

June 30, 2020

Via Email

Faith Anderson, Chair, Whistleblower Protections/Awards working group,
faith.anderson@dfi.wa.gov

Lynne Egan, Chair, State Legislation Committee, legan@mt.gov
NASAA Corporate Office, nasaacomment@nasaa.org

Dear Ms. Anderson and Ms. Egan,

We write to offer comments concerning the NASAA's proposed Model Whistleblower Award and Protection Act (the "Act"). We applaud the NASAA for proposing the adoption of whistleblower incentive and protection laws at the state level. Our primary recommendation concerns enhancements to strengthen the anti-retaliation provision (Section 9 of the Act).

The Government Accountability Project's mission is to promote corporate and government accountability by protecting whistleblowers, advancing occupational free speech, and empowering citizen activists. Founded in 1977, Government Accountability Project (GAP) is the nation's leading whistleblower protection and advocacy organization. Located in Washington, DC, Government Accountability Project is a nonpartisan, public interest group. In addition to focusing on whistleblower support in our stated program areas, we lead campaigns to enact whistleblower protection laws both domestically and internationally.

We would be glad to discuss the matter further by phone if that would be helpful. Please don't hesitate to contact Tom Devine, Legal Director, at TomD@whistleblower.org or (202) 457-0034 ext. 124.

Proposed Revisions to Section 9

We propose the following revisions to Section 9. New proposed text is underlined.

Section 9: Protection of whistleblower

(1) Prohibition against retaliation. No employer may terminate, discharge, demote, suspend, threaten, harass, blacklist, directly or indirectly, or in any other manner retaliate against, a whistleblower because of any lawful act done by the whistleblower, including a disclosure made in the course of the whistleblower's duties:

- a. in providing information to the [Securities Division] regarding any conduct that the whistleblower reasonably believes constitutes a violation of any law, rule, or regulation subject to the jurisdiction of the [Securities Division], being perceived as assisting a disclosure of information to the [Securities Division], or preparing to disclose information to the [Securities Division];

- b. in providing information to a person with supervisory authority over the whistleblower at the employer of the whistleblower or another individual working for the employer who the whistleblower reasonably believes has the authority to investigate, discover, or terminate the misconduct; or to take any other action to address the misconduct regarding any conduct that the whistleblower reasonably believes constitutes a violation of any law, rule, or regulation subject to the jurisdiction of the [Securities Division]
- c. in initiating, testifying in, or assisting in any investigation or administrative or judicial action of the [Securities Administrator] or [Securities Division] based upon or related to such information; or
- d. in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.); the Securities Act of 1933 (15 U.S.C. 77a et seq.); the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.); 18 U.S.C. 1513(e); any other law, rule, or regulation subject to the jurisdiction of the Securities and Exchange Commission; or [the Securities Act of this State] or a rule adopted thereunder.

~~(2) Exceptions from protection against retaliation. Notwithstanding subsection (1) of this section, a whistleblower is not protected under this section if:~~

- ~~1. the whistleblower knowingly [or recklessly] makes a false, fictitious, or fraudulent statement or misrepresentation;~~
- ~~2. the whistleblower uses a false writing or document knowing that[, or with reckless disregard as to whether,] the writing or document contains false, fictitious, or fraudulent information; or~~
- ~~3. the whistleblower knows that[, or has a reckless disregard as to whether,] the disclosure is of original information that is false or frivolous.~~

(3) Cause of Action. A whistleblower, who alleges any act of retaliation in violation of subsection (1) of this section may bring an action for the relief provided in subsection (6) of this section in the court of original jurisdiction for the county or state where the alleged violation occurs, the whistleblower resides, or the person against whom the action is filed resides or has a principal place of business. The officer presiding in a judicial or administrative proceeding, shall apply the legal burdens of proof specified in section 1221(e) of title 5, United States Code, in determining whether a reprisal prohibited under subsection (1) of this section has occurred.

(4) Subpoenas. A subpoena requiring the attendance of a witness at a trial or hearing conducted under subsection (3) of this section may be served at any place in the United States.

(5) Statute of limitations. An action under subsection (3) of this section may not be brought:

1. more than 6 years after the date on which the violation of subsection (1) of this section occurred; or
2. more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation of subsection (1) of this section.

Notwithstanding the above limitations, an action under subsection (3) of this section may not in any circumstance be brought more than 10 years after the date on which the violation occurs.

(6) Relief. A court may award as relief for a whistleblower prevailing in an action brought under this section:

1. reinstatement with the same compensation, fringe benefits, and seniority status that the individual would have had, but for the retaliation;
2. two (2) times the amount of back pay otherwise owed to the individual, with interest;
3. special damages;
4. compensation for litigation costs, expert witness fees, and reasonable attorneys' fees;
5. actual damages;
6. an injunction to restrain a violation; or
7. any combination of these remedies.

(7) Confidentiality. Information that could reasonably be expected to reveal identifying information or the identity of a whistleblower is exempt from public disclosure under [citation to state public records act]. If disclosure is required by law, prior to release the whistleblower must receive timely advance notice. This subsection does not limit the ability of the any person to present evidence to a grand jury or to share evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

(8) Rights Retained by Employee. Nothing in this section shall diminish the rights, privileges, or remedies of any protected individual under any Federal or State law, or under any collective bargaining agreement.

(9) Definition. The term "whistleblower" includes any individual who takes, or 2 or more individuals acting jointly who take, an action described in subsection (1).

Explanation for Proposed Revisions

We propose expanding the scope of protected whistleblowing to include internal whistleblowing and clarifying that the statute prohibits retaliation against a perceived whistleblower.

We propose deleting the exceptions for protections against retaliation, because those exceptions are unnecessary. Anyone engaging in that misconduct would fail the "reasonable belief" test and be unprotected anyway. Further, they would deter whistleblowers from coming forward. The proposed exceptions could be used by employers to undermine legitimate claims. Moreover, there is no documented trend of frivolous whistleblower claims warranting these exceptions. The exceptions are essentially a solution in search of a problem.

We propose adding special damages as a form of relief available to a prevailing whistleblower because the existing proposed relief is limited to economic damages. Legitimate make whole relief must encompass damages for emotional distress and reputational harm. If the model statute does not provide any non-economic damages, then several of the retaliatory acts would be

relegated to a right without a remedy. For example, a whistleblower who is subjected to harassment or a hostile work environment would not be able to secure any monetary relief.

We propose applying the burden of proof/causation standard set forth in the Whistleblower Protection Act (WPA) because it is the standard burden in most federal whistleblower protection laws that Congress has enacted in the past two decades, including in the anti-retaliation provision of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A. For more information about the importance of the causation standard in a whistleblower protection law, see "The Whistleblower Protection Act Burdens of Proof: Ground Rules for Credible Free Speech Rights," E-Journal of International and Comparative Labour Studies 2.3 (September–October 2013).

Proposed Addition: Section 11

REPORT BY THE SECURITIES ADMINISTRATOR.—The Administrator shall, each year, conduct a study and report to Congress on the [use of this section--does this mean the disclosure of information as described in Section 2(3)?] including—

“(A) an analysis of the actions taken by the Administrator during the preceding year and the results of any such action;

“(B) a description of the number of awards granted; and

“(C) the types of cases in which awards were granted during the preceding fiscal year;

“(D) the amount of time from the award of sanctions to the payment of compensation to the whistleblower; and

“(E) any legislative or administrative recommendations regarding this section and the application of this section.