

AMENDED IN ASSEMBLY APRIL 27, 2010

AMENDED IN ASSEMBLY APRIL 5, 2010

CALIFORNIA LEGISLATURE—2009—10 REGULAR SESSION

ASSEMBLY BILL

No. 1749

**Introduced by Assembly Members Bonnie Lowenthal and Audra
Strickland**

(Coauthors: Assembly Members Evans and Jones)

February 8, 2010

An act to amend Section 8547.2 of, and to add Section 8547.13 to, the Government Code, relating to whistleblower protection.

LEGISLATIVE COUNSEL'S DIGEST

AB 1749, as amended, Bonnie Lowenthal. *California Whistleblower Protection Act: Administrative Office of the Courts.*

The California Whistleblower Protection Act prohibits a state employee from using his or her official authority or influence for the purpose of intimidating, threatening, coercing, or commanding any person for the purpose of interfering with his or her right to make a protected disclosure, defined to include the communication of information that may evidence an improper governmental activity. The act requires the State Auditor to investigate and report on improper governmental activities, as specified. The act authorizes an employee or applicant for state employment who files a written complaint alleging reprisal, retaliation, or similar prohibited acts to also file a copy of the written complaint with the State Personnel Board, together with a sworn statement that the complaint is true, under penalty of perjury. The act provides that any person who intentionally engages in acts of reprisal, retaliation, or similar prohibited acts against a state employee or

applicant for state employment for having made a protected disclosure, is subject to punishment for a misdemeanor, and shall be liable in an action for civil damages brought by the injured party. The act defines “employee” as a person appointed by the Governor or employed or holding office in a state agency, as specified.

This bill would include a person employed by the Supreme Court, a court of appeal, a superior court, or the Administrative Office of the Courts within the definition of “employee” for the purposes of the California Whistleblower Protection Act, except as specified. The bill would authorize an employee or applicant for employment with those judiciary entities who files a written complaint alleging actual or attempted acts of reprisal, retaliation, or similar prohibited acts for having made a protected disclosure, to also file a copy of the written complaint with the State Personnel Board, together with a sworn statement that the written complaint is true, under penalty of perjury. The bill would require the State Personnel Board to investigate any claim filed and make a recommendation regarding the alleged retaliation.

The bill would provide that any person, ~~other than a judge or justice~~ *except as specified*, who intentionally engages in acts of reprisal, retaliation, or similar prohibited acts against an employee or applicant for employment with those judiciary entities for having made a protected disclosure, is subject to punishment for a misdemeanor, and shall be liable in an action for civil damages brought by the injured party. The bill also would prohibit an employee of those judiciary entities from using his or her official authority or influence in violation of these provisions, and would make that employee liable, *except as specified*, in an action for civil damages brought by the injured party. By expanding the scope of the crimes of perjury and the intentional reprisal, retaliation, or similar prohibited acts against a state employee, as described above, to include an employee of the Administrative Office of the Courts, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 8547.2 of the Government Code is
2 amended to read:

3 8547.2. For the purposes of this article, the following terms
4 have the following meanings:

5 (a) “Employee” means an individual appointed by the Governor,
6 or employed or holding office in a state agency as defined by
7 Section 11000, including, for purposes of Sections 8547.3 to
8 8547.7, inclusive, an employee of the California State University,
9 or an individual appointed by the Legislature to a state board or
10 commission and who is not a Member or employee of the
11 Legislature. In addition, “employee” means a person employed by
12 the Supreme Court, a court of appeal, a superior court, or the
13 Administrative Office of the Courts for the purposes of Sections
14 8547.3 to 8547.7, inclusive, and Section 8547.13, except for those
15 provisions of Section 8547.4 concerning notice of adverse action
16 and the State Personnel Board. “Employee” includes a former
17 employee who met the criteria of this subdivision during his or
18 her employment.

19 (b) “Illegal order” means a directive to violate or assist in
20 violating a federal, state, or local law, rule, or regulation, or an
21 order to work or cause others to work in conditions outside of their
22 line of duty that would unreasonably threaten the health or safety
23 of employees or the public.

24 (c) “Improper governmental activity” means an activity by a
25 state agency or by an employee that is undertaken in the
26 performance of the employee’s duties, undertaken inside a state
27 office, or, if undertaken outside a state office by the employee,
28 directly relates to state government, whether or not that activity is
29 within the scope of his or her employment, and that (1) is in
30 violation of any state or federal law or regulation, including, but
31 not limited to, corruption, malfeasance, bribery, theft of
32 government property, fraudulent claims, fraud, coercion,
33 conversion, malicious prosecution, misuse of government property,
34 or willful omission to perform duty, or (2) is economically
35 wasteful, or involves gross misconduct, incompetency, or
36 inefficiency. For purposes of Sections 8547.4, 8547.5, 8547.10,
37 and 8547.11, “improper governmental activity” includes any
38 activity by the University of California or by an employee,

1 including an officer or faculty member, who otherwise meets the
2 criteria of this subdivision. For purposes of Sections 8547.4,
3 8547.5, and 8547.13, “improper governmental activity” includes
4 any activity by the Supreme Court, a court of appeal, a superior
5 court, or the Administrative Office of the Courts, or by an
6 employee thereof, who otherwise meets the criteria of this
7 subdivision.

8 (d) “Person” means an individual, corporation, trust, association,
9 a state or local government, or an agency or instrumentality of any
10 of the foregoing.

11 (e) “Protected disclosure” means a good faith communication,
12 including a communication based on, or when carrying out, job
13 duties, that discloses or demonstrates an intention to disclose
14 information that may evidence (1) an improper governmental
15 activity, or (2) a condition that may significantly threaten the health
16 or safety of employees or the public if the disclosure or intention
17 to disclose was made for the purpose of remedying that condition.
18 Protected disclosure specifically includes a good faith
19 communication to the Bureau of State Audits alleging an improper
20 governmental activity and any evidence delivered to the Bureau
21 of State Audits in support of the allegation. “Protected disclosure”
22 also includes, but is not limited to, a complaint made to the
23 Commission on Judicial Performance.

24 (f) “State agency” is defined by Section 11000. “State agency”
25 includes the University of California for purposes of Sections
26 8547.5 to 8547.7, inclusive, and the California State University
27 for purposes of Sections 8547.3 to 8547.7, inclusive. Sections
28 8547.3 to 8547.7, inclusive, shall apply to the Supreme Court, the
29 courts of appeal, the superior courts, and the Administrative Office
30 of the Courts in the same manner as they apply to a state agency.

31 SEC. 2. Section 8547.13 is added to the Government Code, to
32 read:

33 8547.13. (a) As used in this section:

34 (1) “Agency” means the Supreme Court, the courts of appeal,
35 the superior courts, or the Administrative Office of the Courts.

36 (2) “Employee” means a person employed by the Supreme
37 Court, a court of appeal, a superior court, or the Administrative
38 Office of the Courts.

39 (b) An employee or applicant for employment who files a written
40 complaint with his or her supervisor, manager, or any other agency

1 officer designated for that purpose by the agency, alleging actual
2 or attempted acts of reprisal, retaliation, threats, coercion, or similar
3 improper acts prohibited by Section 8547.3, may also file a copy
4 of the written complaint with the State Personnel Board, together
5 with a sworn statement that the contents of the written complaint
6 are true, or are believed by the affiant to be true, under penalty of
7 perjury. The complaint shall be filed within 12 months of the most
8 recent act complained about.

9 (c) The State Personnel Board shall investigate any complaint
10 filed, in accordance with the procedures of this chapter, and make
11 a recommendation to the hiring entity of the agency of the
12 employee or applicant regarding whether retaliation resulted in an
13 adverse action regarding the employee and, if so, what steps should
14 be taken to remedy the situation.

15 (d) Except ~~for~~ *to the extent that* justices and judges ~~who are~~
16 subject to the jurisdiction of the Commission on Judicial
17 Performance *are immune from liability under the doctrine of*
18 *judicial immunity*, a person who intentionally engages in acts of
19 reprisal, retaliation, threats, coercion, or similar acts against an
20 employee or applicant for employment for having made a protected
21 disclosure, is subject to a fine not to exceed ten thousand dollars
22 (\$10,000) and imprisonment in a county jail for up to one year.
23 An employee who intentionally engages in that conduct also shall
24 be subject to discipline by the agency. This subdivision does not
25 limit any other sanction that may be applicable by law.

26 (e) In addition to all other penalties provided by law, ~~except for~~
27 *to the extent that* justices and judges ~~who are~~ subject to the
28 jurisdiction of the Commission on Judicial Performance *are*
29 *immune from liability under the doctrine of judicial immunity*, a
30 person who intentionally engages in acts of reprisal, retaliation,
31 threats, coercion, or similar acts against an employee or applicant
32 for employment for having made a protected disclosure shall be
33 liable in an action for damages brought against him or her by the
34 injured party. Punitive damages may be awarded by the court if
35 the acts of the offending party are proven to be malicious. If
36 liability is established, the injured party also shall be entitled to
37 reasonable attorney's fees as provided by law. It is not a
38 prerequisite for an action for damages for the injured party to first
39 file a complaint pursuant to subdivision (b).

1 (f) This section is not intended to prevent a manager or
2 supervisor from taking, directing others to take, recommending,
3 or approving any personnel action, or from taking or failing to take
4 a personnel action with respect to an employee or applicant for
5 employment, if the manager or supervisor reasonably believes any
6 action or inaction is justified on the basis of evidence separate and
7 apart from the fact that the person has made a protected disclosure.

8 (g) In a civil action or administrative proceeding, once it has
9 been demonstrated by a preponderance of the evidence that an
10 activity protected by this article was a contributing factor in the
11 alleged retaliation against a former, current, or prospective
12 employee, the burden of proof shall be on the supervisor, manager,
13 or appointing power to demonstrate by clear and convincing
14 evidence that the alleged action would have occurred for legitimate,
15 independent reasons even if the employee had not engaged in
16 protected disclosures or refused an illegal order. If the supervisor,
17 manager, or appointing power fails to meet this burden of proof
18 against the employee in an administrative review, challenge, or
19 adjudication in which retaliation has been demonstrated to be a
20 contributing factor, the employee shall have a complete affirmative
21 defense on the issue of retaliation.

22 (h) Nothing in this article shall be deemed to diminish the rights,
23 privileges, or remedies of an employee under any other federal or
24 state law or under any employment contract or collective
25 bargaining agreement.

26 (i) An employee shall not directly or indirectly use or attempt
27 to use the official authority or influence of the employee for the
28 purpose of intimidating, threatening, coercing, commanding, or
29 attempting to intimidate, threaten, coerce, or command a person
30 for the purpose of interfering with the right of that person to
31 disclose to an agency official, designated for that purpose by the
32 agency, or the State Auditor matters within the scope of this article.
33 For the purpose of this subdivision, “use of official authority or
34 influence” includes all of the following:

- 35 (1) Promising to confer, or conferring, any benefit.
- 36 (2) Effecting, or threatening to effect, any reprisal.
- 37 (3) Taking or directing others to take, or recommending,
38 processing, or approving, any personnel action, including, but not
39 limited to, appointment, promotion, transfer, assignment,
40 performance evaluation, suspension, or other disciplinary action.

1 (j) ~~An~~ Except to the extent that justices and judges subject to
2 the jurisdiction of the Commission on Judicial Performance are
3 immune from liability under the doctrine of judicial immunity, an
4 employee who violates subdivision (i) is subject to an action for
5 civil damages brought against the employee by the injured party.

6 (k) Nothing in this section shall be construed to authorize an
7 individual to disclose any information, the disclosure of which is
8 otherwise prohibited by law.

9 SEC. 3. No reimbursement is required by this act pursuant to
10 Section 6 of Article XIII B of the California Constitution because
11 the only costs that may be incurred by a local agency or school
12 district will be incurred because this act creates a new crime or
13 infraction, eliminates a crime or infraction, or changes the penalty
14 for a crime or infraction, within the meaning of Section 17556 of
15 the Government Code, or changes the definition of a crime within
16 the meaning of Section 6 of Article XIII B of the California
17 Constitution.