
SUBSTITUTE HOUSE BILL 2005

State of Washington

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By House Committee on State Government (originally sponsored by Representatives Wolfe, D. Sommers, D. Schmidt, Romero, Carlson, Delvin, Santos, O'Brien, Miloscia, Lovick, Dickerson, Kenney, Ogden, Fisher, Cody, Parlette, Campbell, Lambert, Pennington, Dunshee, Koster, Hankins, Clements, Cairnes, Keiser, Conway and Veloria; by request of State Auditor)

Read first time 03/02/1999.

1 AN ACT Relating to whistleblowers; amending RCW 42.40.020,
2 42.40.040, 42.40.050, and 43.09.410; adding new sections to chapter
3 42.40 RCW; and adding a new section to chapter 42.52 RCW.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 42.40.020 and 1995 c 403 s 509 are each amended to
6 read as follows:

7 As used in this chapter, the terms defined in this section shall
8 have the meanings indicated unless the context clearly requires
9 otherwise.

10 (1) "Agency" means any state board, commission, bureau, committee,
11 department, institution, division, or tribunal in the legislative,
12 executive, or judicial branch of state government. "Agency" includes
13 all elective offices, the state legislature, those institutions of
14 higher education created and supported by the state government, and
15 those courts that are part of state government.

16 (2) "Auditor" means the office of the state auditor.

17 ((+2)) (3) "Employee" means any individual employed or holding
18 office in any department or agency of state government.

1 ~~((3))~~ (4) "Good faith" means a reasonable basis in fact for the
2 communication. "Good faith" is lacking when the employee knows or
3 reasonably ought to know that the report is malicious, false, or
4 frivolous.

5 (5) "Gross waste of funds" means to spend or use funds or to allow
6 funds to be used without valuable result in a manner grossly deviating
7 from the standard of care or competence that a reasonable person would
8 observe in the same situation.

9 (6)(a) "Improper governmental action" means any action by an
10 employee

11 ~~(i) Which is~~) undertaken in the performance of the employee's
12 official duties(~~(, whether or not the action is within the scope of the~~
13 ~~employee's employment; and~~)):

14 ~~((ii))~~ (i) Which ((is in violation of any state law or rule, is
15 an abuse of authority,)) results in mismanagement or gross waste of
16 public funds or resources;

17 (ii) Which is in violation of federal or state law or rule, if the
18 violation is not merely technical or of a minimum nature; or

19 (iii) Which is of substantial and specific danger to the public
20 health or safety(~~(, or is a gross waste of public funds)~~).

21 (b) "Improper governmental action" does not include personnel
22 actions, for which other remedies exist, including but not limited to
23 employee grievances, complaints, appointments, promotions, transfers,
24 assignments, reassignments, reinstatements, restorations,
25 reemployments, performance evaluations, reductions in pay, dismissals,
26 suspensions, demotions, violations of the state civil service law,
27 alleged labor agreement violations, reprimands, claims of
28 discriminatory treatment, or any action which may be taken under
29 chapter 41.06 RCW, or other disciplinary action except as provided in
30 RCW 42.40.030.

31 ~~((4))~~ (7) "Mismanagement" means the exercise of an executive
32 function in a manner grossly deviating from the standard of care or
33 competence that a reasonable person would observe in the same
34 situation.

35 (8) "Substantial and specific danger" means a risk of serious
36 injury, illness, peril, or loss, to which the exposure of the public is
37 a gross deviation from the standard of care or competence which a
38 reasonable person would observe in the same situation.

1 (9) "Use of official authority or influence" includes taking,
2 directing others to take, recommending, processing, or approving any
3 personnel action such as an appointment, promotion, transfer,
4 assignment, reassignment, reinstatement, restoration, reemployment,
5 performance evaluation, or any adverse action under chapter 41.06 RCW,
6 or other disciplinary action.

7 (~~(5)~~) (10) "Whistleblower" means an employee who in good faith
8 reports alleged improper governmental action to the auditor, initiating
9 an investigation under RCW 42.40.040. For purposes of the provisions
10 of this chapter and chapter 49.60 RCW relating to reprisals and
11 retaliatory action, the term "whistleblower" also means: (a) An
12 employee who in good faith provides information to the auditor in
13 connection with an investigation under RCW 42.40.040 and an employee
14 who is believed to have reported (~~alleged~~) asserted improper
15 governmental action to the auditor or to have provided information to
16 the auditor in connection with an investigation under RCW 42.40.040 but
17 who, in fact, has not reported such action or provided such
18 information; or (b) an employee who in good faith identifies rules
19 warranting review or provides information to the rules review
20 committee, and an employee who is believed to have identified rules
21 warranting review or provided information to the rules review committee
22 but who, in fact, has not done so.

23 NEW SECTION. **Sec. 2.** An employee must make a reasonable attempt
24 to ascertain the correctness of the information furnished and may be
25 subject to disciplinary actions, including, but not limited to,
26 suspension or termination, for knowingly furnishing false information
27 as determined by the employee's appointing authority.

28 **Sec. 3.** RCW 42.40.040 and 1992 c 118 s 2 are each amended to read
29 as follows:

30 (1)(a) In order to be investigated, an assertion of improper
31 governmental action must be provided to the auditor within one year
32 after the occurrence of the asserted improper governmental action.

33 (b) The auditor has the authority to determine whether to
34 investigate any assertions received. In determining whether to conduct
35 either a preliminary or further investigation, the auditor shall
36 consider factors including, but not limited to: The nature and quality
37 of evidence and the existence of relevant laws and rules; whether the

1 action was isolated or systematic; the history of previous assertions
2 regarding the same subject or subjects or subject matter; whether other
3 avenues are available for addressing the matter; whether the matter has
4 already been investigated or is in litigation; the degree or
5 significance of the asserted improper governmental action; and the cost
6 and benefit of the investigation. The auditor has the sole discretion
7 to determine the priority and weight given to these and other relevant
8 factors and to decide whether a matter is to be investigated. The
9 auditor shall document the factors considered and the analysis applied.

10 (c) The auditor also has the authority to investigate assertions as
11 part of an audit conducted under chapter 43.09 RCW. The auditor shall
12 document the reasons for handling the matter as part of such an audit.

13 (2) Subject to subsection (5)(c) of this section, the identity of
14 a whistleblower is confidential at all times unless the whistleblower
15 consents to disclosure by written waiver or by acknowledging his or her
16 identity in a claim against the state for retaliation.

17 (3) Upon receiving specific information that an employee has
18 engaged in improper governmental action, the auditor shall, within five
19 working days of receipt of the information, mail written
20 acknowledgement to the whistleblower at the address provided stating
21 whether a preliminary investigation will be conducted. For a period
22 not to exceed thirty working days from receipt of the assertion, the
23 auditor shall conduct such preliminary investigation of the matter as
24 the auditor deems appropriate. (~~In conducting the investigation, the~~
25 identity of the whistleblower shall be kept confidential.

26 ~~(2))~~ (4) In addition to the authority under subsection (~~(1)~~) (3)
27 of this section, the auditor may, on its own initiative, investigate
28 incidents of improper state governmental action.

29 ~~((3))~~ (5)(a) If it appears to the auditor, upon completion of the
30 preliminary investigation, that the matter is so unsubstantiated that
31 no further investigation, prosecution, or administrative action is
32 warranted, the auditor shall so notify the whistleblower.

33 (b) The written notification shall (~~be by memorandum containing~~)
34 contain a summary of the information received(~~, a summary~~) and of the
35 results of the preliminary investigation with regard to each
36 (~~allegation~~) assertion of improper governmental action(~~, and any~~
37 determination made by the auditor under (c) of this subsection).

1 (c) In any case to which this section applies, the identity of the
2 whistleblower shall be kept confidential unless the auditor determines
3 that the information has been provided other than in good faith.

4 ~~(d) ((If it appears to the auditor that the matter does not meet
5 the definition of an "improper governmental action" under RCW
6 42.40.020(3), or is other than a gross waste of public funds, the
7 auditor may forward a summary of the allegations to the appropriate
8 agency for investigation and require a response by memorandum no later
9 than thirty days after the allegations are received from the auditor.
10 The response shall contain a summary of the investigation with regard
11 to each allegation and any determination of corrective action taken.
12 The auditor will keep the identity of the whistleblower confidential.
13 Upon receipt of the results of the investigation from the appropriate
14 agency, the auditor will notify the whistleblower as prescribed under
15 (a), (b), and (c) of this subsection)) With the agency's consent, the
16 auditor may forward the assertions to an appropriate agency to
17 investigate and report back to the auditor no later than sixty working
18 days after the assertions are received from the auditor. The auditor
19 is entitled to all investigative records resulting from such a
20 referral. All procedural and confidentiality provisions of this
21 chapter apply to investigations conducted under this subsection. The
22 auditor shall document the reasons the assertions were referred.~~

23 ~~((4))~~ (6) During the preliminary investigation, the auditor shall
24 provide written notification of the nature of the assertions to the
25 subject or subjects of the investigation and the agency head. The
26 notification shall include the relevant facts and laws known at the
27 time and the procedure for the subject or subjects of the investigation
28 and the agency head to respond to the assertions and information
29 obtained during the investigation. This notification does not limit
30 the auditor from considering additional facts or laws which become
31 known during further investigation.

32 (7)(a) If it appears to the auditor after completion of the
33 preliminary investigation that further investigation, prosecution, or
34 administrative action is warranted, the auditor shall so notify the
35 whistleblower, the subject or subjects of the investigation, and the
36 agency head and either conduct a further investigation((s)) or issue a
37 report under subsection ((6)) (10) of this section.

38 (b) If the preliminary investigation resulted from an anonymous
39 assertion, a decision to conduct further investigation shall be subject

1 to review by a three-person panel convened as necessary by the auditor
2 prior to the commencement of any additional investigation. The panel
3 shall include a state auditor representative knowledgeable of the
4 subject agency operations, a citizen volunteer, and a representative of
5 the attorney general's office. This group shall be briefed on the
6 preliminary investigation and shall recommend whether the auditor
7 should proceed with further investigation.

8 (c) If further investigation is to occur, the auditor shall provide
9 written notification of the nature of the assertions to the subject or
10 subjects of the investigation and the agency head. The notification
11 shall include the relevant facts known at the time and the procedure to
12 be used by the subject or subjects of the investigation and the agency
13 head to respond to the assertions and information obtained during the
14 investigation.

15 (8) Within sixty working days after the (~~thirty-day~~) preliminary
16 investigation period in subsection (~~(+1)~~) (3) of this section, the
17 auditor shall complete the investigation and report its findings to the
18 whistleblower unless written justification for the delay is furnished
19 to the whistleblower, agency head, and subject or subjects of the
20 investigation. In all such cases, the report of the auditor's
21 investigation and findings shall be sent to the whistleblower within
22 one year after the information was filed under subsection (~~(+1)~~) (3)
23 of this section.

24 (~~(+5)~~) (9)(a) At any stage of an investigation under this section
25 the auditor may require by subpoena the attendance and testimony of
26 witnesses and the production of documentary or other evidence relating
27 to the investigation at any designated place in the state. The auditor
28 may issue subpoenas, administer oaths, examine witnesses, and receive
29 evidence. In the case of contumacy or failure to obey a subpoena, the
30 superior court for the county in which the person to whom the subpoena
31 is addressed resides or is served may issue an order requiring the
32 person to appear at any designated place to testify or to produce
33 documentary or other evidence. Any failure to obey the order of the
34 court may be punished by the court as a contempt thereof.

35 (b) The auditor may order the taking of depositions at any stage of
36 a proceeding or investigation under this chapter. Depositions shall be
37 taken before an individual designated by the auditor and having the
38 power to administer oaths. Testimony shall be reduced to writing by or

1 under the direction of the individual taking the deposition and shall
2 be subscribed by the deponent.

3 ~~((6))~~ (c) Agencies shall cooperate fully in the investigation and
4 shall take appropriate action to preclude the destruction of any
5 evidence during the course of the investigation.

6 (d) During the investigation the auditor shall interview each
7 subject of the investigation. If it is determined there is reasonable
8 cause to believe improper governmental action has occurred, the subject
9 or subjects and the agency head shall be given fifteen working days to
10 respond to the assertions prior to the issuance of the final report.

11 (10)(a) If the auditor determines ~~((that))~~ there is reasonable
12 cause to believe ~~((that))~~ an employee has engaged in ~~((any))~~ improper
13 ~~((activity))~~ governmental action, the auditor shall report the nature
14 and details of the activity to:

15 (i) The ~~((employee))~~ subject or subjects of the investigation and
16 the head of the employing agency; and

17 (ii) If appropriate, the attorney general or such other authority
18 as the auditor determines appropriate.

19 (b) The auditor has no enforcement power except that in any case in
20 which the auditor submits ~~((a))~~ an investigative report ~~((of alleged~~
21 improper activity)) containing reasonable cause determinations to the
22 ~~((head of an))~~ agency, the ~~((attorney general, or any other individual~~
23 to which a report has been made under this section, the individual
24 shall report to the auditor with respect to any action taken by the
25 individual regarding the activity, the first report being transmitted
26 no later than thirty days after the date of the auditor's report and
27 monthly thereafter until final action is taken)) agency shall send its
28 plan for resolution to the auditor within fifteen working days of
29 having received the report. The agency is encouraged to consult with
30 the subject or subjects of the investigation in establishing the
31 resolution plan. The auditor may require periodic reports of agency
32 action until all resolution has occurred. If the auditor determines
33 that appropriate action ~~((is))~~ has not ~~((being))~~ been taken ~~((within a~~
34 reasonable time)), the auditor shall report the determination to the
35 governor and to the legislature and may include this determination in
36 the agency audit under chapter 43.09 RCW.

37 ~~((7))~~ (11) Once the auditor concludes that appropriate action has
38 been taken to resolve the matter, the auditor shall so notify the
39 whistleblower, the agency head, and the subject or subjects of the

1 investigation. If the resolution takes more than one year, the auditor
2 shall provide annual notification of its status to the whistleblower,
3 agency head, and subject or subjects of the investigation.

4 (12) This section does not limit any authority conferred upon the
5 attorney general or any other agency of government to investigate any
6 matter.

7 **Sec. 4.** RCW 42.40.050 and 1992 c 118 s 3 are each amended to read
8 as follows:

9 (1) Any person who is a whistleblower, as defined in RCW 42.40.020,
10 and who as a result of being a whistleblower has been subjected to
11 workplace reprisal or retaliatory action has the remedies provided
12 under chapter 49.60 RCW. For the purpose of this section "reprisal or
13 retaliatory action" means but is not limited to:

- 14 ((+1)) (a) Denial of adequate staff to perform duties;
- 15 ((+2)) (b) Frequent staff changes;
- 16 ((+3)) (c) Frequent and undesirable office changes;
- 17 ((+4)) (d) Refusal to assign meaningful work;
- 18 ((+5)) (e) Unwarranted and unsubstantiated letters of reprimand or
19 unsatisfactory performance evaluations;
- 20 ((+6)) (f) Demotion;
- 21 ((+7)) (g) Reduction in pay;
- 22 ((+8)) (h) Denial of promotion;
- 23 ((+9)) (i) Suspension;
- 24 ((+10)) (j) Dismissal;
- 25 ((+11)) (k) Denial of employment; ((and
- 26 (+12)) (l) A supervisor or superior encouraging coworkers to behave
27 in a hostile manner toward the whistleblower; and
- 28 (m) Actions which violate RCW 42.40.030.

29 (2) Nothing in this section prohibits an agency from making any
30 decision exercising its authority to terminate, suspend, or discipline
31 an employee who engages in workplace reprisal or retaliatory action
32 against a whistleblower. However, the agency also shall implement any
33 order under chapter 49.60 RCW (other than an order of suspension if the
34 agency has terminated the retaliator).

35 NEW SECTION. **Sec. 5.** The auditor has the authority to contract
36 for any assistance necessary to carry out the provisions of this
37 chapter.

1 NEW SECTION. **Sec. 6.** The cost of administering this chapter is
2 funded through the auditing services revolving account created in RCW
3 43.09.410.

4 NEW SECTION. **Sec. 7.** A whistleblower wishing to provide
5 information under this chapter regarding asserted improper governmental
6 action against the state auditor or an employee of that office shall
7 provide the information to the attorney general who shall act in place
8 of the auditor in investigating and reporting the matter.

9 NEW SECTION. **Sec. 8.** The auditor and the ethics boards as defined
10 in RCW 42.52.010 may enter into agreements regarding the referral and
11 investigation of matters subject to the authority of the auditor and
12 the ethics boards.

13 NEW SECTION. **Sec. 9.** A new section is added to chapter 42.52 RCW
14 to read as follows:

15 The auditor and the ethics boards as defined in RCW 42.52.010 may
16 enter into agreements regarding the referral and investigation of
17 matters subject to the authority of the auditor and the ethics boards.

18 NEW SECTION. **Sec. 10.** The office of financial management shall
19 contract for a performance audit of the state employee whistleblower
20 program on a cycle to be determined by the office of financial
21 management. The audit shall be done in accordance with generally
22 accepted government auditing standards beginning with the fiscal year
23 ending June 30, 2001. The audit shall determine at a minimum: Whether
24 the program is acquiring, protecting, and using its resources such as
25 personnel, property, and space economically and efficiently; the causes
26 of inefficiencies or uneconomical practices; and whether the program
27 has complied with laws and rules on matters of economy and efficiency.
28 The audit shall also at a minimum determine the extent to which the
29 desired results or benefits established by the legislature are being
30 achieved, the effectiveness of the program, and whether the auditor has
31 complied with significant laws and rules applicable to the program.

32 The cost of the audit is a cost of operating the program and shall
33 be funded by the auditing services revolving account created by RCW
34 43.09.410.

1 **Sec. 11.** RCW 43.09.410 and 1995 c 301 s 25 are each amended to
2 read as follows:

3 An auditing services revolving account is hereby created in the
4 state treasury for the purpose of a centralized funding, accounting,
5 and distribution of the actual costs of the audits provided to state
6 agencies by the state auditor and audits of the state employee
7 whistleblower program under section 10 of this act.

8 NEW SECTION. **Sec. 12.** Sections 2, 5 through 8, and 10 of this act
9 are each added to chapter 42.40 RCW.

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