

VIRGINIA ACTS OF THE ASSEMBLY, 2011

CHAPTER 651

An Act to amend and reenact §§ 8.01-216.2 and 8.01-216.8 of the Code of Virginia, relating to the Virginia Fraud Against Taxpayers Act; waiver of sovereign immunity.

[H 1399]

Approved March 26, 2011

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-216.2 and 8.01-216.8 of the Code of Virginia are amended and reenacted as follows:

§ 8.01-216.2. Definitions.

As used in this article, unless the context requires otherwise:

"Attorney General" means the Attorney General of Virginia, the Chief Deputy, other deputies, counsels or assistant attorneys general employed by the Office of the Attorney General and designated by the Attorney General to act pursuant to this article.

"Claim" means any request or demand, whether under a contract or otherwise, for money or property that is made to a contractor, grantee, or other recipient if the Commonwealth provides any portion of the money or property that is requested or demanded, or if the Commonwealth will reimburse such contractor, grantee, or other recipient for any portion of the money or property that is requested or demanded.

"Commonwealth" means the Commonwealth of Virginia, any agency of state government, and any political subdivision of the Commonwealth.

"Documentary material" means the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery.

"Employee" includes an employee or officer of the Commonwealth.

"Employer" includes the Commonwealth.

"Investigation" means any inquiry conducted by an investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of this article.

"Person" includes any natural person, corporation, firm, association, organization, partnership, limited liability company, business or trust.

"Product of discovery" means (i) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature; (ii) any digest, analysis, selection, compilation, or derivation of any item listed in clause (i); and (iii) any index or other manner of access to any item listed in clause (i).

§ 8.01-216.8. Certain actions barred; relief from employment discrimination; waiver of sovereign immunity.

No court shall have jurisdiction over an action brought under § 8.01-216.5 based on information discovered by a present or former employee of the Commonwealth during the course of his employment unless that employee first, in good faith, exhausted existing internal procedures for reporting and seeking recovery of the falsely claimed sums through official channels and unless the Commonwealth failed to act on the information provided within a reasonable period of time.

No court shall have jurisdiction over any action brought under this article by an inmate incarcerated within a state or local correctional facility as defined in § 53.1-1.

No court shall have jurisdiction over an action brought under this article against any department, authority, board, bureau, commission, or agency of the Commonwealth, any political subdivision of the Commonwealth, a member of the General Assembly, a member of the judiciary, or an exempt official if the action is based on evidence or information known to the Commonwealth when the action was brought. For purposes of this section, "exempt official" means the Governor, Lieutenant Governor, Attorney General and the directors or members of any department, authority, board, bureau, commission or agency of the Commonwealth or any political subdivision of the Commonwealth.

In no event may a person bring an action under this article that is based upon allegations or transactions that are the subject of a civil suit or an administrative proceeding in which the Commonwealth is already a party.

No court shall have jurisdiction over an action under this article based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a legislative, administrative, or Auditor of Public Accounts' report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. For purposes of this section, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Commonwealth before filing an action under this article that is based on the information.

~~The~~ Except as otherwise provided in this section, the Commonwealth shall not be liable for expenses a person incurs in bringing an action under this article.

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his employer because he has opposed any practice referenced in § 8.01-216.3 or because he has initiated, testified, assisted, or participated in any manner in any investigation, action or hearing under this article, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. *Any relief awarded to an employee under this section shall be reduced by any amount awarded to the employee through a state or local grievance process.* An employee may bring an action in a court of competent jurisdiction for the relief provided in this section. *This paragraph shall constitute a waiver of sovereign immunity and creates a cause of action by an employee against the Commonwealth if the Commonwealth is the employer responsible for the adverse employment action that would entitle the employee to the relief set forth in this paragraph.*

CHAPTER 676

An Act to amend and reenact §§ 8.01-216.2, 8.01-216.3, 8.01-216.8, 8.01-216.9, 8.01-216.10, and 8.01-216.17 of the Code of Virginia, relating to the Virginia Fraud Against Taxpayers Act.

[S 1262]

Approved March 26, 2011

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-216.2, 8.01-216.3, 8.01-216.8, 8.01-216.9, 8.01-216.10, and 8.01-216.17 of the Code of Virginia are amended and reenacted as follows:

§ 8.01-216.2. Definitions.

As used in this article, unless the context requires otherwise:

"Attorney General" means the Attorney General of Virginia, the Chief Deputy, other deputies, counsels or assistant attorneys general employed by the Office of the Attorney General and designated by the Attorney General to act pursuant to this article.

"Claim" means any request or demand, whether under a contract or otherwise, for money or property ~~that is made to a contractor, grantee, or other recipient if the Commonwealth provides any portion of the money or property that is requested or demanded, or if the~~

~~of the money or property that is requested or demanded~~, regardless of whether the Commonwealth has title to the money or property, that (i) is presented to an officer, employee, or agent of the Commonwealth or (ii) is made to a contractor, grantee, or other recipient (a) if the money or property is to be spent or used on the Commonwealth's behalf or to advance a governmental program or interest and (b) if the Commonwealth provides or has provided any portion of the money or property requested or demanded or will reimburse such contractor, grantee, or other recipient for any portion of the money or property that is requested or demanded. For purposes of this article, "claim" does not include requests or demands for money or property that the Commonwealth has paid to an individual as compensation for employment with the Commonwealth or as income subsidy with no restriction on that individual's use of the money or property.

"Commonwealth" means the Commonwealth of Virginia, any agency of state government, and any political subdivision of the Commonwealth.

"Documentary material" means the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery.

"Investigation" means any inquiry conducted by an investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of this article.

"Material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

"Obligation" means an established duty, whether or not fixed, arising from (i) an express or implied contractual, grantor-grantee, or licensor-licensee relationship; (ii) a fee-based or similar relationship; (iii) a statute or regulation; or (iv) the retention of any overpayment.

"Official use" means any use that is consistent with the law, regulations, and policies of the Commonwealth, including use in connection with (i) internal memoranda and reports of the Office of the Attorney General; (ii) communications between the Office of the Attorney General and a federal, state, or local government agency, or a contractor of a federal, state, or local government agency, undertaken in furtherance of an Office of the Attorney General investigation or prosecution of a case; (iii) interviews of any qui tam relator or other witness; (iv) oral examinations; (v) depositions; (vi) the preparation for and response to civil discovery requests; (vii) the introduction into the record of a case or proceeding; (viii) applications, motions, memoranda, and briefs submitted to a court or other tribunal; and (ix) communications with government investigators, auditors, consultants, experts, the counsel of other parties, arbitrators, and mediators, concerning an investigation, case, or proceeding.

"Person" includes any natural person, corporation, firm, association, organization, partnership, limited liability company, business or trust.

"Product of discovery" means (i) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature; (ii) any digest, analysis, selection, compilation, or derivation of any item listed in clause (i); and (iii) any index or other manner of access to any item listed in clause (i).

§ 8.01-216.3. False claims; civil penalty.

A. Any person who:

1. Knowingly presents, or causes to be presented, ~~to an officer or employee of the Commonwealth~~ a false or fraudulent claim for payment or approval;
2. Knowingly makes, uses, or causes to be made or used, a false record or statement *material to get a false or fraudulent claim paid or approved by the Commonwealth;*
3. ~~Conspires to defraud the Commonwealth by getting a false or fraudulent claim allowed or paid~~ *commit a violation of subdivision 1, 2, 4, 5, 6, or 7;*
4. Has possession, custody, or control of property or money used, or to be used, by the Commonwealth and, ~~intending to defraud the Commonwealth or willfully to conceal the property,~~ *knowingly* delivers, or causes to be delivered, ~~less property than the amount for which the person receives a certificate or receipt~~ *than all such money or property;*
5. ~~Authorizes~~ *Is authorized* to make or deliver a document certifying receipt of property used, or to be used, by the Commonwealth and, intending to defraud the Commonwealth, makes or delivers the receipt without completely knowing that the information on the receipt is true;
6. Knowingly buys or receives as a pledge of an obligation or debt, public property from an officer or employee of the Commonwealth who lawfully may not sell or pledge the property; or
7. Knowingly makes, uses, or causes to be made or used, a false record or statement *material to conceal, avoid, or decrease* an obligation to pay or transmit money or property to the Commonwealth *or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Commonwealth;*

shall be liable to the Commonwealth for a civil penalty of not less than \$5,500 and not more than \$11,000, plus three times the amount of damages sustained by the Commonwealth.

A person violating this section shall be liable to the Commonwealth for reasonable attorney fees and costs of a civil action brought to recover any such penalties or damages. All such fees and costs shall be paid to the Attorney General's Office by the defendant and shall not be included in any damages or civil penalties recovered in a civil action based on a violation of this section.

B. If the court finds that (i) the person committing the violation of this section furnished officials of the Commonwealth responsible for investigating false claims violations with all information known to the person about the violation within 30 days after the date on which the defendant first obtained the information; (ii) such person fully cooperated with any Commonwealth investigation of such violation; (iii) at the time such person furnished the Commonwealth with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to such violation; and (iv) the person did not have actual knowledge of the existence of an investigation into such violation, the court may assess not less than two times the amount of damages that the Commonwealth sustains because of the act of ~~the~~ *that* person. A person violating this section shall also be liable to the Commonwealth for the costs of a civil action brought to recover any such penalty or damages.

C. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information, (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information; and *require* no proof of specific intent to defraud ~~is required~~.

D. This section shall not apply to claims, records or statements relating to state or local taxes.

§ 8.01-216.8. Certain actions barred; relief from employment discrimination.

No court shall have jurisdiction over an action brought under § 8.01-216.5 based on information discovered by a present or former employee of the Commonwealth during the course of his employment unless that employee first, in good faith, exhausted existing internal procedures for reporting and seeking recovery of the falsely claimed sums through official channels and unless the Commonwealth failed to act on the information provided within a reasonable period of time.

No court shall have jurisdiction over any action brought under this article by an inmate incarcerated within a state or local correctional facility as defined in § [53.1-1](#).

No court shall have jurisdiction over an action brought under this article against any department, authority, board, bureau, commission, or agency of the Commonwealth, any political subdivision of the Commonwealth, a member of the General Assembly, a member of the judiciary, or an exempt official if the action is based on evidence or information known to the Commonwealth when the action was brought. For purposes of this section, "exempt official" means the Governor, Lieutenant Governor, Attorney

General and the directors or members of any department, authority, board, bureau, commission or agency of the Commonwealth or any political subdivision of the Commonwealth.

In no event may a person bring an action under this article that is based upon allegations or transactions that are the subject of a civil suit or an administrative proceeding in which the Commonwealth is already a party.

~~No~~ *The court shall have jurisdiction over* ~~dismiss~~ *an action or claim under this article based upon the public disclosure of § 8.01-216.5 unless opposed by the Commonwealth if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed in a criminal, civil or administrative hearing in which the Commonwealth or its agent is a party, in a legislative, administrative, or Auditor of Public Accounts' report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. For purposes of this section, "original source" means an individual (i) who has direct and independent knowledge of either prior to a public disclosure has voluntarily disclosed to the Commonwealth the information on which the allegations or transactions in a claim are based and or (ii) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions and who has voluntarily provided the information to the Commonwealth before filing an action under this article that is based on the information.*

The Commonwealth shall not be liable for expenses a person incurs in bringing an action under this article.

~~Any employee who, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his employer because he has opposed any practice referenced in § 8.01-216.3 or because he has initiated, testified, assisted, or participated in any manner in any investigation, action or hearing under this article, shall be entitled to all relief necessary to make the employee whole. Such relief of lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor, or agent or associated others in furtherance of others' efforts to stop one or more violations of this article. Relief shall include reinstatement with the same seniority status such that employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' attorney fees. An employee may bring an action under this section may be brought in a court of competent jurisdiction for the relief provided in this section.~~

§ 8.01-216.9. Procedure; statute of limitations.

A subpoena requiring the attendance of a witness at a trial or hearing conducted under this article may be served at any place in the Commonwealth.

A civil action under § 8.01-216.4 or 8.01-216.5 may not be brought (i) more than six years after the date on which the violation is committed or (ii) more than three years after the date when facts material to the right of action are known or reasonably should have been known by the official of the Commonwealth charged with responsibility to act in the circumstances, but in that event no more than ten years after the date on which the violation is committed, whichever occurs last.

If the Commonwealth elects to intervene and proceed with an action brought under § 8.01-216.5, the Commonwealth may file its own complaint or amend the complaint of a person who has brought an action under § 8.01-216.5 to clarify or add detail to any claim in which the Commonwealth is intervening and to add any additional claim for which the Commonwealth contends it is entitled to relief. Any complaint filed by the Commonwealth pursuant to this paragraph shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Commonwealth arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in such person's complaint.

In any action brought under § 8.01-216.4 or 8.01-216.5, the Commonwealth shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

Notwithstanding any other provision of law, a final judgment rendered in favor of the Commonwealth in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action that involves the same transaction as in the criminal proceeding and which is brought under § 8.01-216.4 or 8.01-216.5.

§ 8.01-216.10. Civil investigative demands; issuance; sharing information.

A. Whenever the Attorney General *or his designee* has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General *or his designee* may, before commencing a civil proceeding *or making an election* under this article, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person (i) to produce such documentary material for inspection and copying, (ii) to answer in writing written interrogatories with respect to such documentary material or information, (iii) to give oral testimony concerning such documentary material or information, or (iv) to furnish any combination of such material, answers, or testimony.

B. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General shall cause to be served, in any manner authorized by this article, a copy of such demand upon the person from whom the discovery was

obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

C. Any information obtained by the Attorney General or his designee pursuant to this section may be shared with any qui tam relator if the Attorney General or his designee determines that such information is necessary as part of any false claims investigation.

§ 8.01-216.17. Civil investigative demands; custodian of documents; answers.

A. The Attorney General shall serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this article.

B. An investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the Attorney General. The Attorney General shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material.

C. The Attorney General may cause the preparation of such copies of documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any investigator, or other officer or employee of the Attorney General or employee of the Department of State Police, ~~who is authorized for such use by the Attorney General.~~ Such material, answers, and transcripts may be used by any authorized investigator or other officer or employee in connection with the taking of oral testimony under this article.

D. Except as otherwise provided in this section, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the Attorney General, shall be available for examination by any individual other than an investigator or other officer or employee of the Attorney General or employee of the Department of State Police authorized by the Attorney General. The prohibition on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subsection is intended to prevent disclosure to the General Assembly, including any committee or subcommittee of the General Assembly, or to any other state agency for use by such agency in furtherance of its statutory responsibilities. ~~Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a circuit court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.~~

E. While in the possession of the Attorney General and under such reasonable terms and conditions as the Attorney General shall prescribe, (i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to

examine such material and answers, and (ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony or by a representative of that person authorized by that person to examine such transcripts.

F. Any attorney employed by the Office of the Attorney General designated to appear before any court, grand jury, or state agency in any case or proceeding may use any documentary material, answers to interrogatories, or transcripts of oral testimony in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered that have not passed into the control of the court, grand jury, or agency through introduction into the record of such case or proceeding.

G. If any documentary material has been produced by any person in the course of any investigation pursuant to a civil investigative demand under this article, and (i) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any state agency involving such material, has been completed, or (ii) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation, the Attorney General shall, upon written request of the person who produced such material, return to such person any material, other than copies furnished to the investigator, or made for the Attorney General that has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.