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**SUBSTITUTE SENATE BILL 5374**

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**State of Washington**

**65th Legislature**

**2017 Regular Session**

**By** Senate Law & Justice (originally sponsored by Senators Becker, Bailey, Rivers, Brown, Miloscia, O'Ban, Warnick, Angel, Honeyford, Padden, and Braun)

READ FIRST TIME 02/02/17.

1 AN ACT Relating to state employee whistleblower protection; and  
2 amending RCW 42.40.010 and 42.40.020.

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

4 **Sec. 1.** RCW 42.40.010 and 1995 c 403 s 508 are each amended to  
5 read as follows:

6 It is the policy of the legislature that employees should be  
7 encouraged to disclose, to the extent not expressly prohibited by  
8 law, improper governmental actions, and it is the intent of the  
9 legislature to protect the rights of state employees making these  
10 disclosures, regardless of whether an investigation is initiated  
11 under RCW 42.40.040. It is also the policy of the legislature that  
12 employees should be encouraged to identify rules warranting review or  
13 provide information to the rules review committee, and it is the  
14 intent of the legislature to protect the rights of these employees.

15 **Sec. 2.** RCW 42.40.020 and 2008 c 266 s 2 are each amended to  
16 read as follows:

17 As used in this chapter, the terms defined in this section shall  
18 have the meanings indicated unless the context clearly requires  
19 otherwise.

20 (1) "Auditor" means the office of the state auditor.

1 (2) "Employee" means any individual employed or holding office in  
2 any department or agency of state government.

3 (3) "Good faith" means the individual providing the information  
4 or report of improper governmental activity has a reasonable basis in  
5 fact for reporting or providing the information. An individual who  
6 knowingly provides or reports, or who reasonably ought to know he or  
7 she is providing or reporting, malicious, false, or frivolous  
8 information, or information that is provided with reckless disregard  
9 for the truth, or who knowingly omits relevant information is not  
10 acting in good faith.

11 (4) "Gross mismanagement" means the exercise of management  
12 responsibilities in a manner grossly deviating from the standard of  
13 care or competence that a reasonable person would observe in the same  
14 situation.

15 (5) "Gross waste of funds" means to spend or use funds or to  
16 allow funds to be used without valuable result in a manner grossly  
17 deviating from the standard of care or competence that a reasonable  
18 person would observe in the same situation.

19 (6)(a) "Improper governmental action" means any action by an  
20 employee undertaken in the performance of the employee's official  
21 duties:

22 (i) Which is a gross waste of public funds or resources as  
23 defined in this section;

24 (ii) Which is in violation of federal or state law or rule, if  
25 the violation is not merely technical or of a minimum nature;

26 (iii) Which is of substantial and specific danger to the public  
27 health or safety;

28 (iv) Which is gross mismanagement; ((~~or~~))

29 (v) Which prevents the dissemination of scientific opinion or  
30 alters technical findings without scientifically valid justification,  
31 unless state law or a common law privilege prohibits disclosure. This  
32 provision is not meant to preclude the discretion of agency  
33 management to adopt a particular scientific opinion or technical  
34 finding from among differing opinions or technical findings to the  
35 exclusion of other scientific opinions or technical findings. Nothing  
36 in this subsection prevents or impairs a state agency's or public  
37 official's ability to manage its public resources or its employees in  
38 the performance of their official job duties. This subsection does  
39 not apply to de minimis, technical disagreements that are not  
40 relevant for otherwise improper governmental activity. Nothing in

1 this provision requires the auditor to contract or consult with  
2 external experts regarding the scientific validity, invalidity, or  
3 justification of a finding or opinion; or

4 (vi) Which violates the administrative procedure act or analogous  
5 provisions of law that prohibit ex parte communication regarding  
6 cases or matters pending in which an agency is party between the  
7 agency's employee and a presiding officer, hearing officer, or an  
8 administrative law judge. The availability of other avenues for  
9 addressing ex parte communication by agency employees does not bar an  
10 investigation by the auditor.

11 (b) "Improper governmental action" does not include personnel  
12 actions, for which other remedies exist, including but not limited to  
13 employee grievances, complaints, appointments, promotions, transfers,  
14 assignments, reassignments, reinstatements, restorations,  
15 reemployments, performance evaluations, reductions in pay,  
16 dismissals, suspensions, demotions, violations of the state civil  
17 service law, alleged labor agreement violations, reprimands, claims  
18 of discriminatory treatment, or any action which may be taken under  
19 chapter 41.06 RCW, or other disciplinary action except as provided in  
20 RCW 42.40.030.

21 (7) "Public official" means the attorney general's designee or  
22 designees; the director, or equivalent thereof in the agency where  
23 the employee works; an appropriate number of individuals designated  
24 to receive whistleblower reports by the head of each agency; or the  
25 executive ethics board.

26 (8) "Substantial and specific danger" means a risk of serious  
27 injury, illness, peril, or loss, to which the exposure of the public  
28 is a gross deviation from the standard of care or competence which a  
29 reasonable person would observe in the same situation.

30 (9) "Use of official authority or influence" includes  
31 threatening, taking, directing others to take, recommending,  
32 processing, or approving any personnel action such as an appointment,  
33 promotion, transfer, assignment including but not limited to duties  
34 and office location, reassignment, reinstatement, restoration,  
35 reemployment, performance evaluation, determining any material  
36 changes in pay, provision of training or benefits, tolerance of a  
37 hostile work environment, or any adverse action under chapter 41.06  
38 RCW, or other disciplinary action.

39 (10)(a) "Whistleblower" means:

1 (i) An employee who in good faith reports alleged improper  
2 governmental action to the auditor or other public official, as  
3 defined in subsection (7) of this section(~~(, initiating an~~  
4 ~~investigation by the auditor under RCW 42.40.040)~~); or

5 (ii) An employee who is perceived by the employer as reporting,  
6 whether they did or not, alleged improper governmental action to the  
7 auditor or other public official, as defined in subsection (7) of  
8 this section(~~(, initiating an investigation by the auditor under RCW~~  
9 ~~42.40.040)~~).

10 (b) For purposes of the provisions of this chapter and chapter  
11 49.60 RCW relating to reprisals and retaliatory action, the term  
12 "whistleblower" also means:

13 (i) An employee who in good faith provides information to the  
14 auditor or other public official, as defined in subsection (7) of  
15 this section, (~~(in connection with an investigation under RCW~~  
16 ~~42.40.040)~~) and an employee who is believed to have reported asserted  
17 improper governmental action to the auditor or other public official,  
18 as defined in subsection (7) of this section, or to have provided  
19 information to the auditor or other public official, as defined in  
20 subsection (7) of this section, (~~(in connection with an investigation~~  
21 ~~under RCW 42.40.040)~~) but who, in fact, has not reported such action  
22 or provided such information; or

23 (ii) An employee who in good faith identifies rules warranting  
24 review or provides information to the rules review committee, and an  
25 employee who is believed to have identified rules warranting review  
26 or provided information to the rules review committee but who, in  
27 fact, has not done so.

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