

Department of Legislative Services
 Maryland General Assembly
 2022 Session

FISCAL AND POLICY NOTE
 First Reader

House Bill 1099 (Delegate Bagnall)
 Appropriations

State Personnel - Whistleblower Law - Procedures and Remedies (First Amendment and Public Employee Protection Act)

This bill modifies the State’s Whistleblower Law for Executive Branch employees, including (1) expanding the prohibition against reprisals for protected disclosures to include threatened personnel action and other actual or threatened retaliatory action, as defined in the bill; (2) extending protections to employees who disclose specified information relating to business or other activities of the State that the employee reasonably believes, if disclosed, is in the public interest; (3) requiring the Office of the Attorney General (OAG) to investigate specified unresolved whistleblower complaints; and (4) authorizing the award of specified monetary damages and reasonable attorney’s fees and costs to prevailing complainants.

Fiscal Summary

State Effect: General fund expenditures for OAG increase by *at least* \$53,700 in FY 2023, as discussed below. Future years reflect annualization, inflation, and elimination of one-time costs. State expenditures (all funds) increase further to the extent that monetary damages are awarded, as discussed below (not reflected below). Revenues are not affected.

(in dollars)	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	53,700	62,100	63,900	65,600	67,500
Net Effect	(\$53,700)	(\$62,100)	(\$63,900)	(\$65,600)	(\$67,500)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary/Current Law: The Maryland Whistleblower Law applies to all employees in the Executive Branch of State government, including those in independent personnel systems. The head of each principal unit must provide the employees of the unit with written notice of the protections and remedies provided under the whistleblower law. The Secretary of Budget and Management is responsible for adopting regulations for processing and resolving whistleblower complaints.

Under current law, a supervisor, appointing authority, or head of a principal unit may not take or refuse to take any personnel action as a reprisal against:

- an employee who discloses information that the employee reasonably believes evidences an abuse of authority, gross management, or gross waste of money; a substantial and specific danger to public health or safety; or a violation of law;
- an employee of the Department of Juvenile Services who discloses information to the Director of Juvenile Justice Monitoring or staff of the Juvenile Justice Monitoring Unit relating to the unit's duties; or
- an employee who, following an above-specified disclosure, seeks a remedy provided under the whistleblower law or other law or policy governing the employee's unit.

The whistleblower law does not, however, prohibit a personnel action that would have been taken regardless of a disclosure of information.

Under the bill, the prohibition against reprisals is expanded to include any threatened personnel action or any other actual or threatened retaliatory action as a reprisal against protected disclosures. A personnel or other retaliatory action taken against an employee after the employee files a complaint under the whistleblower law is presumed to be a prohibited act of reprisal. The bill defines "personnel action" to include any recommended, threatened, or actual adverse employment action, including:

- termination, demotion, suspension, or reprimand;
- involuntary or coerced retirement;
- involuntary transfer, reassignment, or detail to an assignment that a reasonable employee would find less favorable; and
- failure to promote, hire, or take other favorable personnel actions.

"Retaliatory action" includes (1) engaging in any conduct that would dissuade a reasonable employee from engaging in protected activities, as specified, and (2) retaliating in any other manner against an employee because the employee makes a protected disclosure.

The bill also extends protections against reprisal to an employee who discloses information relating to business or other activities of the State, including information relating to (1) issues of public health or safety; (2) data preservation; (3) cybersecurity; (4) crimes and the investigation of crimes; and (4) other matters requiring proactive action that the employee reasonably believes, if disclosed, is in the public interest.

Filing of and Actions on Complaints

Under current law, an employee may file a complaint with the Secretary of Budget and Management that alleges a violation of the whistleblower law, as provided under § 5-309 of the State Personnel and Pensions Article. (An employee who seeks relief for a whistleblower violation may also elect to file a grievance under other specified provisions of law.) A complaint filed under § 5-309 must be filed within six months after the complainant first knew of or reasonably should have known of the violation. When a complaint is received, the Secretary or designee must promptly send a copy of the complaint to the head of the principal unit named in the complaint and advise the head of the principal unit to respond to the complaint in writing within 20 days.

Within 60 days after a complaint is received, the complaint must be investigated by the Secretary of Budget and Management, the Secretary's designee, or the Governor's designee (if the Department of Budget and Management (DBM) is charged in the complaint). The Secretary, Secretary's designee, or Governor's designee must issue to the complainant and head of the principal unit a written decision that includes any remedial action taken, as specified.

As a remedial action for a violation, the Secretary or designee may order the removal of any related detrimental information from the complainant's State personnel records and require the head of the principal unit to:

- hire, promote, or reinstate the complainant or end the complainant's suspension from employment;
- award the complainant back pay to the day of the violation;
- grant the complainant leave or seniority;
- take appropriate disciplinary action against any individual who caused the violation; and
- take any other remedial action consistent with the purposes of the whistleblower law.

Under the bill, the timeframe within which a complaint must be filed is expanded to two years. The head of the principal unit named in a complaint must make every effort to resolve the complaint within 15 days of receiving a copy of the complaint. If the head of

the principal unit determines that a violation has occurred, and action is taken to resolve the complaint within the required time period, the employee who filed the complaint must receive statutory damages in an amount of at least \$5,000 and is not entitled to additional damages as specified in the bill.

The bill transfers responsibility for investigating unresolved complaints from DBM to OAG. Thus, if a complaint is not resolved within 60 days, the complaint must be investigated by OAG. If OAG determines that a violation has occurred, OAG must issue a written decision with findings and recommendations, and the Secretary of Budget and Management or designee must take appropriate remedial action in accordance with those findings and recommended actions. The bill authorizes, in addition to the remedial actions available under current law, the awarding of damages to a complainant, including (1) compensatory damages; (2) punitive damages; (3) statutory damages of at least \$5,000 in lieu of other remedial action, if requested by a complainant; and (4) reasonable attorney's fees and costs.

Appeals

Under current law, a complainant may appeal to the Office of Administrative Hearings (OAH) (1) within 10 days after receiving a decision from the head of the unit or (2) when a decision is not issued within 60 days after the complaint is filed, and the complainant requests a hearing. OAH must issue a written decision within 45 days after the close of the hearing record and may grant appropriate relief, as specified. The decision of OAH is final. A complainant who prevails at a hearing may be awarded any appropriate relief, including any specified remedial action and costs of litigation and reasonable attorney's fees. (*Under the bill*, remedial action may include the awarding of specified monetary damages.)

A complainant or appointing authority may seek judicial review of a decision of OAH in accordance with the Administrative Procedure Act. After reviewing a final decision, the court may award costs of litigation and reasonable attorney's fees to a prevailing complainant and any other appropriate relief. *Under the bill*, the relief may include any specified remedial action allowed under existing whistleblower law provisions and specified monetary damages.

Referral of Suspected Criminal Conduct

Under current law, if the Secretary of Budget and Management or Governor's designee finds, during an investigation of an alleged violation, that reasonable grounds exist to believe that a crime has been committed, he or she must promptly refer the matter to an appropriate prosecutor, make all pertinent evidence available to the prosecutor, and send a specified notice to the individual believed to have committed the crime. *Under the bill*,

OAG is responsible for referring such matters to the appropriate prosecutor and sending notice as specified under existing law.

Disclosure of Protected Information to the Attorney General

Under current law, the Attorney General must designate an assistant Attorney General to receive from applicants and employees any information, the disclosure of which is otherwise protected by law; investigate each allegation of illegality or impropriety; take appropriate legal action; and, if the investigation concerns an allegation of illegality or impropriety in the Executive Branch, submit a confidential report to the Governor that describes the content of the disclosure.

State Expenditures: As discussed above, the bill expands existing prohibitions against reprisals under the State’s whistleblower law and transfers responsibility for investigating complaints filed under § 5-309 of the State Personnel and Pensions Article to OAG. Currently, whistleblower complaints are investigated by the Office of the Statewide Equal Employment Opportunity Coordinator (EEOC) within DBM. In recent years, EEOC has generally investigated 10 to 12 complaints annually. (Fiscal 2021 was an outlier compared to other recent fiscal years; EEOC investigated only 5 complaints in fiscal 2021.) Based on the experience of EEOC, it is assumed that, under the bill, OAG will be responsible for investigating at least 10 to 12 complaints annually. However, with the addition of possible monetary damages and the significantly longer timeframe for filing a complaint, it is unknown to what extent the bill’s changes will result in an increase in complaints filed.

Nonetheless, it is assumed that OAG will need to hire at least one additional part-time assistant Attorney General to investigate complaints in accordance with the bill. Thus, general fund expenditures increase by *at least* \$53,690 in fiscal 2023, which accounts for the bill’s October 1, 2022 effective date. This estimate reflects the cost of hiring one part-time (50%) assistant Attorney General to investigate whistleblower complaints. It includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Position	0.5
Salary and Fringe Benefits	\$46,744
Operating Expenses	<u>6,946</u>
Total FY 2023 State Expenditures	\$53,690

Future year expenditures reflect a full salary with annual increases and employee turnover as well as annual increases in ongoing operating expenses. To the extent that the bill results in a significant increase in whistleblower complaints, a full-time assistant Attorney General and/or other additional staff may be needed, and general fund expenditures increase further. While the bill relieves EEOC of responsibilities relating to the investigation of whistleblower complaints, it is assumed that EEOC staff are redirected to other tasks.

State expenditures (all funds) increase further to the extent that monetary damages and/or attorney's fees and costs are awarded to complainants under the bill. The precise impact cannot be reliably estimated. Assuming compliance with the protections in the bill, the amount is likely to be minimal. Nevertheless, the amount could be significant as the bill (1) quadruples the timeframe for filing a complaint (from six months to two years); (2) expands the types of actions for which complaints may be filed; (3) establishes that a personnel (or other retaliatory) action taken against an employee after the employee files a complaint is presumed to be an act of reprisal in violation of the bill; (4) adds a statutory minimum floor of \$5,000 for damages to a complainant when an investigation is completed and action is taken to resolve the complaint within 15 days, as required under the bill; and (5) applies the \$5,000 minimum in statutory damages for complaints that take longer to resolve, but along with other types of damages that may be awarded.

Any impact on OAH or circuit court caseloads is not expected to materially affect the finances of OAH or the Judiciary.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Maryland Department of Aging; Department of Commerce; Maryland Department of Emergency Management; Office of the Attorney General; Governor's Office; Judiciary (Administrative Office of the Courts); Maryland State Department of Education; Maryland Department of the Environment; Maryland School for the Deaf; Maryland Higher Education Commission; Maryland State Library Agency; University System of Maryland; Morgan State University; Maryland Department of Agriculture; Department of Budget and Management; Department of General Services; Maryland Department of Health; Department of Housing and Community Development; Department of Juvenile Services; Maryland Department of Labor; Department of Natural Resources; Maryland Department of Planning; Department of Public Safety and Correctional Services; Department of State Police; Maryland Department of Transportation; Maryland Department of Veterans Affairs; Office of Administrative Hearings; Department of Legislative Services

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