



OHIO LEGISLATIVE SERVICE COMMISSION

Bill Analysis

Kelly Bomba

H.B. 741

132nd General Assembly
(As Introduced)

Reps. Cera and Clyde, Antonio, Ramos, Holmes, Patterson, Ingram, Leland, Lepore-Hagan, Howse, K. Smith, Kelly, Sykes, Boyd, Miller, Ashford, Fedor, Sheehy, Rogers

BILL SUMMARY

Ohio's Whistleblower Protection Law (private and public sector employees)

- Expands the types of activities that an employee may disclose in a protected report under Ohio's Whistleblower Protection Law (OWPL).
- Eliminates the requirements that a report must be made pursuant to a specific process and to specified individuals or entities to be protected under the OWPL.
- Expands protection under the OWPL to an employee who refuses to participate in illegal activities.
- Specifies additional forms of prohibited retaliation.
- Expands the remedies an employee may receive to include any legal or equitable relief that will effectuate the employee's rights (current law allows for injunctive relief, reinstatement, back pay, and reinstatement of benefits and seniority).
- Increases the statute of limitations to file a lawsuit under the OWPL from 180 days to one year after the retaliatory action was taken.
- Specifies that the remedies under the OWPL are not exclusive of other available remedies and that an employee may also bring a lawsuit under the Public Employee Whistleblower Law (PEWL).

Public Employee Whistleblower Law (employees in the classified or unclassified civil service)

- Expands the types of activities that an employee may disclose in a protected report under the PEWL.
- Expands protection under the PEWL to verbal and attempted reports, rather than only written reports.
- Allows protected reports to be made to anyone rather than to specified governmental entities and law enforcement as under current law.
- Expands protection under the PEWL to an employee who refuses to participate in a violation of law or any activity that poses an unreasonable risk of harm to the health or safety of the employee, other employees, or the public.
- Specifies additional forms of prohibited retaliation.
- Allows an aggrieved employee to sue within one year after retaliation for damages and other relief, rather than filing an appeal before the State Personnel Board of Review as under current law.
- Specifies that the remedies under the PEWL are not exclusive of other available remedies and that an employee also may bring a lawsuit under the OWPL.

CONTENT AND OPERATION

Ohio's Whistleblower Protection Law

The bill expands the protections provided under Ohio's Whistleblower Protection Law¹ (OWPL), which applies to private and public sector employees.

Reports

Under the bill, if an employee becomes aware in the course of the employee's employment of an act the employee reasonably believes is a violation by the employee's employer, a fellow employee, or any other person directly or indirectly under the employer's direction, control, or supervision, of any state or federal statute, rule, or regulation or any political subdivision ordinance or regulation, the employee may report the violation, orally or in writing, to the employee's employer, an appropriate

¹ R.C. 4113.51 to 4113.53.



prosecuting attorney, law enforcement agency, or regulatory agency with the authority to investigate, correct, remedy, or prosecute the violation, or both.

Under continuing law, if an employee makes a report to the employee's employer, the employer must notify the employee in writing of any effort of the employer to correct the alleged violation or hazard or of the absence of the alleged violation or hazard. The notification must be made within 24 hours after the employee's report was received or by the close of business on the next regular business day following the day on which the report was received, whichever is later. Currently, this requirement applies only for reports for violations the employer has the authority to correct as described under "**Current law – reports**," below.²

Current law – reports

The bill eliminates the current law framework with respect to the types of reports protected under the OWPL. Under current law, the OWPL protects a report only in the following three circumstances:

- The employee orally notifies and subsequently files a written report with the employee's supervisor or other responsible officer of the employee's employer of a violation of law that:
 - The employee became aware of in the course of the employee's employment;
 - The employer has authority to correct; and
 - The employee reasonably believes is a criminal offense and likely to cause an imminent risk of physical harm to persons or a hazard to public health, a felony, or an improper solicitation for a contribution.
- The employee notifies an appropriate public official or agency that has regulatory authority over the employee's employer of a violation of specified environmental laws that is a criminal offense and that the employee became aware of in the course of the employee's employment.
- The employee orally notifies the employee's supervisor or a responsible officer of the employee's employer of a violation by a fellow employee of any state or federal statute, any political subdivision ordinance or regulation, or any work rule or company policy if the employee:

² R.C. 4113.52(A).

- Reasonably believes that the violation is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety, a felony, or an improper solicitation for a contribution;
- Becomes aware of the violation in the course of the employee's employment; and
- Subsequently files with the supervisor or officer a written report that provides sufficient detail to identify and describe the violation.

The bill eliminates the requirement that an employee must make a report if the first circumstance above occurs, making any report under the OWPL permissive. Also with respect to the first circumstance described above, if the employer does not correct the violation or make a reasonable and good faith effort to correct the violation within 24 hours after the oral notification or receipt of the written report, the OWPL protects an employee who makes a written report that provides sufficient detail to identify and describe the violation with the prosecuting authority of the county or municipal corporation where the violation occurred, with a peace officer, with the Inspector General if the violation is within the Inspector General's jurisdiction, or with any other appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which the employer is engaged.³

Prohibited disciplinary or retaliatory action

The bill prohibits an employer from taking any disciplinary or retaliatory action against an employee for doing any of the following:

- Making a report authorized under the OWPL (similar to current law);
- Refusing to participate in activities the employee reasonably believes are illegal activities, which are activities that are in violation of the state or federal criminal or civil code or any regulation intended to protect the public health, safety, or welfare (current law does not protect an employee's refusal to participate in those activities);
- Making an inquiry or taking any other action to ensure the accuracy of any information related to activities protected under the OWPL (similar to current law).⁴

³ R.C. 4113.52(A), with conforming changes in R.C. 4113.51.

⁴ R.C. 4113.52(B) and 4113.51(E).

For purposes of the OWPL, under the bill disciplinary or retaliatory action by an employer includes recommending or doing the following:

- Removing or suspending the employee from employment (continuing law);
- Withholding from the employee salary increases or employee benefits to which the employee is otherwise entitled (continuing law);
- Transferring or reassigning the employee (continuing law);
- Denying the employee a promotion that otherwise would have been received (continuing law);
- Reducing the employee in pay or position (continuing law);
- Disciplining the employee (added by the bill);
- Threatening the employee (added by the bill);
- Otherwise discriminating against the employee (added by the bill).

With respect to those actions prohibited under continuing law, current law only prohibits taking those actions, not recommending those actions be taken.⁵

Under continuing law, an employee must make a reasonable and good faith effort to determine the accuracy of any information reported under the OWPL. If the employee fails to make that effort, the employee may be subject to disciplinary action by the employee's employer, including suspension or removal.⁶

Enforcement

If an employer violates the OWPL, the bill allows the employee against whom the disciplinary or retaliatory action was taken to sue for any legal or equitable relief that will effectuate the employee's rights (current law allows for injunctive relief, reinstatement, back pay, and reinstatement of benefits and seniority). The lawsuit must be filed within one year after the date the disciplinary or retaliatory action was taken instead of within 180 days after the disciplinary or retaliatory action was taken as under current law. If the employee prevails in the lawsuit, the court is required to award the employee costs and reasonable attorney's fees (current law allows a court to award costs

⁵ R.C. 4113.52(C).

⁶ R.C. 4113.52(D).

to a prevailing party and reasonable attorney's fees and other fees if the employee prevails). The bill eliminates a provision that allows the court, if the court determines that an employer deliberately violated the OWPL, to include interest on an award of back pay.

The bill specifies that remedies under the OWPL are not exclusive of other available remedies and nothing in the bill prevents an employee who sues under the OWPL from bringing a lawsuit under the Public Employee Whistleblower Law⁷ (PEWL). Current law prohibits an employee from bringing a lawsuit under the OWPL if disciplinary or retaliatory action taken against an employee is a result of the employee's having filed a report under the PEWL.⁸

Public Employee Whistleblower Law

The bill makes several changes to the PEWL, which provides whistleblower protection for certain reports made by employees in the classified or unclassified civil service.

Reports

Under the bill, an employee in the classified or unclassified civil service may report, verbally or in writing, the employee's reasonable belief of a violation of a state or federal statute, rule, or regulation, or the misuse of public resources, if the employee becomes aware of the violation or misuse in the course of employment and the employee's supervisor or appointing authority has authority to correct the violation or misuse or a prosecuting attorney, law enforcement agency, or regulatory agency has authority to correct, remedy, or prosecute the violation or misuse. Current law only covers a violation or misuse that the employee's supervisor or appointing authority has authority to correct. Additionally, current law does not require that the report be based on the employee's reasonable belief.

The bill adds activities that an employee may report under the PEWL. Under the bill, an employee in the classified or unclassified civil service may report, verbally or in writing, the employee's reasonable belief of any of the following:

- An act of any person to aid, abet, incite, compel, or coerce the doing of any act that violates a state or federal statute, rule, or regulation, or to obstruct or prevent any person from complying with a state or federal statute, rule,

⁷ R.C. 124.341.

⁸ R.C. 4113.52(E) and (F), with a conforming change in R.C. 4925.10.



or regulation, or to attempt directly or indirectly to commit a violation of a state or federal statute, rule, or regulation;

- An act that constitutes fraud against the state, federal government, the public, or another employee;
- Misappropriation of state or federal resources;
- An act that poses a risk to the health and safety of the public or other employees;
- An act constituting waste of state or federal funds, abuse of authority, or gross mismanagement of a program.

Unlike current law, these activities do not need to be something the employee became aware of in the course of employment.

The bill eliminates the requirements that reports must be made to specified individuals or entities. Current law requires that, to be protected under the PEWL, a report must be filed in writing with the employee's supervisor or appointing authority, the Office of Internal Audit, or the Auditor of State's fraud reporting system. Under current law an employee may only make a report to specified law enforcement entities or an appropriate ethics commission if the employee reasonably believes that the activity being reported is a criminal offense or violation of specified ethics laws. Because the bill eliminates those requirements, it appears to allow an employee to make a report to anyone.⁹

Prohibited disciplinary or retaliatory action

The bill prohibits an officer or employee in the classified or unclassified civil service from taking any disciplinary or retaliatory action against an employee in the classified or unclassified civil service for doing either of the following:

- Making, attempting to make, or preparing to make any report authorized by the bill (current law only protects employees who make a report);
- Refusing to participate in either of the following:
 - A violation of a state or federal statute, rule, or regulation or written policy or procedure;

⁹ R.C. 124.341(A)(1).

- Any activity that poses an unreasonable risk of harm to the health or safety of the employee, other employees, or the public (current law does not protect an employee's refusal to participate in any activities).¹⁰

Under current law, only disciplinary action against an employee is prohibited. The bill adds that retaliatory action also is prohibited. For purposes of the PEWL, disciplinary or retaliatory action includes recommending or doing any of the following (these are the same actions as those prohibited under the OWPL under the bill):

- Removing or suspending the employee from employment (continuing law);
- Withholding from the employee salary increases or employee benefits to which the employee is otherwise entitled (continuing law);
- Transferring or reassigning the employee (continuing law);
- Denying the employee promotion that otherwise would have been received (continuing law);
- Reducing the employee in pay or position (continuing law);
- Disciplining the employee (added by the bill);
- Threatening the employee (added by the bill);
- Otherwise discriminating against the employee (added by the bill).

Similar to the OWPL, with respect to those actions prohibited under continuing law, current law only prohibits taking the action, not recommending the action be taken.

Under continuing law, an employee must make a reasonable effort to determine the accuracy of any information reported under the PEWL. An employee who purposely, knowingly, or recklessly reports false information is subject to disciplinary action, including suspension or removal.¹¹

¹⁰ R.C. 124.341(B).

¹¹ R.C. 124.341(C) and (D).

Enforcement

The bill allows an employee injured by prohibited disciplinary or retaliatory action under the PEWL to sue the person or agency who committed the violation for any legal or equitable relief that will effectuate the employee's rights. The lawsuit must be filed within one year after the alleged violation occurred. If the employee prevails in the lawsuit, the court must award the employee costs and reasonable attorney's fees. If a court determines that a violation of the PEWL was willful or malicious, involved a criminal violation, or an effort to obtain personal gain, the court may award the employee damages up to three times the amount of actual damages. The bill specifies that remedies under the PEWL are not exclusive of other available remedies and that nothing in the bill prevents an employee from bringing a lawsuit under the OWPL.¹²

Current law – enforcement

Under current law, an employee who is disciplined or retaliated against in violation of the PEWL may file an appeal with the State Personnel Board of Review within 30 days after the employee receives notice of the disciplinary action, but is excluded from seeking a remedy for the violation under any other provisions of law, including the OWPL. The Board may affirm or disaffirm the action of the appointing authority or may issue any other order as is appropriate. The Board order is appealable under the Administrative Procedure Act.¹³ Although the PEWL and OWPL provide exclusive remedies under current law, a state employee may be able to file a report under either of the laws, depending on the nature of the violation that the employee is reporting.¹⁴

HISTORY

ACTION	DATE
Introduced	10-10-18

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¹² R.C. 124.341(E), (F), and (G).

¹³ R.C. Chapter 119.

¹⁴ R.C. 124.341(D) and *Robins v. Ohio Dep't of Liquor Control*, 10th Dist. No. 96APE01-38, 1996 Ohio App. LEXIS 2760 (June 25, 1996).

