



DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

DATE: February 9, 2016
TO: Representative Jeff Barker, Chair, House Committee on Judiciary
FROM: Aaron Knott, Department of Justice Legislative Director
SUBJECT: HB 4067 – Whistleblowers

BACKGROUND

Whistleblowers deserve broad legal protections, particularly where protecting them is necessary to hold public bodies account for their conduct. As Attorneys General across the country have recognized, strong whistleblower protections are incredibly important to a well-functioning government, and Oregon is no different. The Department of Justice commends HB 4067 for recognizing this important mechanism for government accountability, and thanks Representative Buehler for his accessibility in considering our remaining concerns. The Department of Justice offers the following technical observations about HB 4067. Note that this analysis assumes the adoption of the -1 amendments and the otherwise very serious concerns with Section 1(3-4) will not be outlined here.

REMAINING CONCERNS WITH HB 4067 -1

Under recent opinions issued by the Oregon Court of Appeals, a “reasonableness” standard like that included in HB 4067 will be evaluated subjectively, based on the belief of the person, not an objective standard. This means that if a deluded but well-meaning person were to steal privileged documents or other information for the purposes of disclosure, they would be immune from all actions as long as they did so in their subjective good faith. While this provision would undoubtedly confer broad protections on whistleblowers, it could permit the disclosure of extremely sensitive information under the very low standard of subjective reasonability.

Additionally, while Section 1 does make reference to an “employee”, it does not also express that the violation of federal, state or local law be committed by an “employer.” This means that the whistleblower provision as written could apply to private data unrelated to the employer. Thus, this bill would potentially protect an employee who illegally hacked into a coworker's computer and uncovered evidence of what they mistakenly believed to be a drug addiction and subsequently disclosed that information. In that situation, this bill would potentially protect the disclosure of private information over the greater intrusion caused by the employee's decision to hack a coworker's computer solely for reasons of personal animus.

Further, requiring every nonprofit to have and distribute a policy is very burdensome. The vast majority of charities operating in the state are very small and generally do not have

the financial resources to retain legal advice. Without the assistance of legal counsel, it would be very difficult for most nonprofits to draft and distribute the policy required by this bill. Nonprofits will either have to use funds that would otherwise be used for charitable purposes to retain a lawyer or they will simply ignore or remain unaware of the requirement, resulting in widespread noncompliance.

While narrowly written, the prohibition against invoking the assistance of law enforcement to coerce, prevent or otherwise interfere with disclosure of information seems to have the potential impact of prohibiting an employer from calling the police. When a leak of information occurs, it may not be at all obvious at the outset whether or not the conduct was criminal or non-criminal. The approach of offering an affirmative defense is the right one – if an indictment does occur, this bill provides a shield against conviction. But prohibiting the engagement of law enforcement on any level is a step too far.

RECOMMENDATIONS

First, a more precise definition for “reasonableness” should be adopted. Such a definition should embrace an objective standard of reasonableness so that the potential for abuse is substantially narrowed. While broad protections to whistleblowers are necessary, “reasonableness” must be tied to an objective standard, otherwise it can be easily and repeatedly abused.

Additionally, the scope of the bill should be limited to misconduct on the behalf of an employer. This bill is clearly intended to boost accountability among public bodies and capture instances of malfeasance by the employer, not by private citizens who might share an office space.

The requirement for all Oregon non-profits to promulgate whistleblower policies has the potential to be unduly burdensome. Instead of imposing this requirement on all non-profits in the state of Oregon, the requirement should be altered to apply only to Oregon non-profits that receive state funding or subsidies. This will ensure that the primary goal of the bill – encouraging government accountability – is achieved without burdening hundreds of small Oregon non-profits who lack the technical capacity to develop these policies.

Finally, the prohibition against engaging with law enforcement at p. 3, line 12-15 should be either significantly curtailed, or completely removed.

If these concerns are met, the Department of Justice strongly supports the passage of HB 4067.

CONTACT

Please contact Department of Justice Legislative Director Aaron Knott with any further questions or concerns.

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