

## Robert Appel

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**From:** Robert Appel [rappel@kohnrath.com]  
**Sent:** Wednesday, March 19, 2014 11:05 AM  
**To:** 'jwhite@leg.state.vt.us'; 'apollina@leg.state.vt.us'; 'Claire Ayer'; 'efrench@leg.state.vt.us'; 'nmcallister@leg.state.vt.us'  
**Cc:** 'Cheryl Ewen'  
**Subject:** whistleblower protection  
**Attachments:** NJ Whistle Blower Law.pdf

### MEMORANDUM

**TO:** MEMBERS OF SENATE GOVERNMENT OPERATIONS COMMITTEE

**FROM:** ROBERT APPEL, ATTORNEY

**RE:** H. 863—RELATING TO A PUBLIC RECORDS ACT EXEMPTION FOR THE IDENTITY OF WHISTLEBLOWERS

**DATE:** MARCH 19, 2014

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First, thanks for inviting me to testify before your committee on H. 863 as passed by the House. Although the House bill is responsive to Auditor Hoffer's limited and immediate concerns around protecting the identity of state employees who report fraud, waste or abuse, the scope of the bill is likened to using a thimble to bail out a sinking boat. Since entering private practice a year ago, I have been surprised by the frequency of alleged retaliation against employees who report misconduct by supervisors and/or co-workers. A substantial component of my employment cases, approximately 25%, involve such claims.

When I testified to the House Government Operations Committee, I made a pitch that Vermont needs a comprehensive whistle blower law patterned on New Jersey's Conscientious Employee Protection Act, see file attached. New Jersey's law is both simple yet comprehensive. I urge your committee to expand the scope of H. 863 to become far more comprehensive in its reach and the protections afforded to ALL Vermont employees who report waste, fraud or abuse--not just those employed by the State as is the present statutory scheme.

While preparing to testify in the House committee, I discovered that Act 128, the state employee whistle blower act (see 3 VSA §977, below), passed in 2008 required that:

Every state agency and department shall distribute a copy of this law by August 1, 2008, and shall post and display notices of state employee protection under this subchapter in a prominent and accessible location in the workplace.

Having been the executive director of the VT Human Rights Commission from August 1, 2008 until December 31, 2012, I was surprised to learn of this requirement since I had never even heard of this law while serving as a manager of a state office.

In preparing for my testimony, I checked on the websites of both the state's departments of human resources and labor and saw neither any reference to this provision of law nor any prepared poster or notice available. I also checked at the Department of Libraries and at Legislative Council to see if there were such postings as required by this law—there were not. My questions to folks in these departments of state government were met with embarrassed, quizzical looks. This non-compliance with a provision of present law does not seem to square with DHR Commissioner Duffy's repeated assertions to the House Government Operations committee that her department takes retaliation against whistle blowers very seriously.

I understand that in response to my testimony, the Administration has begun to shoulder its obligations in this regard and to fully implement this legislative act. You may want to inquire of Administration witnesses in this regard. I would think that is quite disheartening to learn that even when you pass laws designed to stop waste, fraud and abuse of power and direct the State as an employer to do discrete acts, your directive is ignored.

Respectfully submitted,

Robert

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rappel@kohnrath.com**MEMORANDUM**

TO: MEMBERS OF SENATE GOVERNMENT OPERATIONS COMMITTEE

FROM: ROBERT APPEL, ATTORNEY 

RE: H. 863 — AN ACT RELATING TO WHISTLE BLOWERS—STUDY COMMITTEE TO BE ADDED

DATE: MARCH 25, 2014

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When I appeared before your committee last week, I suggested that your committee add a study committee provision to the narrow H. 863 presently being considered. I'm sure that you will recall my testimony that Vermont employees who report fraud, waste and abuse frequently are punished by their employers for bringing forward such reports. The punishments range from shunning, to reassignment, to lack of promotions, to disciplinary sanctions and ultimately, termination. I recommended then, and now, that the Vermont Legislature pursue a statutory scheme similar to that enacted in New Jersey in 2008, entitled the "Conscientious Employee Protection Act," which I appended to my memorandum of March 19, 2014.

Below is a summary of the CEPA produced by Princeton University and posted on its website as required by New Jersey law.

The New Jersey Conscientious Employee Protection Act addresses employer retaliatory action; protected employee actions; employee responsibilities. Individuals can review the notice issued by the New Jersey Department of Labor and Workforce Development in English or Spanish.

New Jersey law prohibits an employer from taking any retaliatory action against an employee because the employee does any of the following:

1. Discloses, or threatens to disclose, to a supervisor or to a public body an activity, policy or practice of the employer or another employer, with whom there is a business relationship, that the employee reasonably believes is in violation of a law, or a rule or regulation issued under the law, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care;

2. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation issued under the law by the employer or another employer, with whom there is a business relationship, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before any public body conducting an investigation, hearing or inquiry into quality of patient care; or
3. Objects to, or refuses to participate in, any activity, policy or practice which the employee reasonably believes:
  - o Is in violation of a law, or a rule or regulation issued under the law or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;
  - o Is fraudulent or criminal; or
  - o Is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment. N.J.S.A. 34:19-3.

The protection against retaliation, when a disclosure is made to a public body, does not apply unless the employee has brought the activity, policy or practice to the attention of a supervisor of the employee by written notice and given the employer a reasonable opportunity to correct the activity, policy or practice. However, disclosure is not required where the employee reasonably believes that the activity, policy or practice is known to one or more supervisors of the employer or where the employee fears physical harm as a result of the disclosure, provided that the situation is emergency in nature.

A one year statute of limitations applies to claims made under CEPA.

As promised, below please find proposed study committee language for your consideration.

(a) Creation of committee; composition. There is created a study committee on protecting persons including employees and contractors who report waste, fraud or abuse by employers, their contractors or agents, composed of the following members:

- (1) The commissioner of labor or designee.
- (2) One member appointed by the Vermont State Employees Association.
- (3) One member appointed by the Vermont Chamber of Commerce.
- (4) One member appointed by the Lake Champlain Chamber of Commerce.
- (5) One member appointed by the VT AFL-CIO.
- (6) One member appointed by the Vermont Businesses for Social Responsibility.
- (7) One member appointed by the Vermont Workers Center.
- (8) The Vermont Auditor of Accounts or designee.

(9) Two members appointed by the Vermont Bar Association, one of whom shall be an employment plaintiff lawyer and one of whom shall be an employment defense lawyer.

(10) One member appointed by the Governor who shall not be a legislator.

(b) Powers and duties.

(1) The committee shall review current provisions of law, collective bargaining agreements and other authorities, existent both in Vermont and elsewhere, which protect persons who come forward with reports of waste, fraud or abuse. The committee may recommend legislation that would provide additional protection to so-called "whistle blowers."

(2) On or before January 15, 2015, the committee shall submit a report of its findings and recommendations to the house and senate committees on government operations and the house committee on general, housing and military affairs as well as the senate committee on economic development, housing and general affairs.

(3) The committee shall hold its first meeting no later than July 1, 2014 at which its members shall select a chair. The committee may meet as many times as it deems necessary to complete its work, and shall cease to exist on January 15, 2015 after filing its report.