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## **EaHB 4067 Whistleblower Protection – at What Cost?**

House Bill 4067 ("HB 4067") sets up an affirmative defense for public or nonprofit employees who disclose (to legislators, state agencies, law enforcement agencies, or managers within the employee's organization) information that they believe shows a violation of the law by their employer. This defense allows disclosure of information that is otherwise protected by state or federal law, as long as the employee had a "good faith and objectively reasonable belief" that the information shows a violation of law by the (public or nonprofit) employer.

The bill also subjects nonprofit or public employers to criminal charges and civil penalty damages up to \$10,000 for certain violations of the law.

### **Supremacy Clause:**

The Supremacy Clause of the United States Constitution prevents state governments from creating legislative exceptions to federal law, including federal privacy laws. Yet HB 4067 appears to provide an exception to those laws, as long as the whistleblower provides the information in good faith and with an objectively reasonable belief of a violation of federal state or local law by the employer.

### **Illusion of Protection:**

By setting up an affirmative defense, HB 4067 creates an illusion of protection that encourages the disclosure of information, potentially in violation of numerous state and federal laws. The following are some, but not all, of the laws impacted:

- The Oregon Consumer Identity Theft Protection Act of 2007;
- Health Insurance Portability and Accountability Act of 1996 ("HIPAA");
- The Family Educational Rights and Privacy Act ("FERPA");
- Privacy Act of 1974;
- The Federal Information Security Act of 2002.

### **HIPAA Example:**

An employee in the accounting department of a nonprofit hospital discloses to a member of the legislature the protected patient information of one thousand patients, believing that the hospital has systematically defrauded Medicare. Among the disclosures is information relating to patients' drug abuse. The employee is mistaken; the hospital has correctly billed each of the patients.

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**The disclosure creates two problems:**

Several of the patients lose their jobs; the hospital may be subject to HIPAA penalties up to \$1.5 million per year due to the disclosure.

HB 4067(2)(2) does not prevent this violation, as the first disclosure of protected information triggers the HIPAA violation. The hospital and the affected patients are foreclosed from suing for damages related to the disclosure.

**Nonprofit Example:**

As a condition of employment, an employee entered into a nondisclosure agreement with a nonprofit organization. The employee subsequently discloses to a law enforcement agency information that she mistakenly, but in good faith, believes is evidence of the nonprofit organization's violation of state law. The nonprofit organization is in the final stages of applying for several million dollars in state grants.

The state agencies learn of the impending investigation and withdraw all grants from the nonprofit organization. The nonprofit organization would be foreclosed, by operation of HB 4067, from exercising its rights under the nondisclosure agreement and may have to dissolve for lack of funding.

**Local Government Example:**

Prior to negotiations on a potential economic development opportunity, a local government signs an exclusive negotiating agreement and a nondisclosure agreement with the interested company. These agreements can impose severe consequences if broken. The interested company plans to produce a controversial commodity, and during negotiations, a local government employee mistakenly believes the company is in violation of the law. The employee turns over protected documents to the attorney of an interest group that is opposing the economic development agreement.

The interest group uses this information to prevent the agreement, the company withdraws, and the economic development opportunity is lost. The local government will be liable for the nondisclosure being broken.

Based on the above concerns, AOI respectfully requests that the Senate Judiciary Committee narrow the scope of HB 4067 so that the bill applies only to state entities.

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