



## Department of Transformation and Shared Services Office of Personnel Management

**Policy Title:** Whistle-Blower Protection

**Policy Number:** 22

**Authority:** Ark. Code Ann. § 21-1-601 *et seq.*

**Effective Date:** May 20, 2021

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Arkansas law provides certain protections for state employees who blow the whistle regarding certain agency actions or inactions.

**Adverse action:** To discharge, threaten, or otherwise discriminate or retaliate against a state employee in any manner that affects the employee's employment, including compensation, job location, rights, immunities, promotions, or privileges.

**Appropriate authority:** Any state agency or organization having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics, or waste; or a member, officer, agent, investigator, auditor, representative or supervisory employee of the body, agency or organization. The term includes, but is not limited to, the office of the Attorney General, the office of the Auditor of state, the Arkansas Ethics Commission, the Legislative Joint Audit Committee and the Division of Legislative Audit, and the offices of the various prosecuting attorneys having the power and duty to investigate criminal law enforcement, regulatory violations, professional conduct or ethics, or waste.

**Communicate:** To give a verbal or written report to an appropriate authority.

**Public employee:** A person who performs a full or part-time service for wages, salary, or other remuneration for a public or state employer, and includes without limitation a state employee.

**Public employer:** An agency, department, board, commission, division, office, bureau, council, authority or other instrumentality of the State of Arkansas, including the offices of the various Arkansas elected constitutional officers and the Arkansas General Assembly and its agencies, bureaus, and divisions; a state-supported college, university, technical college, community college or other institution of higher education or department, division, or agency of a state institution of higher education; The Arkansas Supreme Court, the Court of Appeals, the Administrative Office of the Courts, the circuit courts, and prosecuting attorneys' offices.

**Violation:** An infraction or a breach, which is not of a merely technical or minimal nature, of a state statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or code of ethics designed to protect the interest of the public or a public employer.

**Waste:** A public employer's conduct or omissions which result in substantial abuse, misuse, destruction or loss of public funds, property, or manpower belonging to or derived from state or local political subdivision's resources.

**Whistle-Blower:** A person who witnesses or has evidence of a waste or violation while employed with a public employer and who communicates in good faith or testifies to the waste or violation, verbally or in writing, to one of the employee's superiors, to an agent of the public employer, or to an appropriate authority, provided that the communication is made prior to any adverse action by the employer.



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### **Notification**

State agencies shall use appropriate means to notify their employees of their protection and obligations under these provisions. Public employers must post the sign prepared by Legislative Audit in a visible place informing employees of the Whistle-Blower law, including the appropriate authority to contact to report waste or a violation and whether a telephone hotline number exists. The sign is available on the Legislative Audit website.

### **Reward**

When a state employee communicates waste or a violation to an appropriate authority, and that communication results in savings of state funds, the state employee shall be eligible to receive a reward equal to ten percent (10%) of the savings in state funds as a result of the changes based on that communication. No reward shall be paid in excess of twelve thousand five hundred dollars (\$12,500). If a reward amount is greater than twelve thousand five hundred dollars (\$12,500), the reward shall be referred to the General Assembly for an appropriation. If a reward is appropriated to a state employer for the benefit of a state employee, it shall be paid from the funds available to the state employer.

A state employee is not eligible for a reward for a communication that is part of the state employee's normal course of job duties, unless that communication is not acted upon by the state employer within ninety (90) days.

A report by an employee of a loss of public funds is considered a communication in the normal course of the employee's job duties if the employee:

1. Handles or exerts control over the funds of the employer;
2. Participates in making decisions or recommendations concerning the deposit, investment, or expenditure of the funds of the employer; or
3. Is responsible for auditing the funds of the employer.

### **Report by appropriate authority**

Upon the resolution of a communicated matter, the appropriate authority shall provide a written report detailing the content of the communication and the outcome of the communication to the:

1. State employee who made the communication; and
2. State employer that was the subject of the communication.

A state employee may choose to forego a reward or choose to remain confidential and request to the appropriate authority that the report not include their name or identifying information. If a state employee makes this request, they are not eligible to receive a reward. The name and identifying information of a state employee requesting confidentiality is not disclosable under applicable state or federal laws.

After receiving the report from the appropriate authority, the state employer must within thirty (30) days of the end of the first full fiscal year in which the changes based on the communication were implemented, issue a report. The report must contain the following:



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- A. The total savings in state funds resulting from the communication for the first full fiscal year in which the changes were implemented;
  - B. The name of the state employee who made the communication, unless the state employee chose to maintain confidentiality; and
  - C. The reward amount the state employee is eligible to receive. If a state employer concludes that the state employee is not eligible for a reward, the reasons shall be stated in the report.

The state employer report must be submitted to the Performance Evaluation and Expenditure Review Subcommittee of the Legislative Council or, if the General Assembly is in session, the Review/PEER Subcommittee of the Joint Budget Committee and the Clerk of the Arkansas State Claims Commission. The report must also be submitted to the state employee who made the communication, unless that state employee chose to remain confidential.

### **Right to appeal**

The state employer report to the state employee must include a notice of the right to appeal to the Arkansas State Claims Commission ("Commission"). A state employee who files an appeal is not subject to adverse action. The state employee has forty (40) days of the submission of the state employer report to file an appeal and the state employee must follow the rules and procedures of the Commission. The state employee who files an appeal has the burden of proving by a preponderance of the evidence that the:

1. The report from the state employer does not accurately reflect the savings attributable to the changes made based on the communication; or
2. The state employer did not accurately assess the determination of a reward, including denying a reward to the state employee.

When the Commission notifies the parties of its decision, it must notify them of a right to appeal that decision. The decision of the Commission may be appealed only to the Claims Review Subcommittee of the Legislative Council or, if the General Assembly is in session, the Claims Subcommittee of the Joint Budget Committee. The notice of appeal must be filed with the Commission within forty (40) days after the Commission renders a decision. The Commission is responsible for notifying the Legislative Council or Joint Budget Committee and all parties to the matter when a notice of appeal is filed.

Within thirty (30) days of the end of the appeal period to the Commission or the resolution of an appeal to the Claims Review Subcommittee, whichever is later, the clerk of the Commission shall notify the state employer of the reward amount to be paid to the state employee. The state employer shall deliver a check to the clerk of the Commission who must deposit the check as a nonrevenue receipt into the Miscellaneous Revolving Fund from which the state employee will be paid.

### **Communicate in good faith**

A state agency is prohibited from taking adverse action against an employee because the employee, or a person authorized to act on behalf of the employee, communicates in good faith the existence of waste of public funds, property, or manpower, including federal funds, property, or manpower, administered or



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controlled by a public employer or a violation or suspected violation of a law, rule, or regulation adopted under the law of this State or a political subdivision of the state to an appropriate authority. The communication shall be made at a time and in a manner which gives the public employer reasonable notice of the need to correct the waste or violation.

A state employee communicates in good faith if there is a reasonable basis in fact for the communication of the existence of waste or of a violation. Good faith is lacking when the state employee does not have personal knowledge of a factual basis for the communication or where the state employee knew or reasonably should have known that the communication of the waste or of the violation is malicious, false or frivolous.

A state agency shall not take an adverse action against a state employee because the employee participates or gives information in an investigation, hearing, court proceeding, legislative or other inquiry, or in any form of administrative review.

A state agency shall not take an adverse action against a state employee because an employee has objected to or refused to carry out a directive that the employee reasonably believes violates a law or a rule or regulation adopted under the authority of laws of the state.

### **Civil action**

A state employee who alleges a violation of Whistle-Blower protections may bring a civil action for appropriate injunctive relief or actual damages, or both, within one hundred eighty (180) calendar days after the occurrence of the alleged violation.

An action commenced under this law may be brought in the chancery court for the county where the alleged violation occurred or for the county where the complainant resides, or in the chancery court of Pulaski County.

To prevail in an action brought under this law, the state employee shall establish, by a preponderance of the evidence, that the employee has suffered an adverse action because the employee, or a person acting on his behalf, engaged or intended to engage in a protected activity.

As used in this section, "damages" means damages for a job-related injury or loss caused by each violation of the Whistle-Blower Act, including, but not limited to, fringe benefits, retirement service credit, compensation for lost wages, benefits, and any other remuneration, and reasonable court costs and attorneys' fees.

A state agency shall have an affirmative defense to a civil action brought by a state employee if the adverse action taken against the state employee was due to employee misconduct, poor job performance or a reduction in workforce unrelated to a communication made pursuant to the Whistle-Blower protections. The state agency or must prove by a preponderance of the evidence that the existence of the state employee's misconduct, poor job performance or a reduction in workforce is unrelated to the communication.

A court in rendering judgment under this act may order any or all of the following remedies:



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1. An injunction to restrain continued violation of the provisions of the Whistle-Blower Act;
  2. The reinstatement of the public employee to the same position held before the adverse action or to an equivalent position;
  3. The reinstatement of full fringe benefits and retirement service credit;
  4. The compensation for lost wages, benefits, and any other remuneration;
  5. The payment by the state employer of reasonable court costs and attorney's fees.

A court may also order that reasonable attorney's fees and court costs be awarded to the employer if the court determines that an action brought by a state employee under this act is without basis in law or fact. Provided, a state employee shall not be assessed attorney's fees under this section if, after exercising reasonable and diligent efforts after filing the suit, the state employee files a voluntary non-suit concerning the employer within sixty (60) calendar days after determining the employer would not be liable for damages.

### **Expedited hearing**

An employee may request an expedited hearing regarding the employee being reinstated to his or her position until the resolution of the civil action.

If at the hearing the employee can show that a reasonable person would conclude that the termination was the result of adverse action for the employee exercising his or her right under the Whistle-Blower law, the court will order the employee be 1) reinstated to his or her position until the conclusion of the civil action; or 2) reinstated and placed on paid administrative leave until the conclusion of the civil action.

An employee may also file a grievance and request a hearing if the employee alleges that he or she was terminated for blowing the whistle. Refer to [TSS-OPM Policy 63](#) for more information about this process.

### **Mediation**

A state employee may voluntarily participate in mediation under OPM's mediation program if they wish to resolve a dispute between them that involves an adverse action taken against the state employee. Voluntary mediation shall occur before a civil action has been initiated in court in which the state employee and state agency are parties.

### **FOIA and confidentiality**

The Whistle-Blower law shall not be construed to permit a disclosure which would diminish or impair the rights of any person or any public official to the continued protection of confidentiality of records or working papers where a statute or the common law provides for protection.

Generally, materials and documentation, including notes, memoranda, recordings, preliminary drafts of investigation reports, and other data gathered in connection with a communication regarding the existence of waste or of a violation are privileged and confidential and exempt from disclosure under FOIA. Confidentiality also applies to communications received by a telephone hotline. Final reports and any supporting documentation regarding communication of the existence of waste or violation are open to public inspection



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and copying, except documents that are otherwise exempt under law. Additionally, the name and identifying information of the employee eligible to receive a reward may be disclosed, unless the employee requests confidentiality.

### **Reporting**

State employees may report allegations directly to the Department of Inspector General – Office of Internal Audit at 510-682-0370 or 800-952-8248.

A state agency is prohibited from taking adverse action against an employee for reporting the loss of public funds.