

AMENDED IN ASSEMBLY JANUARY 13, 2012

AMENDED IN ASSEMBLY JANUARY 4, 2012

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 1378

Introduced by Assembly Member Portantino

February 18, 2011

An act to amend Sections 8547.2 ~~and~~, 8547.3, *and* 8547.5 of, and to add Section 8547.14 to, the Government Code, relating to the Legislature.

LEGISLATIVE COUNSEL'S DIGEST

AB 1378, as amended, Portantino. California Whistleblower Protection Act: Legislature: employees.

The California Whistleblower Protection Act prohibits an employee, as defined to include specified employees in the executive and judicial branches of state government, 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 of 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 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.

This bill would make these provisions of the act applicable to the Legislature, ~~except for~~ *that* procedures regarding notices of adverse action and the State Personnel Board ~~and except that would not apply~~, penalties would not apply to the extent that a Member of the Legislature is immune from liability under the doctrine of legislative immunity, *and Members of the Legislature would not be persons permitted to submit an allegation to initiate an investigation against the Legislature or a Member or an employee of the Legislature or be offended parties permitted to bring an action for civil damages against a Member or an employee of the Legislature.* The bill would authorize an employee of the Legislature or an applicant for employment with the Legislature to file a written complaint with his or her supervisor, manager, or other officer designated by the Committee on Rules of the Assembly or Senate, as applicable, alleging improper acts, together with a sworn statement that the complaint is true, under penalty of perjury, within one year of the most recent improper act complained about. The bill would require the Committees on Rules of the Assembly and Senate to each designate an officer to receive these written complaints. By expanding the scope of crimes under the act, 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) (1) "Employee" means any of the following:
- 6 (A) An individual appointed by the Governor.
- 7 (B) An individual employed or holding office in a state agency
- 8 as defined by Section 11000, including, for purposes of Sections

1 8547.3 to 8547.7, inclusive, an employee of the California State
2 University.

3 (C) A Member or employee of the Legislature for purposes of
4 Sections 8547.3 to 8547.7, inclusive, except for those provisions
5 of Section 8547.4 concerning notice of adverse action and the State
6 Personnel Board.

7 (D) An individual appointed by the Legislature to a state board
8 or commission.

9 (E) A person employed by the Supreme Court, a court of appeal,
10 a superior court, or the Administrative Office of the Courts for the
11 purposes of Sections 8547.3 to 8547.7, inclusive, and Section
12 8547.13, except for those provisions of Section 8547.4 concerning
13 notice of adverse action and the State Personnel Board.

14 (2) For purposes of this subdivision, “employee” includes a
15 former employee who met the criteria of this subdivision during
16 his or her employment.

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

22 (c) “Improper governmental activity” means an activity by a
23 state agency or by an employee that is undertaken in the
24 performance of the employee’s duties, undertaken inside a state
25 office, or, if undertaken outside a state office by the employee,
26 directly relates to state government, whether or not that activity is
27 within the scope of his or her employment, and that (1) is in
28 violation of any state or federal law or regulation, including, but
29 not limited to, corruption, malfeasance, bribery, theft of
30 government property, fraudulent claims, fraud, coercion,
31 conversion, malicious prosecution, misuse of government property,
32 or willful omission to perform duty, (2) is in violation of an
33 Executive order of the Governor, a California Rule of Court, or
34 any policy or procedure mandated by the State Administrative
35 Manual or State Contracting Manual, or (3) is economically
36 wasteful, involves gross misconduct, incompetency, or inefficiency.
37 For purposes of Sections 8547.4, 8547.5, 8547.7, 8547.10, and
38 8547.11, “improper governmental activity” includes any activity
39 by the University of California or by an employee, including an
40 officer or faculty member, who otherwise meets the criteria of this

1 subdivision. For purposes of Sections 8547.4, 8547.5, and 8547.13,
2 “improper governmental activity” includes any activity by the
3 Supreme Court, a court of appeal, a superior court, or the
4 Administrative Office of the Courts, or by an employee thereof,
5 who otherwise meets the criteria of this subdivision. For purposes
6 of Sections 8547.4, 8547.5, 8547.7, and 8547.14, “improper
7 governmental activity” includes any activity by the Legislature or
8 by an employee thereof who otherwise meets the criteria of this
9 subdivision.

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

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

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

34 SEC. 2. Section 8547.3 of the Government Code is amended
35 to read:

36 8547.3. (a) An employee may not directly or indirectly use or
37 attempt to use the official authority or influence of the employee
38 for the purpose of intimidating, threatening, coercing, commanding,
39 or attempting to intimidate, threaten, coerce, or command any

1 person for the purpose of interfering with the rights conferred
2 pursuant to this article.

3 (b) For the purpose of subdivision (a), “use of official authority
4 or influence” includes promising to confer, or conferring, any
5 benefit; effecting, or threatening to effect, any reprisal; or taking,
6 or directing others to take, or recommending, processing, or
7 approving, any personnel action, including, but not limited to,
8 appointment, promotion, transfer, assignment, performance
9 evaluation, suspension, or other disciplinary action.

10 (c) Any employee who violates subdivision (a) may be liable
11 in an action for civil damages brought against the employee by
12 the offended party, except to the extent that a Member of the
13 Legislature is immune from liability under the doctrine of
14 legislative immunity. *For purposes of this section, a Member of*
15 *the Legislature is not an offended party who may bring an action*
16 *for damages if the employee who violates subdivision (a) is a*
17 *Member or an employee of the Legislature.*

18 (d) Nothing in this section shall be construed to authorize an
19 individual to disclose information otherwise prohibited by or under
20 law.

21 *SEC. 3. Section 8547.5 of the Government Code is amended*
22 *to read:*

23 8547.5. (a) The State Auditor shall create the means for the
24 submission of allegations of improper governmental activity both
25 by transmission via mail or other carrier to a specified mailing
26 address and electronic submission through an Internet Web site
27 portal. The State Auditor may request that a person submitting an
28 allegation provide his or her name and contact information and
29 provide the names and contact information for any persons who
30 could help to substantiate the claim. However, the State Auditor
31 shall not require any person submitting an allegation to provide
32 his or her name or contact information and shall clearly state on
33 the agency Internet Web site that this information is not required
34 in order to submit an allegation.

35 (b) Upon receiving specific information that any employee or
36 state agency has engaged in an improper governmental activity,
37 the State Auditor may conduct an investigation of the matter. The
38 identity of the person providing the information that initiated the
39 investigation, or of any person providing information in confidence
40 to further an investigation, shall not be disclosed without the

1 express permission of the person providing the information except
2 that the State Auditor may make the disclosure to a law
3 enforcement agency that is conducting a criminal investigation.

4 *(c) Notwithstanding the definition of “person” in Section 8547.2,*
5 *a Member of the Legislature is not a person permitted to submit*
6 *an allegation to initiate an investigation pursuant to this section*
7 *if the allegation of improper governmental activity is directed*
8 *against the Legislature or a Member or an employee of the*
9 *Legislature.*

10 ~~SEC. 3.~~

11 *SEC. 4.* Section 8547.14 is added to the Government Code, to
12 read:

13 8547.14. (a) An employee of the Legislature or applicant for
14 employment with the Legislature may file a written complaint with
15 his or her supervisor, manager, or other officer designated for that
16 purpose by the Committee on Rules of the Assembly or Senate,
17 as applicable, alleging actual or attempted acts of reprisal,
18 retaliation, threats, coercion, or similar improper acts prohibited
19 by Section 8547.3, together with a sworn statement that the
20 contents of the written complaint are true, or are believed by the
21 affiant to be true, under penalty of perjury. The complaint shall be
22 filed within one year of the most recent improper act complained
23 about. The Committees on Rules of the Assembly and Senate shall
24 each designate an officer to receive written complaints for purposes
25 of this subdivision.

26 (b) Except to the extent that a Member of the Legislature is
27 immune from liability under the doctrine of legislative immunity,
28 any person who intentionally engages in acts of reprisal, retaliation,
29 threats, coercion, or similar improper acts against an employee of
30 the Legislature or applicant for employment with the Legislature
31 for having made a protected disclosure, is subject to a fine not to
32 exceed ten thousand dollars (\$10,000) and imprisonment in ~~the a~~
33 county jail for a period not to exceed one year.

34 (c) In addition to all other penalties provided by law, except to
35 the extent that a Member of the Legislature is immune from
36 liability under the doctrine of legislative immunity, any person
37 who intentionally engages in acts of reprisal, retaliation, threats,
38 coercion, or similar acts against a state employee or applicant for
39 state employment for having made a protected disclosure shall be
40 liable in an action for damages brought against him or her by the

1 injured party. Punitive damages may be awarded by the court
2 where the acts of the offending party are proven to be malicious.
3 Where liability has been established, the injured party shall also
4 be entitled to reasonable attorney’s fees as provided by law.

5 (d) This section does not prevent a supervisor, manager, or other
6 officer of the Legislature from taking, directing others to take,
7 recommending, or approving any personnel action or from taking
8 or failing to take a personnel action with respect to any employee
9 of the Legislature or applicant for employment with the Legislature
10 if the supervisor, manager, or other officer reasonably believes
11 any action or inaction is justified on the basis of evidence separate
12 and apart from the fact that the person has made a protected
13 disclosure.

14 (e) In any civil action, once it has been demonstrated by a
15 preponderance of evidence that an activity protected by this article
16 was a contributing factor in the alleged retaliation against a former,
17 current, or prospective employee, the burden of proof shall be on
18 the supervisor, manager, or other officer of the Legislature to
19 demonstrate by clear and convincing evidence that the alleged
20 action would have occurred for legitimate, independent reasons
21 even if the employee had not engaged in protected disclosures or
22 refused an illegal order.

23 (f) This article does not diminish the rights, privileges, or
24 remedies of any employee under any other federal or state law.

25 ~~SEC. 4.~~

26 *SEC. 5.* No reimbursement is required by this act pursuant to
27 Section 6 of Article XIII B of the California Constitution because
28 the only costs that may be incurred by a local agency or school
29 district will be incurred because this act creates a new crime or
30 infraction, eliminates a crime or infraction, or changes the penalty
31 for a crime or infraction, within the meaning of Section 17556 of
32 the Government Code, or changes the definition of a crime within
33 the meaning of Section 6 of Article XIII B of the California
34 Constitution.