
**State Government & Tribal
Affairs Committee**

ESSB 6776

Brief Description: Modifying state whistleblower protections.

Sponsors: Senate Committee on Government Operations & Elections (originally sponsored by Senators Kline, Roach, Fraser, Fairley and Swecker).

<p>Brief Summary of Engrossed Substitute Bill</p> <ul style="list-style-type: none">• Expands protections for state employee whistleblowers.

Hearing Date:

Staff: Tracey Taylor (786-7196).

Background:

The State Whistleblower Act (Act) was created in 1982 to encourage state employees to report improper governmental actions and to protect the rights of state employees making such disclosures. Under the Act, retaliatory actions are prohibited against the employee who discloses the information concerning the improper governmental action.

Summary of Bill:

An intent section is added that includes an expression of the Legislature's intent for this legislation is to protect public servants who step forward to inform the citizens of Washington about the actions of their government that are contrary to the law or the public's interest. The Legislature also intends that the Whistleblower Act shall be broadly construed.

Whistleblower Act Procedures

The State Auditor (Auditor) has the sole authority to investigate reports of improper government activities made by whistleblowers to any public official. The Auditor also has the authority to investigate, within available resources, reports of improper governmental activities that have led to workplace reprisal or retaliatory action against the whistleblower.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Any public official receiving the report must submit a record of that report to the Auditor within 15 business days of receiving it. The period of time the Auditor has to investigate is extended from 30 days to 60 working days.

If the Auditor's preliminary investigation indicates the allegations are unsubstantiated, the Auditor must provide notification to the whistleblower summarizing where the allegations are deficient and provide a reasonable opportunity for the employee to reply. The communication may be accomplished electronically.

If the Auditor determines there is reasonable cause to believe an employee or public official has engaged in improper governmental action, the Auditor must report, the extent allowed under the Public Disclosure Act, the nature and details to not only the subjects of the investigation, the head of the employing agency and the Attorney General, but also to the Governor, the Secretary of the Senate, the Chief Clerk of the House of Representatives and the public, unless the release of such information is prohibited by statute or executive order.

Failure to cooperate with an audit or investigation, or engaging in retaliation against anyone who assists the Auditor shall be reported as a separate finding with recommendations for corrective action in the Auditor's report.

Confidentiality Under the Act

The current confidential protections of the whistleblower's identity is expanded to include identifying characteristics. If the Auditor makes a determination that the information has been provided other than in good faith the identity or identifying characteristics of the whistleblower may be disclosed. However, the Auditor must provide reasonable advance notice to the employee that his or her identity or identifying characteristics are to be disclosed.

In addition, the identity or identifying characteristics of any person who in good faith provides information to the investigation is confidential. The identity or identifying characteristics of such person may only be disclosed by the person's consent by written waiver or by acknowledgment of his or her identity as a witness.

An agency may not issue any nondisclosure order or policy, execute any nondisclosure agreement or expend any funds requiring that information that is public under the Public Disclosure Act be kept confidential, unless state or federal law requires the information must remain confidential.

Retaliatory Actions

A complaint alleging whistleblower retaliation must be filed within two years of the alleged retaliation.

In cases where the file has been certified to the Human Rights Commission (Commission), if a determination is made that retaliatory action has been taken against a whistleblower, the administrative law judge may order the restoration of benefits, back pay and any increases in compensation which would have occurred, with interest. The amount of the civil penalty that may be imposed upon the retaliator is increased from up to \$3000 to up to \$5000.

Reprisal or retaliatory action under the Whistleblower Act (Act) is expanded to include the issuance or attempt to enforce any nondisclosure policy or agreement in a manner inconsistent with prior practice. It also includes any other action that is inconsistent compared to actions taken

before the employee engaged in conduct protected under the Act or in comparison to other employees who have not engaged in whistleblower conduct.

An agency may rebut the presumption that it has taken retaliatory action by a showing, by the preponderance of the evidence, that there have been a series of documented personnel problems or a single, egregious event. An agency may also demonstrate that the action or actions were justified by reasons unrelated to the whistleblowing by showing that improper motive was not a substantial factor.

The limit for damages for humiliation and mental suffering is increased from \$10,000 to \$20,000.

A whistleblower alleging retaliation may pursue arbitration, with the cost of the arbitration shared equally by the whistleblower and the agency.

Definitions

"Abuse of authority" is defined as arbitrary or capricious exercise of, or willful failure to exercise, a power that adversely affects the rights of another person or results in personal gain or advantage to himself, herself or other preferred persons..

The definition of "good faith" is clarified to means there is a reasonable basis in fact for the belief or communication. Good faith is lacking where the employee reports or provides information that is malicious, false or frivolous or with a reckless disregard for the truth. If an employee knowingly omits relevant information, he or she is not acting in good faith.

"Gross mismanagement" is defined as the arbitrary or capricious exercise of management responsibilities in a manner grossly deviating from the standard of care that a reasonable person would observe in the same situation.

The definition of "improper governmental action" is expanded to include gross mismanagement and abuse of authority. It also includes the prevention of the dissemination of scientific opinion or the alteration of technical findings without scientifically valid justification, unless state law or a common law privilege prohibits disclosure. This does not preclude the discretion of agency management to adopt a particular scientific opinion or technical finding from among differing opinions or findings to the exclusion of other scientific opinions or technical findings. A state agency or public official shall not be prevented or impaired in the managements of public resources or employees in the performance of official job duties. De minimis, technical disagreements are not relevant. The Auditor is not required to contract or consult with external experts regarding the scientific validity, invalidity or justification of an opinion or finding.

A definition of "public official" is added. It means the Attorney General or his or her designee, the director or equivalent in the agency where the employee works, an appropriate number of individuals designated by the head of the agency to receive whistleblower reports, or the Executive Ethics Board.

The definition of "use of official authority or influence" is clarified. It includes threatening actions. In addition, personnel action may include, but is not limited to duties and office location and determining any material changes in pay, provision of training or benefits, and the tolerance of a hostile work environment.

The definition of "whistleblower" is expanded to include an employee that is perceived by the employer as reporting, whether they did or not, alleged improper government action.

General Provisions

An annual report by the Commission shall be submitted to the Governor and the Legislature and include the number of retaliation reports received in the past year, the number of reports substantiated and the number of unresolved cases. The information shall be posted on the agency website for public review.

The required notices to state employees about the Whistleblower Act and procedures may be provided via agency internal newsletters, included with paychecks or stubs, sent via electronic mail, or sent by other cost-effective means. The notice must reach all employees of the government level, division, or subdivision.

This bill does not affect the jurisdiction of the Legislative Ethics Board, the Executive Ethics Board or the Commission on Judicial Conduct. The Senate, the House of Representatives and the Supreme Court must still adopt policies regarding the applicability of the Whistleblower Act to the Senate, House of Representatives and the Judiciary.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.