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WHISTLEBLOWERS

Various states and local governments have whistleblower laws to encourage public employees to report waste, fraud, and abuse. The city of Washington, D.C., recently amended its Whistleblower Protection Act, which attorneys R. Scott Oswald and Jason Zuckerman say ''is now the strongest public sector whistleblower protection statute in the country.''

In this BNA Insights article, they detail the D.C. WPA's amended provisions and urge other governments to use it as a model for adopting similarly robust protection for whistleblowers.

D.C.'s Amended Whistleblower Protection Act: The Gold Standard for Public Sector Whistleblower Protection

BY R. SCOTT OSWALD AND JASON ZUCKERMAN

As states face unprecedented budgetary constraints, curbing waste, fraud, and abuse has become a top priority. To encourage public sector employees to blow the whistle on waste, fraud, and abuse, states must provide robust whistleblower protections to employees.

Fortunately, several state and local governments have recently enacted whistleblower protection legislation or strengthened existing whistleblower protection statutes, including Alabama, Alaska, Illinois, Iowa, Massachusetts, New Mexico, Pennsylvania, South Dakota, Utah, and Vermont.[1]

Washington, D.C., recently amended its Whistleblower Protection Act (D.C. WPA),[2] which is now the strongest public sector whistleblower protection statute in the country.[3]

The expansion of whistleblower protection law in the public sector is likely driven by the following conclusion that the D.C. Council reached in strengthening the D.C. WPA: ''There is real value . . . whenever a whistleblower identifies potential risks to the District like fraud, waste, and abuse. Retaliation deters future whistleblowing, thereby affecting the District's bottom

[1] Public Employees for Environmental Responsibility, *State Watch*, (June 24, 2011), http://www.peer.org/state/index.php (containing a detailed survey of whistleblower protection statutes).

[2] D.C. Whistleblower Protection Act §§ 1-615.51 - .59 (2001).

[3] See Whistleblower Protection Amendment Act of 2009, Act No. 18-0265, Bill No. 18-0233, 57 D.C. Reg. 139697 (Jan. 11, 2010).

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line. Similarly, visible acts of retaliation by managers and public officials reduce morale, contribute to attrition, and diminish the public trust.''[4]

This article discusses the recent amendments to the D.C. WPA, which should serve as a model to other jurisdictions seeking to strengthen their whistleblower protection laws.

$48 Million Theft Spurs D.C. to Amend Its WPA

The primary impetus for D.C. to amend its WPA was the discovery that Harriette Walters, an employee at the Office of Tax and Revenue, stole more than $48 million from the District over the course of 18 years, during which time not one employee reported her crime.

When the D.C. Council investigated how Ms. Walters was able to orchestrate such a large-scale theft from the public fisc, they concluded that inadequate protections for whistleblowers and the absence of ''a culture of compliance'' were major factors in Walters's brazen fraud lasting so long.

According to an investigation of the cause of Walters's fraudulent scheme, the danger of reprisal is best illustrated in the following anecdote: ''when one senior OCFO [Office of the Chief Financial Officer] manager asked his assistant, after the discovery of the fraud, why no one reported the misconduct of members of the Adjustment Unit, [she] responded: 'snitches get stitches.' ''[5]

The 2009 amendments to the D.C. WPA were also spurred by court decisions creating significant loopholes in the D.C. WPA, which the D.C. Council deemed contrary to the original intent of the D.C. WPA.[6] For example, in *Wilburn v. District of Columbia*, the D.C. Court of Appeals held that a whistleblower is not protected if the information she disclosed is already known.[7] The *Wilbur* court stated that '' '[a] disclosure of information that is publicly known is not a disclosure under the WPA,' '' thereby creating an original source disclosure requirement not found in the text of the statute.[8]

Broad Scope of Coverage and Individual Liability

The D.C. WPA protects any current or former employee, applicant for employment, as well as employees of independent and subordinate agencies.[9] An employee can bring suit not only against the District, but also against ''any District employee, supervisor, or official'' personally involved in an act prohibited under the WPA.[10] A supervisor is anyone who has the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, the responsibility to direct them or evaluate their performance, or the permission to adjust their grievances or effectively to recommend such action.[11] Authorizing actions against individuals is critical to deterring retaliation against whistleblowers.

Broad Scope of Protected Conduct. The D.C. Whistleblower Protection Act protects an employee who lawfully discloses information which he or she reasonably believes evidences gross mismanagement, waste of public funds, abuse of authority in connection with the administration of a public program or the execution of a public contract, a violation of law, regulation, or contractual term, or a substantial danger to public health and safety.[12] The D.C. WPA also protects an employee's refusal to comply with an illegal order. An ''illegal order'' is a directive to violate or assist in violating any federal, state, or local law, rule, or regulation.[13]

The recent amendments to the D.C. WPA protect a disclosure ''without restriction to time, place, form, motive, context, forum, or prior disclosure made to any person by an employee or applicant . . . .''[14] An employee's communication does not have to be an original disclosure to qualify for protection under the D.C. WPA. According to the D.C. Council, it is better to provide protection to two employees than to risk either of them remaining silent:

> ''Prospective whistleblowers should not have to guess about whether a supervisor already knows about misconduct in government. Indeed, it is better for the public body receiving the protected disclosure as well. Repetition of the same allegation may draw heightened attention to overburdened investigators, and even if two whistleblowers disclose some common facts, each could also disclose other unknown facts. Accordingly, the proposed legislation clarifies that a disclosure is protected without restriction to prior disclosure made to any person by an employee or applicant.''[15]

This broad scope of protected conduct is critical to ensuring that employees can blow the whistle without jeopardizing their livelihood.

Protecting 'Duty Speech.' The amended D.C. WPA also eliminates the ''duty speech'' loophole. Foreseeing the application of the ''duty speech'' defense from *Garcetti v. Ceballos*, the D.C. Council clarified that employees are protected even if their disclosure is made during the course of performing their job duties.[16] According to the Council:

> ''As a matter of public policy, duty speech should be protected for the purposes of the WPA. It is counterproductive to have a situation where two employees—one acting according to her job duties and one not—could make identical disclosures, but one would not receive whistleblower protection. Moreover, given most public employees' sense of civic duty and expertise, the WPA ought to provide protection when they speak about the subject matter of their vocation. Finally, the Committee believes that a duty-

[4] D.C. Council Report accompanying Bill 18-233, the ''Whistleblower Protection Amendment Act of 2009'' at 3 (November 19, 2009).

[5] Id.

[6] Whistleblower Protection Amendment Act of 2009.

[7] *Wilburn v. District of Columbia*, 957 A.2d 921, 28 IER Cases 866 (D.C. 2008).

[8] Id. at 925 (alteration in original) (citation omitted).

[9] D.C. Code, § 1-615.52(a)(3), (2010).

[10] § 1-615.54(a)(1) (as amended by 57 D.C. Reg. 139697 § 2(c)(1)).

[11] § 1-617.01(d).

[12] § 1-615.52(a)(6).

[13] § 1-615.52(a)(4).

[14] Id. (as amended by 57 D.C. Reg. 139697 § 2(a)(2)).

[15] Report on Bill 18-233 at 4.

[16] *Garcetti v. Ceballos*, 547 U.S. 410, 24 IER Cases 737 (2006) (''when public employees make statements pursuant to their official duties . . . the Constitution does not insulate their communications from employer discipline'') (104 DLR AA-1, 5/31/06).

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speech exception to the WPA is irreconcilable with a District employee's responsibility to report what they believe or reasonably should believe is a violation of law.''[17]

Other jurisdictions contemplating enhancements to their whistleblower protection laws should close the ''duty speech'' loophole, which essentially guts existing whistleblower protections.

Prohibited Types of Retaliation. The D.C. WPA forbids a wide range of retaliatory adverse actions, including ''recommended, threatened, or actual termination, demotion, suspension, or reprimand; involuntary transfer, reassignment or detail; referral for psychiatric or psychological counseling; failure to promote or take other favorable personnel action.''[18]

The use of retaliatory investigations and fitness-for-duty examinations is something the D.C. Council found ''particularly disturbing.''[19] No longer can a supervisor label a disclosure ''crazy talk'' and use it as justification to require a mental-health or fitness-for-duty examination. This particular protection is especially of value to police officers and firemen and applies to investigations and fact-finding activities not necessary to the mission of the agency.

Causation Standard and Burden-Shifting Framework. The D.C. WPA applies a causation standard and burden-shifting framework that is more favorable to employees than Title VII of the 1964 Civil Rights Act's *McDonnell Douglas* standard.[20] To prevail under the D.C. WPA, an employee must show by a preponderance of the evidence that her protected conduct was a contributing factor in the adverse employment action.[21] A contributing factor is ''any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.''[22] Once the employee has met her burden, the defendant may avoid liability only by proving by clear and convincing evidence that ''the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by this section.''[23]

Right to Jury Trial. Under the D.C. WPA, a whistleblower may seek a trial by jury within three years after a violation occurs or within one year after he or she first learns of the violation, whichever comes first.[24] Even if a whistleblower has obtained a judgment by filing an administrative claim or engaging in arbitration pursuant to an employment contract, he or she may still file a civil action.[25]

Remedies. Remedies available to a whistleblower include injunctive relief, reinstatement to the same or equivalent position with all seniority rights and benefits, back pay, interest, compensatory damages, attorneys' fees, and costs.[26]

Individuals that retaliate against a whistleblower are subject to fines up to $10,000 and mandatory discipline.[27]

Financial Incentive for Whistleblowing. In addition, the mayor may award a whistleblower up to $50,000 for disclosures that help recover or prevent the loss of more than $100,000 in public funds based on the recommendation of the inspector general, the District of Columbia auditor, or other law enforcement authority.[28] Simply put, the District is encouraging employees to become whistleblowers by protecting them and creating financial incentives while simultaneously discouraging retaliation by holding those to participate in retaliation personally responsible for their acts.

Protections for Employees of D.C. Contractors. The District extends similar protections to the employees of District contractors and instrumentalities.[29] Instrumentalities are quasi-governmental entities that operate in part with District funds such as the Washington Metropolitan Area Transit Authority, the District of Columbia Water and Sewer Authority, and the Washington Convention Center Authority.[30] Aggrieved individuals covered by the District's contractor and instrumentalities whistleblower statutes have the right to a jury trial and may seek damages including injunctive relief, back pay, compensatory damages, and fees.[31]

Conclusion

The D.C. WPA provides robust protection to whistleblowers and a strong financial incentive to encourage whistleblowing. To effectively reduce fraud, waste, and abuse, states should adopt a substantially similar whistleblower protection statute.

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[17] Report on Bill 18-233 at 5.

[18] § 1-615.52(a)(5) (as amended by 57 D.C. Reg. 139697 § 2(a)(1)(B)).

[19] Report on Bill 18-233 at 6.

[20] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 5 FEP Cases 965 (1973) (After plaintiff establishes prima facie case of discrimination, the defendant bears the burden of producing a legitimate nondiscriminatory reason for the adverse employment action. The burden of persuasion remains with the plaintiff.)

[21] § 1-615.54(b).

[22] § 1-615.52(a)(2).

[23] § 1-615.54(b).

[24] § 1-615.54(a)(2) (as amended by 57 D.C. Reg. 139697 § 2(c)(1)).

[25] § 1-615.56(b) (as amended by 57 D.C. Reg. 139697 § 2(e)).

[26] § 1-615.54(a).

[27] § 1-615.55 (as amended by 57 D.C. Reg. 139697 § 2(d)(2)).

[28] § 1-615.54(e)(1) (as amended by 57 D.C. Reg. 139697 § 2(c)(3)).

[29] The Employees of District Contractors and Instrumentality Whistleblower Protection Act of 1998, §§ 2-223.01 - .07 (2001) provides protections similar to the D.C. WPA and was amended by 57 D.C. Reg. 139697 § 3.

[30] § 2-223.01(5).

[31] § 2-223.03(a).