PROPOSED WHISTLEBLOWER PROTECTION AMENDMENT FOR REPORTING VIOLATIONS OF FEDERAL LAW, MUSUSE OF TAXPAYER MONIES AND PROTECTING FEDERAL WITNESSES

Need: *The majority of Americans who provide information to federal authorities lack any effective legal protections if they are subject to retaliation.*

Goal: *To provide protection for employees who advance the public interest by providing information about the possible violation of federal laws to the appropriate authorities or who testify on federal law enforcement or oversight proceedings.*

Method: *By reviewing current federal employee protection laws and modeling the amendment on the provisions of prior laws which have been effective. Because Congress recently passed, and the President signed, a transportation whistleblower protection provision, the procedures set forth in that law, with minor modifications, are incorporated herein.*

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PROTECTED ACTIVITY

(a)(1) IN GENERAL. It shall be an unlawful employment practice for an employer to discriminate against any employee or applicant for employment because the employee made a protected disclosure or because the employee has opposed any practice made an unlawful employment practice by this amendment, or because the employee has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this provision or other provision of federal law.[1]

(2) PROTECTED DISCLOSURE. A protected disclosure shall also mean any lawful disclosure of information for which the employee reasonably believes constitutes a violation any federal law, rule or regulation, the gross mismanagement or gross waste of federal monies or a danger to the public health or safety.[2] A lawful disclosure includes any action by an employee to --

(A) provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a protected disclosure when the information or assistance is provided to or the investigation is conducted by –

(i) a Federal or State regulatory or law enforcement agency;

(ii) any Member of Congress or any committee of Congress;

(iii) An Inspector General or the Office of Special Counsel; or

(iv) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(B) commence, caused to be commenced, or is about to commence a proceeding, or assist or participated in or is about to assist or participate in any manner in such a proceeding or in any other action designed to enforce the laws of the United States or the provisions of this section;[3] or

(C) testify, or is about to testify, in any federal, state, judicial, administrative or Congressional proceeding; or

(D) refuse to violate or assist in the violation of a federal law, rule, or regulation or engage in any conduct which the employee reasonably believes constitutes a violation of any law, or which the employee reasonably believes constitutes a threat to the public health or safety.[4]

PROCEDURES[5]

(b) FILING COMPLAINTS AND PROCEDURES.—

(1) An employee alleging discharge, discipline, retaliation, blacklisting, discrimination or other adverse actions in violation of subsection (a) of this section, or another person at the employee's request, may file a complaint with the Secretary of Labor not later than 180 days after the last alleged violation occurred. All complaints initiated under this section shall be governed by the legal burdens of proof set forth in section 42121(b) of Title 42. On receiving the complaint, the

Secretary of Labor shall notify, in writing, the person alleged to have committed the violation of the filing of the complaint.

(2) (A) Not later than 60 days after receiving a complaint, the Secretary of Labor shall conduct an investigation, decide whether it is reasonable to believe the complaint has merit, and notify, in writing, the complainant and the person alleged to have committed the violation of the findings. If the Secretary of Labor decides it is reasonable to believe a violation occurred, the Secretary of Labor shall include with the decision findings and a preliminary order for the relief provided under paragraph (3) of this subsection.

(B) Not later than 90 days after the notice under subparagraph (A) of this paragraph, the complainant and the person alleged to have committed the violation may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of objections does not stay a reinstatement ordered in the preliminary order, and such preliminary order shall be enforced in U.S. District Court. If a hearing is not requested within the 30 days, the preliminary order is final and not subject to judicial review.

(C) A hearing shall be conducted expeditiously. Not later than 120 days after the end of the hearing, the Secretary of Labor shall issue a final order. Before the final order is issued, the proceeding may be ended by a settlement agreement made by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

(c) DE NOVO REVIEW.—With respect to a complaint under paragraph (1), 180 days after filing a complaint, but not later than 90 days after the notice in subparagraph (A) of this paragraph, an employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury. The Court shall award all relief available to an employee under this provision, enforce any preliminary order issued by the Department of Labor and shall apply the burdens of proof as set forth in section 42121(b) of Title 42.

(d) JUDICIAL REVIEW AND VENUE.—A person adversely affected by an order issued after a hearing under subsection (b) of this section may file a petition for review, not later than 60 days after the order is issued, in the court of appeals of the United States for the circuit in which the violation occurred or the person resided on the date of the violation. Review shall conform to chapter 7 of title 5. The review shall be heard and decided expeditiously. An order of the Secretary of Labor subject to review under this subsection is not subject to judicial review in a criminal or other civil proceeding.

(e) CIVIL ACTIONS TO ENFORCE.—If a person fails to comply with an order issued under subsection (b) of this section, the Secretary of Labor or the aggrieved party shall bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred.

(f) NO PREEMPTION.—Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law.

(g) RIGHTS RETAINED BY EMPLOYEE.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or

under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.

(h) DISMISSAL OR SETTLEMENT – Any settlement of a claim under this chapter must be approved by the appropriate court or administrative agency and no settlement may be entered without the voluntary consent of the employee and employer. No employee or employer may waive or modify any procedural or substantive right set forth in this Amendment through a collective bargaining agreement or a pre-employment agreement.[6]

(i) PRIVILEGES – No employer may invoke any privilege in order to dismiss an employment discrimination claim under this provision, but any person may request and obtain special procedures in order to protect privileged information.[7]

REMEDIES

(j) REMEDIES – Any employee who prevails in an action under this Amendment shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, front pay, interest on the back pay, and compensation for any special damages or compensatory damages sustained as a result of the discrimination, litigation costs, expert witness fees and reasonable attorneys' fees.[8] Relief in any action may include punitive damages in an amount not to exceed $250,000 for each violation[9] or three times the amount of back pay, front pay and compensatory damages, whichever is larger.

TAXPAYER PROTECTION (QUI TAM)

(k) TAXPAYER PROTECTION – Any employee whose protected disclosure(s) set forth in section (a) results in a recovery of any monies by the United States from an employer, including recovery based on civil or criminal penalties, fines, interest or penalties obtained by the Department of Treasury, shall be entitled to a total payment by the United States of 20% of any such monies received by the United States. The United States Department of Justice shall implement regulations effectuating this provision, in which the United States shall expeditiously determine the amount of recovery an employee is entitled. Any demand for payment under this provision, or the appeal of any decision of the United States concerning a payment under this provision, may be filed in accordance with the procedures set forth in section (b) Only the first employee to file a claim under this provision shall be entitled to a recovery. Any recovery under this provision may be reduced by the amount of recovery obtained by the employee under any other federal law. For the purposes of this subsection, the United States shall not be considered an employer, but a contractor or employer may not defend against liability to the United States for recovery under this provision, or any other provision of federal law, based on an allegation that an employee of the United States knew of the contractor's misconduct.[10]

DEFINITIONS OF EMPLOYEE AND EMPLOYER/EFFECTIVE DATE

(l) DEFINITIONS -

(1) Employer shall mean any employer covered under the Civil Rights Act of 1964, as amended, or as set forth in sections 2000e(b) and 2000e-16, of Title 42, United States Code; [11]

(2) Employer shall also include any employer who is employed as a contractor, subcontractor, agent or representative of any employer set forth in section (k)(1) or any employer who is the recipient of any federal grants, contracts or other federal resources;

(3) Employee shall include any employee of an employer.

(j) EFFECTIVE DATE -- This Amendment shall be applicable to any claim filed on or after the date in which this provision was signed into law.

EXPLANATORY NOTES

[1] This provision modeled on the standard definitions of protected activity contained in various laws, e.g. MOTOR CARRIER EMPLOYEE PROTECTIONS, 49 U.S.C. Section 31105 (enacted into law in 2007). The initial definition is is copied directly from the anti-retaliation provision contained in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. section 2000e-3(a). It is also substantially identical to the similar provisions contained numerous whistleblower provisions and the anti-retaliation provisions of the Age Discrimination in Employment Act, 29 U.S.C. section 623(d) and the Americans with Disabilities Act, 42 U.S.C. section 12203.

[2] The definition of what constitutes a protected disclosure is based directly on the Civil Service Reform Act's definition of protected disclosures set forth in 5 U.S.C. section 2302(b)(8)(B)(i) and (ii).

[3] With the addition of protecting disclosures to state regulatory/law enforcement agencies, sections (b)(1) and (2) are adopted directly from the Sarbanes Oxley Act, 18 U.S.C. section 1514A(a).

[4] Sections (b)(3) and (4) are adopted from the statutory language contained in the whistleblower provision of the Energy Reorganization Act, 42 U.S.C. section 5851(a)(1)(B), (C) and (F). The provision makes the law consistent with other whistleblower protection provisions and protects employees who testify in federal court proceedings.

[5] These procedures are directly adopted, with minor modifications, from the MOTOR CARRIER EMPLOYEE PROTECTIONS, 49 U.S.C. Section 31105 (enacted into law in 2007)]. The Motor Carrier Employee Protection provision was modeled directly on other recently enacted federal whistleblower laws, including the Energy Reorganization Act and the Sarbanes-Oxley Act whistleblower provisions.

[6] This provision would ensure that employee rights under this provision remain intact regardless of any collective bargaining agreement or other employment contract. It incorporates the requirement existing under many whistleblower laws that employee settlement agreements be voluntary and approved by a court or administrative agency in order to ensure that the settlement is fair, adequate and reasonable. For example, for over twenty years such reviews have been mandatory under the Energy Reorganization Act, and has resulted in protecting the public from improper agreements. 42 U.S.C. section 5851(b)(2)(A); Connecticut Light & Power v. Secretary of Labor, 85 F.3d 89 (2nd Cir. 1996). Settlement agreements and employment contracts which have interfered with an employees right to file a claim under a Title VII of the Civil Rights Act have also been voided. EEOC v. Cosmair, 821 F.2d 1085 (5th Cir. 1987).

[7] This provision permits agencies or courts to take specific steps to protect a privilege asserted by any person during a whistleblower proceeding. However, it prevents a court or agency from dismissing a claim based solely on the assertion that information relevant to a whistleblower proceeding may be privileged.

[8] The remedies available under this Act are consistent with most other employment discrimination laws and are adopted directly from the anti-retaliation provision of the False Claims Act, 31 U.S.C. Section 2730(h).

[9] The $250,000.00 cap on punitive damages is taken directly from the MOTOR CARRIER EMPLOYEE PROTECTIONS, 49 U.S.C. Section 31105 (enacted into law in 2007). Although punitive damages should be fully available under all whistleblower protection laws, any cap on such damages should be large enough to effectively discourage retaliatory behavior by an employer and the cap should increase over time to reflect inflation. Thus, the proposed cap is also tied to the amount of monies obtained by an employee in actual damages.

[10] This provision is modeled from the federal False Claims Act, and is designed to close loophole in that law, which currently prevent employees from *qui tam* recoveries, regardless of their contribution to exposing fraud in government contracting or misuse of federal monies. According to U.S. Department of Justice statistics, the qui tam provisions encouraged employees to risk retaliation by reporting contract abuses. These statistics now demonstrate that the majority of civil fraud recoveries in the United States are based in whole or part on whistleblower disclosures. *See,* Civil Division, U.S. Department of Justice, Fraud Statistics Overview, October 1, 1986 – September 30, 2006.

[11] This provision incorporates the definition of employee and employer currently existing under Title VII of the Civil Rights Act of 1964, as amended.