

WASHINGTON 2023 LEGISLATIVE SERVICE

68th Legislature, 2023 Regular Session

CHAPTER 149

H.B. No. 1370

AN ACT Relating to the payment of awards to whistleblowers who report violations of state or federal securities laws and providing protection to whistleblowers and internal reporters; amending RCW 42.56.400 and 43.320.115; and adding a new chapter to Title 21 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** This act may be known and cited as the whistleblower award and protection act.

NEW SECTION. **Sec. 2.** The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) “Monetary sanction” means any moneys, including penalties, disgorgement, and interest, ordered to be paid as a result of an administrative or judicial action.

(2) “Original information” means information that is:

(a) Derived from the independent knowledge or analysis of a whistleblower;

(b) Not already known to the securities administrator or the securities division from any other source, unless the whistleblower is the original source of the information;

(c) Not exclusively derived from an allegation made in an administrative or judicial hearing, in a government report, hearing, audit, or investigation, or from the news media, unless the whistleblower is the source of the information; and

(d) Provided to the securities division for the first time after the effective date of this section.

(3) “Securities administrator” means the administrator of the securities act of Washington, chapter 21.20 RCW, designated pursuant to RCW 21.20.460.

(4) “Securities division” means the division of the department of financial institutions that administers the securities act of Washington, chapter 21.20 RCW.

(5) “Whistleblower” means an individual who, alone or jointly with others, provides the state or other law enforcement agency with information pursuant to the provisions set forth in this chapter, and the information relates to a possible violation of state or federal securities laws, including any rules or regulations thereunder, that has occurred, is ongoing, or is about to occur.

NEW SECTION. Sec. 3. Subject to the provisions of this chapter, the securities administrator may award an amount to one or more whistleblowers who voluntarily provide original information in writing, and in the form and manner required by the securities administrator, to the securities division that leads to the successful enforcement of an administrative or judicial action under chapter 21.20 RCW.

NEW SECTION. Sec. 4. Any individual who anonymously makes a claim must be represented by counsel. Prior to the payment of an award, a whistleblower shall disclose their identity and provide such other information as the securities division may require, directly or through counsel, for the whistleblower.

NEW SECTION. Sec. 5. If the securities administrator determines to make one or more awards under section 3 of this act, the aggregate amount of awards that may be awarded in connection with an administrative or judicial action may not be less than 10 percent nor more than 30 percent of the monetary sanctions imposed and collected in the related administrative or judicial action.

NEW SECTION. Sec. 6. The determination of the amount of an award made under this chapter shall be in the discretion of the securities administrator consistent with sections 5 and 7 of this act.

NEW SECTION. Sec. 7. Any whistleblower awards paid under this chapter shall be paid from the securities prosecution fund established in RCW 43.320.115.

NEW SECTION. Sec. 8. In determining the amount of an award under this chapter, the securities administrator shall consider:

- (1) The significance of the original information provided by the whistleblower to the success of the administrative or judicial action;
- (2) The degree of assistance provided by the whistleblower in connection with the administrative or judicial action;
- (3) The programmatic interest of the securities administrator in deterring violations of the securities laws by making awards to whistleblowers who provide original information that leads to the successful enforcement of such laws; and

(4) Any other factors the securities administrator considers relevant.

NEW SECTION. Sec. 9. The securities administrator shall not provide an award to a whistleblower under this section if the whistleblower:

(1) Is convicted of a felony in connection with the administrative or judicial action for which the whistleblower otherwise could receive an award;

(2) Acquires the original information through the performance of an audit of financial statements required under the securities laws and for whom providing the original information violates 15 U.S.C. 78j-1;

(3) Fails to submit information to the securities division in such form as the securities administrator may prescribe;

(4) Knowingly or recklessly makes a false, fictitious, or fraudulent statement or misrepresentation as part of, or in connection with, the original information provided or the administrative or judicial proceeding for which the original information was provided;

(5) In the whistleblower's submission, the whistleblower's other dealings with the securities administrator, or in the whistleblower's dealings with another authority in connection with a related action, knowingly and willfully makes any false, fictitious, or fraudulent statement or representation, or uses any false writing or document knowing that it contains any false, fictitious, or fraudulent statement or entry with intent to mislead or otherwise hinder the securities administrator or another authority;

(6) Knows that, or has a reckless disregard as to whether, the original information provided is false, fictitious, or fraudulent;

(7) Has a legal duty to report the original information to the securities administrator or securities division;

(8) Is, or was at the time the whistleblower acquired the original information submitted to the securities division, a member, officer, or employee of the department of financial institutions, the securities and exchange commission, any other state securities regulatory authority, a self-regulatory organization, the public company accounting oversight board, or any law enforcement organization;

(9) Is, or was at the time the whistleblower acquired the original information submitted to the securities division, a member, officer, or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in 15 U.S.C. 78c(a)(52);

(10) Is the spouse, parent, child, or sibling of the securities administrator or an employee of the department of financial institutions, or resides in the same household as the securities administrator or an employee of the department of financial institutions; or

(11) Directly or indirectly acquires the original information provided to the securities division from a person:

(a) Who is subject to subsection (2) of this section, unless the information is not excluded from that person's use, or provides the securities division with information about possible violations involving that person;

(b) Who is a person described in subsection (8), (9), or (10) of this section; or

(c) With the intent to evade any provision of this chapter.

NEW SECTION. Sec. 10. (1) No employer may directly or indirectly terminate, discharge, demote, suspend, threaten, harass, or in any other manner retaliate against, an individual because of any lawful act done by the individual:

(a) In providing information to the state or other law enforcement agency concerning a possible violation of state or federal securities laws, including any rules or regulations thereunder, that has occurred, is ongoing, or is about to occur;

(b) In initiating, testifying in, or assisting in any investigation or administrative or judicial action of the securities administrator, securities division, or other law enforcement agency based upon or related to such information;

(c) In making disclosures that are required or protected under the Sarbanes–Oxley act of 2002, 15 U.S.C. 7201 et seq.; the securities act of 1933, 15 U.S.C. 77a et seq.; the securities exchange act of 1934, 15 U.S.C. 78a et seq.; 18 U.S.C. 1513(e); any other law, rule, or regulation subject to the jurisdiction of the securities and exchange commission; or chapter 21.20 RCW or a rule adopted thereunder; or

(d) In making disclosures to 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, regarding matters subject to the jurisdiction of the securities administrator, securities division, or the securities and exchange commission.

(2) Notwithstanding subsection (1) of this section, an individual is not protected under this section if:

(a) The individual knowingly or recklessly makes a false, fictitious, or fraudulent statement or misrepresentation;

(b) The individual uses a false writing or document knowing that, or with reckless disregard as to whether, the writing or document contains false, fictitious, or fraudulent information; or

(c) The individual knows that, or has a reckless disregard as to whether, the disclosure is of original information that is false or frivolous.

(3) An individual who alleges any act of retaliation in violation of subsection (1) of this section may bring an action for the relief provided in subsection (6) of this section in the court of original jurisdiction for the county or state where the alleged violation occurs, the individual resides, or the person against whom the action is filed resides or has a principal place of business.

(4) A subpoena requiring the attendance of a witness at a trial or hearing conducted under subsection (3) of this section may be served at any place in the United States, in compliance with applicable court rules and the law of the other jurisdiction.

(5) An action under subsection (3) of this section may not be brought:

(a) More than six years after the date on which the violation of subsection (1) of this section occurred; or

(b) More than three years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation of subsection (1) of this section. Notwithstanding the above limitations, an action under subsection (3) of this section may not in any circumstance be brought more than 10 years after the date on which the violation occurs.

(6) A court may award as relief for an individual prevailing in an action brought under this section:

(a) Reinstatement with the same compensation, fringe benefits, and seniority status that the individual would have had, but for the retaliation;

(b) Two times the amount of back pay otherwise owed to the individual, with interest;

(c) Compensation for litigation costs, expert witness fees, and reasonable attorneys' fees;

(d) Actual damages;

(e) An injunction to restrain a violation; or

(f) Any combination of these remedies.

(7) Information that could reasonably be expected to reveal the identity of a whistleblower is exempt from public disclosure under chapter 42.56 RCW. This subsection does not limit the ability of any person to present evidence to a grand jury or to share evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

(8) No person may take any action to impede an individual from communicating directly with the securities division staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement with respect to such communications, except with respect to:

(a) Agreements concerning communications covered by the attorney-client privilege, unless disclosure of that information would otherwise be permitted by an attorney under applicable state attorney conduct rules or otherwise; and

(b) Information obtained in connection with legal representation of a client on whose behalf an individual or the individual's employer or firm are providing services, and the individual is seeking to use the information to make a whistleblower submission for the individual's own benefit, unless disclosure would otherwise be permitted by an attorney pursuant to applicable state attorney conduct rules or otherwise.

(9) The rights and remedies provided for in this chapter may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.

(10) Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any individual under any federal or state law, or under any collective bargaining agreement.

NEW SECTION. Sec. 11. The securities administrator may adopt such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter consistent with its purpose.

Sec. 12. RCW 42.56.400 and 2022 c 8 s 2 are each amended to read as follows:

The following information relating to insurance and financial institutions is exempt from disclosure under this chapter:

(1) Records maintained by the board of industrial insurance appeals that are related to appeals of crime victims' compensation claims filed with the board under RCW 7.68.110;

(2) Information obtained and exempted or withheld from public inspection by the health care authority under RCW 41.05.026, whether retained by the authority, transferred to another state purchased health care program by the authority, or transferred by the authority to a technical review committee created to facilitate the development, acquisition, or implementation of state purchased health care under chapter 41.05 RCW;

(3) The names and individual identification data of either all owners or all insureds, or both, received by the insurance commissioner under chapter 48.102 RCW;

- (4) Information provided under RCW 48.30A.045 through 48.30A.060;
- (5) Information provided under RCW 48.05.510 through 48.05.535, 48.43.200 through 48.43.225, 48.44.530 through 48.44.555, and 48.46.600 through 48.46.625;
- (6) Examination reports and information obtained by the department of financial institutions from banks under RCW 30A.04.075, from savings banks under RCW 32.04.220, from savings and loan associations under RCW 33.04.110, from credit unions under RCW 31.12.565, from check cashers and sellers under RCW 31.45.030(3), and from securities brokers and investment advisers under RCW 21.20.100, information that could reasonably be expected to reveal the identity of a whistleblower under section 10 of this act, and information received under RCW 43.320.190, all of which are confidential and privileged information;
- (7) Information provided to the insurance commissioner under RCW 48.110.040(3);
- (8) Documents, materials, or information obtained by the insurance commissioner under RCW 48.02.065, all of which are confidential and privileged;
- (9) Documents, materials, or information obtained or provided by the insurance commissioner under RCW 48.31B.015(2) (l) and (m), 48.31B.025, 48.31B.030, 48.31B.035, and 48.31B.036, all of which are confidential and privileged;
- (10) Data filed under RCW 48.140.020, 48.140.030, 48.140.050, and 7.70.140 that, alone or in combination with any other data, may reveal the identity of a claimant, health care provider, health care facility, insuring entity, or self-insurer involved in a particular claim or a collection of claims. For the purposes of this subsection:
 - (a) "Claimant" has the same meaning as in RCW 48.140.010(2).
 - (b) "Health care facility" has the same meaning as in RCW 48.140.010(6).
 - (c) "Health care provider" has the same meaning as in RCW 48.140.010(7).
 - (d) "Insuring entity" has the same meaning as in RCW 48.140.010(8).
 - (e) "Self-insurer" has the same meaning as in RCW 48.140.010(11);
- (11) Documents, materials, or information obtained by the insurance commissioner under RCW 48.135.060;
- (12) Documents, materials, or information obtained by the insurance commissioner under RCW 48.37.060;
- (13) Confidential and privileged documents obtained or produced by the insurance commissioner and identified in RCW 48.37.080;

(14) Documents, materials, or information obtained by the insurance commissioner under RCW 48.37.140;

(15) Documents, materials, or information obtained by the insurance commissioner under RCW 48.17.595;

(16) Documents, materials, or information obtained by the insurance commissioner under RCW 48.102.051(1) and 48.102.140 (3) and (7)(a)(ii);

(17) Documents, materials, or information obtained by the insurance commissioner in the commissioner's capacity as receiver under RCW 48.31.025 and 48.99.017, which are records under the jurisdiction and control of the receivership court. The commissioner is not required to search for, log, produce, or otherwise comply with the public records act for any records that the commissioner obtains under chapters 48.31 and 48.99 RCW in the commissioner's capacity as a receiver, except as directed by the receivership court;

(18) Documents, materials, or information obtained by the insurance commissioner under RCW 48.13.151;

(19) Data, information, and documents provided by a carrier pursuant to section 1, chapter 172, Laws of 2010;

(20) Information in a filing of usage-based insurance about the usage-based component of the rate pursuant to RCW 48.19.040(5)(b);

(21) Data, information, and documents that are submitted to the office of the insurance commissioner by an entity providing health care coverage pursuant to RCW 28A.400.275;

(22) Data, information, and documents obtained by the insurance commissioner under RCW 48.29.017;

(23) Information not subject to public inspection or public disclosure under RCW 48.43.730(5);

(24) Documents, materials, or information obtained by the insurance commissioner under chapter 48.05A RCW;

(25) Documents, materials, or information obtained by the insurance commissioner under RCW 48.74.025, 48.74.028, 48.74.100(6), 48.74.110(2) (b) and (c), and 48.74.120 to the extent such documents, materials, or information independently qualify for exemption from disclosure as documents, materials, or information in possession of the commissioner pursuant to a financial conduct examination and exempt from disclosure under RCW 48.02.065;

(26) Nonpublic personal health information obtained by, disclosed to, or in the custody of the insurance commissioner, as provided in RCW 48.02.068;

- (27) Data, information, and documents obtained by the insurance commissioner under RCW 48.02.230;
- (28) Documents, materials, or other information, including the corporate annual disclosure obtained by the insurance commissioner under RCW 48.195.020;
- (29) Findings and orders disapproving acquisition of a trust institution under RCW 30B.53.100(3);
- (30) All claims data, including health care and financial related data received under RCW 41.05.890, received and held by the health care authority; and
- (31) Contracts not subject to public disclosure under RCW 48.200.040 and 48.43.731.

Sec. 13. RCW 43.320.115 and 2003 c 288 s 2 are each amended to read as follows:

(1) The securities prosecution fund is created in the custody of the state treasurer and shall consist of all fines received by the division of securities under RCW 21.20.400(2), 21.20.110, and 21.20.395 and all undistributed funds from orders of disgorgement and restitution under RCW 21.20.110(8) and 21.20.390(6). No appropriation is required to permit expenditures from this fund, but the account is subject to allotment procedures under chapter 43.88 RCW.

(2) Expenditures from this fund may be used solely for administering the fund ~~and~~, for payment of costs, expenses, and charges incurred in the preparation, initiation, and prosecution of criminal charges for violations of chapters 21.20, 21.30, 19.100, and 19.110 RCW, and for making an award to a whistleblower under section 3 of this act. Only the director or the director's designee may authorize expenditures from the fund.

(3) ~~Applications~~ Except for an award to a whistleblower under section 3 of this act, applications for fund expenditures must be submitted by the attorney general or the proper prosecuting attorney to the director. The application must clearly identify the alleged criminal violations identified in subsection (2) of this section and indicate the purpose for which the funds will be used. The application must also certify that any funds received will be expended only for the purpose requested. Funding requests must be approved by the director prior to any expenditure being incurred by the requesting attorney general or prosecuting attorney. At the conclusion of the prosecution, the attorney general or prosecuting attorney shall provide the director with an accounting of fund expenditures, a summary of the case, and certify his or her compliance with any rules adopted by the director relating to the administration of the fund.

(4) If the balance of the securities prosecution fund reaches ~~three hundred fifty thousand dollars~~ \$1,000,000, all fines received by the division of securities under RCW 21.20.400(2), 21.20.110, and 21.20.395 and all undistributed funds from orders of disgorgement and restitution under RCW 21.20.110(8) and 21.20.390(6) shall be deposited in the financial services regulation fund until such time as the balance in the fund falls below ~~three hundred fifty thousand dollars~~ \$1,000,000,

at which time the fines received by the division of securities under RCW 21.20.400(2), 21.20.110, and 21.20.395 and all undistributed funds from orders of disgorgement and restitution under RCW 21.20.110(8) and 21.20.390(6) shall be deposited to the securities prosecution fund until balance in the fund once again reaches ~~three hundred fifty thousand dollars~~ \$1,000,000.

NEW SECTION. **Sec. 14.** Sections 1 through 11 of this act constitute a new chapter in Title 21 RCW.

Approved April 20, 2023.

Effective July 23, 2023.