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THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 1505 Session of 2007

INTRODUCED BY McCALL, BELFANTI, BENNINGTON, BLACKWELL, BRENNAN, BUXTON, DeWEESE, EACHUS, FABRIZIO, FRANKEL, FREEMAN, GEORGE, GIBBONS, GOODMAN, GRUCELA, HARKINS, JAMES, JOSEPHS, KIRKLAND, KORTZ, KULA, MAHONEY, MARKOSEK, MELIO, MOUL, MUNDY, MYERS, M. O'BRIEN, PASHINSKI, PETRONE, SANTONI, SEIP, SIPTROTH, K. SMITH, SOLOBAY, SURRA, THOMAS, WALKO AND YUDICHAK, JUNE 13, 2007

REFERRED TO COMMITTEE ON LABOR RELATIONS, JUNE 13, 2007

AN ACT

Providing for whistleblower protection in privatization of public service contracts; and imposing penalties.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short title.

This act shall be known and may be cited as the Public Services Privatization Whistleblower Protection Act.

Section 2. Declaration of policy.

The General Assembly finds and declares that using private contractors to provide public services formerly provided by public employees does not always promote the public interest. To ensure that residents of this Commonwealth receive high-quality public services at low cost, with due regard for the taxpayers of this Commonwealth, the service recipients and the needs of public and private workers, the General Assembly finds it

necessary to regulate privatization contracts and to protect those workers who report conditions and practices which impact on the efficiency and quality of public services provided by private contractors.

Section 3. Definitions.

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Agency." Includes an executive office, department, division, board, commission or other office or officer in the executive branch of the government.

"Discrimination or retaliation." Includes a threat, intimidation or any adverse change in an employee's wages, benefits or terms or conditions of employment. In the case of a person who is not an employee of the private contractor, the term includes any adverse action taken against the person or the person's employer, including the cancellation of or refusal to renew a contract with the person or the person's employer.

"Employee of a private contractor." Includes a worker directly employed by a private contractor as well as an employee of a subcontractor or an independent contractor that provides supplies or services to a private contractor. The term includes former employees of a private contractor or subcontractor and former independent contractors.

"Person." Includes an individual, institution, Federal, State or local governmental entity or any other public or private entity.

"Private contractor." Any entity which enters into a privatization contract.

"Privatization contract." An agreement or combination or

series of agreements by which a nongovernmental person or entity agrees with an agency to provide services, valued at $100,000 or more, which are substantially similar to and in lieu of services previously provided or that could have been provided in whole or in part, by regular employees of an agency.

"Public record." A public record as defined in section 1 of the act of June 21, 1957 (P.L.390, No.212), referred to as the Right-to-Know Law. The term includes any document relating to the privatization contract or performance under the contract, prepared, received or retained by a contractor or subcontractor whether the document be handwritten, typed, tape-recorded, printed, photocopied, photographed or recorded by any other method.

"Services." Includes, with respect to a private contractor, all aspects of the provision of services provided by a private contractor pursuant to a privatization contract or any services provided by a subcontractor of a private contractor.

"Subcontractor." A subcontractor of a private contractor for work under a privatization contract or an amendment to a privatization contract.

Section 4. Prohibition against discrimination or retaliation for disclosure of information.

(a) General rule.--No person shall retaliate or discriminate in any manner against any public employee or employee of a private contractor because that employee, or any person acting on behalf of the employee, in good faith:

(1) Engaged in any disclosure of information relating to the services provided by a private contractor pursuant to a privatization contract.

(2) Advocated on behalf of service recipients with

respect to the care or services provided by the private contractor.

(3) Initiated, cooperated or otherwise participated in any investigation or proceeding of any governmental entity relating to the services provided pursuant to a privatization contract.

(b) Attempts.--No person shall retaliate or discriminate in any manner against any public employee or employee of a private contractor because the employee has attempted or has an intention to engage in an action described in subsection (a).

(c) Restrictions on reporting prohibited.--No person shall by contract, policy or procedure prohibit or restrict any employee of a private contractor from engaging in any action for which a protection against discrimination or retaliation is provided under subsection (a).

(d) Confidential information.--This section does not protect disclosures that would violate Federal or State law or diminish or impair the rights of any person to the continued protection of confidentiality of communications provided by Federal or State law.

(e) Good faith action.--With respect to the conduct described in subsection (a)(1), an employee of a private contractor shall be considered to be acting in good faith if the employee reasonably believes that:

(1) the information is true; and

(2) the information disclosed by the employee:

(i) evidences a violation of any law, rule or regulation or of a generally recognized professional or clinical standard; or

(ii) relates to the care, services or conditions

which potentially endanger one or more recipients of service or employees employed pursuant to a privatization contract.

(f) Confidentiality of complaints to government agencies.--The identity of an employee of a private contractor who complains in good faith to a government agency or department or any member or employee of the General Assembly about the quality of services provided by a private contractor shall remain confidential and shall not be disclosed by any person except upon the knowing written consent of the employee of the private contractor and except in the case in which there is imminent danger to health or public safety or an imminent violation of criminal law.

(g) Enforcement.--

(1) (i) Any current or former public employee or employee of a private contractor who believes that the employee has been retaliated or discriminated against in violation of subsection (a), (b) or (c) may file a civil action in a court of competent jurisdiction against the person believed to have violated subsection (a), (b) or (c).

(ii) If the court determines that a violation of subsection (a), (b) or (c) has occurred, the court shall award damages which result from the unlawful act or acts, including compensatory damages, reinstatement, reimbursement of any wages, salary, employment benefits or other compensation denied or lost to the employee by reason of the violation, as well as punitive damages, attorney fees and costs, including expert witness fees. The court shall award interest on the amount of damages

awarded at the prevailing rate.

(iii) The court may issue temporary, preliminary and permanent injunctive relief restraining violations of this law, including the restraint of any withholding of the payment of wages, salary, employment benefits or other compensation, plus interest, found by the court to be due and the restraint of any other change in the terms and conditions of employment and may award other equitable relief as may be appropriate, including employment, reinstatement and promotion.

(iv) An action may be brought under this subsection not later than two years after the date of the last event constituting the alleged violation for which the action is brought.

(2) Any person who violated subsection (a), (b) or (c) shall be subject to a civil penalty not to exceed $10,000 for each violation. In determining the amount of any penalty under this subsection, the appropriateness of the penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be:

(i) deducted from any sums owing by the Commonwealth to the person charged; or

(ii) ordered by the court, in an action brought for a violation of subsection (a), (b) or (c) brought by the employee or employees who suffered retaliation or discrimination.

(h) Burden of proof.--

(1) In any civil action brought under this act, the

complainant shall have the initial burden of making a prima facie showing that any behavior described in subsections (a) through (c) was a contributing factor in the adverse action or inaction alleged in the complaint. A prima facie case shall be established if the complainant can show that:

(i) the respondent knew of the complainant's protected activities at the time that the alleged unfavorable action or inaction was taken; and

(ii) the discriminatory action occurred within a period of time such that a reasonable person could conclude that an activity protected by subsection (a) or (b) was a contributing factor in the discriminatory treatment.

(2) Once the complainant establishes a prima facie case, the burden shifts to the respondent to demonstrate, by clear and convincing evidence, that it would have taken the same action or inaction in the absence of the behavior.

(i) Notice.--

(1) Each private contractor shall post and keep posted in conspicuous places on its premises where notices to employees and applicants for employment are customarily posted, a notice setting forth excerpts from or summaries of the pertinent provisions of this act and information pertaining to the filing of a charge under this section.

(2) Any employer that willfully violates this section may be assessed a civil penalty not to exceed $100 for each separate offense.

Section 19. Nonpreemption.

Nothing in this act preempts any other law and nothing in this act shall be construed or interpreted to impair or diminish

in any way the authority of any locality, municipality or subdivision to enact and enforce any law which provides equivalent or greater protection for its employees.

Section 20. Applicability.

This act shall apply to acts of retaliation or discrimination occurring on or after the first day of the first month that begins after the effective date of this act.

Section 21. Effective date.

This act shall take effect in 60 days.