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AN ACT

RELATING TO PUBLIC EMPLOYMENT; ENACTING THE WHISTLEBLOWER PROTECTION ACT; PROHIBITING PUBLIC EMPLOYER RETALIATORY ACTION AGAINST PUBLIC EMPLOYEES IN CERTAIN CIRCUMSTANCES; PROVIDING FOR GRIEVANCE PROCEDURES; PRESCRIBING PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the "Whistleblower Protection Act".

Section 2. PURPOSE.--It is the purpose of the Whistleblower Protection Act to encourage public employees to notify the appropriate persons of illegal acts of public concern. This reporting is encouraged in order to protect the public and employees and to assist public bodies charged with ensuring adequate safety and health standards.

Section 3. DEFINITIONS.--As used in the Whistleblower Protection Act:

A. "blacklist" means to inform others that a public employee acted in a manner that is protected by the Whistleblower Protection Act with the intention of hindering the public employee's ability to obtain employment;

B. "commission" means the human rights commission;

C. "director" means the director of the division;

D. "division" means the human rights division of the labor department;

1 E. "improper act" means a practice, procedure,
2 action or failure to act on the part of a public employer
3 that is of public concern and violates a state or federal
4 law, federal regulation or state administrative rule;

5 F. "public employee" means a person who works for
6 or contracts with a public employer;

7 G. "public employer" means:

8 (1) any department, agency, office,
9 institution, board, commission, committee, branch or district
10 of state government, including appeals, district, magistrate
11 and metropolitan courts, district attorneys and charitable
12 institutions for which appropriations are made by the
13 legislature;

14 (2) any political subdivision of the state,
15 created under either general or special act, that receives or
16 expends public money from whatever source derived, including
17 counties, county institutions, boards, bureaus or
18 commissions; municipalities; regional authorities; entities
19 created through joint powers agreements; drainage,
20 conservancy, irrigation or other special districts; and
21 school districts;

22 (3) any entity or instrumentality of the
23 state specifically provided for by law, including the New
24 Mexico finance authority and the New Mexico mortgage finance
25 authority; and

1 (4) every office or officer of any entity
2 listed in Paragraphs (1) through (3) of this subsection;

3 H. "retaliatory action" means blacklisting or the
4 discharge, suspension, demotion, disciplining or any
5 discriminatory or adverse employment action against a public
6 employee in the terms and conditions of public employment;
7 and

8 I. "secretary" means the secretary of labor.

9 Section 4. PUBLIC EMPLOYER RETALIATORY ACTION

10 PROHIBITED.--A public employer shall not take any retaliatory
11 action against a public employee because the public employee:

12 A. discloses or threatens to disclose an activity,
13 policy or practice of the public employer that constitutes an
14 improper act or that the public employee believes in good
15 faith constitutes an improper act;

16 B. provides information to, or testifies before, a
17 public body as part of an investigation, hearing or inquiry
18 into an improper act; or

19 C. objects to or refuses to participate in an
20 activity, policy or practice that constitutes an improper
21 act.

22 Section 5. BLACKLISTING PROHIBITED.--A public employer
23 shall not blacklist a current or former public employee.

24 Section 6. GRIEVANCE PROCEDURE--PENALTY FOR DIVULGING
25 INFORMATION.--

1 A. A public employee claiming to be subject to a
2 retaliatory action prohibited by the Whistleblower Protection
3 Act may file with the division a written complaint that
4 states the name and address of the public employer alleged to
5 have engaged in the retaliatory action, all information
6 relating to the retaliatory action and any other information
7 that may be required by the commission. All complaints shall
8 be filed with the division within one hundred eighty days
9 after the alleged retaliatory action was committed.

10 B. The director shall advise the public employer
11 that a complaint has been filed against the public employer
12 and shall furnish the public employer with a copy of the
13 complaint. The director shall promptly investigate the
14 alleged retaliatory action. If the director determines that
15 the complaint lacks probable cause, the director shall
16 dismiss the complaint and notify the public employee and
17 public employer of the dismissal. The complaint shall be
18 dismissed subject to appeal as in the case of other orders of
19 the commission.

20 C. If the director determines that probable cause
21 exists for the complaint, the director shall attempt to
22 achieve a satisfactory adjustment of the complaint through
23 persuasion and conciliation.

24 D. The director and staff shall neither disclose
25 what has transpired during the attempted conciliation nor

1 divulge information obtained during any hearing before the
2 commission or a commissioner prior to final action relating
3 to the complaint. An officer or employee of the labor
4 department who makes public in any manner whatsoever any
5 information in violation of this subsection is guilty of a
6 misdemeanor and upon conviction shall be fined not more than
7 one thousand dollars (\$1,000) or imprisoned up to one year.

8 E. A public employee who has filed a complaint
9 with the division may request and shall receive an order of
10 nondetermination from the director one hundred eighty days
11 after the division's receipt of the complaint. The order of
12 nondetermination may be appealed pursuant to the provisions
13 of Section 39-3-1.1 NMSA 1978.

14 F. If conciliation fails or if, in the opinion of
15 the director, informal conference cannot result in
16 conciliation and the public employee has not requested a
17 waiver of right to hearing pursuant to the provisions of
18 Subsection I of this section, the commission shall issue a
19 written complaint in its own name against the public
20 employer. The complaint shall set forth the alleged
21 retaliatory action, the secretary's rule or the section of
22 the Whistleblower Protection Act alleged to have been
23 violated and the relief requested. The complaint shall
24 require the public employer to answer the allegations of the
25 complaint at a hearing before the commission or hearing

1 officer and shall specify the date, time and place of the
2 hearing. The hearing date shall not be more than fifteen or
3 less than ten days after service of the complaint. The
4 hearing shall be held in the county where the public employer
5 is located or the alleged retaliatory action occurred.

6 G. Within one year of the filing of a complaint by
7 an aggrieved public employee, the commission or the director
8 shall:

9 (1) dismiss the complaint for lack of
10 probable cause;

11 (2) achieve satisfactory adjustment of the
12 complaint as evidenced by order of the commission; or

13 (3) file a formal complaint on behalf of the
14 commission.

15 H. Upon the commission's petition, the district
16 court of the county where the public employer is located or
17 the alleged retaliatory action occurred may grant injunctive
18 relief pending hearing by the commission or pending judicial
19 review of an order of the commission so as to preserve the
20 status quo or to ensure that the commission's order as issued
21 will be effective. The commission shall not be required to
22 post a bond.

23 I. The public employee may seek a trial de novo in
24 the district court in lieu of a hearing before the
25 commission; provided that the public employee requests from

1 the director, in writing, a waiver of the public employee's
2 right to hearing within sixty days of service of written
3 notice of a probable cause determination by the director.
4 The director shall approve the waiver request and shall serve
5 notice of the waiver upon the public employee and public
6 employer. The public employee may request a trial de novo
7 pursuant to Section 39-3-1 NMSA 1978 within thirty days from
8 the date of service of the waiver. Issuance of the notice
9 shall be deemed a final order of the commission.

10 J. If a public employee prevails in an action or
11 proceeding brought pursuant to this section, the court may
12 award compensatory damages, punitive damages and reasonable
13 attorney fees.

14 K. If the public employee does not prevail in an
15 action or proceeding brought pursuant to this section and the
16 court finds that the complaint is frivolous and wholly
17 without merit, the court shall award the public employer
18 reasonable attorney fees.

19 Section 7. HEARING PROCEDURES.--

20 A. The public employer may file a written answer
21 to the complaint, appear at the hearing, give testimony and
22 be represented by counsel and may obtain from the commission
23 subpoenas for any person or for the production of any
24 evidence pertinent to the proceeding. The public employee
25 shall be present at the hearing and may be represented by

1 counsel. Each party shall have the right to amend the
2 party's complaint or answer.

3 B. A panel of three members of the commission
4 designated by the chair shall sit, and a decision agreed upon
5 by two members of the panel shall be the decision of the
6 commission. However, a commissioner who has filed or been a
7 party to a complaint shall not sit on the panel hearing that
8 complaint. Hearings also may be conducted by a hearing
9 officer employed by the division or, if the hearing officer
10 is unavailable, one member of the commission may be
11 designated by the chair to act as a hearing officer. A
12 hearing officer shall have the same powers and duties as the
13 commission.

14 C. The public employee or the public employee's
15 representative shall present to the commission or the hearing
16 officer the case supporting the complaint. Evidence
17 concerning prior attempts at conciliation shall not be
18 received. The director shall not participate in the hearing,
19 except as a witness.

20 D. The commission and the hearing officer shall
21 not be bound by the formal rules of evidence governing courts
22 of law or equity but shall permit reasonable direct
23 examination and cross-examination and the submission of
24 briefs. Testimony at the hearing shall be taken under oath
25 and recorded by tape or otherwise. Upon the request of any

1 party, testimony shall be transcribed; provided that all
2 costs of transcribing shall be paid by the party so
3 requesting. Each commissioner and the hearing officer may
4 administer oaths.

5 E. Upon the conclusion of a hearing conducted by a
6 hearing officer, the hearing officer shall prepare a written
7 report setting forth proposed findings of fact and
8 conclusions of law and recommending the action to be taken by
9 the commission. The hearing officer shall submit the report
10 to a review panel consisting of no more than three members of
11 the commission designated by the chair. A commissioner shall
12 not sit on the panel reviewing the hearing officer's report
13 issued in connection with a complaint filed by or against
14 that commissioner. A decision by a majority of the members
15 of the review panel shall be the decision of the commission.
16 If the commission finds from the evidence presented at any
17 hearing held pursuant to this section that the public
18 employer has engaged in a retaliatory action, it shall make
19 written findings of fact, conclusions of law and its decision
20 based upon the findings of fact and conclusions of law. The
21 commission may adopt, modify or reject the proposed findings
22 of fact and conclusions of law and the action recommended by
23 the hearing officer. Within five days after any order is
24 rendered by the commission following a hearing, the
25 commission shall serve upon the public employee and public

1 employer, and their attorneys, if any, a written copy of the
2 order by certified mail to the addresses of record. The
3 public employee and public employer shall be deemed to have
4 been notified on the tenth day following the mailing. As
5 part of its order, the commission may require the public
6 employer to pay actual damages to the public employee and to
7 pay reasonable attorney fees, if the public employee was
8 represented by private counsel, and to take such affirmative
9 action as the commission considers necessary, including a
10 requirement for reports of the manner of compliance.

11 F. If the commission finds from the evidence that
12 the public employer has not engaged in a retaliatory action,
13 it shall make written findings of fact and serve the public
14 employee and public employer with a copy of the findings of
15 fact and with an order dismissing the complaint.

16 Section 8. ENFORCEMENT.--If a public employer does not
17 comply with an order of the commission, the secretary may
18 request the attorney general or district attorney to secure
19 enforcement of the commission's order by a district court.
20 The proceeding shall be initiated by the filing of a petition
21 in the district court of the county where the public employer
22 is located or the alleged retaliatory action occurred. A
23 copy of the petition shall be served on the public employer
24 personally or by certified mail, return receipt requested.

25 The court may make and enter upon the proceedings an order to

1 decree enforcement of the order of the commission.

2 Section 9. APPEAL.--A party may appeal the final
3 decision of the commission pursuant to the provisions of
4 Section 39-3-1.1 NMSA 1978.

5 Section 10. POSTING OF LAW AND INFORMATION.--Every
6 public employer shall keep posted in a conspicuous place on
7 the public employer's premises notices prepared by the
8 division that set forth excerpts of the Whistleblower
9 Protection Act and other relevant information as determined by
10 the secretary.

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