

1 HOUSE BILL NO. 358

2 INTRODUCED BY B. MERCER, J. ESP

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING LAWS RELATED TO PRIVACY AND THE
5 PUBLIC RIGHT TO KNOW; PROVIDING DISCLOSURE REQUIREMENTS FOR THE COMPROMISE AND
6 SETTLEMENT OF CLAIMS AGAINST THE STATE; REQUIRING QUARTERLY REPORTS ON DEMANDS TO
7 RESOLVE CLAIMS; PROVIDING DEFINITIONS; AMENDING SECTION 2-9-303, MCA; AND PROVIDING AN
8 EFFECTIVE DATE."

9
10 WHEREAS, there is a strong public policy supporting the public's right to know the precise reason for
11 the expenditure of public money to settle claims against the government, as discussed in Citizens to Recall
12 Whitlock v. Whitlock, 255 Mont. 517, 524, 844 P.2d 74, 78 (1992); and

13 WHEREAS, the concept of accountability of government includes accountability of how taxpayer dollars
14 are spent; and

15 WHEREAS, a ~~recent~~ 2020 performance audit performed by the Legislative Audit Division, State
16 Employee Settlements: Trends, Transparency, and Administration, concluded that the state used nondisclosure
17 agreements in approximately two-thirds of its monetary settlements with employees; and

18 WHEREAS, anything that prohibits disclosure of how taxpayer dollars are spent inhibits the public's
19 right to know under Article II, section 9, of the Montana Constitution and should rarely be precluded by the
20 protections in the right to privacy contained in Article II, section 10, of the Montana Constitution; and

21 WHEREAS, there is no basis to protect disclosure of details of settlements given that parties who sue
22 the state in court are typically unable to conceal their identities and allegations from public disclosure; and

23 WHEREAS, there is no public policy basis to conceal facts about a claim against the state when a party
24 settles a claim given that the same treatment is not afforded to a party who chooses to litigate a claim against
25 the state; and

26 WHEREAS, the Legislature's intent is to create sunshine and transparency when public money is used
27 to settle claims based on the acts or omissions of state employees and state actors.

28

1 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

2

3 NEW SECTION. Section 1. Short title. [Sections 1 through 4] may be cited as the "State's
4 Settlement of Claims Sunshine and Transparency Act".

5

6 NEW SECTION. Section 2. Definitions. As used in [sections 1 through 6 4], the following definitions
7 apply:

8 (1) (a) "Claim" means any claim against a ~~government~~ GOVERNMENTAL entity for \$10,000 OR MORE IN
9 monetary COMPENSATION damages, including but not limited to employment-related claims and tort claims.

10 (b) The term does not include benefits disputes under Title 39, chapter 51 or 71.

11 (2) "Department" means the department of administration provided for in 2-15-1001.

12 (3) "Employee" has the meaning provided in 2-9-101. The term includes a permanent employee,
13 short-term worker, student intern, seasonal employee, personal staff, and temporary employee as those terms
14 are defined in 2-18-101.

15 (4) "MONETARY COMPENSATION" INCLUDES MONEY AND ANYTHING OF FINANCIAL VALUE THAT IS USED BY A
16 GOVERNMENTAL ENTITY TO RESOLVE A CLAIM, INCLUDING BUT NOT LIMITED TO PAID ADMINISTRATIVE LEAVE AND
17 REINSTATEMENT OR REHIRING OF A TERMINATED EMPLOYEE.

18 (5) "Nondisclosure agreement" means any kind of contract or agreement requiring the parties to
19 maintain confidentiality of any information related to a settlement with the state, or compromise or settlement
20 agreements with the state.

21 (6) "Settlement" means a binding legal agreement between the state or its agencies, departments, or
22 other state entities and a party who accepts monetary compensation in return for releasing claims against the
23 state or its entities. ~~Monetary compensation includes anything of financial value, including but not limited to~~
24 ~~reinstatement or rehiring of a terminated state employee and paid administrative leave.~~

25 (7) "State" and "governmental entity" means the state of Montana or any office, department, agency,
26 authority, commission, board, institution, hospital, college, OR university, ~~or other instrumentality~~ of the state.

27

28 NEW SECTION. Section 3. Requirements for compromise and settlement of claims against

- 1 **state.** (1) The department shall create, monitor, maintain, and update, on an ongoing basis, a website that is
 2 available to the public and publishes the following information:
- 3 (a) the names of the parties settling claims with the state unless the right to individual privacy
 4 outweighs the public right to know;
- 5 (b) the date of each compromise or settlement of a claim against the state that results in a monetary
 6 ~~settlement~~ COMPENSATION;
- 7 (c) the identity of the entity of the state where the claim originated;
- 8 (d) the ~~dollar amount of the~~ OF MONETARY COMPENSATION CONTAINED IN THE compromise or settlement;
- 9 AND
- 10 (e) a BRIEF description of the ALLEGED conduct, acts, or omissions by one or more employees, officers,
 11 or agents of the state AT ISSUE ~~that caused the state to find it was in its best interests to settle the case; and~~
- 12 (f) ~~the source of funds utilized to pay the settlement and the legal basis for utilizing the funds for~~
 13 ~~settlement.~~
- 14 (2) If a member of the public requests a paper copy of information on the website or a paper copy of
 15 the quarterly report as provided in [section 4], the department shall charge a fee for paper copies that is
 16 commensurate with the cost of printing.
- 17 (3) All information regarding the compromise or settlement of a claim involving a minor is exempted
 18 from disclosure UNDER SUBSECTION (1) and is designated confidential information as defined in 2-6-1002.
- 19 (4) The information identified in subsection (1) must be published within 60 days of the date the
 20 compromise or settlement occurred.
- 21 (5) (A) Nondisclosure agreements are disfavored in compromise or settlement agreements when the
 22 state is a party and may be utilized only in the rare instance in which the right to individual privacy outweighs
 23 the public right to know.
- 24 (B) Nondisclosure agreements may not exempt the state from its reporting obligations in subsections
 25 (1)(b) through (1)(f) ~~(1)(E)~~, EXCEPT IN THE RARE INSTANCE IN WHICH:
- 26 (I) DISCLOSURE OF INFORMATION REQUIRED TO BE REPORTED BY SUBSECTION (1)(C) OR (1)(E) WOULD LEAD
 27 TO A VIOLATION OF AN INDIVIDUAL'S RIGHT TO PRIVACY; AND
- 28 (II) THE RIGHT TO PRIVACY ARISING AS A RESULT OF THE CLAIM OUTWEIGHS THE PUBLIC RIGHT TO KNOW.

1 (C) NO PRIVACY INTEREST MAY OVERCOME THE PUBLIC RIGHT TO KNOW WITH RESPECT TO THE DUTY TO
 2 REPORT THE INFORMATION IN SUBSECTIONS (1)(B) AND (1)(D).

3 (6) All money paid by the state pursuant to a settlement or compromise must be consistently coded in
 4 the statewide accounting, budgeting, and human resource system so that when the code or codes are reviewed
 5 a complete list of all settled claims is provided. The department shall set the standards for the coding.

6 (7) AMONG THE RECORDS TO BE MAINTAINED PURSUANT TO ~~2-9-303(1)(B)~~ WHEN MONETARY COMPENSATION
 7 IS UTILIZED TO SETTLE OR COMPROMISE CLAIMS ARE DOCUMENTS ~~FROM THE STATE~~ SIGNED BY AN APPROPRIATE
 8 OFFICIAL, INCLUDING:

9 (A) ~~CERTIFYING~~ A STATEMENT THAT NO CONDITION OR LIMITATION PRECLUDES THE USE OF THE FUNDS
 10 UTILIZED TO PAY THE SETTLEMENT OR OTHER MONETARY COMPENSATION OR DAMAGES;

11 (B) ~~DESCRIBING~~ A DETAILED DESCRIPTION OF THE ALLEGED CONDUCT, ACTS, OR OMISSIONS BY ONE OR MORE
 12 EMPLOYEES, OFFICERS, OR AGENTS OF THE STATE ~~AND OTHER RELEVANT FACTORS THAT CAUSED THE STATE TO FIND IT~~
 13 ~~WAS IN THE STATE'S BEST INTERESTS TO SETTLE, AND THE STATE'S DEFENSES, INCLUDING LEGAL AND FACTUAL~~
 14 ~~DEFENSES AT ISSUE IN THE CASE; AND~~

15 (C) THE SETTLEMENT TERMS.

16 (8) WHEN A GOVERNMENTAL ENTITY PROVIDES MONETARY COMPENSATION OTHER THAN MONEY TO RESOLVE
 17 A CLAIM, THE GOVERNMENTAL ENTITY MUST EVALUATE THE VALUE CONVEYED PURSUANT TO THE SETTLEMENT OR
 18 COMPROMISE TO DETERMINE WHETHER IT MEETS THE \$10,000 THRESHOLD REQUIRING DISCLOSURE UNDER THIS
 19 SECTION.

20
 21 NEW SECTION. Section 4. Quarterly report on demands to resolve claims. (1) Each agency and
 22 administratively attached GOVERNMENTAL entity shall submit a quarterly report to the legislative fiscal division
 23 capturing:

24 (1) ~~(A) all initial demands, EXCLUSIVE OF INITIAL DEMANDS MADE IN MEDIATIONS OR SETTLEMENT~~
 25 ~~CONFERENCES IN WHICH COURT RULES OR ORDERS PRECLUDE DISCLOSURE OF DEMANDS, submitted to the state to~~
 26 ~~resolve claims for money MONETARY COMPENSATION, including demands made to any state agency or~~
 27 ~~department; and~~

28 (2) ~~(B) EXCEPT AS PROVIDED IN SUBSECTION (2), all civil and administrative complaints filed WITH A COURT~~

1 ~~OR AGENCY~~ about which the state is aware HAS KNOWLEDGE or for which service has been effectuated on the
 2 state and the identity of the court or entity of the state where the complaint is filed DISCLOSING ALL CIVIL CLAIMS
 3 OR COMPLAINTS, INCLUDING THE IDENTITY OF THE COURT OR ENTITY OF THE STATE WHERE THE COMPLAINT IS FILED,
 4 RECEIVED BY OR FOR WHICH SERVICE OF PROCESS HAS BEEN PERFECTED WITH INITIAL DEMANDS SEEKING \$10,000 OR
 5 MORE IN MONETARY COMPENSATION, EXCLUSIVE OF INITIAL DEMANDS MADE IN MEDIATIONS OR SETTLEMENT
 6 CONFERENCES IN WHICH COURT RULES OR ORDERS PRECLUDE DISCLOSURE OF DEMANDS.

7 (2) THE PROVISIONS OF ~~SUBSECTION (1)(B)~~ THIS SECTION DO NOT APPLY TO AN EMPLOYEE OR OFFICIAL IN
 8 THE JUDICIAL BRANCH.

9 (3) CLAIMS FOR INJUNCTIVE RELIEF NEED NOT BE REPORTED AS CLAIMS SEEKING MONETARY COMPENSATION.

10 (4) DEMANDS DEEMED TO BE FRIVOLOUS BY GOVERNMENTAL ENTITIES NEED NOT BE REPORTED UNDER THIS
 11 SECTION, AND JUDICIAL REVIEW IS NOT AVAILABLE TO CHALLENGE ANY SUCH DETERMINATION MADE BY A
 12 GOVERNMENTAL ENTITY IF A GOVERNMENTAL ENTITY DOES NOT DISCLOSE A CLAIM OR COMPLAINT IN A QUARTERLY
 13 REPORT BECAUSE THE CLAIM IS DEEMED TO BE FRIVOLOUS, THE GOVERNMENTAL ENTITY SHALL DISCLOSE THE NUMBER
 14 OF CLAIMS OR COMPLAINTS NOT DISCLOSED UNDER THE EXEMPTION IN THIS SUBSECTION.

15

16 **Section 5.** Section 2-9-303, MCA, is amended to read:

17 **"2-9-303. Compromise or settlement of claim against state.** (1) (a) The department of
 18 administration may compromise and settle any claim allowed by parts 1 through 3 of this chapter, subject to the
 19 terms of insurance, if any. A settlement from the self-insurance reserve fund or deductible reserve fund
 20 exceeding \$10,000 must be approved by the district court of the first judicial district except when suit has been
 21 filed in another judicial district, in which case the presiding judge shall approve the compromise settlement.

22 (b) All records related to a compromise or settlement of a claim against the state must be retained for
 23 a period of 20 years.

24 (2) (a) All terms, conditions, and details of the governmental portion of a compromise or settlement
 25 agreement entered into or approved pursuant to subsection (1) are public records available for public inspection
 26 unless a right of individual privacy clearly exceeds the merits of public disclosure.

27 (b) Unless the state or its entities pay nothing to resolve a claim, the compromise or settlement
 28 agreement must include a description of the alleged acts, omissions, or other basis of liability ~~that caused the~~

1 ~~state to enter into the compromise or settlement agreement as necessary and beneficial~~ AT ISSUE.

2 (3) An employee who is a party to a compromise or settlement entered into or approved pursuant to
3 subsection (1) may waive the right of individual privacy and allow the state to release all records or details of
4 the compromise or settlement, such as personnel records, that pertain to the employee personally and that
5 would otherwise be protected by the right of individual privacy subject to the merits of public disclosure."
6

7 NEW SECTION. Section 6. Use of existing resources. It is the intent of the legislature that the
8 executive branch agencies and entities implement the provisions of [this act] within existing resources.
9

10 NEW SECTION. Section 7. Codification instruction. [Sections 1 through 4] are intended to be
11 codified as an integral part of Title 2, chapter 9 6, PART 10, and the provisions of Title 2, chapter 9 6, PART 10,
12 apply to [sections 1 through 4].
13

14 NEW SECTION. Section 8. Severability. If a part of [this act] is invalid, all valid parts that are
15 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,
16 the part remains in effect in all valid applications that are severable from the invalid applications.
17

18 NEW SECTION. Section 9. Effective date. [This act] is effective July 1, 2021.
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