

Enrolled
House Bill 4067

Sponsored by Representative BUEHLER, Senator GELSER, Representatives HOYLE, WHISNANT, Senators DEVLIN, HANSELL, KNOPP, KRUSE, WHITSETT; Representatives BARKER, BARRETO, BENTZ, CLEM, DAVIS, DOHERTY, ESQUIVEL, EVANS, FAGAN, FREDERICK, GALLEGOS, GORSEK, HACK, HAYDEN, HEARD, HUFFMAN, JOHNSON, KENNEMER, LININGER, LIVELY, MCLAIN, MCLANE, OLSON, PARRISH, PILUSO, RAYFIELD, READ, REARDON, SMITH WARNER, SPRENGER, TAYLOR, VEGA PEDERSON, WEIDNER, WILLIAMSON, WILSON, WITT, Senators BOQUIST, JOHNSON, OLSEN (Presession filed.)

CHAPTER

AN ACT

Relating to employee whistleblowers; creating new provisions; and amending ORS 659A.200, 659A.203 and 659A.885.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Section 2 of this 2016 Act is added to and made a part of ORS 659A.200 to 659A.224.

SECTION 2. (1) An employee’s good faith and objectively reasonable belief of a violation of federal, state or local law, rule or regulation by the employer shall be an affirmative defense to a civil or criminal charge related to the disclosure by the employee of lawfully accessed information related to the violation, including information that is exempt from disclosure as provided in ORS 192.501 to 192.505 or by employer policy, if the information is provided to:

- (a) A state or federal regulatory agency;
- (b) A law enforcement agency;
- (c) A manager employed by the public or nonprofit employer of the employee; or
- (d) An attorney licensed to practice law in this state if a confidential communication is made in connection with the alleged violation described in this section and in furtherance of the rendition of professional legal services to the employee that are subject to ORS 40.225.

(2) An employee may not assert the affirmative defense described under subsection (1) of this section if the information described in subsection (1) of this section:

- (a) Is disclosed or redisclosed by the employee or at the employee’s direction to a party other than the parties listed in subsection (1) of this section;
- (b) Is stated in a commercial exclusive negotiating agreement with a public or nonprofit employer, provided that the agreement is not related to the employee’s employment with the employer; or
- (c) Is stated in a commercial nondisclosure agreement with a public or nonprofit employer, provided that the agreement is not related to the employee’s employment with the employer.

(3) The affirmative defense described in subsection (1) of this section is available to an employee who discloses information related to an alleged violation by a coworker or super-

visor described in subsection (1) of this section if the disclosure relates to the course and scope of employment of the coworker or supervisor.

(4) The affirmative defense described in subsection (1) of this section may not be asserted by an employee who is an attorney or by an employee who is not an attorney but who is employed, retained, supervised or directed by an attorney if the information disclosed pursuant to subsection (1) of this section is related to the representation of a client.

(5) This section and ORS 659A.203, including disclosures under subsection (1) of this section, are subject to the rules of professional conduct established pursuant to ORS 9.490.

(6) Public and nonprofit employers shall establish and implement a policy regarding employees who invoke their rights under this section or ORS 659A.203. The policy shall delineate all rights and remedies provided to employees under this section and ORS 659A.203. The employer shall deliver a written or electronic copy of the policy to each employee.

(7) Subject to the rules of professional conduct established pursuant to ORS 9.490, a public employee who is an attorney may report to the Attorney General the employee's knowledge of a violation of federal, state or local law, rule or regulation by the public employer.

(8) Disclosure of information pursuant to subsection (1) of this section does not waive attorney-client privilege or affect the applicability of any exemption from disclosure of a public record under ORS 192.501 to 192.505.

(9) Notwithstanding subsection (1) of this section, information protected from disclosure under federal law, including but not limited to the federal Health Insurance Portability and Accountability Act of 1996 (P.L. 104-191), may be disclosed only in accordance with federal law.

SECTION 3. ORS 659A.200 is amended to read:

659A.200. As used in ORS 659A.200 to 659A.224:

(1) "Disciplinary action" includes but is not limited to any discrimination, dismissal, demotion, transfer, reassignment, supervisory reprimand, warning of possible dismissal or withholding of work, whether or not the action affects or will affect employee compensation.

(2) "Employee" means a person:

(a) Employed by or under contract with the state or any agency of or political subdivision in the state;

(b) Employed by or under contract with any person authorized to act on behalf of the state, or agency of the state or subdivision in the state, with respect to control, management or supervision of any employee;

(c) Employed by the public corporation created under ORS 656.751;

(d) Employed by a contractor who performs services for the state, agency or subdivision, other than employees of a contractor under contract to construct a public improvement; *[and]*

(e) Employed by or under contract with any person authorized by contract to act on behalf of the state, agency or subdivision[.];

(f) **Employed by a nonprofit organization; or**

(g) **Serving as a member of a board of directors of a nonprofit organization who is not otherwise considered an employee.**

(3) "Information" includes public and private records, documents and electronically stored data.

(4) "Knowledge" means actual knowledge.

(5) "Nonprofit organization" or "nonprofit" means an organization or group of organizations that:

(a) **Receives public funds by way of grant or contract; and**

(b) **Is exempt from income tax under section 501(c)(3) of the Internal Revenue Code.**

[(3)] (6) "Public employer" means:

(a) The state or any agency of or political subdivision in the state; *[and]*

(b) Any person authorized to act on behalf of the state, or any agency of or political subdivision in the state, with respect to control, management or supervision of any employee; **or**.]

(c) An employer who employs an employee described in subsection (2)(a) to (e) of this section.

SECTION 4. ORS 659A.203 is amended to read:

659A.203. (1) Subject to ORS 659A.206, except as provided in ORS 659A.200 to 659A.224, it is an unlawful employment practice for any public **or nonprofit** employer to:

(a) Prohibit any employee from discussing, [*in response to an official request,*] either specifically or generally with any member of the Legislative Assembly, legislative committee staff acting under the direction of a member of the Legislative Assembly, any member of the elected governing body of a political subdivision in the state or any elected auditor of a city, county or metropolitan service district, the activities of:

(A) The state or any agency of or political subdivision in the state; or

(B) Any person authorized to act on behalf of the state or any agency of or political subdivision in the state.

(b) Prohibit any employee from disclosing, or take or threaten to take disciplinary action against an employee for the disclosure of any information that the employee reasonably believes is evidence of:

(A) A violation of any federal, [*or*] state **or local** law, rule or regulation by the [*state, agency or political subdivision*] **public or nonprofit employer;**

(B) Mismanagement, gross waste of funds or abuse of authority or substantial and specific danger to public health and safety resulting from action of the [*state, agency or political subdivision*] **public or nonprofit employer;** or

(C) Subject to ORS 659A.212 (2), the fact that a person receiving services, benefits or assistance from the state or agency or subdivision, is subject to a felony or misdemeanor warrant for arrest issued by this state, any other state, the federal government, or any territory, commonwealth or governmental instrumentality of the United States.

(c) Require any employee to give notice prior to making any disclosure or engaging in discussion described in this section, except as allowed in ORS 659A.206 (1).

(d) Discourage, restrain, dissuade, coerce, prevent or otherwise interfere with disclosure or discussions described in this section.

(2) [*No*] **A public or nonprofit employer [*shall*] may not** invoke or impose any disciplinary action against an employee for employee activity described in subsection (1) of this section or ORS 659A.212.

(3) The remedies provided by this section are in addition to any remedy provided to an employee under ORS 659A.199 or other remedy that may be available to an employee for the conduct alleged as a violation of this section.

(4) A violation of this section is a Class A misdemeanor.

SECTION 5. ORS 659A.885 is amended to read:

659A.885. (1) Any person claiming to be aggrieved by an unlawful practice specified in subsection (2) of this section may file a civil action in circuit court. In any action under this subsection, the court may order injunctive relief and any other equitable relief that may be appropriate, including but not limited to reinstatement or the hiring of employees with or without back pay. A court may order back pay in an action under this subsection only for the two-year period immediately preceding the filing of a complaint under ORS 659A.820 with the Commissioner of the Bureau of Labor and Industries, or if a complaint was not filed before the action was commenced, the two-year period immediately preceding the filing of the action. In any action under this subsection, the court may allow the prevailing party costs and reasonable attorney fees at trial and on appeal. Except as provided in subsection (3) of this section:

(a) The judge shall determine the facts in an action under this subsection; and

(b) Upon any appeal of a judgment in an action under this subsection, the appellate court shall review the judgment pursuant to the standard established by ORS 19.415 (3).

(2) An action may be brought under subsection (1) of this section alleging a violation of ORS 10.090, 10.092, 25.337, 25.424, 171.120, 408.230, 408.237 (2), 475B.233, 476.574, 652.355, 653.060, 653.601 to 653.661, 659.852, 659A.030, 659A.040, 659A.043, 659A.046, 659A.063, 659A.069, 659A.082, 659A.088, 659A.103 to 659A.145, 659A.150 to 659A.186, 659A.194, 659A.199, 659A.203, 659A.218, 659A.228, 659A.230, 659A.233, 659A.236, 659A.250 to 659A.262, 659A.277, 659A.290, 659A.300, 659A.306, 659A.309, 659A.315, 659A.318, 659A.320, 659A.355, [or] 659A.421, [or ORS] 653.547 [and] or 653.549.

(3) In any action under subsection (1) of this section alleging a violation of ORS 25.337, 25.424, 659.852, 659A.030, 659A.040, 659A.043, 659A.046, 659A.069, 659A.082, 659A.103 to 659A.145, 659A.199, **659A.203**, 659A.228, 659A.230, 659A.250 to 659A.262, 659A.290, 659A.318, [or] 659A.421, [or ORS] 653.547 [and] or 653.549:

(a) The court may award, in addition to the relief authorized under subsection (1) of this section, compensatory damages or \$200, whichever is greater, and punitive damages;

(b) At the request of any party, the action shall be tried to a jury;

(c) Upon appeal of any judgment finding a violation, the appellate court shall review the judgment pursuant to the standard established by ORS 19.415 (1); and

(d) Any attorney fee agreement shall be subject to approval by the court.

(4) In any action under subsection (1) of this section alleging a violation of ORS 652.355 or 653.060, the court may award, in addition to the relief authorized under subsection (1) of this section, compensatory damages or \$200, whichever is greater.

(5) In any action under subsection (1) of this section alleging a violation of ORS 171.120, 476.574[, 659A.203] or 659A.218, the court may award, in addition to the relief authorized under subsection (1) of this section, compensatory damages or \$250, whichever is greater.

(6) In any action under subsection (1) of this section alleging a violation of ORS 10.090 or 10.092, the court may award, in addition to the relief authorized under subsection (1) of this section, a civil penalty in the amount of \$720.

(7) Any individual against whom any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age, if the individual is 18 years of age or older, has been made by any place of public accommodation, as defined in ORS 659A.400, by any employee or person acting on behalf of the place or by any person aiding or abetting the place or person in violation of ORS 659A.406 may bring an action against the operator or manager of the place, the employee or person acting on behalf of the place or the aider or abettor of the place or person. Notwithstanding subsection (1) of this section, in an action under this subsection:

(a) The court may award, in addition to the relief authorized under subsection (1) of this section, compensatory and punitive damages;

(b) The operator or manager of the place of public accommodation, the employee or person acting on behalf of the place, and any aider or abettor shall be jointly and severally liable for all damages awarded in the action;

(c) At the request of any party, the action shall be tried to a jury;

(d) The court shall award reasonable attorney fees to a prevailing plaintiff;

(e) The court may award reasonable attorney fees and expert witness fees incurred by a defendant who prevails only if the court determines that the plaintiff had no objectively reasonable basis for asserting a claim or no reasonable basis for appealing an adverse decision of a trial court; and

(f) Upon any appeal of a judgment under this subsection, the appellate court shall review the judgment pursuant to the standard established by ORS 19.415 (1).

(8) When the commissioner or the Attorney General has reasonable cause to believe that a person or group of persons is engaged in a pattern or practice of resistance to the rights protected by ORS 659A.145 or 659A.421 or federal housing law, or that a group of persons has been denied any of the rights protected by ORS 659A.145 or 659A.421 or federal housing law, the commissioner or the Attorney General may file a civil action on behalf of the aggrieved persons in the same manner as a person or group of persons may file a civil action under this section. In a civil action

filed under this subsection, the court may assess against the respondent, in addition to the relief authorized under subsections (1) and (3) of this section, a civil penalty:

- (a) In an amount not exceeding \$50,000 for a first violation; and
- (b) In an amount not exceeding \$100,000 for any subsequent violation.

(9) In any action under subsection (1) of this section alleging a violation of ORS 659A.145 or 659A.421 or alleging discrimination under federal housing law, when the commissioner is pursuing the action on behalf of an aggrieved complainant, the court shall award reasonable attorney fees to the commissioner if the commissioner prevails in the action. The court may award reasonable attorney fees and expert witness fees incurred by a defendant that prevails in the action if the court determines that the commissioner had no objectively reasonable basis for asserting the claim or for appealing an adverse decision of the trial court.

(10) In an action under subsection (1) or (8) of this section alleging a violation of ORS 659A.145 or 659A.421 or discrimination under federal housing law:

- (a) "Aggrieved person" includes a person who believes that the person:
 - (A) Has been injured by an unlawful practice or discriminatory housing practice; or
 - (B) Will be injured by an unlawful practice or discriminatory housing practice that is about to occur.

(b) An aggrieved person in regard to issues to be determined in an action may intervene as of right in the action. The Attorney General may intervene in the action if the Attorney General certifies that the case is of general public importance. The court may allow an intervenor prevailing party costs and reasonable attorney fees at trial and on appeal.

Passed by House February 17, 2016

Received by Governor:

Repassed by House March 1, 2016

.....M.,....., 2016

Approved:

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Timothy G. Sekerak, Chief Clerk of House

.....M.,....., 2016

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Tina Kotek, Speaker of House

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Kate Brown, Governor

Passed by Senate February 29, 2016

Filed in Office of Secretary of State:

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Peter Courtney, President of Senate

.....M.,....., 2016

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Jeanne P. Atkins, Secretary of State