supplement)

15 BY repealing and reenacting, with amendments,
16 Article – State Personnel and Pensions
17 Section 5–304, 5–305, and 5–309 through 5–312
18 Annotated Code of Maryland
19 (2015 Replacement Volume and 2021 Supplement)

20 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,
21 That the Laws of Maryland read as follows:

22 **Article – State Personnel and Pensions**

23 5–301.

24 (a) This subtitle applies to:

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



1 (1) all employees and State employees who are applicants for positions in
2 the Executive Branch of State government, including a unit with an independent personnel
3 system; and

4 (2) if both the Commonwealth of Virginia and the District of Columbia
5 enact similar whistleblower protections or waive their sovereign immunity as applied to
6 the Washington Metropolitan Area Transit Authority for the purpose of providing
7 whistleblower protections, all employees of the Washington Metropolitan Transit
8 Authority.

9 (b) For the purpose of subsection (a)(2) of this section, the General Assembly
10 considers the following whistleblower protection laws to be similar to whistleblower
11 protection laws established under Title 5, Subtitle 3 of the State Personnel and Pensions
12 Article:

13 (1) the District of Columbia's Employees of District Contractors and
14 Instrumentality Whistleblower Protection Act, Title 2, Chapter 2, Subchapter XII of the
15 Code of the District of Columbia; and

16 (2) the Commonwealth of Virginia's Fraud and Abuse Whistleblower
17 Protection Act, Title 2.2, Chapter 30.1 of the Code of Virginia.

18 5-302.

19 (a) This subtitle does not preclude action for defamation or invasion of privacy.

20 (b) This subtitle does not prohibit a personnel action that would have been taken
21 regardless of a disclosure of information.

22 5-303.

23 The Secretary shall adopt regulations for processing and resolving complaints
24 brought under this subtitle.

25 5-304.

26 (a) The head of each principal unit shall provide the employees of the unit with
27 written notice of the protections and remedies provided by this subtitle.

28 (b) In addition to the requirement specified in subsection (a) of this section, the
29 Secretary of Juvenile Services shall:

30 (1) provide all employees of the Department of Juvenile Services with
31 written notice of the protections and remedies provided by **§ 5-305(2) and (3)** **§**
32 **5-305(B)(3) AND (4)** of this subtitle; and

1 (2) include information on the protections and remedies provided by [§
2 5–305(2) and (3)] **§ 5–305(B)(3) AND (4)** of this subtitle in the Department’s employee
3 handbook and in any new employee orientation or training.

4 5–305.

5 (A) (1) IN THIS SECTION THE FOLLOWING WORDS HAVE THE MEANINGS
6 INDICATED.

7 (2) “PERSONNEL ACTION” INCLUDES ANY RECOMMENDED,
8 THREATENED, OR ACTUAL ADVERSE EMPLOYMENT ACTION, INCLUDING:

9 (I) TERMINATION, DEMOTION, SUSPENSION, OR REPRIMAND;

10 (II) INVOLUNTARY OR COERCED RETIREMENT;

11 (III) INVOLUNTARY TRANSFER, REASSIGNMENT, OR DETAIL TO
12 AN ASSIGNMENT THAT A REASONABLE EMPLOYEE WOULD FIND LESS FAVORABLE;
13 AND

14 (IV) FAILURE TO PROMOTE, HIRE, OR TAKE OTHER FAVORABLE
15 PERSONNEL ACTIONS.

16 (3) “RETALIATORY ACTION” INCLUDES:

17 (I) ENGAGING IN ANY CONDUCT THAT WOULD DISSUADE A
18 REASONABLE EMPLOYEE FROM ENGAGING IN ACTIVITIES PROTECTED UNDER THIS
19 SUBTITLE; AND

20 (II) RETALIATING IN ANY OTHER MANNER AGAINST AN
21 EMPLOYEE BECAUSE THE EMPLOYEE MAKES A DISCLOSURE PROTECTED UNDER
22 THIS SUBTITLE.

23 (B) Subject to the limitations of § 5–306 of this subtitle, a supervisor, appointing
24 authority, or the head of a principal unit may not **THREATEN OR** take or refuse to take any
25 personnel **OR OTHER RETALIATORY** action as a reprisal against:

26 (1) an employee who discloses information that the employee reasonably
27 believes evidences:

28 (i) an abuse of authority, gross mismanagement, or gross waste of
29 money;

30 (ii) a substantial and specific danger to public health or safety; or

1 (iii) a violation of law;

2 **(2) AN EMPLOYEE WHO DISCLOSES INFORMATION RELATING TO**
 3 **BUSINESS OR OTHER ACTIVITIES OF THE STATE, INCLUDING INFORMATION**
 4 **RELATING TO ISSUES OF PUBLIC HEALTH OR SAFETY, DATA PRESERVATION,**
 5 **CYBERSECURITY, CRIMES AND THE INVESTIGATION OF CRIMES, AND OTHER**
 6 **MATTERS REQUIRING PROACTIVE ACTION, THAT THE EMPLOYEE REASONABLY**
 7 **BELIEVES, IF DISCLOSED, IS IN THE PUBLIC INTEREST;**

8 **[(2)] (3)** an employee of the Department of Juvenile Services who
 9 discloses information to the Director of Juvenile Justice Monitoring or staff of the Juvenile
 10 Justice Monitoring Unit relating to the Unit's duties under § 6-404(1) of the State
 11 Government Article; or

12 **[(3)] (4)** an employee who, following a disclosure under item **[(1) or (2)]**
 13 **(1), (2), OR (3)** of this [section] **SUBSECTION**, seeks a remedy provided under this subtitle
 14 or any other law or policy governing the employee's unit.

15 **(C) A PERSONNEL OR OTHER RETALIATORY ACTION TAKEN AGAINST AN**
 16 **EMPLOYEE AFTER THE EMPLOYEE FILES A COMPLAINT UNDER § 5-309 OF THIS**
 17 **SUBTITLE IS PRESUMED TO BE AN ACT OF REPRISAL IN VIOLATION OF SUBSECTION**
 18 **(B) OF THIS SECTION.**

19 5-306.

20 Section 5-305 of this subtitle applies to a disclosure that is specifically prohibited by
 21 law only if that disclosure is made exclusively to the Attorney General in the manner
 22 allowed in § 5-313 of this subtitle.

23 5-307.

24 (a) An employee in the State Personnel Management System who seeks relief for
 25 a violation of § 5-305 of this subtitle may elect to file:

26 (1) a complaint under § 5-309 of this subtitle; or

27 (2) a grievance under Title 12 of this article.

28 (b) An employee of the University System of Maryland who is eligible to file a
 29 grievance under Title 13 of the Education Article and seeks relief for a violation of § 5-305
 30 of this subtitle may elect to file:

31 (1) a complaint under § 5-309 of this subtitle; or

32 (2) a grievance under Title 13 of the Education Article.

1 (c) An employee of Morgan State University who is eligible to file a grievance
2 under Title 14 of the Education Article and seeks relief for a violation of § 5–305 of this
3 subtitle may elect to file:

4 (1) a complaint under § 5–309 of this subtitle; or

5 (2) a grievance under Title 14 of the Education Article.

6 5–308.

7 (a) (1) A complainant may be represented during the complaint process by any
8 person the complainant chooses.

9 (2) Either party may be represented at a hearing by counsel.

10 (b) (1) If a complainant fails to appeal a decision in accordance with this
11 subtitle, the complainant is considered to have accepted the decision.

12 (2) A failure to decide a complaint in accordance with this subtitle is
13 considered a denial from which an appeal may be made.

14 (c) Each party shall make every effort to resolve a complaint at the lowest level
15 possible.

16 5–309.

17 (a) (1) An employee subject to this subtitle may file with the Secretary a
18 complaint that alleges a violation of § 5–305 of this subtitle.

19 (2) A complaint under this subtitle must be filed within [6 months] **2**
20 **YEARS** after the complainant first knew of or reasonably should have known of the
21 violation.

22 (b) When a complaint is received, the Secretary or designee promptly shall:

23 (1) send a copy of the complaint to the head of the principal unit named in
24 the complaint; and

25 (2) advise the head of the principal unit to respond in writing to the
26 complaint within [20] **15** days after receiving the copy.

27 **(C) (1) WITHIN 15 DAYS OF RECEIVING A COPY OF THE COMPLAINT**
28 **UNDER SUBSECTION (B)(1) OF THIS SECTION, THE HEAD OF THE PRINCIPAL UNIT**
29 **SHALL MAKE EVERY EFFORT TO RESOLVE THE COMPLAINT.**

1 **(2) IF THE HEAD OF THE PRINCIPAL UNIT DETERMINES THAT A**
 2 **VIOLATION OF § 5–305 OF THIS SUBTITLE HAS OCCURRED AND ACTION IS TAKEN TO**
 3 **RESOLVE THE COMPLAINT WITHIN THE TIME PERIOD SPECIFIED UNDER**
 4 **PARAGRAPH (1) OF THIS SUBSECTION, THE EMPLOYEE WHO FILED THE COMPLAINT:**

5 **(I) SHALL RECEIVE STATUTORY DAMAGES IN AN AMOUNT OF**
 6 **NOT LESS THAN \$5,000; AND**

7 **(II) IS NOT ENTITLED TO ANY ADDITIONAL DAMAGES UNDER**
 8 **SUBSECTION (F) OF THIS SECTION.**

9 **[(c)] (D)** Within 60 days after a complaint is received:

10 **(1) IF THE COMPLAINT IS NOT RESOLVED UNDER SUBSECTION (C) OF**
 11 **THIS SECTION, the complaint shall be investigated BY THE OFFICE OF THE ATTORNEY**
 12 **GENERAL to determine whether a violation of § 5–305 of this subtitle has occurred[:**

13 (i) by the Secretary or designee of the Secretary; or

14 (ii) if the Department is charged in the complaint, by a designee of
 15 the Governor]; and

16 **(2) the Secretary or designee or the Governor’s designee, IF THE**
 17 **DEPARTMENT IS CHARGED IN THE COMPLAINT, shall:**

18 (i) take the action described in subsection [(d)(1) or (2)] **€(1) OR (2)**
 19 of this section; and

20 (ii) issue to the complainant and head of the principal unit a written
 21 decision that includes **FINDINGS AND RECOMMENDATIONS OF THE OFFICE OF THE**
 22 **ATTORNEY GENERAL AND** any remedial action taken **IN ACCORDANCE WITH THOSE**
 23 **FINDINGS AND RECOMMENDATIONS.**

24 **[(d)] (E)** **(1) If the [Secretary or designee or the Governor’s designee] OFFICE**
 25 **OF THE ATTORNEY GENERAL** determines that a violation has not occurred, the Secretary
 26 or Governor’s designee shall dismiss the complaint.

27 **(2) If the [Secretary or designee or the Governor’s designee] OFFICE OF**
 28 **THE ATTORNEY GENERAL** determines that a violation has occurred, the **OFFICE SHALL**
 29 **ISSUE A WRITTEN DECISION WITH FINDINGS AND RECOMMENDATIONS AND THE**
 30 Secretary or designee shall take appropriate remedial action **IN ACCORDANCE WITH**
 31 **THOSE FINDINGS AND RECOMMENDATIONS.**

32 **[(e)] (F)** As a remedial action for a violation of § 5–305 of this subtitle, the
 33 Secretary or designee may:

1 (1) order the removal of any related detrimental information from the
2 complainant's State personnel records;

3 (2) require the head of the principal unit to:

4 (i) hire, promote, or reinstate the complainant or end the
5 complainant's suspension from employment;

6 (ii) award the complainant back pay to the day of the violation;

7 (iii) grant the complainant leave or seniority;

8 (iv) take appropriate disciplinary action against any individual who
9 caused the violation; [and]

10 (V) **AWARD THE COMPLAINANT DAMAGES, INCLUDING:**

11 **1. COMPENSATORY DAMAGES, INCLUDING FRONT PAY,**
12 **OUT-OF-POCKET COSTS RELATED TO OBTAINING OTHER EMPLOYMENT, AND PAIN**
13 **AND SUFFERING DAMAGES;**

14 **2. PUNITIVE DAMAGES; AND**

15 **3. STATUTORY DAMAGES IN LIEU OF OTHER REMEDIAL**
16 **ACTION IN AN AMOUNT OF NOT LESS THAN \$5,000 IF REQUESTED BY A**
17 **COMPLAINANT;**

18 (VI) **REASONABLE ATTORNEY'S FEES AND COSTS; AND**

19 [(v)] (VII) take any other remedial action consistent with the
20 purposes of this subtitle.

21 5-310.

22 (a) A complainant may appeal to the Office of Administrative Hearings:

23 (1) within 10 days after receiving a decision under § 5-309 of this subtitle;

24 or

25 (2) when a decision is not issued within 60 days after the complaint is filed
26 and the complainant requests a hearing.

27 (b) (1) The Office of Administrative Hearings shall conduct a hearing on each
28 appeal in accordance with Title 10, Subtitle 2 of the State Government Article. The Office
29 is bound by any regulation, declaratory ruling, prior adjudication, or other settled,

1 preexisting policy, to the same extent as the Department is or would have been bound if it
2 were hearing the case.

3 (2) A record that is protected from disclosure under Title 4 of the General
4 Provisions Article may be used as evidence in a hearing only if:

5 (i) the material is essential to the conduct of the hearing; and

6 (ii) names and other identifying information are deleted to the
7 extent necessary to maintain confidentiality.

8 (3) The confidentiality of records and information protected from disclosure
9 under Title 4 of the General Provisions Article shall be maintained in each hearing.

10 (c) (1) Within 45 days after the close of the hearing record, the Office of
11 Administrative Hearings shall issue to the parties a written decision and may grant any
12 appropriate relief under subsection (d) of this section.

13 (2) The decision of the Office of Administrative Hearings is final.

14 (d) A complainant who prevails at a hearing may be awarded any appropriate
15 relief, including:

16 (1) any remedial action allowed under [~~§ 5–309(e)~~] **§ 5–309(F)** of this
17 subtitle; and

18 (2) costs of litigation and reasonable attorney's fees.

19 (e) A complainant or appointing authority may appeal the decision issued under
20 subsection (c) of this section in accordance with § 10–222 of the State Government Article.

21 5–311.

22 After reviewing a final decision under this subtitle, the court may award costs of
23 litigation and reasonable attorney's fees to a prevailing complainant and any other
24 appropriate relief, **INCLUDING ANY REMEDIAL ACTION ALLOWED UNDER § 5–309(F)**
25 **OF THIS SUBTITLE.**

26 5–312.

27 If, during an investigation under [~~§ 5–309(c)~~] **§ 5–309(D)** of this subtitle, the
28 [~~Secretary or Governor's designee~~] **OFFICE OF THE ATTORNEY GENERAL** finds that
29 reasonable grounds exist to believe that a crime has been committed, the [~~Secretary or~~
30 ~~Governor's designee~~] **OFFICE** shall:

31 (1) promptly refer the matter to an appropriate prosecutor;

- 1 (2) make all pertinent evidence available to the prosecutor; and
- 2 (3) send to the individual believed to have committed the crime a notice
- 3 that:
- 4 (i) contains a statement of the allegation;
- 5 (ii) notifies the individual that the matter has been referred to a
- 6 prosecutor;
- 7 (iii) advises the individual of the individual’s right to obtain counsel;
- 8 and
- 9 (iv) advises the individual of the individual’s right to refuse to
- 10 respond to the allegation if a response might be incriminating.

11 5–313.

12 For purposes of this subtitle, the Attorney General shall:

- 13 (1) designate an assistant Attorney General to receive from applicants and
- 14 employees any information the disclosure of which is otherwise protected by law;
- 15 (2) investigate each allegation of illegality or impropriety;
- 16 (3) take appropriate legal action; and
- 17 (4) if the investigation concerns an allegation of illegality or impropriety in
- 18 the Executive Branch, submit a confidential report to the Governor that describes the
- 19 content of the disclosure.

20 5–314.

21 Information obtained as part of an investigation conducted under this subtitle is

22 confidential within the meaning of Title 4 of the General Provisions Article.

23 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect

24 October 1, 2022.