Well-intentioned laws are known to backfire and cause more harm than healing. And when good laws go bad, the taxpayer can suffer.

The New Mexico Fraud Against Taxpayers Act is an example of such legislation. Passed in 2011 to address the theft of state and local taxpayer dollars through fraudulent activity, the law contains provisions that protect people from retaliation for reporting such crimes.

The irony is that taxpayers whose interests are protected by FATA may be liable for punitive damages awarded to a public employee who reported, testified about, or furthered a Fraud Against Taxpayers action.

Language of the law

Under the provisions of FATA, any public employer who retaliates against an employee for reporting suspected fraud is liable for "all relief necessary to make the employee whole," including "two times the amount of back pay with interest on the back pay, compensation for any special damage sustained as a result of the violation and, if appropriate, punitive damages."

"Employer" is specifically defined under FATA as "the state and any of its agencies, institutions or political subdivisions." That means a public employee who proves a FATA violation and suffers retaliatory action by the public employer can obtain compensatory and punitive damages from the same public agency victimized by the fraud.

This conflicts with the New Mexico Tort Claims Act, which prohibits punitive damages claims against the state and its political subdivisions for personal injury claims, including claims for something as serious as wrongful death. FATA is the only state statute permitting punitive damages to be awarded against the state or local governments.

Adding to injury

In *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996), the United States Supreme Court ruled that a court could award punitive damages of up to 10 times the compensatory damages against a defendant without automatically triggering questions about due process violations.

Because of this, the punitive damages provision of FATA could injure the taxpaying public far more than the reported fraudulent activity did. For example, a public employer earlier this year settled a case involving a retaliation claim under FATA (and related claims under the Whistleblower Protection Act) for $2 million because the potential exposure to punitive damages and attorney's fees was too great to let the case proceed to trial. This was the same agency allegedly victimized by the fraudulent scheme.

While the employee, if actually punished for reporting fraud, may be due some compensation for lost wages, a large punitive damages award magnifies injury to the state and the agency that was harmed.

Impeding economic development

The potential under this law for an employment claimant to obtain a large jury verdict prompted the *2015 Hiscox Guide to Employee Lawsuits* to list New Mexico as the state with the highest employee lawsuit risk in the nation. While U.S. companies on average had an 11.75-percent chance of facing an employment discrimination charge in 2014, employers in New Mexico "are

66 percent more likely to receive a charge than the average."

If the New Mexico Legislature is intent on growing the state by creating a favorable business climate, it should modify the punitive damages provision of FATA to eliminate these unintended consequences. At a minimum, lawmakers should limit damage awards under FATA to the maximum amounts permitted under the Tort Claims Act.

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