

# NOTES

## CONSTRUCTING AN EFFECTIVE WHISTLEBLOWER STATUTE: VIRGINIA IS NEARLY THERE

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## INTRODUCTION

Whistleblowing—the act of a person, often an employee, reporting evidence of illegal practices within an organization<sup>1</sup>—provides a public good to society by helping to hold corporations and institutions accountable for engaging in unlawful behavior. By uncovering instances of fraud, discrimination, corruption, and unsafe conditions in both the public and private sectors, the information provided by whistleblowers has led to the cessation of ongoing harm, remediation for the harm caused, and much-needed policy changes to prevent similar future harm.<sup>2</sup>

Whistleblowers have uncovered harmful and illegal practices in an array of industries, including healthcare,<sup>3</sup> transportation,<sup>4</sup>

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1. Rachel Beller, Note, *Whistleblower Protection Legislation of the East and West: Can It Really Reduce Corporate Fraud and Improve Corporate Governance? A Study of the Successes and Failures of Whistleblower Protection Legislation in the US and China*, 7 N.Y.U. J.L. & BUS. 873, 875 (2011).

2. See, for example, Derek Kerr & Maria Rivero, *Whistleblower Peter Buxton and the Tuskegee Syphilis Study*, GOV'T ACCOUNTABILITY PROJECT (Apr. 30, 2014), <https://whistleblower.org/uncategorized/whistleblower-peter-buxton-and-the-tuskegee-syphilis-study/> [<https://perma.cc/WL75-5LYP>], for a discussion of the infamous Tuskegee Syphilis Study, conducted between 1932 and 1972 by the United States Public Health Service (USPHS), in which the study participants—four hundred Black men with syphilis—were left untreated so that the full progression of the disease could be studied, even though penicillin became the recommended treatment for the disease by 1947. Peter Buxton, a USPHS employee, exposed the unethical study and brought it to national attention, leading to the cessation of the study and the provision of readily available treatment to its surviving participants. *See id.* Victims of the study later used the information revealed by Buxton to bolster their claims in a civil suit in which they received \$10 million. *See id.* Information uncovered due to Buxton's bravery stimulated much-needed reforms in the U.S. healthcare industry and “led to both new laws governing human research, and Medical Ethics Committees with non-physician members.” *See id.*

3. *See, e.g.*, Press Release, U.S. Dep't of Just., Sero to Pay \$704 Million for the Illegal Marketing of AIDS Drug (Oct. 17, 2005), [https://www.justice.gov/archive/opa/pr/2005/October/05\\_civ\\_545.html](https://www.justice.gov/archive/opa/pr/2005/October/05_civ_545.html) [<https://perma.cc/29T7-KBM8>].

4. *See, e.g.*, Press Release, Nat'l Highway Traffic Safety Admin., NHTSA Makes Its First Ever Whistleblower Award (Nov. 9, 2021), <https://www.nhtsa.gov/press-releases/first-whistleblower-award> [<https://perma.cc/T7F2-V2Q2>] (Hyundai Motor America and Kia Motors America “inaccurately reported crucial information to NHTSA about the nature of serious defects in [Theta II] engines”).

banking,<sup>5</sup> and defense,<sup>6</sup> halting and preventing innumerable harms in doing so.

As these examples illustrate, whistleblowers are pivotal in ensuring transparency and accountability in numerous public and private industries. They ensure that existing laws are enforced and hold employers accountable when they seek to evade them.<sup>7</sup> Recognizing the significant value provided by whistleblowers, and that private actors within organizations are often in a better position than government enforcement officials to uncover wrongdoing, Virginia has enacted several whistleblower protection statutes, including the Virginia Whistleblower Protection Law (VWPL), which advocates lauded for “provid[ing] broad protections against retaliation and fundamentally alter[ing] the landscape for” Virginia whistleblowers.<sup>8</sup> The VWPL’s enactment was undoubtedly a momentous achievement for Virginia whistleblower advocates, as private employees who faced retaliation for whistleblowing in Virginia had previously been authorized to file only narrow common law claims for wrongful discharge.<sup>9</sup>

While the VWPL seems promising, two provisions of the law, its statute of limitations and the remedies available to those who bring successful claims, are deficient in ways that discourage reporting of illegal activity under the statute.<sup>10</sup> House Bill 770, which would have amended the statute of limitations and remedies provisions of the VWPL, offered a fair starting point for addressing the statute’s

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5. See, e.g., *Bradley Birkenfeld*, NAT’L WHISTLEBLOWER CTR. (May 26, 2018), <https://www.whistleblowers.org/whistleblowers/bradley-birkenfeld/> [<https://perma.cc/V42D-DH9E>] (“[Birkenfeld’s] disclosures have resulted in unprecedented recoveries for the U.S. taxpayers ... [including] over [twenty-five] billion dollars in collections from U.S. taxpayers who had illegally held ‘undeclared’ offshore accounts.”).

6. See, e.g., Press Release, U.S. Dep’t of Just., Northrop Grumman Corp. Settles False Claims Act Case for Defective Satellite Parts (Apr. 2, 2009), <https://www.justice.gov/opa/pr/northrop-grumman-corp-settles-false-claims-act-case-defective-satellite-parts#> [<https://perma.cc/B856-VFFC>].

7. See Gerard Sinzdek, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CALIF. L. REV. 1633, 1635-36 (2008).

8. See Jason Zuckerman & Dallas Hammer, *New Va. Whistleblower Law Offers Broad Employee Protection*, ZUCKERMAN L. (Apr. 21, 2020, at 16:30 ET), [https://www.zuckermanlaw.com/sp\\_faq/virginia\\_whistleblower\\_laws/](https://www.zuckermanlaw.com/sp_faq/virginia_whistleblower_laws/) [<https://perma.cc/AR9N-PVW3>].

9. *Id.* (discussing the “narrowly construed” “common law wrongful discharge tort claim known as a Bowman action”).

10. See *infra* Part IV.

deficiencies.<sup>11</sup> Unfortunately, while Virginia's House and Senate passed the bill, Governor Youngkin ultimately vetoed it.<sup>12</sup>

This Note discusses the efficacy of the VWPL compared to other whistleblower statutes and suggests best-practice recommendations for creating functional whistleblower laws. Part I provides a brief overview of federal whistleblower laws, including the benefits provided to the public by robust whistleblower protections, the key requirements of effective whistleblower statutes, and the need for whistleblower protections at the state level. Part II discusses the nature of employment relationships in Virginia prior to the VWPL's passage and summarizes the necessary elements of a VWPL claim. Part III examines the VWPL's strengths—the provisions of the law that increase access to whistleblower protections. Part IV discusses the VWPL's weaknesses and how they diminish the statute's effectiveness. Finally, Part V examines House Bill 770's proposed amendments to the VWPL and argues for its eventual passage into law.

Effective whistleblower laws provide the government with a critical tool to hold unlawful employers accountable for their harmful actions, protect employees who act in the public interest, and advance broader positive societal changes. Amending the VWPL's statute of limitations and remedies provisions would go a long way toward bolstering protections for whistleblowers in Virginia.

## I. BACKGROUND: WHISTLEBLOWING STATUTES IN THE UNITED STATES

Before narrowing in on Virginia's active whistleblower legislation, a brief overview of federal whistleblower laws within the United States and their increased importance over the last several decades contextualizes Virginia's current laws and the need for further action.

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11. Michael S. McIntosh, Elizabeth A. Lalik, Alex Berg & Ashley D.N. Jones, *Virginia's 2024 Legislative Session Sees Few Employment Bills Passed and Record Vetoes*, LITTLER MENDELSON P.C. (June 7, 2024), <https://www.littler.com/news-analysis/asap/virginias-2024-legislative-session-sees-few-employment-bills-passed-and-record> [https://perma.cc/C6JE-4LSW].

12. *Id.*

The United States government has long recognized that ensuring legal compliance and accountability requires incentivizing private parties to disclose information they might have regarding legal infractions.<sup>13</sup> In 1778, during the passage of the first known whistleblower law, the Continental Congress stated that all government employees have a duty to inform Congress “or other proper authority of any misconduct, frauds[,] or misdemeanors committed ... which may have come to their knowledge.”<sup>14</sup> Since its passage, Congress has continued to expand whistleblower pathways and protections at the federal level.<sup>15</sup>

President Abraham Lincoln introduced the False Claims Act (FCA), the United States’ most notable whistleblower law, in 1863 to address the rampant fraud perpetrated by defense contractors against the U.S. government during the Civil War.<sup>16</sup> The FCA is effective due to its *qui tam* component that incentivizes private parties to assume a policing role and report fraud against the government.<sup>17</sup> Today, the FCA is the federal government’s primary tool for detecting and preventing fraud, reaping \$46.5 billion in recoveries from 1986 to 2020, of which whistleblowers received \$7.8 billion in compensation for the crucial information they provided.<sup>18</sup>

The FCA’s enormous success spurred further congressional action.<sup>19</sup> The Whistleblower Protection Act of 1989 (WPA) improved

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13. See generally Betsy George, *America’s First Whistleblowers*, UNIV. S.C. AUDIT & ADVISORY SERVS. (July 8, 2021), [https://sc.edu/about/offices\\_and\\_divisions/audit\\_and\\_advisory\\_services/about/news/2021/americas\\_first\\_whistleblowers.php](https://sc.edu/about/offices_and_divisions/audit_and_advisory_services/about/news/2021/americas_first_whistleblowers.php) [<https://perma.cc/2PVA-F2FY>] (discussing the fraud committed by Commodor Esek Hopkins, the commander-in-chief of the Continental Navy, which, in part, necessitated the creation of the “first whistleblower protection law in the world”).

14. JOURNALS OF THE CONTINENTAL CONGRESS 732 (Worthington Chauncey Ford ed., 1908) (1778).

15. Katelyn Deibler, *The Blacklist: Post-Employment Retaliation Under the False Claims Act*, 49 OHIO N.U. L. REV. 21, 26-27 (2022).

16. See Shelley L. Pepper, Aleksandr Bocheiko, Rita E. Del Valle, Allmir Osmani, Shawn Peyton & Edna Roman, *Whistle Where You Work? The Ineffectiveness of the Federal Whistleblower Protection Act of 1989 and the Promise of the Whistleblower Protection Enhancement Act of 2012*, 35 REV. PUB. PERS. ADMIN. 70, 71-72 (2015).

17. See *Protect the False Claims Act*, NAT’L WHISTLEBLOWER CTR., <https://www.whistleblowers.org/protect-the-false-claims-act/> [<https://perma.cc/RN8U-9RD9>].

18. See *id.*

19. See Pepper et al., *supra* note 16, at 71-72. For discussion and statistics on the success of the False Claims Act, see Press Release, U.S. Dep’t of Just., False Claims Act Settlements and Judgments Exceed \$2.68 Billion in Fiscal Year 2023 (Feb. 22, 2024), <https://www.>

protections for federal employees who report “a violation of any law, rule, or regulation” or “gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety.”<sup>20</sup> In 2002, in the aftermath of the Enron scandal, Congress passed the Sarbanes-Oxley Act (SOX) to address commodities and securities fraud, prohibiting employers from retaliating against corporate whistleblowers employed at private and public companies.<sup>21</sup> Similarly, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) in 2010 in response to the 2007-2009 financial crisis, the cause of which was widely attributed to insufficient “oversight and regulation of financial institutions.”<sup>22</sup> Dodd-Frank considerably strengthened whistleblower protections and expanded potential whistleblower rewards, making the statute crucial to a broad range of whistleblowers throughout the United States today.<sup>23</sup>

Additionally, Congress has created several other avenues for individuals to pursue whistleblower claims, including over twenty statutes containing whistleblower provisions that are enforced by the Occupational Safety and Health Administration (OSHA).<sup>24</sup> As recognized with the passage of the WPA, having strong whistleblower protections “is ... one of the most effective means available to us to reduce the cost and improve the functioning of our Federal Government.”<sup>25</sup>

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justice.gov/archives/opa/pr/false-claims-act-settlements-and-judgments-exceed-268-billion-fiscal-year-2023 [https://perma.cc/DBG4-3W8M].

20. Pub. L. No. 101-12, § 1213(a)(1)(A)-(B), 103 Stat. 21 (1989).

21. See Michael W. Peregrine & Charles W. Elson, *The Important Legacy of the Sarbanes Oxley Act*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 30, 2022), <https://corpgov.law.harvard.edu/2022/08/30/the-important-legacy-of-the-sarbanes-oxley-act/> [https://perma.cc/4V2G-REH7].

22. Jeffrey R. Boles, Leora Eisenstadt & Jennifer M. Pacella, *Whistleblowing in the Compliance Era*, 55 GA. L. REV. 147, 152-53 (2020).

23. See *The Dodd-Frank Act*, NAT'L WHISTLEBLOWER CTR., <https://www.whistleblowers.org/what-is-the-dodd-frank-act/> [https://perma.cc/UPS9-ZDPR].

24. See generally *Whistleblower Statutes Summary Chart*, OSHA WHISTLEBLOWER PROTECTION PROGRAM (Mar. 10, 2025), <https://www.whistleblowers.gov/sites/wb/files/2025-04/Whistleblower-Statutes-Summary-Chart-3.10.25-Update-508.pdf> [https://perma.cc/X6R4-KAJ8] (listing the twenty-five whistleblower statutes currently enforced by OSHA).

25. 135 Cong. Rec. 565 (1989) (statement of Sen. Carl Levin).

*A. Public Benefits Derived from Robust Whistleblower Laws*

Congress has clearly recognized the value of creating, implementing, and enforcing robust whistleblower laws. Law enforcement authorities could not possibly hope to unearth any significant portion of the fraud and other illegal activity that constantly occurs in both the public and private sectors without the aid of whistleblowers.<sup>26</sup> Often employees, whistleblowers are positioned to unearth wrongdoing that those outside of their organization would never have otherwise been aware of.<sup>27</sup> The Michigan Supreme Court has identified that “[w]ithout employees who are willing to risk adverse employment consequences as a result of whistleblowing activities, the public would remain unaware of large-scale and potentially dangerous abuses.”<sup>28</sup>

Whistleblowers also benefit their employers, who may be unaware that illegal activity has occurred. While this might be most obvious in the public sector,<sup>29</sup> private sector entities also benefit from a robust culture of internal reporting, which protects them from unnecessary legal exposure.<sup>30</sup> Many employers are largely removed from the day-to-day operations of their workplace, and whistleblowers can ensure adherence to necessary policies and procedures by bringing potential problems to their employers’ attention before

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26. See, e.g., *Why Whistleblowing Works*, NAT’L WHISTLEBLOWER CTR., <https://www.whistleblowers.org/why-whistleblowing-works/> [https://perma.cc/4UKQ-4A3Q] (“In a 2007 study conducted by PricewaterhouseCoopers, it was found that professional auditors only detected 19% of fraudulent activities at private corporations, while whistleblowers detected and exposed 43%. According to the study, surveyed executives ‘estimated that the whistleblowers saved their shareholders billions of dollars.’”).

27. Sinzdek, *supra* note 7, at 1635.

28. *Dolan v. Cont’l Airlines*, 563 N.W.2d 23, 26 (Mich. 1997).

29. See, e.g., Knowledge at Wharton Staff, *The Whistleblower’s Dilemma: Do the Risks Outweigh the Benefits?*, WHARTON (Nov. 5, 2019) <https://knowledge.wharton.upenn.edu/article/whistleblowers-in-business/> [https://perma.cc/JT4Y-L8KG] (“Since 1978, New York City has required city workers to report instances of waste, fraud, abuse, or corruption, lest they face disciplinary action.”).

30. Matt Kelly, *The Importance of Whistleblowing in an Organization*, GAN INTEGRITY (Aug. 1, 2021), <https://www.ganintegrity.com/resources/blog/the-importance-of-whistleblowing-in-an-organization/> [https://perma.cc/HDN4-URJR] (“Academics have found that businesses with a strong culture of internal reporting, and those that get more internal reports than their peers, achieve better business outcomes generally. This includes fewer lawsuits, smaller settlements when litigation does happen, more efficient operations, and even fewer negative headlines in the press.”).



they escalate.<sup>31</sup> Additionally, whistleblower laws have a deterrent effect, as employers are less likely to commit wrongful acts when they are aware of existing robust whistleblower protections.<sup>32</sup> Finally, because whistleblowing facilitates greater compliance without additional expenditure of public funds, whistleblowers “reduce the public cost of monitoring and detection” needed to enforce laws.<sup>33</sup>

### *B. Components of Effective Whistleblower Statutes*

Whistleblower laws must contain several key elements to be effective.<sup>34</sup> Commentators have identified two particularly crucial provisions necessary to address the common obstacles that impede whistleblowing, one aimed at preventing retaliation and the other aimed at financial incentives.<sup>35</sup>

First, whistleblowers must be assured that they will receive adequate protection from employer retaliation. Retaliation is “[o]ne of the most central discouragements of blowing the whistle,” and so “it is crucial that governments provide legal protection for employee whistleblowers against such retaliation.”<sup>36</sup> Congress created the anti-retaliation provision of the FCA after a survey of federal employees revealed that 37 percent would not report suspected fraud for fear of retaliation.<sup>37</sup> The creation of the anti-retaliatory provision, along with Congress’s later amendment in 2009 increasing the

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31. See Sinzdak, *supra* note 7, at 1635.

32. See *id.* at 1635-36.

33. *Id.* at 1636 n.21; Laura Simoff, *Confusion and Deterrence: The Problems That Arise from a Deficiency in Uniform Laws and Procedures for Environmental “Whistleblowers,”* 8 DICK. J. ENV’T L. & POL’Y 325, 326 (1999).

34. See *Best Practices in Whistleblower Law*, NAT’L WHISTLEBLOWER CTR., <https://www.whistleblowers.org/whistleblower-law-best-practices/> [<https://perma.cc/D96Z-YZXT>]. The four key elements of the most successful whistleblower laws are: (1) “[w]histleblowers can keep their identities confidential”; (2) “[w]histleblowers are encouraged to help with prosecutions by offering financial rewards in the event of a successful outcome”; (3) “[w]histleblowers are guaranteed remedies for retaliation”; and (4) “[w]histleblowers can report through independent reporting channels.” *Id.* This Note will discuss the second and third of these elements with regard to the VWPL.

35. See Rachel Goodson, *The Adequacy of Whistleblower Protection: Is the Cost to the Individual Whistleblower Too High?*, 12 HOUS. BUS. & TAX L.J. 161, 167 (2012).

36. Beller, *supra* note 1, at 875-76.

37. Deibler, *supra* note 15, at 28-29.

statute of limitations for retaliation claims under the FCA, is largely responsible for the FCA being the “highly effective fraud-fighting tool” it is today.<sup>38</sup>

Second, the risk that employees face from blowing the whistle provides a need for assurance that they will be fully compensated, or “made whole,” for doing so.<sup>39</sup> In addition to its anti-retaliation provision, the FCA’s efficacy is also attributed to its sizeable monetary penalties and its provision requiring a portion of the damage award be distributed to a whistleblower when they provide valuable information to an FCA litigation.<sup>40</sup> Due to the severe threat of retaliation faced by whistleblowers, Congress identified that monetary incentives were necessary to encourage individuals to take the risk that whistleblowing entails.<sup>41</sup> Retaliation can, and often does, include termination, defamation, and harassment, and a whistleblower should have some confidence that the available remedies will outweigh the perceived risks.<sup>42</sup>

Another notable element of effective whistleblower laws is a lenient statute of limitations, particularly for its retaliation provision. The FCA acts as a model here as well and provides a three-year statute of limitations period for a whistleblower’s retaliation claims.<sup>43</sup> Other less effective federal whistleblower laws are not as generous.<sup>44</sup> While a statute of limitations on retaliation claims should not be so long as to make a claim untimely, the limitations period must be one year at minimum for it to be “meaningful.”<sup>45</sup>

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38. *Id.* at 29.

39. See SAMANTHA FEINSTEIN & TOM DEVINE, ARE WHISTLEBLOWING LAWS WORKING? A GLOBAL STUDY OF WHISTLEBLOWER PROTECTION LITIGATION 27 (2021) (“[R]elief must be sufficiently comprehensive to cover all the direct, indirect and future consequences of the reprisal ([whistleblowers] should be ‘made whole’). Otherwise, the whistleblower may ‘lose by winning.’”).

40. Paden M. Hanson, Note, *True Damages for False Claims: Why Gross Trebling Should Be Adopted*, 104 IOWA L. REV. 2093, 2094-95 (2019).

41. See *id.*

42. See Terry Moorehead Dworkin & Janet P. Near, *A Better Statutory Approach to Whistle-Blowing*, 7 BUS. ETHICS Q., Jan. 1997, at 1, 5.

43. See 31 U.S.C. § 3730(h)(3).

44. See Kristin Goodchild, *Internal Reporters Who Blow the Whistle: Are They Protected Under the Dodd-Frank Act’s Anti-Retaliation Provision?*, 38 W. NEW ENG. L. REV. 1, 13 (2016) (noting that employees have 180 days to file a retaliation claim under the Sarbanes-Oxley Act).

45. Dworkin & Near, *supra* note 42, at 12; see INT’L WHISTLEBLOWING RSCH. NETWORK, DEVELOPMENTS IN WHISTLEBLOWING RESEARCH 2015 12 (David Lewis & Wim

### *C. Whistleblower Statutes Are Needed at the State Level*

As discussed above, numerous federal laws provide remedies to whistleblowers who meet the statutory reporting requirements; however, whistleblowers will only receive protections and remedies for disclosing “violations of a *limited* number of federal laws.”<sup>46</sup> For example, a whistleblower aiming to obtain a remedy under the FCA must present evidence that an actor “knowingly present[ed], or cause[d] to be presented, a false or fraudulent claim for payment or approval” to the federal government.<sup>47</sup> As a result of these limitations, most private-sector employees are dependent on state whistleblower statutes to obtain relief.<sup>48</sup>

Many states have enacted whistleblower laws to fill the gap left by federal legislation and protect whistleblowers who would otherwise have no form of legal redress.<sup>49</sup> Virginia has become one of the more whistleblower-friendly states in recent years after enacting the Virginia Fraud Against Taxpayers Act,<sup>50</sup> the Fraud and Abuse Whistle Blower Protection Act,<sup>51</sup> and a law that prohibits hospitals from retaliating against “any person” for reporting health and safety violations.<sup>52</sup> The VWPL, the state’s most significant piece of whistleblower legislation to date,<sup>53</sup> was enacted in 2020.<sup>54</sup> While

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Vanderkerckhove eds., 2015).

46. Sinzdak, *supra* note 7, at 1638 (emphasis added).

47. 31 U.S.C. § 3729(a)(1)(A).

48. Sinzdak, *supra* note 7, at 1638.

49. See *State Whistleblower Laws*, WHISTLEBLOWER INFO, <https://www.whistleblowerinfo.com/state-laws/> [<https://perma.cc/JQP7-6S43>].

50. See VA. CODE ANN. § 8.01-216.3(A)(1) (2024) (providing monetary rewards and retaliation protections for whistleblowers reporting employers for “[k]nowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval”).

51. VA. CODE ANN. §§ 2.2-3009 to 2.2-3014 (2022) (“No governmental agency may threaten or otherwise discriminate or retaliate against a citizen whistle blower because the whistle blower is requested ... to participate in an investigation, hearing, or inquiry by an appropriate authority or in a court action.”).

52. VA. CODE ANN. § 32.1-125.4 (2018) (“No hospital may retaliate or discriminate in any manner against any person who (i) in good faith complains or provides information to ... the Department or any other agency of government or any person or entity ... having responsibility for protecting the rights of patients of hospitals, or (ii) attempts to assert any right protected by state or federal law.”).

53. Matthew F. Nieman & Jeremy S. Schneider, *Virginia Enacts Comprehensive Whistleblower Protection*, JACKSON LEWIS (Apr. 14, 2020), <https://www.jacksonlewis.com/insights/virginia-enacts-comprehensive-whistleblower-protection> [<https://perma.cc/QQ39-Q8Q4>].

54. 2020 Va. Acts 2272 (codified as amended at VA. CODE ANN. § 40.1-27.3 (2021)).

Virginia previously offered few statutory protections for whistleblowers in the private sector, the comprehensive VWPL prohibits retaliation against any Virginia worker who reports or refuses to engage in violations of state or federal law.<sup>55</sup> Additionally, the VWPL authorizes employees who have faced retaliation to bring a private lawsuit, in which they may obtain remedies including “injunctive relief, reinstatement, and uncapped compensation for lost wages, benefits, and other remuneration.”<sup>56</sup>

While the VWPL represents a notable victory for Virginia whistleblowers and is a sign that Virginia legislators understand the value that whistleblowers provide to the public, certain elements must be amended to ensure that the statute effectively incentivizes employees to blow the whistle when necessary. Most notably, the interpretation of the statute of limitations for the VWPL’s retaliation provision tends to reward sneaky employers who might intentionally string along a whistleblower employee in order to “run out” the statute of limitations period, barring otherwise valid retaliation claims.<sup>57</sup> Additionally, the remedies available under the VWPL are limited and do not include punitive or even full compensatory damages.<sup>58</sup> Such remedies fail to adequately compensate whistleblowers when accounting for the challenges and trauma associated with being terminated, ostracized by their peers, and forced to undertake a demanding lawsuit.<sup>59</sup>

This Note analyzes the effectiveness of the VWPL in comparison to federal laws, other Virginia whistleblower and employment laws, and expert recommendations for creating effective whistleblower legislation. Additionally, this Note argues that the amendments to the VWPL proposed by House Bill 770 are necessary to fully accomplish the statute’s intent to encourage whistleblowing in the private sector and deter detrimental illegal activity.

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55. Nieman & Schneider, *supra* note 53.

56. *Id.*

57. McIntosh et al., *supra* note 11 (noting that the VWPL’s current language bars claims not brought within “one year following ‘the employer’s prohibited retaliatory action’” rather than “one year following ‘the employer’s *final* prohibited retaliatory action’”).

58. See *infra* note 154 and accompanying text.

59. Dworkin & Near, *supra* note 42, at 4-5.

## II. OVERVIEW OF THE VWPL AND ITS EFFECT ON EMPLOYMENT RELATIONSHIPS IN VIRGINIA

The VWPL's broad protection of whistleblowers marked a significant shift in the power distribution in Virginia's employer-employee relationships. While Virginia employees who reported wrongful conduct by their employers previously had limited, if any, assurances that they would be shielded from retaliation, the VWPL "has transformed Virginia into one of the more whistleblower-friendly states in the U.S."<sup>60</sup> This Part examines the limited options available to Virginia whistleblowers under state common law and the increased protections whistleblowers receive under key provisions of the VWPL.

### A. *From Bowman to the VWPL*

Virginia employees had few, if any, avenues to pursue remedies when retaliated against by their employers prior to the VWPL's enactment in 2020.<sup>61</sup> Employment relationships in Virginia are generally presumed to be "at will," meaning that the relationship continues indefinitely and can be terminated by either party at any time, so long as the employer provides reasonable notice.<sup>62</sup> Further, the "at-will" employment standard does not require parties to provide a reason for the termination of the employment relationship, allowing employees to be discharged "for any reason, or no reason at all."<sup>63</sup>

The Virginia Supreme Court first recognized a narrow exception to the "at-will" employment standard in *Bowman v. State Bank of*

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60. *Powerful Legal Protections for Virginia Whistleblowers*, EMP. L. GRP., <https://www.employmentlawgroup.com/what-we-do/whistleblower-protection-rewards/virginia-whistleblower-attorney/> [<https://perma.cc/GW9U-UT7T>].

61. See *Breaking Down the New Virginia Whistleblower Law*, KALIJARVI, CHUZI, NEWMAN & FITCH (Apr. 16, 2020), <https://kcncfdc.com/blog/breaking-down-the-new-virginia-whistleblower-law/> [<https://perma.cc/L59G-3VPK>].

62. *Public Policy Exception to At-Will Employment Doctrine in Virginia*, GEN. COUNS. (May 29, 2018), <https://www.generalcounsellaw.com/public-policy-exception-to-at-will-employment-doctrine-in-virginia/> [<https://perma.cc/3JUJ-8ZGK>].

63. *Id.*

*Keysville*.<sup>64</sup> There, agents of the defendant bank created “false and misleading” documents in preparation for a potential merger with NB Corporation, in violation of federal and state securities laws.<sup>65</sup> The court found that the bank’s termination of two shareholder-employees who refused to vote for the bank’s merger violated public policy.<sup>66</sup> The *Bowman* doctrine, as it became known, enables Virginia at-will employees to seek remedies for wrongful termination by proving they were “discharged in violation of an established public policy.”<sup>67</sup>

Later, the Virginia Supreme Court’s holding in *Francis v. National Accrediting Commission of Career Arts & Sciences, Inc.* illustrated the limitations of the *Bowman* doctrine and the court’s unwillingness to expand its scope to better protect employees from retaliatory termination.<sup>68</sup> Francis was an at-will employee who was fired after filing a protective order against a coworker who yelled obscenities at Francis and threatened her with physical violence.<sup>69</sup>

The *Francis* court held firm to its narrow interpretation of *Bowman* in finding that Francis failed to state a claim for wrongful termination.<sup>70</sup> The opinion observed that in the thirty-two years since *Bowman*, the Virginia Supreme Court had recognized only three limited exceptions to the “at-will” employment doctrine:

- (1) when “an employer violated a policy enabling the exercise of an employee’s statutorily created right”; (2) when “the public policy violated by the employer was explicitly expressed in the statute and the employee was clearly a member of that class of persons directly entitled to the protection enunciated by the public policy”; and (3) when “the discharge was based on the employee’s refusal to engage in a criminal act.”<sup>71</sup>

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64. 331 S.E.2d 797, 801 (Va. 1985).

65. *Id.* at 799.

66. *Id.* at 799-801.

67. *Id.* at 801.

68. *See* 796 S.E.2d 188, 190-92 (Va. 2017).

69. *Id.* at 189-90. Approximately twelve other employees witnessed this traumatic event. *Id.* at 189.

70. *See id.* at 191-92.

71. *Id.* at 190-91 (quoting *Rowan v. Tractor Supply Co.*, 559 S.E.2d 709, 711 (Va. 2002) (internal citations and parentheticals omitted)).

The court went on to reject Francis’s argument that her termination violated the public policy interest stated in the Protective Order Statutes, which was the “protection of [her] health and safety.”<sup>72</sup> In doing so, the court noted that “*Bowman* does not recognize ‘a generalized cause of action for the tort of “retaliatory discharge.”’”<sup>73</sup>

### *B. The VWPL’s Elements: Requirements to File*

The Virginia Legislature passed the VWPL just three years after the *Francis* decision.<sup>74</sup> The VWPL applies to a broad range of employees, protected activities, and retaliatory acts.<sup>75</sup> Vastly exceeding the protections provided under the *Bowman* doctrine, the VWPL prohibits employers<sup>76</sup> from discharging, disciplining, threatening, discriminating against, penalizing, or taking “other retaliatory action” against employees who engage in statutorily protected activity.<sup>77</sup> Protected activities include:

1. An employee’s “good faith” reporting of “a violation of any federal or state law or regulation to a supervisor,” governmental body, or law enforcement official;<sup>78</sup>
2. An employee’s participation, upon request by a governmental body or law enforcement official, in an investigation, hearing, or inquiry;<sup>79</sup>

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72. *Id.*

73. *Id.* at 192 (quoting *Miller v. SEVAMP, Inc.*, 362 S.E.2d 915, 918 (Va. 1987)).

74. Va. Acts 2272 (codified as amended at VA. CODE ANN. § 40.1-27.3 (2021)).

75. Matthew F. Nieman & D. Paul Holdsworth, *Virginia’s 2020 Whistleblower Law: Major Ramifications for Employers*, VA. LAW., Feb. 2024, at 30, 30.

76. The text of the VWPL does not expressly waive the Commonwealth’s or its agencies’ rights to sovereign immunity. *See* VA. CODE ANN. § 40.1-2 (2021) (“*Employer*” means an individual, partnership, association, corporation, legal representative, receiver, trustee, or trustee in bankruptcy doing business in or operating within this Commonwealth who employs another to work for wages, salaries, or on commission.”). Thus, while “employer” includes most, if not all, private sector employers, the Commonwealth and its agencies are excluded from liability under the VWPL. *See id.*; *see also* *Moschetti v. Off. of the Inspector Gen.*, No. 3:22-cv-24, 2022 WL 3329926, at \*10 (E.D. Va. Aug. 11, 2022) (holding that statutes lacking an “express waiver of sovereign immunity” cannot be enforced against the Commonwealth or its agencies under Rule 12(b)(1) of the Federal Rules of Civil Procedure).

77. VA. CODE ANN. § 40.1-27.3(A).

78. *Id.* § 40.1-27.3(A)(1).

79. *Id.* § 40.1-27.3(A)(2).

3. An employee's refusal "to engage in a criminal act that would subject the employee to criminal liability;"<sup>80</sup>
4. An employee's refusal of an order to act in a way that violates any federal or state regulation, so long as the employee informs the employer of the reason for refusal;<sup>81</sup> and
5. An employee's agreement to "[p]rovide[] information to or testif[y] before any governmental body or law-enforcement official conducting an investigation, hearing, or inquiry into any alleged violation by the employer of federal or state law or regulation."<sup>82</sup>

Employees who bring a timely VWPL claim may, by court order, receive remedies, including: "an injunction to restrain" the retaliatory act, "the reinstatement of the employee to the same position held before the retaliatory action or to an equivalent position, and ... compensation for lost wages, benefits, and other remuneration, together with interest thereon, as well as reasonable attorney fees and costs."<sup>83</sup> The VWPL does not expressly allow claimants to seek compensatory or punitive damages,<sup>84</sup> and Virginia courts have explicitly rejected the argument that the inclusion of the term "remuneration" in the remedies subsection of the VWPL provides leeway for plaintiffs to pursue compensatory relief.<sup>85</sup>

Finally, those who file VWPL claims are limited by its statute of limitations. While the *Bowman* doctrine provides a two-year statute of limitations period, the VWPL's statute of limitations is only one year.<sup>86</sup> Further, the text of the VWPL states that claims must be brought "within one year of the employer's prohibited retaliatory

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80. *Id.* § 40.1-27.3(A)(3).

81. *Id.* § 40.1-27.3(A)(4).

82. *Id.* § 40.1-27.3(A)(5).

83. *Id.* § 40.1-27.3(C).

84. *See id.*

85. *Markley v. Liberty Univ., Inc.*, 111 Va. Cir. 356, 366 (2023) ("[T]he Court must presume that the General Assembly used the term 'remuneration' instead of the term 'damages' for a reason.").

86. Madison Kewin, *Understanding the New Virginia Whistleblower Protection Law*, ALDEN L. GRP. (June 10, 2022), <https://www.employmentlawfederal.com/understanding-the-new-virginia-whistleblower-protection-law/> [<https://perma.cc/73ZP-XPZH>].



action.”<sup>87</sup> Relying on this language, Virginia courts have held that the VWPL’s cause of action accrues—and the statute of limitations begins to run—“as of the date of the employer’s ‘prohibited retaliatory action,’ not from the date that the employee felt the full impact of the action.”<sup>88</sup>

### III. EFFECTIVE ELEMENTS OF THE VWPL

As discussed in Part II of this Note, the VWPL vastly expanded the whistleblower and general employment protections available to Virginia employees. Since its enactment in 2020, the VWPL has become frequently relied on by Virginia employees to obtain relief from employer retaliation.<sup>89</sup> While the number of VWPL claims filed in Virginia courts is not publicly available, federal courts have analyzed “nearly 100 lawsuits” alleging violations of the VWPL in the four years since its passage.<sup>90</sup> This Part examines the key elements of the VWPL that make it a powerful tool for Virginia whistleblowers to hold their employers accountable for wrongdoing and protect themselves from retaliation in the process.

#### *A. The VWPL Applies to a Broad Range of Retaliatory Acts*

The VWPL is Virginia’s “first comprehensive whistleblower protection law.”<sup>91</sup> While it “acts as a proxy retaliation claim under the Virginia Human Rights Act,” the VWPL covers a far broader range of employees, and its application is not limited to employees who have suffered discriminatory discharge.<sup>92</sup> Similarly, while the *Bowman* doctrine applies only to employees who have been wrongfully discharged,<sup>93</sup> the VWPL prohibits employers from “tak[ing] [any] retaliatory action” against an employee who engages in activity protected under the VWPL.<sup>94</sup>

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87. See VA. CODE ANN. § 40.1-27.3(C).

88. See *Rivera v. ManTech Int’l Corp.*, 902 S.E.2d 120, 123 (Va. Ct. App. 2024) (quoting § 40.1-27.3(C)).

89. Nieman & Holdsworth, *supra* note 75, at 30.

90. *Id.*

91. Kewin, *supra* note 86.

92. Nieman & Holdsworth, *supra* note 75, at 30.

93. Kewin, *supra* note 86.

94. See VA. CODE ANN. § 40.1-27.3(A) (2021).

The VWPL's broad framing of retaliatory conduct conforms with the House Office of the Whistleblower Ombuds's "best practice standards for framing the scope of prohibited conduct" from its report providing recommendations for crafting effective whistleblower laws.<sup>95</sup> As the report explains, a broad scope of prohibited retaliation is necessary "both to protect whistleblowers who come forward and to deter creative means of harassment that extend beyond the workplace."<sup>96</sup>

*B. The VWPL Provides a Private Cause of Action*

Another practical aspect of the VWPL is that it enables employees who allege a violation of the statute to file a civil lawsuit "in a court of competent jurisdiction."<sup>97</sup> This language allows injured claimants to immediately file suit against employers in court, rather than forcing claimants to first go through a cumbersome administrative process.<sup>98</sup> This language is also significant in that it enables claimants to bring a VWPL claim in a Virginia state court, which tend to be less biased toward defendants than federal courts.<sup>99</sup>

Further, Virginia law "respects the important right to a jury trial by making it difficult to obtain summary judgment."<sup>100</sup> Accordingly, VWPL claims filed in state court are more likely to go to trial, and the resulting verdicts encourage other employers to ensure compliance with federal and state law.<sup>101</sup> The VWPL's private cause of action allows VWPL plaintiffs to have direct access to Virginia courts and advocate for themselves rather than being dependent on a government agency choosing to act on their behalf.

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95. *Best Practice Whistleblower Law Standards*, OFF. WHISTLEBLOWER OMBUDS 4, [https://whistleblower.house.gov/sites/evo-subsites/whistleblower.house.gov/files/evo-media-document/Best\\_Practice\\_Whistleblower\\_Law\\_Standards.pdf](https://whistleblower.house.gov/sites/evo-subsites/whistleblower.house.gov/files/evo-media-document/Best_Practice_Whistleblower_Law_Standards.pdf) [<https://perma.cc/4TS5-S2L9>].

96. *Id.*

97. VA. CODE ANN. § 40.1-27.3(C).

98. See Tom Spiggle, *What the New HB798 Whistleblowing Law Means for Virginia Workers*, FORBES (May 5, 2020, at 12:57 ET), <https://www.forbes.com/sites/tomspiggle/2020/05/05/new-virginia-whistleblower-law/> [<https://perma.cc/FRS4-QMS7>].

99. *Id.*

100. Jason Zuckerman & Dallas Hammer, *2020 Legislative Session Heralds a Sea Change in Virginia Employment Law*, VA. LAW., June 2020, at 20, 22 (2020) (citing VA. CODE ANN. § 8.01-420 (2024) (widely disallowing basing motions for summary judgment on discovery depositions)).

101. See *id.*

*C. The VWPL “But-For” Causation Standard Is Not Significantly Onerous*

While the VWPL does not provide a causation standard, Virginia courts have determined that the statutory language infers “but-for” causation.<sup>102</sup> The ostensibly onerous “but-for” causation standard places a higher burden on a plaintiff than the standard employed under the Virginia Human Rights Act, which merely requires a plaintiff prove that a protected category was “a motivating factor” for an employer’s retaliatory conduct, even if other motivating factors existed.<sup>103</sup>

However, courts have recognized that the “but-for” standard does not prohibit plaintiffs from proving causation even in cases in which employers allege that other factors, aside from statutorily protected activity, are to blame for the alleged retaliation.<sup>104</sup> Further, the Supreme Court has held that a plaintiff’s protected activity or characteristic is not required to be the sole, or even primary, cause of the employer’s adverse action.<sup>105</sup> Rather, “but-for” causation “means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision.”<sup>106</sup>

Moreover, in *Foster v. University of Maryland-Eastern Shore*, the Fourth Circuit held that a plaintiff seeking relief for retaliation is not required to prove “but-for” causation to establish a prima facie case, and can instead wait to prove causation from evidence procured during discovery.<sup>107</sup> In summary, the “but-for” causation standard is not “significantly more onerous than a motivating factor standard.”<sup>108</sup>

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102. *Moore v. Copper River Shared Servs.*, 113 Va. Cir. 47, 58-59 (2024).

103. *See* VA. CODE ANN. § 2.2-3905(B)(6) (2022).

104. *See* *Burrage v. United States*, 571 U.S. 204, 211 (2014) (engaging in statutorily protected activity is the “but-for” cause even if it “combines with other factors to produce the result, so long as the other factors alone would not have done so”).

105. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020).

106. *Id.*

107. 787 F.3d 243, 251 (4th Cir. 2015) (holding that the Supreme Court’s decision in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), “does not alter the causation prong of a prima facie case of retaliation”).

108. Jason Zuckerman, *Virginia Whistleblower Protection Law*, ZUCKERMAN L. (Aug. 12, 2024), [https://www.zuckermanlaw.com/sp\\_faq/virginia\\_whistleblower\\_protection\\_law/](https://www.zuckermanlaw.com/sp_faq/virginia_whistleblower_protection_law/) [https://perma.cc/BJ6F-KNQ9].

The vast expansion of protections afforded to whistleblowers under the VWPL signifies the Virginia legislature's recognition of the importance of whistleblowers in serving the public good and its desire to both incentivize a broad range of private employees to come forward with information about their employer's illegal activity and to protect them when they do so.

#### IV. THE VWPL'S DEFICIENCIES AND THE REPERCUSSIONS

The VWPL's notable components, namely its broad application, private right of action provision, and "but-for" causation standard, contribute significantly to its utility.<sup>109</sup> However, two key provisions unnecessarily inhibit the statute's full functionality. This Part first examines the VWPL's constraining statute of limitations and the complexities involved in determining when one has a cause of action under the VWPL, triggering the statute of limitations. This Part then discusses the insufficient remedies available to plaintiffs who successfully prove a violation of the VWPL.

##### A. *The VWPL's Statute of Limitations*

The VWPL imposes a one-year statute of limitations.<sup>110</sup> This limited window—during which injured employees must file any potential VWPL claims—is further reduced by Virginia's strict rule for determining when a cause of action has accrued, and thus when the applicable statute of limitations period begins to run.<sup>111</sup>

The "discovery rule," which tolls the accrual of a cause of action and the prescribed statute of limitations until the injured party knew, or had reason to know, of the injury's existence, is generally not employed in Virginia, absent limited statutory exceptions.<sup>112</sup>

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109. See *supra* Part III.

110. VA. CODE ANN. § 40.1-27.3(C) (2021).

111. See *Virginia Statute of Limitations*, PENDLETON L. TEAM, <https://www.virginiainjurylawyers.com/blog/virginia-statute-of-limitations/> [https://perma.cc/K3YC-P6MK].

112. Michael Phelan, *Virginia Now Has a Discovery Rule for Medical Device Cases*, PHELAN PETTY (July 28, 2016), <https://phelanpetty.com/blog/virginia-now-has-a-discovery-rule-for-medical-device-cases/> [https://perma.cc/MNG3-XTAD] (noting that "the Virginia Assembly carved out statutory exceptions to the" occurrence rule only for fraud, asbestos, sexual abuse, breast implant cases, and medical device cases, none of which are directly applicable to whistleblower plaintiffs). See generally Katelyn Ashton, *50-State Survey of Statutes of*

Rather, causes of action in Virginia are often subject to the “occurrence rule,” meaning that the statute of limitations begins to run the moment one is injured, regardless of when that injury is discovered.<sup>113</sup> Virginia courts adamantly abide by the “occurrence rule” and have consistently applied it even when “the injured party may not suffer damages until later.”<sup>114</sup>

The VWPL states that potential plaintiffs must file suit “within one year of the *employer’s prohibited retaliatory action*.”<sup>115</sup> Accordingly, Virginia courts hold that a VWPL plaintiff sustains “injury,” and thus the statute of limitations begins to run, on the date when the employer first commits *any* “prohibited retaliatory action,” however slight, rather than “from the date that the employee felt the full impact of the action.”<sup>116</sup>

Employee whistleblowers are in a uniquely vulnerable position in that the actor responsible for causing their injury has influence over their employment and thus their livelihood, as many Americans are reliant on their employers for their health insurance and other benefits, in addition to their salaries.<sup>117</sup> One can imagine that an employee, *while still employed*, would accept any number of “retaliatory” slights or indignities rather than risk further alienating their employer, and possibly being terminated, by bringing a cause of action. Thus, an employee’s reasonable decision to delay filing suit

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*Limitations and Repose in Prescription Product Liability Cases*, JD SUPRA (Nov. 16, 2020), <https://www.jdsupra.com/legalnews/50-state-survey-of-statutes-of-20476/> [<https://perma.cc/FSM4-FJKX>] (finding that Virginia is one of the five states that does not recognize the discovery rule in prescription product liability cases).

113. PENDLETON L. TEAM, *supra* note 111; VA. CODE ANN. § 8.01-230 (“In every action for which a limitation period is prescribed ... the prescribed limitation period shall begin to run from the date the injury is sustained ... and not when the resulting damage is discovered.”).

114. *Rivera v. Mantech Int’l Corp.*, 902 S.E.2d 120, 122 (Va. Ct. App. 2024); *see also* *Kerns v. Wells Fargo Bank*, 818 S.E.2d 779, 785 (Va. 2018) (“Any amount of damages, ‘however slight,’ triggers the accrual of the cause of action, and for this reason, ‘it is immaterial that all the damages resulting from the injury do not occur at the time of the injury.’” (quoting *Van Dam v. Gay*, 699 S.E.2d 480, 482 (Va. 2010))).

115. VA. CODE ANN. § 40.1-27.3(C) (2021) (emphasis added).

116. *Rivera*, 902 S.E.2d at 123.

117. *Coverage in Employer Medical Care Plans Among Workers in Different Wage Groups in 2022*, U.S. BUREAU OF LAB. STATS. (Mar. 9, 2023), <https://www.bls.gov/opub/ted/2023/coverage-in-employer-medical-care-plans-among-workers-in-different-wage-groups-in-2022.htm> [<https://perma.cc/MTY6-7NHD>] (“[I]n March 2022[,] [f]orty-seven percent of workers participated in a medical care plan offered by their employer.”).

until their employer commits a *significant* retaliatory action can easily bar them from obtaining any relief.

*1. The VWPL's Statute of Limitations Compared to Model Statutes, Best Practice Recommendations, and Similar Virginia Laws*

Most actionable offenses are restricted by a statute of limitations period. Statutes of limitations are believed to be necessary to “avoi[d] litigation based on ‘stale evidence’ and protect[] the ‘repose’ of the defendant.”<sup>118</sup> While this may or may not be accurate,<sup>119</sup> needlessly restrictive limitations present a significant obstacle that plaintiffs must carefully navigate to obtain relief and far too often bar otherwise meritorious claims.

Following an extensive global study, the Government Accountability Project (GAP) included a “realistic” statute of limitations in its recommendations for “best practice whistleblower laws.”<sup>120</sup> The GAP found that one year is the preferred minimum statute of limitations period for functional whistleblowing statutes.<sup>121</sup> Additionally, the GAP referenced four “best practices” examples of U.S. whistleblowing statutes with “[r]ealistic” and “functional” statutes of limitations, three of which provide a *three-year* statute of limitations.<sup>122</sup>

In its “Best Practice Whistleblower Law Standards” report, the House Office of the Whistleblower Ombuds advised that effective whistleblower statutes should “[p]rovide[] *at least* a three-year statute of limitations in which to file a claim of unlawful reprisal.”<sup>123</sup> The report listed the False Claims Act (FCA), which provides a three-year statute of limitations for retaliation claims,<sup>124</sup> as an exemplary whistleblower statute.<sup>125</sup>

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118. George Rutherglen, *Statutes of Limitations: Claims Forgotten, Forgiven, or Foregone?*, 72 RUTGERS U. L. REV. 1, 4 (2019).

119. See generally *id.* at 16-25 for an argument against the need for statutes of limitations.

120. FEINSTEIN & DEVINE, *supra* note 39, at 13, 27.

121. *Id.* at 27.

122. *Id.* (listing 10 U.S.C. § 2409(b)(4), 41 U.S.C. § 4712(b)(4), 18 U.S.C. § 1514A(b)(1)(B), and 5 U.S.C. § 1214(a)(6)(A)(iii) as “best practices” examples).

123. OFF. WHISTLEBLOWER OMBUDS, *supra* note 95, at 5 (emphasis added).

124. 31 U.S.C. § 3730(h)(3).

125. OFF. WHISTLEBLOWER OMBUDS, *supra* note 95, at 5.

Virginia modeled its statute, the Virginia Fraud Against Taxpayers Act (VFATA), after the FCA.<sup>126</sup> In doing so, the Virginia legislature included a three-year statute of limitations for retaliation claims filed under the statute.<sup>127</sup> The Virginia legislature again chose to provide a three-year statute of limitations on retaliation claims filed under its Fraud and Abuse Whistleblower Protection Act.<sup>128</sup> With *Bowman* claims attaching a two-year statute of limitations,<sup>129</sup> the VWPL's limited one-year statute of limitations departs both from best practice recommendations for whistleblower laws and from similar Virginia whistleblower and employment retaliation statutes and case law.

## 2. Consequences of the VWPL's Statute of Limitations

### a. Confusing Interpretations by Virginia Courts

Before any plaintiff may bring a cause of action, they must be sure that a valid claim exists. Whereas employers often have legal departments or other professionals advising them of their legal rights and responsibilities, most employees are more poorly situated to know their rights and when they have been violated.<sup>130</sup> While the VWPL provides a one-year statute of limitations, the actual timeframe an employee has to file shrinks substantially when accounting for time lost while the employee seeks legal assistance. As Professor George Rutherglen explains, a "limitation period is too short if it makes it practically impossible for most claimants to make an informed decision whether to sue, even if it is long enough to give them a formal opportunity to be heard."<sup>131</sup>

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126. See *Phipps v. Agape Counseling & Therapeutic Servs., Inc.*, No. 3:13-CV-166, 2015 U.S. Dist. LEXIS 67262, at \*10 (E.D. Va. May 21, 2015) (noting that "the FCA and VFATA ... contain nearly identical provisions"); *United States ex rel. Rector v. Bon Secours Richmond Health Corp.*, No. 3:11CV38, 2014 U.S. Dist. LEXIS 52161, at \*42 (E.D. Va. Apr. 14, 2014) ("the VFATA and FCA are analogous.").

127. *Id.* § 8.01-216.8.

128. *Id.* § 2.2-3011(D).

129. Kewin, *supra* note 86.

130. See Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6, 7, 11-12 (2002).

131. Rutherglen, *supra* note 118, at 10.

In the four years since the VWPL's enactment, claimants and courts have wrestled with the issue of determining when a "retaliatory act" by an employer has taken place, thereby triggering the statute of limitations.<sup>132</sup> In *Rivera v. Mantech International Corp.*, the Virginia Court of Appeals dismissed the plaintiff's suit after finding his claim untimely.<sup>133</sup> During a government investigation at his workplace, Rivera confirmed that he had been instructed by his supervisor to forge official documents in violation of federal law, which he refused to do.<sup>134</sup> Mantech fired Rivera shortly afterward on January 14, 2022, claiming a "contract reduction" as the cause.<sup>135</sup> Mantech advised Rivera, however, "that he was eligible for 'Mantech's Mobility Program to identify a suitable position to continue [his] employment with Mantech.'"<sup>136</sup> Because of this offer, Rivera argued that his cause of action did not ripen on the date of his termination, since he had the opportunity to obtain an alternative "suitable position."<sup>137</sup> The court disagreed, finding that Mantech had retaliated against Rivera by firing him, and that "[a]ny new position Rivera may have found would only have reduced the magnitude of Rivera's injury."<sup>138</sup> Rivera was ultimately barred from obtaining relief under the VWPL based on a procedural technicality rather than the merits of his claim.<sup>139</sup>

The Virginia Court of Appeals did, however, side with a plaintiff employee in a recent VWPL case decision.<sup>140</sup> In *Ingleside Emergency Grp., LLC v. Hollis*, the plaintiff, a physician employed by Ingleside, made repeated complaints to her supervisors of alleged upcoding violations and patient quality of care concerns.<sup>141</sup> On March 2, 2021, Dr. Hollis became aware that she was not scheduled to work in April.<sup>142</sup> When she asked why, Dr. Hollis was told "that

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132. Nieman & Holdsworth, *supra* note 75, at 33-34.

133. 902 S.E.2d 120, 123-24 (Va. Ct. App. 2024).

134. *Id.* at 121.

135. *Id.*

136. *Id.*

137. *Id.* at 123.

138. *Id.*

139. *See id.* at 124.

140. *Ingleside Emergency Grp., LLC v. Hollis*, No. 1311-23-2, 2024 Va. App. LEXIS 654, at \*10 (Va. Ct. App. Nov. 12, 2024).

141. *Id.* at \*1-3.

142. *Id.* at \*3.



‘there [was] a case pending review.’”<sup>143</sup> Despite repeated attempts to contact Ingleside higher-ups, Dr. Hollis did not hear from hospital staff until June 2, 2021, when she was told “that her ‘resignation’ was ‘approved.’”<sup>144</sup> The court found that although Dr. Hollis was taken off the schedule in April, Ingleside had not retaliated against her until June because “Ingleside did not engage in any meaningful communication with her, and the only information she was given was that there was a ‘case pending review.’”<sup>145</sup>

While the *Ingleside* holding helps to clarify what actions qualify as “retaliatory acts” under the VWPL, the Virginia Court of Appeals, unfortunately, chose not to publish its *Ingleside* opinion, and it thus lacks binding precedential value.<sup>146</sup> Consequently, Virginia law lacks clarity regarding when one has experienced “retaliation” and thus has standing to sue under the VWPL, beginning the one-year limitations period. Although an extended VWPL limitations period would not necessarily resolve these ambiguities, it would lessen the burden on plaintiffs by making the limitations period far less consequential to VWPL case outcomes.

### *b. Valid Claims Barred*

The preclusion of otherwise valid claims is an unavoidable consequence of any statute of limitations period. The statute of limitations prohibits any inquiry into the merits of a time-barred claim.<sup>147</sup> Short limitations periods often arise “as a result of compromise” and serve to “weaken the power” of the statute the limitations period applies to.<sup>148</sup> Of the few VWPL cases that are currently publicly available, several include seemingly colorable claims that were dismissed solely due to the statute of limitations not being met.<sup>149</sup>

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143. *Id.*

144. *Id.* at \*3-4.

145. *Id.* at \*9.

146. *Id.* at \*1; see VA. CODE ANN. § 17.1-413(A) (2020) (“Opinions designated by the Court of Appeals as having precedential value or as otherwise having significance for the law or legal system shall be expeditiously reported in separate Court of Appeals Reports.”).

147. Rutherglen, *supra* note 118, at 4.

148. See *id.* at 26.

149. See, e.g., *Rivera v. Mantech Int’l Corp.*, 902 S.E.2d 120, 124 (Va. Ct. App. 2024).

Despite refusing to engage in unlawful activity and providing crucial information in a government investigation, Rivera was left with no avenues to obtain VWPL relief after Mantech retaliated against him for his legally protected disclosures.<sup>150</sup> Rivera is, unfortunately, not the only employee left without a remedy because of the VWPL's short limitations period and the confusion surrounding when it begins. In *Beckford v. Elevance Health, Inc.*, the plaintiff, a Black woman, sued her employer after its agents allegedly retaliated against her multiple times for reporting racial harassment and disability discrimination.<sup>151</sup> Elevance initially fired Beckford on February 4, 2021, after she complained about her supervisor racially harassing and discriminating against her.<sup>152</sup> Elevance claimed that she was being terminated "as part of a reduction in force."<sup>153</sup>

Beckford was interviewed and rehired for the same position at Elevance two months later, this time reporting to a different supervisor.<sup>154</sup> In mid-September, Beckford requested time off from September 24 through October 8 under the Family Medical Leave Act (FMLA) because her husband required emergency surgery.<sup>155</sup> Despite being told she would have worked the minimum hours required to qualify for FMLA leave by September 29, Elevance denied Beckford's second FMLA leave request on October 13, claiming that she was ineligible.<sup>156</sup> The U.S. District Court for the Eastern District of Virginia rejected Beckford's VWPL claim, finding that her cause of action accrued on February 4, 2021, when Elevance initially fired her.<sup>157</sup>

Despite the repeated retaliation Beckford experienced, she could not pursue recourse under the VWPL, and her employers faced no accountability for the harm they caused her.<sup>158</sup> Notably, under the

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150. See *supra* notes 133-39 and accompanying text.

151. Civil Action No. 3:23cv828, 2024 U.S. Dist. LEXIS 155041, at \*2-9 (E.D. Va. Aug. 28, 2024).

152. *Id.* at \*3-4.

153. *Id.* at \*5-6.

154. *Id.* at \*6-7.

155. *Id.* at \*7-8.

156. *Id.* ("In all, Elevance sent Ms. Beckford three emails reflecting inconsistent numbers regarding her total working hours.").

157. *Id.* at \*12-13.

158. *Id.* at \*15-16.

amended VWPL proposed in Part V of this Note, which would extend its statute of limitations to one year following the employer's *final* prohibited retaliatory act, Beckford's claim would have been found timely.<sup>159</sup> As Virginia Delegate Karrie Delaney explains, the VWPL's limitations period must be extended to "give the current statute teeth" and create a more equitable system for employees who face unjust actions from their employers.<sup>160</sup>

### *B. The VWPL's Remedies*

The remedies component of the VWPL is another element that unnecessarily undermines its efficacy. Currently, those who successfully bring a VWPL claim may—if the court deems it appropriate—be awarded an injunction to restrain the retaliatory behavior, reinstatement to the same position the employee previously held "or to an equivalent position, ... compensation for lost wages, benefits, and other remuneration," with interest, and "reasonable attorney fees and costs."<sup>161</sup>

Virginia courts have so far held that "the term 'remuneration' cannot be construed to include all forms of compensatory damages" and instead "must be limited to a meaning similar or analogous to payment, compensation, and reimbursement for services and labor."<sup>162</sup> Further, courts have rejected arguments that "past and future impairment to earn money" falls within the definition of "remuneration" under the VWPL.<sup>163</sup> While the provision of interim relief and coverage for legal fees and costs complies with certain best practice recommendations for whistleblower remedies,<sup>164</sup> the

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159. *See id.* at \*9 ("Beckford states that November 21, 2021 was the latest date that she experienced discrimination.... On November 9, 2022, she filed an initial Complaint."); *infra* Part V.A.

160. *Labor and Commerce Subcommittee #2 [HCA]*, VA. HOUSE OF DELS. COMM. STREAMING (Jan. 25, 2024, at 2:15:46 ET) (statement of Del. Karrie Delaney, Member, Va. House of Dels.), <https://virginiageneralassembly.gov/house/committees/commstream.html> [<https://perma.cc/ZJW5-M4NS>]. Delaney is proponent of the change that this Note advocates for; her influence and recommendations will be discussed in more detail in Part V, *infra*.

161. VA. CODE ANN. § 40.1-27.3(C) (2021).

162. *Markley v. Liberty Univ., Inc.*, No. CL22001035-00, 2023 WL 12040534, at \*7 (Va. Cir. Apr. 17, 2023).

163. *Harris v. Int'l Gourmet Foods*, No. CL-2024-2326, 2024 WL 5454665, at \*3 (Va. Cir. May 22, 2024).

164. FEINSTEIN & DEVINE, *supra* note 120, at 28-31.

VWPL's remedies are woefully insufficient at deterring violations of the VWPL and making injured employees whole due to the absence of awardable compensatory or punitive relief.

*1. VWPL Remedies Compared to Model Statutes, Best Practice Recommendations, and Similar Virginia Laws*

In its list of best practice recommendations for whistleblower laws, the GAP listed “[c]ompensation with ‘no loopholes’” as an essential element of effective whistleblower laws.<sup>165</sup> The GAP argues that successful whistleblowers should be “made whole,” meaning they should obtain relief sufficient to cover “all the direct, indirect and future consequences” of the retaliatory acts.<sup>166</sup> Such relief should include, where applicable, compensation for both direct and indirect consequences of reprisal, including associated medical bills, pain and suffering, emotional distress, and loss of reputation.<sup>167</sup> Of the four U.S. whistleblower laws that the GAP cites as model statutes,<sup>168</sup> two contain punitive damages provisions<sup>169</sup> and all four contain compensatory damages provisions,<sup>170</sup> with two statutes explicitly providing for special damages.<sup>171</sup>

The remedies available under the anti-retaliation provision of the VFATA largely comply with best practice recommendations. Those retaliated against for reporting VFATA violations may be reinstated, receive *two times* the amount of back pay, and compensation for any special damages, along with reasonable attorney fees and costs.<sup>172</sup> *Bowman* claimants also stand to receive more than VWPL claimants when successful, as *Bowman* plaintiffs may recover both compensatory and punitive damages.<sup>173</sup>

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165. *Id.* at 27.

166. *Id.*; see OFF. WHISTLEBLOWER OMBUDS, *supra* note 95, at 6 (arguing that whistleblowing law “[b]est practice standards address the full scope of harm—past, present, and future—to make the whistleblower whole”).

167. FEINSTEIN & DEVINE, *supra* note 39, at 28.

168. *Id.* (listing 10 U.S.C. § 2409(c)(2), 41 U.S.C. § 4712(c)(2), 18 U.S.C. § 1514A(b)(2), and 5 U.S.C. § 1221(g)(1) as “best practices” examples).

169. 10 U.S.C. § 2409(c)(2); 41 U.S.C. § 4712(c)(2).

170. 10 U.S.C. § 2409(c)(2); 41 U.S.C. § 4721(c)(2); 18 U.S.C. § 1514A(c)(2); 5 U.S.C. § 1221(g)(1)(A).

171. 18 U.S.C. § 1514A(c)(2)(C); 5 U.S.C. § 1221(g)(1)(A)(ii).

172. See VA. CODE ANN. § 8.01-216.8 (2024).

173. Kewin, *supra* note 86.

## 2. Consequences of the VWPL's Limited Remedies

### a. Limited Remedies Prevent Employees from Filing

The decision to report wrongdoing at one's workplace is often not a decision an employee takes lightly. The fear that one may face professional reprisal after choosing to do so is unfortunately well-founded.<sup>174</sup> Even for whistleblowers who do not face professional repercussions for speaking out, "the experience of reporting an employer is often a stressful and grueling one that can produce a range of adverse effects on the physical and mental health of the whistleblower."<sup>175</sup> It seems obvious then that a reasonable employee would want to ensure that the costs of doing so—particularly the professional ramifications they may face as a result—do not substantially outweigh any benefits they may receive.<sup>176</sup>

Given the minimal relief offered to meritorious VWPL claimants, a cost-benefit analysis may frequently weigh in favor of remaining silent and forgoing the option to file a claim.<sup>177</sup> While including relief in the form of reinstatement to the employee's former position may be an attractive option for some employees, it is not a viable remedy for many whose "employer and co-employees are likely to be hostile[] and [whose] career advancement[s] will be severely limited."<sup>178</sup> Additionally, the provision of monetary relief solely in the form of lost wages "disproportionately rewards plaintiffs with high[er] salaries" and precludes many lower-salaried plaintiffs from

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174. Evan J. Ballan, *Protecting Whistleblowing (and Not Just Whistleblowers)*, 116 MICH. L. REV. 475, 488 (2017) ("A 2011 survey by the Ethics Resource Center found that 22% of American workers who reported misconduct actually experienced retaliation.").

175. *Id.*

176. Several findings illustrate this point. *See id.* at 488-89 (citing a study that "noted that among employees who were aware of misconduct but chose not to report it, 46% cited fear of retaliation as the reason for their failure to report"); *id.* at 481 (noting that "[t]he FCA has seen widespread use" following Congress' 1986 amendments, which provided for "all relief necessary to make the employee whole," including, where appropriate, reinstatement, back pay, and special damages." (quoting False Claims Amendments Act, Pub. L. No. 99-562 § 4, 100 Stat. 3158 (1986))); Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1033 (2004) ("[A] further and fuller analysis [of the Sarbanes-Oxley Act] reveals that the lack of remedies provided in the Act results in a less effective scheme for encouraging whistleblowing than it would initially seem.").

177. *See supra* notes 162-63 and accompanying text.

178. Dworkin & Near, *supra* note 42, at 5.

filing entirely.<sup>179</sup> Those facing retaliation will likely need to hire an attorney on a contingency basis, and finding a willing attorney is next to impossible for low-income workers who stand to receive very little even if successful.<sup>180</sup> The addition of full compensatory and punitive damages under the VWPL would help to adequately compensate employees and “make them whole” by mitigating the costs associated with filing a VWPL claim.<sup>181</sup>

The VWPL’s remedies are significantly deficient in light of its troubling statute of limitations, as interpreted by Virginia courts.<sup>182</sup> A VWPL claimant has only one year from their employer’s initial retaliatory act to weigh the associated risks involved in filing suit, meet with attorneys to discuss the viability of their claim, and ultimately choose to file a complaint.<sup>183</sup> *Rivera v. ManTech International Corp.* provides an example of the possible incentives employees might have to delay filing suit, and how the employee’s perception of the severity or immediacy of the sustained injury plays into their determination to file suit.<sup>184</sup> Rivera was informed that his employment contract was being terminated after he assisted in a government investigation into his workplace.<sup>185</sup> However, Rivera was also advised “that he was eligible for ‘ManTech’s Mobility Program to identify a suitable position to continue [his] employment with ManTech.’”<sup>186</sup> When Rivera ultimately chose to file suit thirteen months after receiving the notice of his employment contract being terminated, the court denied his argument that his claim was timely because he had an option to continue working for ManTech after the date of his employment contract termination.<sup>187</sup> But from a cost-benefit analysis standpoint, Rivera’s decision to postpone filing suit was reasonable. He and similarly situated plaintiffs should not be penalized for the delay.

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179. Usha R. Rodrigues, *Optimizing Whistleblowing*, 94 TEMP. L. REV. 255, 306 (2022).

180. *Id.*

181. Joseph A. Seiner, *Punitive Damages, Due Process, and Employment Discrimination*, 97 IOWA L. REV. 473, 486 (2012).

182. *See supra* Part IV.A.

183. *See supra* notes 115-16 and accompanying text.

184. *See* 902 S.E.2d 120, 123 (Va. Ct. App. 2024).

185. *Id.* at 121.

186. *Id.* (alteration in original).

187. *Id.* at 123-24.

*b. Limited Remedies Reduce the Deterrent Effect*

Statutes have little power or real-world effect absent meaningful enforcement mechanisms. Employers are aware that in many cases, a wrongfully injured employee cannot afford to pursue their suit or, due to the often minimal damages awards possible, obtain an attorney who will represent them on a contingency basis.<sup>188</sup> Providing compensatory and punitive damages to successful VWPL claimants would serve both to make injured employees “whole” and prevent employers from engaging in the unlawful and damaging behavior the VWPL aims to prevent.

Deterrence is thought to be a “critical function” of punitive relief.<sup>189</sup> Punitive damages “make an example of the offender and deter future misconduct of a similar nature.”<sup>190</sup> Criminal penalties are often unavailable or inadequate for civil wrongs, making punitive damages all the more necessary to punish the offender and foster both deterrence and accountability.<sup>191</sup>

Recognizing the utility of punitive damages as a deterrent mechanism, Delegate Karrie Delaney included the addition of double damages in her proposed amendment to the VWPL.<sup>192</sup> In a Virginia House Labor and Commerce Subcommittee hearing, Delegate Delaney defended including punitive damages as a remedy necessary to ensure that violations of the law result in penalties severe enough to discourage employers from taking prohibited “retaliatory actions against their employees.”<sup>193</sup> Further, as Virginia has a \$350,000 statutory cap on punitive damages,<sup>194</sup> including punitive damages provided by White House Bill 770 (HB770) would not be unduly burdensome on most employers.

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188. Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 468 (1992).

189. Seiner, *supra* note 181, at 485.

190. *Id.*

191. Vanessa Ruggles, *The Ineffectiveness of Capped Damages in Cases of Employment Discrimination: Solutions Toward Deterrence*, 6 CONN. PUB. INT. L.J. 143, 146-47 (2006).

192. See *infra* notes 204, 215 and accompanying text.

193. *Labor and Commerce Subcommittee #2 [HCA]*, *supra* note 160, at 14:15:59 ET (statement of Del. Karrie Delaney, Member, Va. House of Dels.), <https://viriniageneralassembly.gov/house/committees/commstream.html> [<https://perma.cc/ZJW5-M4NS>].

194. See VA. CODE ANN. § 8.01-38.1 (2024) (“In no event shall the total amount awarded for punitive damages exceed \$350,000.”).

#### V. HOUSE BILL 770'S AMENDMENTS TO THE VWPL WOULD IMPROVE ITS EFFICACY

As discussed in Parts III and IV of this Note, despite the promise that the VWPL would be a paradigm-shifting employment law, the relatively minimal statute of limitations period and available remedies inhibit its efficacy.<sup>195</sup> Virginia legislators seemed to agree with this sentiment when they opted to amend the VWPL to address both of these issues.<sup>196</sup> HB770 amendments to the VWPL would not increase its statute of limitations to three years or provide for full compensatory damages, as recommended in Part IV of this Note, this Part argues that HB770's amendments mark a significant step in the right direction and must be enacted into law for the VWPL to work as the Virginia Legislature intended.

##### A. *Proposed Amendments and Governor Youngkin's Veto*

In early January 2024, Delegate Delaney introduced HB770 in the Virginia House of Delegates.<sup>197</sup> As passed by the Virginia House, HB770 made three key alterations to the VWPL.<sup>198</sup> First, HB770 extended the VWPL's statute of limitations to enable plaintiffs to bring their claims "within one year of the employer's *final* prohibited retaliatory action."<sup>199</sup> This amendment "would render timely actions from many years earlier" if an employer retaliated against the employee multiple times, "as long as at least one of those actions occurred within the 12 months prior to filing suit."<sup>200</sup> Second, HB 770 would have changed the VWPL to allow for reinstatement, compensation, and "other remuneration" to be awarded by the court "*or any jury*," rather than damages

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195. See *supra* Parts III-IV.

196. See Meghan McIntyre, *Three Interesting Bills: Labor Trafficking, City Council Salary Caps and Employee Retaliation*, VA. MERCURY (Feb. 16, 2024), <https://viriniamercury.com/2024/02/16/three-interesting-bills-labor-trafficking-city-council-salary-caps-and-employee-retaliation/> [https://perma.cc/8QWS-D9KK].

197. H.B. 770, 2024 Gen. Assemb., Reg. Sess. (Va. H. 2024).

198. See *id.*

199. *Id.*

200. McIntosh et al., *supra* note 11.



determinations being at the sole discretion of the court.<sup>201</sup> Third, HB770, as written when it passed in the Virginia House of Delegates, would have imposed *treble damages* for violations of the VWPL “if such violation[s] [were] willful.”<sup>202</sup>

The Virginia House of Delegates voted to pass HB770 in early February 2024, and the Virginia Senate passed a nearly identical bill three weeks later.<sup>203</sup> The version of HB770 passed by the Virginia Senate was nearly identical to the bill passed by the House of Delegates; however, the Senate’s version changed the punitive damages award to allow only for double, rather than treble, damages.<sup>204</sup>

In April 2024, Virginia Governor Glenn Youngkin vetoed HB770.<sup>205</sup> In his brief explanation, Governor Youngkin took issue with the change to the VWPL that would enable juries to order the reinstatement of an employee upon the finding that their employer violated the VWPL.<sup>206</sup> “Juries are,” Governor Youngkin claimed, “appropriately defined as finders of fact that deliver verdicts, not remedies.”<sup>207</sup> Despite not explicitly disagreeing with HB770’s amendments to the VWPL’s statute of limitations and damages provisions, Governor Youngkin chose to veto the bill entirely rather than recommending a revision of HB770 to remove the jury-empowerment provision that he opposed.<sup>208</sup>

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201. H.B. 770, 2024 Gen. Assemb., Reg. Sess. (Va. 2024).

202. *Id.*

203. *HB 770 Retaliatory Action Against Employee Prohibited; Remedies Available*, VA’S LEGIS. INFO. SYS., <https://legacylis.virginia.gov/cgi-bin/legp604.exe?241+sum+HB770> [<https://perma.cc/79XZ-V86T>].

204. H.B. 770, 2024 Gen. Assemb., Reg. Sess. (Va. 2024).

205. VA’S LEGIS. INFO. SYS., *supra* note 203.

206. *HB 770 Governor’s Veto*, VA’S LEGIS. INFO. SYS., <https://legacylis.virginia.gov/cgi-bin/legp604.exe?241+amd+HB770AG> [<https://perma.cc/M9NV-V9FG>].

207. *Id.*

208. See VA’S LEGIS. INFO. SYS., *supra* note 203; see also VA. CONST. art. V, § 6(b)(iii) (“The Governor may recommend one or more specific and severable amendments to a bill by returning it with his recommendation to the house in which it originated.... If both houses agree to the Governor’s entire recommendation, the bill, as amended, shall become law.”).

*B. Amendments Would Enable the VWPL to Work as  
Virginia Legislators Intended*

The Virginia Delegate who introduced HB770, Karrie Delaney, was the same Delegate who sponsored the VWPL in 2020.<sup>209</sup> In a House Labor and Commerce Subcommittee hearing in late January 2024, Delegate Delaney explained that the VWPL, as written, lacks several key elements to deter retaliative violations adequately.<sup>210</sup>

While discussing the intended change to the VWPL's statute of limitations, Delegate Delaney noted that she and her colleagues had "discovered that courts are currently interpreting that the one-year statute of limitations is to start at the *occurrence* of a threat of action and not the action itself."<sup>211</sup> Adding the word "final" to the statute would ensure that a cause of action accrues, and thus the statute of limitations begins to run, "at the actual occurrence of the illegal action," so that otherwise valid claims are not barred due to confusion as to when the "retaliatory act" has occurred.<sup>212</sup> In particular, as Delegate Delaney noted, in a situation in which an employer makes a *threat* of retaliation against an employee but does not take any significant retaliatory action against them until months later, HB770's amendment would start the one-year statutory period from the date that the retaliatory action was taken against them.<sup>213</sup> Doing so would eliminate the possibility of "run[ning] out the clock" simply because the employee had not yet experienced the actual retaliatory act until it was too late.<sup>214</sup>

According to Delegate Delaney, the component of HB770 that would allow for reinstatement, compensation, and other remuneration to be awarded by the court *or* the jury is similarly necessary because "courts are finding that juries are not legally

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209. See Ana Popovich, *Virginia's New Whistleblower Law Increases Protections for Whistleblowers*, WHISTLEBLOWER NETWORK NEWS (June 12, 2020), <https://whistleblowersblog.org/whistleblower-news/virginias-new-whistleblower-law-increases-protections-for-whistleblowers/> [https://perma.cc/QHD9-22PN].

210. *Labor and Commerce Subcommittee #2 [HCA]*, *supra* note 160, at 14:15:56 ET (statement of Del. Karrie Delaney, Member, Va. House of Delegates), <https://virginiageneralassembly.gov/house/committees/commstream.html> [https://perma.cc/2JW5-M4NS].

211. *Id.* at 14:14:56 ET (emphasis added).

212. *Id.* at 14:15:06 ET, 14:15:10 ET.

213. *Id.* at 14:17:10 ET.

214. *Id.* at 14:17:14 ET.

qualified to hear these cases, which is out of step with the way that Virginia currently handles other similar matters.”<sup>215</sup> Delegate Delaney also discussed the addition of a punitive damages provision to the VWPL, arguing that it would “give the current statute teeth and deter employers from making willful violations of the law.”<sup>216</sup>

In her closing statements to the Committee, Delegate Delaney emphasized that HB770 would serve only to make “technical amendments to the existing law” to make the VWPL work as the Virginia legislature intended when it initially enacted the statute.<sup>217</sup> Lawmakers commonly amend legislation to remediate unintended consequences of the original language after witnessing how courts interpret and apply certain statutory language. HB770 would do precisely that.

*C. Amendments Would Not Encourage Litigious Employers  
or Burden Lawful Employers*

Opponents of similar provisions argue that significant statutory limitations periods and prospective financial rewards unnecessarily prolong employer liability exposure and ultimately lead to an increase in filings of baseless whistleblower claims.<sup>218</sup> While these concerns may initially appear to have merit, they are mainly unfounded here when accounting for the only marginal increase to the VWPL limitations period and damages provision proposed by HB770 and the VWPL’s current good faith and specificity requirements.

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215. *Id.* at 14:15:36 ET.

216. *Id.* at 14:15:46 ET.

217. *Id.* at 14:19:49 ET, 14:19:53 ET (“There was, I think, intent that the General Assembly had when I passed my original bill several years ago, and what we’re finding is practicing attorneys who are now trying to apply the law that I passed several years ago are just identifying how the courts may be interpreting, or misinterpreting, or maybe not realizing that it doesn’t have quite the power that perhaps we’d hoped it had.”).

218. See Rutherglen, *supra* note 118, at 11 (“[L]ong limitation periods raise the specter of a long tail of exposure to liability.”); see also EQS Editorial Team, *A Closer Look at the Ethics Behind Whistleblower Rewards*, EQS INTEGRITY LINE (Nov. 7, 2024), <https://www.integrityline.com/expertise/blog/ethics-behind-whistleblower-rewards/> [<https://perma.cc/2AMT-TJMK>] (“Many [critics] say [financial rewards] could lead to spurious tips (although there is no evidence that this is true—in fact, many studies including Transparency International and the Stockholm Institute of Transition Economics have found the opposite).”).

Even with HB770's recommended addition of punitive damages to the VWPL, successful VWPL claimants would not receive large award figures unless they were previously making a significant salary<sup>219</sup> and, as previously noted, they would never receive more than \$350,000 in punitive damages.<sup>220</sup> Additionally, VWPL plaintiffs risk being ostracized in their industry—as they must pursue a public lawsuit against their former employers for the mere prospect of obtaining the limited available remedies—further reducing the likelihood of employees filing frivolous claims. Further, to succeed on a claim for double damages, a VWPL plaintiff would have the burden of proving that the employer's VWPL violation was “willful,” which is not an easy standard to meet.<sup>221</sup>

The VWPL's pleading requirements also assist in deterring baseless claims and mitigating employers' exposure to liability. The VWPL explicitly requires that reports of VWPL violations be made “in good faith.”<sup>222</sup> The Court of Appeals for the Fourth Circuit relied on this requirement in upholding the circuit court's dismissal of the plaintiff's claim in *Cook v. Roanoke Electric Steel Corp.*<sup>223</sup> There, Cook mischaracterized the working conditions his supervisor imposed on him, implying that his supervisor was breaking the law.<sup>224</sup> The court held that the defendant employer had just cause to fire Cook, rejecting his argument that he had made the report in good faith.<sup>225</sup> As a consequence of this finding, the court required Cook to pay the costs his employer incurred as a result of the litigation.<sup>226</sup>

Virginia courts have also dismissed several VWPL claims for failing to meet the specificity requirements necessary for pleadings. In *Chenault v. RBI Corp.*, the plaintiff was fired after voicing concerns about his employer's “cavalier attitude” toward COVID-19

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219. See VA. CODE ANN. § 40.1-27.3(C) (2021).

220. See *supra* note 194 and accompanying text.

221. H.B. 770, 2024 Gen. Assemb., Reg. Sess. (Va. 2024).

222. VA. CODE ANN. § 40.1-27.3(A)(1) (2021).

223. See No. 23-1511, 2024 U.S. App. LEXIS 32217, at \*4 (4th Cir. Dec. 19, 2024).

224. *Id.* at \*3.

225. *Id.* at \*2-3 (“An employer may defend against an action brought under [the VWPL] by showing that an employee made a report ‘knowing that [it was] false or that [it was] in reckless disregard of the truth.’” (alterations in original) (quoting VA. CODE ANN. § 40.1-27.8(B)(2))).

226. *Cook v. Roanoke Elec. Steel Corp.*, No. 7:22-cv-00040, 2023 U.S. Dist. LEXIS 99949, at \*7 (W.D. Va. June 8, 2023).

and failure to comply with health and safety protocols.<sup>227</sup> There, the Hanover County Circuit Court found that the plaintiff failed to state sufficient allegations to survive the defendant's demurrer.<sup>228</sup> The court in *Markley v. Liberty University* reached a similar conclusion.<sup>229</sup> There, despite alleging sufficient facts about multiple VWPL violations, "including fraud, financial accounting irregularities, [and] acts to thwart Title IX of the Higher Education Act," the court held that the plaintiff failed to allege specifics regarding when he made his reports, what information his reports contained, and to whom he made his reports.<sup>230</sup>

Concerns that HB770's increased statute of limitations period would subject employers to endless litigation can also be easily dismissed. HB770's amendment would restart the one-year limitations period every time an employer retaliated against an employee for engaging in statutorily protected activity.<sup>231</sup> Thus, an employer could prevent liability "unless that employer is continuously retaliating against the former employee."<sup>232</sup> Further, employers who choose to retaliate against their employees repeatedly "can predict their liability because it will only extend if the employer continues to retaliate."<sup>233</sup>

HB770's amendments are in keeping with other Virginia statutes and case law and, in fact, are less burdensome to employers than are many best practice recommendations for model whistleblower statutes.<sup>234</sup> The amendments would serve only to make the VWPL more effective in carrying out the Virginia legislature's original intent.

## CONCLUSION

The VWPL's passage into law marked a tremendous achievement for whistleblower and employment rights activists, and this Note does not intend to undervalue this immense accomplishment

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227. 108 Va. Cir. 529, 530-31 (2021).

228. *Id.* at 531.

229. 111 Va. Cir. 356, 366 (2023).

230. *Id.* at 357-59.

231. H.B. 770, 2024 Gen. Assemb., Reg. Sess. (Va. 2024).

232. Deibler, *supra* note 15, at 51.

233. *Id.*

234. See *supra* notes 121-25, 165-71 and accompanying text.

by the Virginia legislature. However, revisions to the VWPL's statute of limitations and damages provisions are crucially needed, as Delegate Delaney asserts, to "give the current statute teeth and deter employers from making willful violations of the law."<sup>235</sup>

With the immense benefits to the government, businesses, and the general public provided by whistleblower claimants,<sup>236</sup> is there not a reciprocal responsibility to ensure that those whistleblowers are adequately compensated for the injuries they incur due to pursuing their claims? Moreover, how well are employees protected from illegal retaliatory actions if constraining and confusing statutes of limitations bar claims before a judge or jury ever has the opportunity to decide them based on merit? The United States has a long tradition of valuing and protecting whistleblowers, and the Commonwealth of Virginia has clearly embraced these goals. The Virginia legislature must pass HB770 if these goals are to be brought to fruition.

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235. *Labor and Commerce Subcommittee #2 [HCA]*, *supra* note 160, at 14:15:46 ET (statement of Del. Karrie Delaney, Member, Va. House of Delegates), <https://virginiageneralassembly.gov/house/committees/commstream.html> [<https://perma.cc/2JW5-M4NS>].

236. *See supra* Part 1.A.

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