

# House Bill 3562

Sponsored by Representative BUEHLER

## 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 **as introduced**.

Prohibits retaliation against public employees for disclosing public records or other information related to unlawful conduct. Requires employer to establish protocols for public employee whistleblowers. Directs Oregon State Bar to promulgate rules for state attorneys with evidence of potential public whistleblower violation.

Makes retaliation subject to maximum penalty of one year's imprisonment, \$6,250 fine, or both. Authorizes court to award punitive damages in addition to existing remedies.

Declares emergency, effective on passage.

## A BILL FOR AN ACT

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

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

5 **SECTION 1. The Oregon State Bar shall establish rules for the Attorney General, the**  
6 **Deputy Attorney General, assistant attorneys general, district attorneys, deputy district at-**  
7 **torneys and any other attorney employed by, or working on behalf of, a public body that re-**  
8 **quires an attorney to report to the Oregon Government Ethics Commission evidence of:**

9 (1) **A material violation of federal, state or local law, rule or regulation by a public em-**  
10 **ployer; or**

11 (2) **Mismanagement, gross waste of funds or abuse of authority or substantial and spe-**  
12 **cific danger to public health and safety resulting from action of a public employer.**

13 **SECTION 2. ORS 659A.200, as amended by section 2, chapter 78, Oregon Laws 2014, is amended**  
14 **to read:**

15 659A.200. As used in ORS 659A.200 to 659A.224:

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

19 (2) "Employee" means a person:

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

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

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

26 (d) Employed by the public corporation established under ORS 741.001;

27 (e) Employed by a contractor who performs services for the state, agency or subdivision, other  
28 than employees of a contractor under contract to construct a public improvement; and

**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 (f) Employed by or under contract with any person authorized by contract to act on behalf of  
2 the state, agency or subdivision.

3 **(3) "Information" includes, but is not limited to, public and private records, records de-**  
4 **scribed under ORS 192.501 and 192.502, documents and electronically stored data.**

5 [(3)] (4) "Public employer" means:

6 (a) The state or any agency of or political subdivision in the state; and

7 (b) Any person authorized to act on behalf of the state, or any agency of or political subdivision  
8 in the state, with respect to control, management or supervision of any employee.

9 **SECTION 3.** ORS 659A.203 is amended to read:

10 659A.203. (1) Subject to ORS 659A.206, except as provided in ORS 659A.200 to 659A.224, it is  
11 an unlawful employment practice for any public employer to:

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

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

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

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

23 (A) A violation of any federal or state law, rule or regulation by the state, agency or political  
24 subdivision;

25 (B) Mismanagement, gross waste of funds or abuse of authority or substantial and specific dan-  
26 ger to public health and safety resulting from action of the state, agency or political subdivision;  
27 or

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

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

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

36 **(e) Invoke or encourage the assistance of law enforcement to discourage, restrain,**  
37 **dissuade, coerce, prevent or otherwise interfere with disclosures or discussions described in**  
38 **this section.**

39 **(f) Retaliate against an employee in any manner with regard to terms and conditions of**  
40 **employment for lawfully disclosing or discussing information that the employee reasonably**  
41 **and in good faith believes constitutes information described in subsection (1)(b)(A) or (B) of**  
42 **this section if the information is provided to:**

43 **(A) A state regulatory agency;**

44 **(B) A law enforcement agency; or**

45 **(C) Any member of the Legislative Assembly.**

1 (2) No public employer shall invoke or impose any disciplinary action against an employee for  
 2 employee activity described in subsection (1) of this section or ORS 659A.212.

3 (3) **A good faith, reasonable belief that a public employer has violated a federal, state or**  
 4 **local law, rule or regulation shall be an affirmative defense to a civil or criminal charge re-**  
 5 **lated to the disclosure of information for actions or prosecutions initiated after June 1, 2015.**

6 (4) **In a civil action filed under this section, the court may assess against the respondent,**  
 7 **in addition to the relief authorized under ORS 659A.885, a civil penalty in an amount not**  
 8 **exceeding \$10,000.**

9 (5) **A violation of this section is a Class A misdemeanor.**

10 **SECTION 4.** ORS 659A.885 is amended to read:

11 659A.885. (1) Any person claiming to be aggrieved by an unlawful practice specified in sub-  
 12 section (2) of this section may file a civil action in circuit court. In any action under this subsection,  
 13 the court may order injunctive relief and any other equitable relief that may be appropriate, in-  
 14 cluding but not limited to reinstatement or the hiring of employees with or without back pay. A  
 15 court may order back pay in an action under this subsection only for the two-year period imme-  
 16 diately preceding the filing of a complaint under ORS 659A.820 with the Commissioner of the Bureau  
 17 of Labor and Industries, or if a complaint was not filed before the action was commenced, the two-  
 18 year period immediately preceding the filing of the action. In any action under this subsection, the  
 19 court may allow the prevailing party costs and reasonable attorney fees at trial and on appeal. Ex-  
 20 cept as provided in subsection (3) of this section:

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

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

24 (2) An action may be brought under subsection (1) of this section alleging a violation of ORS  
 25 10.090, 10.092, 25.337, 25.424, 171.120, 408.230, 408.237 (2), 476.574, 652.355, 653.060, 659A.030,  
 26 659A.040, 659A.043, 659A.046, 659A.063, 659A.069, 659A.082, 659A.088, 659A.103 to 659A.145,  
 27 659A.150 to 659A.186, 659A.194, 659A.199, 659A.203, 659A.218, 659A.228, 659A.230, 659A.233,  
 28 659A.236, 659A.250 to 659A.262, 659A.277, 659A.290, 659A.300, 659A.306, 659A.309, 659A.315,  
 29 659A.318, 659A.320 or 659A.421.

30 (3) In any action under subsection (1) of this section alleging a violation of ORS 25.337, 25.424,  
 31 659A.030, 659A.040, 659A.043, 659A.046, 659A.069, 659A.082, 659A.103 to 659A.145, 659A.199,  
 32 **659A.203**, 659A.228, 659A.230, 659A.250 to 659A.262, 659A.290, 659A.318 or 659A.421:

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

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

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

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

39 (4) In any action under subsection (1) of this section alleging a violation of ORS 652.355 or  
 40 653.060, the court may award, in addition to the relief authorized under subsection (1) of this section,  
 41 compensatory damages or \$200, whichever is greater.

42 (5) In any action under subsection (1) of this section alleging a violation of ORS 171.120,  
 43 476.574[, 659A.203] or 659A.218, the court may award, in addition to the relief authorized under  
 44 subsection (1) of this section, compensatory damages or \$250, whichever is greater.

45 (6) In any action under subsection (1) of this section alleging a violation of ORS 10.090 or 10.092,

1 the court may award, in addition to the relief authorized under subsection (1) of this section, a civil  
 2 penalty in the amount of \$720.

3 (7) Any individual against whom any distinction, discrimination or restriction on account of  
 4 race, color, religion, sex, sexual orientation, national origin, marital status or age, if the individual  
 5 is 18 years of age or older, has been made by any place of public accommodation, as defined in ORS  
 6 659A.400, by any employee or person acting on behalf of the place or by any person aiding or  
 7 abetting the place or person in violation of ORS 659A.406 may bring an action against the operator  
 8 or manager of the place, the employee or person acting on behalf of the place or the aider or abettor  
 9 of the place or person. Notwithstanding subsection (1) of this section, in an action under this sub-  
 10 section:

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

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

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

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

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

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

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

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

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

34 (9) In any action under subsection (1) of this section alleging a violation of ORS 659A.145 or  
 35 659A.421 or alleging discrimination under federal housing law, when the commissioner is pursuing  
 36 the action on behalf of an aggrieved complainant, the court shall award reasonable attorney fees to  
 37 the commissioner if the commissioner prevails in the action. The court may award reasonable at-  
 38 torney fees and expert witness fees incurred by a defendant that prevails in the action if the court  
 39 determines that the commissioner had no objectively reasonable basis for asserting the claim or for  
 40 appealing an adverse decision of the trial court.

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

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

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

45 (B) Will be injured by an unlawful practice or discriminatory housing practice that is about to

1 occur.

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

6 **SECTION 5. Section 6 of this 2015 Act is added to and made a part of ORS 659A.200 to**  
7 **659A.224.**

8 **SECTION 6. A public employer shall establish and implement a policy regarding employ-**  
9 **ees who report allegations of wrongdoing or potentially unlawful conduct by the employer**  
10 **or an agent of the employer. The policy shall delineate all rights and remedies provided to**  
11 **public employees under ORS 659A.203. The employer shall deliver a written or electronic copy**  
12 **of the policy to each employee of the employer.**

13 **SECTION 7. This 2015 Act being necessary for the immediate preservation of the public**  
14 **peace, health and safety, an emergency is declared to exist, and this 2015 Act takes effect**  
15 **on its passage.**

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