

ASSEMBLY BILL

No. 2256

Introduced by Assembly Member Portantino

February 24, 2012

An act to add Article 11 (commencing with Section 9149.50) to Chapter 1.5 of Part 1 of Division 2 of Title 2 of the Government Code, relating to the Legislature.

LEGISLATIVE COUNSEL'S DIGEST

AB 2256, as introduced, Portantino. California Legislature Whistleblower Protection Act.

Existing law, the California Whistleblower Protection Act, prohibits a state employee from using his or her official authority or influence to discourage or retaliate against any person in order to interfere with the right of that person to disclose evidence of an improper government activity. The act requires the State Auditor to investigate disclosures of improper government activities. The act expressly does not apply to an employee who is a Member or employee of the Legislature.

This bill would enact, and would require the Fair Political Practices Commission to administer, the California Legislature Whistleblower Protection Act. The act would prohibit a Member or employee of the Legislature from directly or indirectly using or attempting to use his or her official authority or influence to retaliate, threaten, coerce, or engage in any similar improper act for the purpose of interfering with the right of an employee of the Legislature to make a protected disclosure of improper governmental activity or to refuse an illegal order, as defined. The act would authorize a current, prospective, or former employee of the Legislature, as specified, within one year of the most recent improper act complained of, to file a written complaint with his or her supervisor,

manager, or other officer designated by the Senate Committee on Rules or the Assembly Committee on Rules alleging actual or attempted violations of these prohibited acts. The act would provide that any Member or employee of the Legislature who intentionally engages in these prohibited acts is subject to, except as specified, a civil action brought by the injured party in addition to specified civil and criminal penalties.

The act would require the commission to create the means for the submission of allegations of improper governmental activities to the commission, and would authorize the commission to investigate the allegations or refer them to the Senate Committee on Rules or the Assembly Committee on Rules, the Attorney General, or the appropriate district attorney for investigation. The act would require the commission, if it investigates an allegation and determines that a Member or employee of the Legislature may have engaged or participated in such activities, to prepare an investigative report and send a copy to the Senate Committee on Rules or the Assembly Committee on Rules, as applicable. The act would also authorize the commission, as it deems appropriate, to send a copy of the investigative report to other entities.

This bill would impose a state-mandated local program by creating additional crimes.

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. The Legislature finds and declares all of the
- 2 following:
- 3 (a) The California Whistleblower Protection Act prohibits a
- 4 state employee from using his or her official authority or influence
- 5 for the purpose of intimidating, threatening, coercing, or
- 6 commanding any person for the purpose of interfering with his or
- 7 her right to make a protected disclosure of improper governmental
- 8 activity. The Legislature has passed legislation exempting itself
- 9 and its employees from this prohibition.

1 (b) The California Whistleblower Protection Act requires the
2 State Auditor to investigate and report on improper state
3 governmental activities. The State Auditor has maintained that she
4 will not investigate California Whistleblower Protection Act
5 violation allegations against Members or employees of the
6 Legislature because the Legislature is one of the State Auditor's
7 clients.

8 (c) The California Whistleblower Protection Act authorizes a
9 state employee or applicant for state employment who files a
10 written complaint alleging reprisal, retaliation, or similar prohibited
11 acts to also file a copy of the written complaint with the State
12 Personnel Board, together with a sworn statement that the
13 complaint is true, under penalty of perjury. The act provides that
14 any person who intentionally engages in acts of reprisal, retaliation,
15 or similar prohibited acts against a state employee or applicant for
16 state employment for having made a protected disclosure is subject
17 to punishment for a misdemeanor, and shall be liable in an action
18 for civil damages brought by the injured party. The Legislature
19 has exempted itself from these provisions and, therefore, legislative
20 employees have no protection against reprisal or retaliation for
21 reporting fraud, waste, criminal acts, abuse, or other improper
22 governmental activities.

23 (d) There currently is no place where employees of the
24 Legislature can report fraud, waste, criminal acts, abuse, or other
25 improper governmental activities anonymously and without fear
26 of reprisal or retaliation. The lack of a forum to anonymously
27 disclose improper governmental activities creates an environment
28 of secrecy and closed government in the Legislature that serves to
29 ensure that no corrective action or measures are taken.

30 (e) It is the intent of the Legislature that its decisions be made
31 openly. If there are instances of fraud, waste, criminal acts, abuse,
32 or other improper governmental activities, it is the policy of the
33 Legislature that these be reported and corrected. The Legislature
34 actively seeks openness and accountability in government.
35 Employees of the Legislature need to be free to report these abuses
36 with the same protections as other state employees.

37 SEC. 2. Article 11 (commencing with Section 9149.50) is
38 added to Chapter 1.5 of Part 1 of Division 2 of Title 2 of the
39 Government Code, to read:

1 Article 11. California Legislature Whistleblower Protection
2 Act

3
4 9149.50. This article shall be known and may be cited as the
5 California Legislature Whistleblower Protection Act.

6 9149.51. (a) The Legislature finds and declares that employees
7 of each house of the Legislature should be free to report waste,
8 fraud, abuse of authority, violations of law, or threats to the public
9 without fear of retribution. The Legislature further finds and
10 declares that legislative employees best serve the citizens of this
11 state when they can be candid and honest without reservation in
12 conducting the people’s business. Employees of each house of the
13 Legislature have an affirmative duty to disclose or report improper
14 governmental activity.

15 (b) The Legislature finds and declares that access to information
16 concerning the conduct of the people’s business by the Legislature
17 is a fundamental and necessary right of every citizen in this state.
18 It is the intent of the Legislature that the Legislature conduct the
19 people’s business in a manner that is free from improper
20 governmental activity. To this end, the Legislature encourages and
21 requires that instances of fraud, waste, abuse of authority, violations
22 of law, or threats to public safety be reported to an independent
23 entity for review and action.

24 9149.52. For the purposes of this article, the following terms
25 have the following meanings:

26 (a) “Illegal order” means a directive to violate or assist in
27 violating a federal, state, or local law, rule, or regulation, or an
28 order to work or cause others to work in conditions outside of their
29 line of duty that would unreasonably threaten the health or safety
30 of employees or the public.

31 (b) “Improper governmental activity” means an activity of a
32 Member or employee of either house of the Legislature that is
33 undertaken in the performance of the Member’s or employee’s
34 duties, whether or not that activity is within the scope of his or her
35 employment, and is in violation of any state or federal law or
36 regulation, including corruption, malfeasance, bribery, theft of
37 government property, fraudulent claims, fraud, coercion,
38 conversion, malicious prosecution, misuse of government property,
39 or willful omission to perform a duty, or that is economically

1 wasteful or involves gross misconduct, incompetency, or
2 inefficiency.

3 (c) “Protected disclosure” means a good faith communication,
4 including a communication based on, or when carrying out, job
5 duties, that discloses or demonstrates an intention to disclose
6 information that may evidence (1) an improper governmental
7 activity, or (2) a condition that may significantly threaten the health
8 or safety of employees or the public if the disclosure or intention
9 to disclose was made for the purpose of remedying that condition.
10 Protected disclosure specifically includes a good faith
11 communication to the Fair Political Practices Commission alleging
12 an improper governmental activity and any evidence delivered to
13 the commission in support of the allegation. “Protected disclosure”
14 also includes a complaint made to the Commission on Judicial
15 Performance.

16 9149.53. (a) (1) A Member or employee of either house of
17 the Legislature shall not directly or indirectly use or attempt to use
18 his or her official authority or influence to retaliate, threaten,
19 coerce, or engage in any similar improper act for the purpose of
20 interfering with the right of an employee of either house of the
21 Legislature to make a protected disclosure of improper
22 governmental activity or to refuse an illegal order.

23 (2) For the purposes of this subdivision, the use of “official
24 authority or influence” includes promising to confer, or conferring,
25 any benefit; effecting, or threatening to effect, any reprisal; or
26 taking, or directing others to take, or recommending, processing,
27 or approving, any personnel action, including appointment,
28 promotion, transfer, assignment, performance evaluation,
29 suspension, or other disciplinary action.

30 (b) An employee of either house of the Legislature or applicant
31 for employment with either house of the Legislature may file a
32 written complaint with his or her supervisor, manager, or other
33 officer designated for that purpose by the Senate Committee on
34 Rules or the Assembly Committee on Rules, as applicable, alleging
35 actual or attempted acts of reprisal, retaliation, threats, coercion,
36 or similar improper acts prohibited by subdivision (a), together
37 with a sworn statement that the contents of the complaint are true,
38 or are believed by the affiant to be true, under penalty of perjury.
39 The complaint shall be filed within one year of the most recent
40 improper act complained about. The Senate Committee on Rules

1 and the Assembly Committee on Rules shall each designate an
2 officer to receive complaints pursuant to this subdivision. A former
3 employee of either house of the Legislature may file a complaint
4 pursuant to this subdivision if the alleged acts complained of
5 occurred on or after January 1, 2013.

6 (c) Except to the extent that a Member of the Legislature is
7 immune from liability under the doctrine of legislative immunity,
8 a person who intentionally engages in an act prohibited by
9 subdivision (a) is subject to all of the following:

10 (1) (A) A civil action for damages brought against him or her
11 by the injured party. Punitive damages may be awarded by the
12 court if the acts of the offending party are proven to be malicious.
13 If liability is established, the injured party shall also be entitled to
14 reasonable attorney's fees.

15 (B) In any civil action pursuant to this paragraph, once it has
16 been demonstrated by a preponderance of evidence that an activity
17 protected by this article was a contributing factor in the alleged
18 reprisal, retaliation, threat, coercion, or other similar improper act
19 against a former, current, or prospective employee of the
20 Legislature, the burden of proof shall be on the offending party to
21 demonstrate by clear and convincing evidence that the alleged
22 action would have occurred for legitimate and independent reasons
23 even if the employee had not engaged in a protected disclosure or
24 refused an illegal order.

25 (2) A fine not to exceed ten thousand dollars (\$10,000).

26 (3) Imprisonment in a county jail for a period not to exceed one
27 year.

28 (d) This section does not prevent a Member or employee of
29 either house of the Legislature from taking, directing others to
30 take, recommending, or approving any personnel action or from
31 taking or failing to take a personnel action with respect to any
32 employee of either house of the Legislature or applicant for
33 employment with either house of the Legislature if the Member
34 or employee reasonably believes any action or inaction is justified
35 on the basis of evidence separate and apart from the fact that the
36 person has made a protected disclosure or refused an illegal order.

37 (e) This article does not diminish the rights, privileges, or
38 remedies of any employee under any other federal or state law,
39 nor does it authorize an individual to disclose information
40 otherwise prohibited by or under law.

1 9149.54. (a) The Fair Political Practices Commission shall
2 administer this article. For purposes of this article, the commission
3 does not have any enforcement power.

4 (b) The commission shall establish the means for the submission
5 of allegations of improper governmental activity to the commission
6 by transmission via mail or other carrier to a specified mailing
7 address and by electronic submission through an Internet Web site
8 portal. The commission may request that a person submitting an
9 allegation voluntarily provide his or her name and contact
10 information and the names and contact information for any persons
11 who could substantiate the claim. However, the commission shall
12 not require a person submitting an allegation to provide his or her
13 name or contact information, and shall clearly state on its Internet
14 Web site that this information is not required in order to submit
15 an allegation.

16 (c) Upon receipt of an allegation pursuant to subdivision (b),
17 the commission may investigate the matter. The identity of the
18 person submitting the allegation that initiated the investigation, or
19 of any person providing information in confidence to further an
20 investigation, shall not be disclosed without the express permission
21 of that person, except that the commission may make the disclosure
22 to a law enforcement agency that is conducting a criminal
23 investigation pursuant to subdivision (d) or (e).

24 (d) As an alternative to conducting its own investigation, if the
25 commission determines that there is reasonable cause to believe
26 that a Member or employee of either house of the Legislature may
27 have engaged in an improper governmental activity, the
28 commission may refer the allegation to the Senate Committee on
29 Rules or the Assembly Committee on Rules to conduct an
30 investigation of the allegation. If the commission refers an
31 allegation to the Senate Committee on Rules or the Assembly
32 Committee on Rules, that committee shall investigate the allegation
33 and report the results of the investigation to the commission within
34 60 days of the referral and monthly thereafter until final action has
35 been taken. In addition, whenever the commission determines that
36 there is reasonable cause to believe that a Member or employee
37 of either house of the Legislature may have engaged in an improper
38 governmental activity, the commission may refer the allegation to
39 the Attorney General or the appropriate district attorney.

1 (e) If, after investigating an allegation, the commission finds
2 that a Member or employee of either house of the Legislature may
3 have engaged or participated in an improper governmental activity,
4 the commission shall prepare an investigative report and send a
5 copy of that report to the Senate Committee on Rules or the
6 Assembly Committee on Rules and the office of the Member or
7 employee who is the subject of the allegation. The investigative
8 report may include the commission's recommended actions to
9 prevent the continuation or recurrence of the activity. The
10 commission may, as it deems appropriate, also send a copy of the
11 investigative report to the Attorney General, the appropriate district
12 attorney, the policy committees of the Senate and Assembly having
13 jurisdiction over the subject involved, or to any other entity. The
14 commission may provide to the Senate Committee on Rules or the
15 Assembly Committee on Rules any evidence gathered during the
16 investigation that, in the judgment of the commission, is necessary
17 to support any of the recommendations. Within 60 days of
18 receiving the commission's investigative report, the Senate
19 Committee on Rules or the Assembly Committee on Rules, as
20 applicable, shall report to the commission any actions that it has
21 taken or that it intends to take to implement the recommendations.
22 The committee shall file subsequent reports on a monthly basis
23 until final action has been taken.

24 (f) The commission may request the assistance of any Member
25 or employee of either house of the Legislature, or the Senate
26 Committee on Rules or the Assembly Committee on Rules, in
27 evaluating an allegation or conducting any investigation of an
28 improper governmental activity as authorized by this article. In
29 response to a request for assistance from the commission, the
30 Member or employee, or the Senate Committee on Rules or the
31 Assembly Committee on Rules, as applicable, shall provide the
32 assistance, including providing access to documents or other
33 information in a timely manner. No information obtained from the
34 commission by a Member or employee, or the Senate Committee
35 on Rules or the Assembly Committee on Rules, as a result of the
36 commission's request for assistance, or any information obtained
37 thereafter as a result of further investigation, shall be divulged or
38 made known to any person without the prior approval of the
39 commission.

1 (g) The commission shall keep confidential every investigation,
2 including all investigative files and work product, except that the
3 commission, whenever it determines that it is necessary to serve
4 the interests of the state, may issue a public report of an
5 investigation that has substantiated an improper governmental
6 activity, keeping confidential the identity of the employee or
7 employees involved. In addition, the commission may release any
8 findings or evidence supporting any findings resulting from an
9 investigation conducted pursuant to this article whenever the
10 commission determines it is necessary to serve the interests of the
11 state.

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