

B-Engrossed
House Bill 4067

Ordered by the Senate February 24
Including House Amendments dated February 15 and Senate Amendments
dated February 24

Sponsored by Representative BUEHLER, Senator GELSER, Representative HOYLE; Representatives BARKER, CLEM, DOHERTY, FAGAN, FREDERICK, GALLEGOS, GORSEK, LININGER, LIVELY, MCLAIN, PILUSO, RAYFIELD, READ, REARDON, SMITH WARNER, TAYLOR, VEGA PEDERSON, WHISNANT, WILLIAMSON, WITT (Pre-session filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Provides affirmative defense to public [*or nonprofit organization*] employee **and certain nonprofit employee** whistleblowers who provide lawfully accessed information to state **or federal** regulatory agency, law enforcement agency, [*member of Legislative Assembly,*] manager employed by employer or employee's attorney [*licensed in Oregon*]. Bars affirmative defense if information is disclosed or redisclosed to other party. **Bars affirmative defense if information disclosed is stated in commercial exclusive negotiating agreement or commercial nondisclosure agreement involving public or nonprofit employer. Denies affirmative defense if information disclosed relates to individual coworker or supervisor unless information disclosed relates to coworker or supervisor's scope of employment.** Provides that attorney or employee of attorney may not assert affirmative defense if information disclosed relates to representation of client. **Subjects disclosures to rules of professional conduct.** Requires public and nonprofit employers to establish policies for employee whistleblowers **and notify employees of whistleblower rights under Act.** [*Requires*] **Allows** attorneys who work for public employers to report violations of law **to Attorney General**, subject to rules of professional conduct. Provides that information disclosed remains subject to attorney-client privilege **and public records law. Acknowledges supremacy of federal law over state law.**

[*Creates whistleblower protection for nonprofit employees.*] **Extends public whistleblower protection to employees of nonprofit organizations that accept public funds.** Makes certain violations subject to maximum penalty of one year's imprisonment, \$6,250 fine, or both. [*Authorizes court to award civil damages up to \$10,000 and punitive damages in addition to existing remedies.*] **Provides right to jury trial and punitive damages.**

A BILL FOR AN ACT

1
2 Relating to employee whistleblowers; creating new provisions; and amending ORS 659A.200,
3 659A.203 and 659A.885.

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

5 **SECTION 1. Section 2 of this 2016 Act is added to and made a part of ORS 659A.200 to**
6 **659A.224.**

7 **SECTION 2. (1) An employee's good faith and objectively reasonable belief of a violation**
8 **of federal, state or local law, rule or regulation by the employer shall be an affirmative de-**
9 **fense to a civil or criminal charge related to the disclosure by the employee of lawfully ac-**
10 **cessed information related to the violation, including information that is exempt from**
11 **disclosure as provided in ORS 192.501 to 192.505 or by employer policy, if the information is**
12 **provided to:**

13 (a) **A state or federal regulatory agency;**

14 (b) **A law enforcement agency;**

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 (c) A manager employed by the public or nonprofit employer of the employee; or

2 (d) An attorney licensed to practice law in this state if a confidential communication is
3 made in connection with the alleged violation described in this section and in furtherance
4 of the rendition of professional legal services to the employee that are subject to ORS 40.225.

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

7 (a) Is disclosed or redisclosed by the employee or at the employee's direction to a party
8 other than the parties listed in subsection (1) of this section;

9 (b) Is stated in a commercial exclusive negotiating agreement with a public or nonprofit
10 employer, provided that the agreement is not related to the employee's employment with the
11 employer; or

12 (c) Is stated in a commercial nondisclosure agreement with a public or nonprofit em-
13 ployer, provided that the agreement is not related to the employee's employment with the
14 employer.

15 (3) The affirmative defense described in subsection (1) of this section is available to an
16 employee who discloses information related to an alleged violation by a coworker or super-
17 visor described in subsection (1) of this section if the disclosure relates to the course and
18 scope of employment of the coworker or supervisor.

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

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

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

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

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

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

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

41 659A.200. As used in ORS 659A.200 to 659A.224:

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

45 (2) "Employee" means a person:

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

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

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

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

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

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

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

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

16 **(4) "Knowledge" means actual knowledge.**

17 **(5) "Nonprofit organization" or "nonprofit" means an organization or group of organiza-**
18 **tions that:**

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

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

21 *[(3)]* **(6) "Public employer" means:**

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

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

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

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

28 659A.203. (1) Subject to ORS 659A.206, except as provided in ORS 659A.200 to 659A.224, it is
29 an unlawful employment practice for any public **or nonprofit** employer to:

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

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

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

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

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

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

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

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

7 (d) Discourage, restrain, dissuade, coerce, prevent or otherwise interfere with disclosure or dis-
8 cussions described in this section.

9 (2) [No] A public **or nonprofit** employer [shall] **may not** invoke or impose any disciplinary
10 action against an employee for employee activity described in subsection (1) of this section or ORS
11 659A.212.

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

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

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

17 659A.885. (1) Any person claiming to be aggrieved by an unlawful practice specified in sub-
18 section (2) of this section may file a civil action in circuit court. In any action under this subsection,
19 the court may order injunctive relief and any other equitable relief that may be appropriate, in-
20 cluding but not limited to reinstatement or the hiring of employees with or without back pay. A
21 court may order back pay in an action under this subsection only for the two-year period imme-
22 diately preceding the filing of a complaint under ORS 659A.820 with the Commissioner of the Bureau
23 of Labor and Industries, or if a complaint was not filed before the action was commenced, the two-
24 year period immediately preceding the filing of the action. In any action under this subsection, the
25 court may allow the prevailing party costs and reasonable attorney fees at trial and on appeal. Ex-
26 cept as provided in subsection (3) of this section:

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

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

30 (2) An action may be brought under subsection (1) of this section alleging a violation of ORS
31 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
32 to 653.661, 659.852, 659A.030, 659A.040, 659A.043, 659A.046, 659A.063, 659A.069, 659A.082, 659A.088,
33 659A.103 to 659A.145, 659A.150 to 659A.186, 659A.194, 659A.199, 659A.203, 659A.218, 659A.228,
34 659A.230, 659A.233, 659A.236, 659A.250 to 659A.262, 659A.277, 659A.290, 659A.300, 659A.306,
35 659A.309, 659A.315, 659A.318, 659A.320, 659A.355, [or] 659A.421, [or ORS] 653.547 [and] **or** 653.549.

36 (3) In any action under subsection (1) of this section alleging a violation of ORS 25.337, 25.424,
37 659.852, 659A.030, 659A.040, 659A.043, 659A.046, 659A.069, 659A.082, 659A.103 to 659A.145, 659A.199,
38 **659A.203**, 659A.228, 659A.230, 659A.250 to 659A.262, 659A.290, 659A.318, [or] 659A.421, [or ORS]
39 653.547 [and] **or** 653.549:

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

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

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

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

1 (4) In any action under subsection (1) of this section alleging a violation of ORS 652.355 or
2 653.060, the court may award, in addition to the relief authorized under subsection (1) of this section,
3 compensatory damages or \$200, whichever is greater.

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

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

10 (7) Any individual against whom any distinction, discrimination or restriction on account of
11 race, color, religion, sex, sexual orientation, national origin, marital status or age, if the individual
12 is 18 years of age or older, has been made by any place of public accommodation, as defined in ORS
13 659A.400, by any employee or person acting on behalf of the place or by any person aiding or
14 abetting the place or person in violation of ORS 659A.406 may bring an action against the operator
15 or manager of the place, the employee or person acting on behalf of the place or the aider or abettor
16 of the place or person. Notwithstanding subsection (1) of this section, in an action under this sub-
17 section:

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

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

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

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

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

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

31 (8) When the commissioner or the Attorney General has reasonable cause to believe that a
32 person or group of persons is engaged in a pattern or practice of resistance to the rights protected
33 by ORS 659A.145 or 659A.421 or federal housing law, or that a group of persons has been denied
34 any of the rights protected by ORS 659A.145 or 659A.421 or federal housing law, the commissioner
35 or the Attorney General may file a civil action on behalf of the aggrieved persons in the same
36 manner as a person or group of persons may file a civil action under this section. In a civil action
37 filed under this subsection, the court may assess against the respondent, in addition to the relief
38 authorized under subsections (1) and (3) of this section, a civil penalty:

39 (a) In an amount not exceeding \$50,000 for a first violation; and

40 (b) In an amount not exceeding \$100,000 for any subsequent violation.

41 (9) In any action under subsection (1) of this section alleging a violation of ORS 659A.145 or
42 659A.421 or alleging discrimination under federal housing law, when the commissioner is pursuing
43 the action on behalf of an aggrieved complainant, the court shall award reasonable attorney fees to
44 the commissioner if the commissioner prevails in the action. The court may award reasonable at-
45 torney fees and expert witness fees incurred by a defendant that prevails in the action if the court

1 determines that the commissioner had no objectively reasonable basis for asserting the claim or for
2 appealing an adverse decision of the trial court.

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

5 (a) "Aggrieved person" includes a person who believes that the person:

6 (A) Has been injured by an unlawful practice or discriminatory housing practice; or

7 (B) Will be injured by an unlawful practice or discriminatory housing practice that is about to
8 occur.

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

13
