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HOUSE BILL NO. 439

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on General Laws and Technology
on February 24, 2014)

(Patron Prior to Substitute—Delegate LeMunyon)

A BILL to amend and reenact §§ 2.2-3009 through 2.2-3012, 2.2-3014, and 8.01-216.8 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 2.2-3010.1, relating to the Fraud and Abuse Whistle Blower Protection Act; applicability to Virginia citizens.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3009 through 2.2-3012, 2.2-3014, and 8.01-216.8 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 2.2-3010.1 as follows:

§ 2.2-3009. Policy.

It shall be the policy of the Commonwealth that *citizens of the Commonwealth and employees of state government* be freely able to report instances of wrongdoing or abuse committed by ~~their~~ *employing agency, other state agencies, or independent contractors of state agencies.*

§ 2.2-3010. Definitions.

As used in this chapter:

"Abuse" means an employer's or employee's conduct or omissions that result in substantial misuse, destruction, waste, or loss of funds or resources belonging to or derived from federal, state, or local government sources.

"Appropriate authority" means a federal or state agency or organization having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics, or abuse; or a member, officer, agent, representative, or supervisory employee of the agency or organization. The term also includes the Office of the Attorney General, the Office of the State Inspector General, and the General Assembly and its committees having the power and duty to investigate criminal law enforcement, regulatory violations, professional conduct or ethics, or abuse.

"Employee" means any person who is regularly employed full time on either a salaried or wage basis, whose tenure is not restricted as to temporary or provisional appointment, in the service of and whose compensation is payable, no more often than biweekly, in whole or in part, by a state agency.

"Employer" means a person supervising one or more employees, including the employee filing a good faith report, a superior of that supervisor, or an agent of the state agency.

"Good faith report" means a report of conduct defined in this chapter as wrongdoing or abuse which is made without malice and which the person making the report has reasonable cause to believe is true.

"Misconduct" means conduct or behavior by an employee that is inconsistent with state or agency standards for which specific corrective or disciplinary action is warranted.

"State agency" means any agency, institution, board, bureau, commission, council, or instrumentality of state government in the executive branch listed in the appropriation act.

"Whistle blower" means an employee who witnesses or has evidence of wrongdoing or abuse and who makes or demonstrates by clear and convincing evidence that he is about to make a good faith report of, or testifies or is about to testify to, the wrongdoing or abuse to one of the employee's superiors, an agent of the employer, or an appropriate authority. *"Whistle blower" includes a citizen of the Commonwealth who witnesses or has evidence of wrongdoing or abuse and who makes or demonstrates by clear and convincing evidence that he is about to make a good faith report of, or testifies or is about to testify to, the wrongdoing or abuse to an appropriate authority.*

"Wrongdoing" means a violation, which is not of a merely technical or minimal nature, of a federal or state law or regulation or a formally adopted code of conduct or ethics of a professional organization designed to protect the interests of the public or employee.

§ 2.2-3010.1. *Discrimination and retaliatory actions against citizen whistle blowers prohibited; good faith required; other remedies.*

A. No state agency may threaten or otherwise discriminate or retaliate against a citizen whistle blower because the whistle blower is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing, or inquiry by an appropriate authority or in a court action.

B. To be protected by the provisions of this chapter, a citizen of the Commonwealth who discloses information about suspected wrongdoing or abuse shall do so in good faith and upon a reasonable belief that the information is accurate. Disclosures that are reckless or that the citizen knew or should have known were false, confidential by law, or malicious shall not be deemed good faith reports and shall not be protected.

C. Any citizen whistle blower disclosing information of wrongdoing or abuse under this chapter

60 *where the disclosure results in a recovery of at least \$5,000 may file a claim for reward under the*
61 *Fraud and Abuse Whistle Blower Reward Fund established in § 2.2-3014.*

62 *D. Except for the provisions of subsection E of § 2.2-3011, nothing in this chapter shall be construed*
63 *to limit the remedies provided by the Virginia Fraud Against Taxpayers Act (§ 8.01-216.1 et seq.).*

64 **§ 2.2-3011. Discrimination and retaliatory actions against whistle blowers prohibited; good faith**
65 **required.**

66 A. No employer may discharge, threaten, or otherwise discriminate or retaliate against a whistle
67 blower whether acting on his own or through a person acting on his behalf or under his direction.

68 B. No employer may discharge, threaten, or otherwise discriminate or retaliate against a whistle
69 blower because the whistle blower is requested or subpoenaed by an appropriate authority to participate
70 in an investigation, hearing, or inquiry by an appropriate authority or in a court action.

71 C. To be protected by the provisions of this chapter, an employee who discloses information about
72 suspected wrongdoing or abuse shall do so in good faith and upon a reasonable belief that the
73 information is accurate. Disclosures that are reckless or the employee knew or should have known were
74 false, confidential by law, or malicious shall not be deemed good faith reports and shall not be
75 protected.

76 D. Nothing in this chapter shall prohibit an employer from disciplining or discharging a whistle
77 blower for his misconduct or any violation of criminal law.

78 *E. No court shall have jurisdiction over an action brought under § 8.01-216.5 based on information*
79 *discovered by a present or former employee of the Commonwealth during the course of his employment*
80 *unless that employee first, in good faith, has exhausted existing internal procedures for reporting and*
81 *seeking recovery of the falsely claimed sums through official channels and unless the Commonwealth*
82 *failed to act on the information provided within a reasonable period of time.*

83 **§ 2.2-3012. Application of state grievance procedure; other remedies.**

84 A. Any whistle blower covered by the state grievance procedure (§ 2.2-3000 et seq.) may initiate a
85 grievance alleging retaliation and requesting relief through that procedure.

86 B. Any whistle blower disclosing information of wrongdoing or abuse under this chapter where the
87 disclosure results in a savings of at least \$10,000 may file a claim for reward under the Fraud and
88 Abuse Whistle Blower Reward Fund established in § 2.2-3014.

89 ~~C. Nothing~~ *Except for the provisions of subsection E of § 2.2-3011, nothing in this chapter shall be*
90 *construed to limit the remedies provided by the Virginia Fraud Against Taxpayers Act, Article 19-1*
91 *(§ 8.01-216.1 et seq.) of Chapter 3 of Title 8.01.*

92 **§ 2.2-3014. Fraud and Abuse Whistle Blower Reward Fund.**

93 A. From such funds as may be authorized by the General Assembly, there is hereby created in the
94 state treasury a special nonreverting fund to be known as the Fraud and Abuse Whistle Blower Reward
95 Fund, hereafter referred to as "the Fund." The Fund shall be established on the books of the Comptroller
96 and shall be administered by the State Inspector General. All moneys recovered by the State Inspector
97 General as the result of whistle blower activity and alerts originating with the Office of the State
98 Inspector General shall be deposited in the Fund. Interest earned on moneys in the Fund shall remain in
99 the Fund and be credited to it. Except as provided in subsection B, any moneys remaining in the Fund,
100 including interest thereon, at the end of each fiscal year shall not revert to the general fund but shall
101 remain in the Fund. Moneys in the Fund shall be used solely to (i) provide monetary rewards to persons
102 who have disclosed information of wrongdoing or abuse under ~~the Fraud and Abuse Whistle Blower~~
103 ~~Protection Act (§ 2.2-3009 et seq.)~~ *this chapter* and the disclosure results in a recovery of at least \$5,000
104 or (ii) support the administration of the Fund, defray Fund advertising costs, or subsidize the operation
105 of the Fraud, Waste and Abuse Hotline (previously known as the State Employee Fraud, Waste and
106 Abuse Hotline).

107 B. By the end of each calendar quarter and upon authorization of the State Inspector General, 85
108 percent of all sums recovered shall be remitted to the institutions or agencies on whose behalf the
109 recovery was secured by the State Inspector General unless otherwise directed by a court of law. Each
110 such institution or agency on whose behalf the recovery was secured by the State Inspector General
111 shall receive an amount equal to 85 percent of the actual amount recovered by the State Inspector
112 General on its behalf.

113 C. The amount of the reward shall be up to 10 percent of the actual sums recovered by the
114 Commonwealth as a result of the disclosure of the wrongdoing or abuse. Regardless of the sums
115 recovered, at no time shall the amount of any reward, even if less than 10 percent, exceed the balance
116 of the Fund. Reward disbursements from the Fund shall be made by the State Treasurer on warrants
117 issued by the Comptroller upon written request signed by the State Inspector General. In the event that
118 multiple whistle blowers contemporaneously report the same qualifying incident or occurrence of
119 wrongdoing or abuse, the State Inspector General in his sole discretion may split the reward of up to 10
120 percent among the multiple whistle blowers. The decision of the State Inspector General regarding the
121 allocation of the rewards shall be final and binding on all parties and shall not be appealable.

D. Five percent of all sums recovered shall be retained in the Fund to support the administration of the Fund, defray advertising costs, and subsidize the operation of the Fraud, Waste and Abuse Hotline. Expenditures for administrative costs for management of the Fund shall be managed as approved by the State Inspector General.

E. The Office of the State Inspector General shall promulgate regulations for the proper administration of the Fund including eligibility requirements and procedures for filing a claim. The Office of the State Inspector General shall submit an annual report to the General Assembly summarizing the activities of the Fund.

§ 8.01-216.8. Certain actions barred; relief from employment discrimination; waiver of sovereign immunity.

No court shall have jurisdiction over an action brought under § 8.01-216.5 based on information discovered by a present or former employee of the Commonwealth during the course of his employment unless that employee first, in good faith, exhausted existing internal procedures for reporting and seeking recovery of the falsely claimed sums through official channels and unless the Commonwealth failed to act on the information provided within a reasonable period of time.

No court shall have jurisdiction over any action brought under this article by an inmate incarcerated within a state or local correctional facility as defined in § 53.1-1.

No court shall have jurisdiction over an action brought under this article against any department, authority, board, bureau, commission, or agency of the Commonwealth, any political subdivision of the Commonwealth, a member of the General Assembly, a member of the judiciary, or an exempt official if the action is based on evidence or information known to the Commonwealth when the action was brought. For purposes of this section, "exempt official" means the Governor, Lieutenant Governor, Attorney General and the directors or members of any department, authority, board, bureau, commission or agency of the Commonwealth or any political subdivision of the Commonwealth.

In no event may a person bring an action under this article that is based upon allegations or transactions that are the subject of a civil suit or an administrative proceeding in which the Commonwealth is already a party.

The court shall dismiss an action or claim under § 8.01-216.5 unless opposed by the Commonwealth if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed in a criminal, civil or administrative hearing in which the Commonwealth or its agent is a party, in a Virginia legislative, administrative, or Auditor of Public Accounts' report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. For purposes of this section, "original source" means an individual (i) who either prior to a public disclosure has voluntarily disclosed to the Commonwealth the information on which the allegations or transactions in a claim are based or (ii) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions and who has voluntarily provided the information to the Commonwealth before filing an action under this article.

Except as otherwise provided in this section, the Commonwealth shall not be liable for expenses a person incurs in bringing an action under this article.

Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action under this article or other efforts to stop one or more violations of this article. Relief shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney fees. Any relief awarded to an employee under this section shall be reduced by any amount awarded to the employee through a state or local grievance process. An action under this section may be brought in a court of competent jurisdiction for the relief provided in this section, but may not be brought more than three years after the date the discrimination occurred. This paragraph shall constitute a waiver of sovereign immunity and creates a cause of action by an employee against the Commonwealth if the Commonwealth is the employer responsible for the adverse employment action that would entitle the employee to the relief set forth in this paragraph.