

MEMORANDUM

TO: County Council

FROM: Robert H. Drummer, Legislative Attorney 

SUBJECT: **Public Hearing:** Bill 2-10, Personnel - Contracts – Retaliation

Bill 2-10, Personnel - Contracts – Retaliation, sponsored by Council Vice President Ervin, Councilmember Andrews, Councilmember Trachtenberg, Council President Floreen, Councilmember Navarro and Councilmember Elrich, was introduced on January 19. A Management and Fiscal Policy (MFP) Committee worksession is tentatively scheduled for March 1 at 2:00 p.m.

Bill 2-10 would prohibit retaliation against a County employee or an employee of a County contractor or subcontractor for disclosing information about illegal or improper action in County government to a County official or employee. The Bill would protect an employee who has a good faith belief the information disclosed is accurate even if it is not.

The Bill would also permit an appeal to the Merit System Protection Board by a County employee who alleges a retaliatory personnel action in violation of this law. Finally, the Bill would require County contracts and subcontracts to specify that an aggrieved employee, as a third-party beneficiary, may by civil action recover compensatory damages, including interest and a reasonable attorney's fee, against the contractor or subcontractor for retaliation in violation of this law.

| <u>This packet contains:</u> | <u>Circle #</u> |
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Bill No. 2-10
Concerning: Personnel, Contracts -
Retaliation
Revised: January 13, 2010 Draft No. 5
Introduced: January 19, 2010
Expires: July 19, 2011
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Council Vice President Ervin, Councilmember Andrews, Councilmember Trachtenberg,
Council President Floreen, Councilmember Navarro and Councilmember Elrich

AN ACT to:

- (1) provide an appeal to the Merit System Protection Board by certain employees who allege retaliation for certain actions;
- (2) prohibit retaliation against a County employee or an employee of certain contractors or subcontractors for disclosing certain information; and
- (3) generally amend the law regarding retaliation for disclosure of illegal or improper actions in County government.

By amending

Montgomery County Code
Chapter 2, Administration.
Section 2-151.
Chapter 33, Personnel and Human Resources
Sections 33-10, 33-13A, and 33-17

By adding

Montgomery County Code
Chapter 11B, Contracts and Procurement
Section 11B-36

| | |
|------------------------------|--|
| Boldface | <i>Heading or defined term.</i> |
| <u>Underlining</u> | <i>Added to existing law by original bill.</i> |
| [Single boldface brackets] | <i>Deleted from existing law by original bill.</i> |
| <u>Double underlining</u> | <i>Added by amendment.</i> |
| [[Double boldface brackets]] | <i>Deleted from existing law or the bill by amendment.</i> |
| * * * | <i>Existing law unaffected by bill.</i> |

The County Council for Montgomery County, Maryland approves the following Act:

Sec. 1. Sections 2-151, 33-10, 33-13A, and 33-17 are amended as follows:

2-151. Inspector General

* * *

(1) *Access to information.*

* * *

(5) An employee of the County government or any instrumentality of the County, and an employee of any contractor or subcontractor with the County or any instrumentality of the County, must not be retaliated against or penalized, or threatened with retaliation or penalty, for providing information to, cooperating with, or in any way assisting the Inspector General in connection with any activity of that Office under this Section.

* * *

33-10. Disclosure of illegal or improper actions in [county] County government; protection for merit system employees against retaliation or coercion [for disclosing illegal or improper actions in county government; prohibited practices; complaint procedures; investigations; penalties;] appeals.

(a) *Disclosure of illegal or improper actions.*

(1) Employees should report illegal or improper actions in County government.

(2) Employees should first report illegal or improper actions to the individual responsible for corrective action. That person may be anyone from the employee's immediate supervisor [up] to [and including] the County Executive, or for legislative branch employees, the County Council.

[(3) In unusual circumstances, or if a retaliatory action or coercion

28 has taken place, the employee may file a report directly with
 29 either the Board or the Ethics Commission. Unless expressly
 30 authorized by Section 19A-10, the identity of both the
 31 employee filing a report and the county employee or official
 32 who is the subject of this report must be kept confidential
 33 unless waived in writing by each party, respectively. The Board
 34 or the Ethics Commission must refer the report to the
 35 government agency, including the Board or the Ethics
 36 Commission, that is responsible for addressing the unlawful
 37 conduct raised in the report. That government agency must then
 38 conduct an inquiry.]

39 (b) *Protection for employees.*

40 (1) A personnel action is an act or omission by a supervisor which
 41 has a significant adverse impact on the employee, or a change
 42 in the employee's duties or responsibilities which is inconsistent
 43 with the employee's grade and salary. A personnel action does
 44 not include an act or omission by a supervisor that is not subject
 45 to review by the Merit Systems Protection Board under Section
 46 33-12.

47 (2) [Any] A merit system employee must not be subjected to a
 48 personnel action in retaliation for:

49 (A) [who refuses] refusing to obey an instruction involving
 50 an illegal or improper action; or

51 (B) [who discloses] disclosing information concerning illegal
 52 or improper action in [county] County government to a
 53 County official or employee with a reasonable good-faith
 54 belief that [such disclosures are true and] the information

55 disclosed is accurate [shall be protected under procedures
56 authorized herein from any retaliatory or coercive
57 personnel action].

58 (3) This [provision] subsection does not [extend protection to]
59 protect a merit system employee [upon a determination that] if
60 the:

61 (A) [(1) The] employee's actions were frivolous,
62 unreasonable, and without foundation, even though not
63 brought in bad faith;

64 (B) [(2) The] employee, without good cause, [failed to] did
65 not comply with [administrative] applicable regulations
66 concerning the making of such disclosures; or

67 (C) [(3) The] employee was the subject of an otherwise
68 proper personnel [actions] action that would have been
69 taken regardless of the employee's disclosure of
70 information concerning illegal or improper action in
71 County government [taken for disciplinary reasons and
72 not for retaliatory purposes prohibited by this section].

73 [A "personnel action" shall mean any administrative act or omission which
74 has a significant adverse impact upon the employee, or a change in the
75 employee's duties or responsibilities inconsistent with the employee's grade
76 and salary.]

77 (c) [*Prohibited practices.* It shall be unlawful for any person to coerce
78 any merit system employee into taking an illegal or improper action or
79 take any retaliatory action against any merit system employee because
80 of that employee's disclosure of information relating to illegal and
81 improper action in county government.] Appeal. A merit system

82 employee who alleges that he or she was subjected to a retaliatory
 83 personnel action in violation of subsection (b) may appeal to the Merit
 84 System Protection Board under Section 33-12.

85 (d) [*Filing of complaints.* If an employee believes a retaliatory action or
 86 coercion has taken place or been attempted because of his refusal to
 87 obey an illegal or improper instruction or disclosure of same, the
 88 employee may file a written complaint with the board. The complaint
 89 must be filed within sixty (60) days of the alleged violation or action
 90 and must contain:]

- 91 [(1) The employee's name and signature;
 92 (2) The employee's home address and telephone number;
 93 (3) The name of the individual who allegedly took the action;
 94 (4) A concise description of the alleged coercion or retaliatory
 95 action and reasons for believing it to be so. The identity of all
 96 parties shall be kept confidential unless and until there is a
 97 finding of probable cause or all parties waive such
 98 confidentiality in writing.

99 The board may initiate an inquiry of any person suspected of taking
 100 retaliatory or coercive action, with or without a written complaint
 101 from an employee.] Decision. The Board must issue a written
 102 decision, including necessary findings of fact and conclusions of law,
 103 and may order any remedy authorized by Section 33-14.

104 [(e) *Investigations.* All complaints charging a violation of subsection (c)
 105 shall be promptly investigated by the board's staff, who shall
 106 determine whether probable cause exists to believe a violation of that
 107 subsection has occurred. Should the board's staff determine that the
 108 subject matter of the complaint involved allegations more properly the

109 subject of an employee grievance or complaint to be filed under the
110 provisions of the personnel regulations or other laws or regulations,
111 the complainant shall be so advised and the complaint dismissed; and
112 the period of limitations for the bringing of such other action shall be
113 deemed to run from the date of the dismissal. Should the board's staff
114 determine that no probable cause exists, that determination shall be
115 final and the complaint dismissed unless board reconsideration is
116 requested. Should the board's staff determine that probable cause does
117 exist, the staff shall prepare and cause to be served on the person
118 believed to have violated subsection (c) a statement of charges fairly
119 describing the alleged violation and the sanctions sought to be
120 imposed for such violation. The charges shall then be certified to the
121 board to schedule and conduct hearings in accordance with the
122 provisions of this chapter. The case in support of charges shall be
123 presented by the board's staff.]

124 [(f) *Penalties.* If a county employee is found guilty of coercion,
125 harassment or retaliation, the merit system protection board may order
126 the imposition of one (1) or more of the following penalties:

- 127 (1) Any disciplinary action provided for in the personnel
128 regulations up to and including dismissal;
- 129 (2) A monetary fine in any amount up to two thousand dollars
130 (\$2,000.00);
- 131 (3) Reimbursement of expenses incurred by all parties;
- 132 (4) Other penalties as may be deemed appropriate and consistent
133 with the charter and laws of Montgomery County, Maryland.]

134 [(g) *Appeals.* An employee subject to the foregoing penalties based on the
135 merit system protection board's findings and decision may appeal to a

136 court of competent jurisdiction.]

137 **33-13A. Audits, investigations and inquiries.**

138 * * *

139 There is hereby created the position of special personnel investigator. The
140 special personnel investigator shall exercise the following powers and perform the
141 following duties and functions:

142 (a) Investigate any matter referred to him by the merit system protection
143 board[, including matters arising under section 33-10, in which case
144 he shall be deemed board staff as provided in section 33-10(e)].

145 * * *

146 **33-17. Prohibited personnel practices; criminal penalty.**

147 * * *

148 (g) A person must not threaten, promise, or take any action against a
149 County employee to:

150 (1) induce or coerce an employee to take an illegal or improper
151 action; or

152 (2) retaliate against an employee for disclosing information to a
153 County official or employee concerning an illegal or improper
154 action in County government that the employee has a good faith
155 belief is accurate.

156 * * *

157 **Sec. 2. Section 11B-36 is added as follows:**

158 **11B-36. Disclosure of illegal or improper actions.**

159 (a) Definitions. In this Section, the following words have the meaning

160 indicated:

161 Contract means an agreement to which the County is a party for the
 162 procurement or disposal of goods, services, or construction, including
 163 any contract modification.

164 Covered employee means an employee of a contractor or subcontractor
 165 who performed services under a contract subject to this Section.

166 Director means the Director of the Department of General Services or
 167 the Director's designee.

168 Personnel action means an act or omission by the employer that has a
 169 significant adverse impact on the employee, or a change in the
 170 employee's duties or responsibilities which is inconsistent with the
 171 employee's position and salary.

172 (b) Policy. A covered employee must not be subjected to a personnel
 173 action for disclosing information involving the solicitation, award,
 174 administration, or performance of any contract to a County official or
 175 employee that the employee reasonably believes is:

- 176 (1) an abuse of authority, gross mismanagement, or gross waste of
 177 money;
 178 (2) a substantial and specific danger to public health or safety; or
 179 (3) a violation of law.

180 (c) Each contract must:

- 181 (1) prohibit retaliation against a covered employee who discloses any
 182 illegal or improper action described in subsection (b); and
 183 (2) specify that an aggrieved employee, as a third-party beneficiary,
 184 may by civil action recover compensatory damages, including
 185 interest and a reasonable attorney's fee, against the employer for
 186 retaliation in violation of this Section.

187 (d) The Director may cancel, terminate, or suspend a contract, in whole or
 188 in part, and declare a contractor or subcontractor ineligible for further
 189 County contracts for non-compliance with this Section. The Director
 190 may impose other appropriate sanctions and remedies as provided in
 191 applicable regulations or by contract. Each Contractor must bind its
 192 subcontractors contractually to comply with this Section.

193 (e) This Section does not prohibit a personnel action against a covered
 194 employee that would have been taken regardless of a disclosure of
 195 information described in subsection (b).

196 *Approved:*

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| Nancy Floreen, President, County Council | Date |
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198 *Approved:*

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| Isiah Leggett, County Executive | Date |
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200 *This is a correct copy of Council action.*

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| Linda M. Lauer, Clerk of the Council | Date |
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LEGISLATIVE REQUEST REPORT

Bill 2-10, Personnel, Contracts - Retaliation

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| DESCRIPTION: | Bill 2-10 would prohibit retaliation against a County employee or an employee of a County contractor or subcontractor for disclosing information to a County official or employee concerning an illegal or improper action in County government that the employee has a good faith belief is accurate. The Bill would also provide a contractual remedy for an employee of a contractor or subcontractor alleging retaliation and permit an appeal to the Merit System Protection Board by a County employee alleging retaliation in violation of the law. |
| PROBLEM: | Current County law does not prohibit retaliation against an employee of a County contractor or subcontractor for disclosing information to a County official or employee other than the Office of Legislative Oversight. Although current law prohibits retaliation against a County employee, it does not provide a clear remedy for a County employee or an employee of a contractor or subcontractor who alleges such retaliation. |
| GOALS AND OBJECTIVES: | Increase the protection of County employees and employees of County contractors and subcontractors for disclosing information about County waste and fraud. |
| COORDINATION: | Inspector General, Merit System Protection Board, Office of Human Resources, Department of General Services |
| FISCAL IMPACT: | To be requested. |
| ECONOMIC IMPACT: | To be requested. |
| EVALUATION: | To be requested. |
| EXPERIENCE ELSEWHERE: | Maryland State law and Federal law protect whistleblowers. |
| SOURCE OF INFORMATION: | Robert H. Drummer, Senior Legislative Attorney |
| APPLICATION WITHIN MUNICIPALITIES: | Not applicable. |
| PENALTIES: | Not applicable. |