

March 21, 2014

TO THE MEMBERS OF THE MARYLAND GENERAL ASSEMBLY:

The Maryland Chamber of Commerce and the U.S. Chamber Institute for Legal Reform (ILR), an affiliate of the U.S. Chamber of Commerce dedicated to making the legal system simpler, fairer, and faster, oppose H.B. 867, the “Maryland False Claims Act.” H.B. 867 would be an unwarranted expansion of liability that fails to truly prevent fraud by, among other things, ignoring the benefits of incentivizing self-reporting, creating a windfall for the State, and imposing disproportionate and severe penalties on businesses. While we recognize the importance of protecting state governments from false or fraudulent claims for state funds, the bill proposes several burdensome and unfair provisions and is not necessary to protect Maryland’s financial interests.

First, the bill unfairly authorizes the State to recover double its attorneys’ fees and costs. Specifically, the bill permits the State to recover from a defendant not only treble the amount of the economic harm sustained by the State, plus penalties of up to \$10,000 for each false claim, but also the State’s “court costs and attorney’s fees.” Sec. 8-103(B)(2). Under this provision, the State would be granted a windfall because through the trebling of its losses and through the penalties of up to \$10,000 awarded for each false claim, the State is already reimbursed for all of its costs and attorneys’ fee expenses. By contrast, the federal False Claims Act, on which the bill is modeled, does *not* permit the federal government to double-recover its attorneys’ fees. Instead, the federal statute recognizes that the government is made whole for its attorneys’ fees through the combination of the damages multiplier and penalties.

Second, H.B. 867 would fail to afford businesses and individuals a concrete incentive to self-report misconduct to the State. Self-reporting saves the government a significant amount of time and money by reducing the costs of investigating and prosecuting fraud and ensuring that violations are detected. However, H.B. 867 does not include any automatic reduction in the damages multiplier for a person that self-reports misconduct, and thus, would fail to appropriately incentivize self-reporting. Instead, this bill would simply grant the Court broad discretion in assessing the overall amount of damages and fines against a defendant based on a list of considerations, only one of which is “[w]hether the person self-reported the violation.” Sec. 8-102(C).

Third, the bill includes a statute of limitations that is far longer than the statute of limitations in the federal False Claims Act. Additionally, and of most concern, the statute of limitations included in the bill essentially extends indefinitely. Under the federal False Claims Act, a suit must be filed by the Department of Justice or whistleblower within ten years after the date on which the violation was actually committed. By contrast, H.B. 867 would provide that actions must be asserted within 3 years of the date when *material facts are known* to the whistleblower or to the State. Sec. 8-108(A). This means that actions could be filed decades after the alleged violation was committed, unfairly prejudicing the defendant. In the United States justice system, a virtually unlimited statute of limitations is unprecedented. A reasonable statute of limitations is needed to protect potential defendants from lawsuits brought years or

decades after the fact when witnesses and documents necessary for the defense no longer exist. The bill should be rejected because it sets no maximum outside limit to the time period within which the State or whistleblowers must assert an action.

Fourth, this bill would unnecessarily authorize the award of punitive damages and penalties for employers that allegedly retaliate against a whistleblower. We recognize the importance of providing protections for whistleblowers and support appropriately tailored provisions. Here, however, the bill proposes that an employer who retaliates against an employee for whistleblowing under the law could be liable not only for reinstatement, double back pay with interest, and injunctive relief, but also punitive damages and civil penalties. Sec. 8-107(B)(2). By contrast, the federal statute does *not* permit punitive damages or penalties for retaliation claims. This is because the employee who suffers retaliation is already made whole through other available remedies and the employer is already punished through the liability for double back pay.

Finally, the pending bill appears to be a solution in search of a problem. There is no information that would suggest the State needs this generalized false claims law. Maryland already has a statute addressing Medicaid and other health care fraud, which was enacted in 2010 as the “Maryland False Health Claims Act.” The statute imposes liability on persons who submit false or fraudulent claims against a State health plan or State health program. Health General Code Ann. § 2-604(A). There is no evidence that this Act is insufficient to protect the State from Medicaid fraud and other health care fraud. Moreover, Maryland has other remedies available for combating non-health care fraud against the State. Absent a showing that additional legislation is needed to protect the State’s financial interests, ILR and the Maryland Chamber of Commerce respectfully oppose H.B. 867.

U. S. Chamber Institute for Legal Reform
Maryland Chamber of Commerce