

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 221
Judiciary

(Delegate Carter, *et al.*)

Public Safety - Law Enforcement Officers - Whistleblower Protections

This bill prohibits a supervisor, an appointing authority, or the head of a law enforcement agency from threatening or taking a “retaliatory action” against a “law enforcement officer” who discloses specified information or, following such a disclosure, seeks a remedy under the bill’s provisions or any other law or policy governing the law enforcement agency. The bill details the procedures that must be followed for these whistleblower protections. The bill’s provisions apply prospectively only.

Fiscal Summary

State Effect: Because general whistleblower protections already exist and relatively few complaints are made each year under those provisions, it is assumed that enforcement of the bill’s provisions can be handled with existing budgeted resources of affected State agencies, including the Office of the Attorney General (OAG) and the Judiciary. The extent to which additional monetary awards, including attorney costs, may occur through an increase in civil case filings cannot be reliably predicted or quantified.

Local Effect: The number of actual complaints made prospectively is assumed to be minimal statewide. Thus, it is assumed that affected local agencies and the circuit courts can implement the bill with existing resources, as discussed below. The extent to which additional monetary awards, including attorney costs, may occur through an increase in civil case filings cannot be reliably predicted or quantified.

Small Business Effect: None.

Analysis

Bill Summary: A disclosure that is otherwise prohibited by law or is confidential by law is protected only if the disclosure is made exclusively to the Attorney General, in writing, and contains specified information.

A “retaliatory action” includes any recommended, threatened, or actual adverse employment action, including:

- termination, demotion, suspension, or reprimand;
- involuntary transfer, reassignment, or detail to an assignment that a reasonable law enforcement officer would find less favorable;
- failure to promote, hire, or take other favorable personnel action;
- engaging in any conduct that would dissuade a reasonable law enforcement officer from engaging in activities protected under the bill; or
- retaliation in any other manner against a law enforcement officer because the law enforcement officer makes a disclosure protected under the bill’s whistleblower protections.

A law enforcement agency must provide a copy of the bill’s provisions to a law enforcement officer who requests a copy or alleges that a retaliatory action has occurred. In a civil action brought in accordance with the bill’s provisions, an aggrieved law enforcement officer may be awarded damages in the amount of \$5,000 for each violation of this requirement.

A law enforcement officer aggrieved by a violation of the bill’s prohibitions may bring a civil action against the law enforcement agency for equitable relief or damages. In such an action, if the law enforcement officer demonstrates by a preponderance of the evidence that the disclosure of information was a contributing factor in the alleged retaliatory action, the law enforcement agency has the burden of proving by clear and convincing evidence that the personnel action would have occurred for legitimate reasons, even if the officer had not made the disclosure. In the civil action, the officer may seek, instead of reinstatement and back pay, statutory damages of at least \$5,000 for each instance of retaliatory action. The trier of fact, in awarding statutory damages, must consider the severity of the prohibited retaliatory action and the purposes of the bill’s whistleblower provisions.

The bill details options for the court when a determination is made that an officer is entitled to equitable relief or damages in a civil action, including the award of compensation for all lost remuneration and reasonable attorney’s fees and costs. In addition, the court must issue an injunction against the law enforcement agency if violations of the bill’s provisions

continue. If the court determines that a civil action was brought by a law enforcement officer in bad faith or without substantial justification, the court may award reasonable attorney's fees and other litigation expenses to the law enforcement agency.

The bill's provisions may not be construed to diminish the rights, privileges, or remedies of a law enforcement officer provided under any federal, State, or local law or under a collective bargaining agreement.

The Attorney General must (1) designate an assistant Attorney General to receive from law enforcement officers any information the disclosure of which is otherwise protected by law; (2) investigate each allegation of illegality or impropriety; and (3) take appropriate legal action.

The term "law enforcement officer" has the same meaning as under the Law Enforcement Officers' Bill of Rights (LEOBR).

Current Law/Background: In general, under provisions of the State Personnel and Pensions Article, an employee, contractor, or grantee who has experienced retaliation may file a civil action against the retaliator and may seek any relief necessary to make the employee whole, including reinstatement, two times the amount of back pay, interest on back pay, and compensation for other damages, including litigation costs, reasonable attorney's fees, and punitive damages. These protections are extended only to the Executive Branch of State government, including a unit with an independent personnel system.

Under these provisions, the Attorney General is required to (1) designate an assistant Attorney General to receive from applicants and employees any information the disclosure of which is otherwise protected by law; (2) investigate each allegation of illegality or impropriety; (3) take appropriate legal action; and (4) 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.

If the Secretary of Budget and Management, the Secretary's designee, or the Governor's designee determines that a violation has not occurred, the Secretary or Governor's designee must dismiss the complaint. If it is determined that a violation has occurred, the Secretary or designee must take appropriate remedial action, which may include ordering the removal of any related detrimental information from the complainant's State personnel records and requiring 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 Maryland's whistleblower provisions.

Appeals from these decisions may be made by the complainant to the Office of Administrative Hearings.

A 2000 survey of the National State Auditors Association indicated that 39 states have whistleblower laws. In 2002, the Office of Legislative Audits (OLA) reviewed whistleblower laws from 17 states surveyed by comparing them to Maryland's law for "coverage" and "remedies." OLA concluded that Maryland's law is generally consistent with those of the other states in most respects. Subsequent to that finding, in 2003, OLA set up and now operates a confidential fraud hotline to facilitate the reporting of allegations of fraud, waste, or abuse of State government resources.

LEOBR was enacted in 1974 to guarantee police officers specified procedural safeguards in any investigation that could lead to disciplinary action. It extends to police officers of 26 specified State and local agencies. It does not grant collective bargaining rights. The investigation or interrogation by a law enforcement agency of a law enforcement officer for a reason that may lead to disciplinary action, demotion, or dismissal must be conducted in accordance with LEOBR. A law enforcement officer is entitled to a hearing under LEOBR before any disciplinary action may be taken.

According to the Office of the Statewide Equal Employment Opportunity, which has handled whistleblower claims brought under current law whistleblower provisions, nine whistleblower complaints were investigated and had a determination made in fiscal 2015. The number of complaints made in 2014 was also nine. However, it is not known whether any of those cases involved a complaint by a law enforcement officer.

State Fiscal Effect: The number of law enforcement whistleblower complaints that may occur each year under the bill cannot be reliably predicted. As noted above, general whistleblower provisions already exist, and relatively few complaints are made each year. However, because current whistleblower protection remedies do not include provisions for statutory damages, this bill may lead to additional monetary awards being made to law enforcement officer complainants. While the number of additional civil case filings that may result from the bill annually is unknown, it is assumed to be minimal. The magnitude of damages awarded by courts in cases brought against State law enforcement agencies under the bill's provisions cannot be reliably predicted at this time.

Office of the Attorney General

OAG advises that it needs one additional assistant Attorney General and one additional investigator to fulfill its responsibilities under the bill; however, it did not provide any additional information regarding how its estimate was derived. While the Department of Legislative Services (DLS) concurs that the bill may increase OAG's workload by requiring it to investigate and take legal actions in additional whistleblower cases, without reliable information regarding how many new potential cases OAG must handle each year, it is not possible to accurately predict any increase in staffing costs. *For illustrative purposes only*, hiring one additional assistant Attorney General and one additional investigator increases general fund expenditures by approximately \$192,400 in fiscal 2017, which accounts for the bill's October 1, 2016 effective date, and by a minimum of \$241,600 annually thereafter. Assuming relatively few additional cases result from the bill, however, OAG can handle the bill's requirements with existing resources.

State Law Enforcement Agencies and the Judiciary

DLS assumes that implementation of the bill's provisions applicable to State law enforcement agencies and the Judiciary can also be handled with existing budgeted resources because (1) law enforcement officers are already entitled to a hearing under LEOBR before any disciplinary action may be taken; (2) State law enforcement officers are already eligible to make a whistleblower complaint under current provisions; and (3) few whistleblower complaints are made annually under the current relatively broad whistleblower provisions. The bill is not expected to materially affect the caseload of the District Court.

Local Fiscal Effect: Current State whistleblower protections cited above do not extend to local law enforcement officers. However, local jurisdictions may already have similar whistleblower provisions in place. Montgomery County reports that similar provisions are already in place. Accordingly, because similar local protections may already exist and because local law enforcement officers are already entitled to a hearing under LEOBR before any disciplinary action may be taken, DLS assumes that the bill's provisions can be handled with existing local resources. The magnitude of damages awarded by courts in cases brought against law enforcement agencies under the bill's provisions cannot be reliably predicted at this time. The bill is not expected to materially affect the caseloads of the circuit courts.

Additional Information

Prior Introductions: HB 1187 of 2015, a similar bill, received a hearing in the House Judiciary Committee, but no further action was taken on the bill.

Cross File: None.

Information Source(s): Carroll, Harford, Montgomery, and St. Mary's counties; Office of the Attorney General; Judiciary (Administrative Office of the Courts); Department of Budget and Management; University System of Maryland; Department of General Services; Department of Natural Resources; Department of State Police; Maryland Department of Transportation; Department of Legislative Services

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Analysis by: Shirleen M. E.
Pilgrim

Direct Inquiries to:
(410) 946-5510
(301) 970-5510