

ASSEMBLY BILL

No. 2699

Introduced by Committee on Accountability and Administrative Review (Assembly Members Dickinson (Chair), Block, Buchanan, Huber, Bonnie Lowenthal, Mitchell, and Portantino)

March 26, 2012

An act to amend Sections 9149.22 and 19683 of, and to add Section 9149.24 to, the Government Code, relating to whistleblowers.

LEGISLATIVE COUNSEL'S DIGEST

AB 2699, as introduced, Committee on Accountability and Administrative Review. Whistleblower protection.

Existing law, the Whistleblower Protection Act, prohibits a state or local governmental employee from interfering with the right of a person to disclose an improper governmental activity to an investigating committee of the Legislature.

This bill would authorize a state employee or an applicant for state employment who files a written complaint with his or her supervisor, manager, or appointing power alleging certain improper acts to also file a copy of the complaint with the State Personnel Board. The bill would impose specified fines and penalties on a person who intentionally engages in specified improper acts against a state employee or an applicant for state employment who has made a protected disclosure, as defined. By establishing a new crime, this 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 9149.22 of the Government Code is
2 amended to read:

3 9149.22. For the purposes of this article, the following words
4 have the following meanings:

5 (a) “Committee” means ~~any~~ *an* investigating committee of the
6 Legislature.

7 (b) “Employee” means ~~any~~ *an* individual appointed by the
8 Governor or employed or holding office in a state agency, as
9 defined by Section 11000, including the California State University
10 and the University of California, or ~~any~~ *a* public entity as defined
11 by Section 7260, or ~~any~~ *an* agency of local government, as defined
12 in subdivision (d) of Section 8 of Article XIII B of the California
13 Constitution.

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

19 (e)

20 (d) “Improper governmental activity” means ~~any~~ *an* activity by
21 a governmental agency or by an employee that is undertaken in
22 the performance of the employee’s official duties, whether or not
23 that action is within the scope of his or her employment, and that
24 (1) is in violation of ~~any~~ *a* state or federal law or regulation,
25 including, but not limited to, corruption, malfeasance, bribery,
26 theft of government property, fraudulent claims, fraud, coercion,
27 conversion, malicious prosecution, misuse of government property,
28 or willful omission to perform *a* duty, or (2) is economically
29 wasteful; or involves gross misconduct, incompetency, or
30 inefficiency.

31 (d)

1 (e) “Person” means—~~any~~ *an* individual, corporation, trust,
2 association,~~any~~ state or local government, or—~~any~~ *an* agency or
3 instrumentality of any of the foregoing.

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

15 (e)

16 (g) “Use of official authority or influence” includes promising
17 to confer, or conferring, ~~any~~ a benefit; effecting, or threatening to
18 effect, ~~any~~ a reprisal; or taking, or directing others to take, or
19 recommending, processing, or approving, ~~any~~ a personnel action,
20 including, but not limited to, appointment, promotion, transfer,
21 assignment, performance evaluation, suspension, or other
22 disciplinary action.

23 SEC. 2. Section 9149.24 is added to the Government Code, to
24 read:

25 9149.24. (a) A state employee or applicant for state
26 employment who files a written complaint with his or her
27 supervisor, manager, or the appointing power alleging actual or
28 attempted acts of reprisal, retaliation, threats, coercion, or similar
29 improper acts prohibited by Section 9149.23 may also file a copy
30 of the written complaint with the State Personnel Board, together
31 with a sworn statement that the contents of the written complaint
32 are true, or are believed by the affiant to be true, under penalty of
33 perjury. The complaint filed with the board shall be filed within
34 12 months of the most recent act of reprisal complained about.

35 (b) A person who intentionally engages in acts of reprisal,
36 retaliation, threats, coercion, or similar acts against a state
37 employee or applicant for state employment for having made a
38 protected disclosure is subject to a fine not to exceed ten thousand
39 dollars (\$10,000) and imprisonment in a county jail for a period
40 not to exceed one year. Pursuant to Section 19683, a state civil

1 service employee who intentionally engages in that conduct shall
2 be disciplined by adverse action as provided by Section 19571.

3 (c) In addition to all other penalties provided by law, a person
4 who intentionally engages in acts of reprisal, retaliation, threats,
5 coercion, or similar acts against a state employee or applicant for
6 state employment for having made a protected disclosure shall be
7 liable in an action for damages brought against him or her by the
8 injured party. Punitive damages may be awarded by the court if
9 the acts of the offending party are proven to be malicious. If
10 liability has been established, the injured party shall also be entitled
11 to reasonable attorney’s fees as provided by law. However, an
12 action for damages shall not be available to the injured party unless
13 the injured party has first filed a complaint with the State Personnel
14 Board pursuant to subdivision (a), and the board has issued, or
15 failed to issue, findings pursuant to Section 19683.

16 (d) This section is not intended to prevent an appointing power,
17 manager, or supervisor from taking, directing others to take,
18 recommending, or approving a personnel action or from failing to
19 take a personnel action with respect to a state employee or applicant
20 for state employment if the appointing power, manager, or
21 supervisor reasonably believes the action or inaction is justified
22 on the basis of evidence separate and apart from the fact that the
23 person has made a protected disclosure as defined in Section
24 9149.22.

25 (e) In a civil action or administrative proceeding, once it has
26 been demonstrated by a preponderance of evidence that an activity
27 protected by this article was a contributing factor in the alleged
28 retaliation against a former, current, or prospective employee, the
29 burden of proof shall be on the supervisor, manager, or appointing
30 power to demonstrate by clear and convincing evidence that the
31 alleged action would have occurred for legitimate, independent
32 reasons even if the employee had not engaged in protected
33 disclosures or refused an illegal order. If the supervisor, manager,
34 or appointing power fails to meet this burden of proof in an adverse
35 action against the employee in an administrative review, challenge,
36 or adjudication in which retaliation has been demonstrated to be
37 a contributing factor, the employee shall have a complete
38 affirmative defense in the adverse action.

39 (f) Nothing in this article shall be deemed to diminish the rights,
40 privileges, or remedies of an employee under any other federal or

1 state law or under an employment contract or collective bargaining
2 agreement.

3 SEC. 3. Section 19683 of the Government Code is amended
4 to read:

5 19683. (a) The State Personnel Board shall initiate a hearing
6 or investigation of a written complaint of reprisal or retaliation as
7 prohibited by Section 8547.3 *or* 9149.23 within 10 working days
8 of its submission. The executive officer shall complete findings
9 of the hearing or investigation within 60 working days thereafter,
10 and shall provide a copy of the findings to the complaining state
11 employee or applicant for state employment and to the appropriate
12 supervisor, manager, employee, or appointing authority. When the
13 allegations contained in a complaint of reprisal or retaliation are
14 the same as, or similar to, those contained in another appeal, the
15 executive officer may consolidate the appeals into the most
16 appropriate format. In these cases, the time limits described in this
17 subdivision shall not apply.

18 (b) If the executive officer finds that the supervisor, manager,
19 employee, or appointing power retaliated against the complainant
20 for engaging in protected whistleblower activities, the supervisor,
21 manager, employee, or appointing power may request a hearing
22 before the State Personnel Board regarding the findings of the
23 executive officer. The request for hearing and any subsequent
24 determination by the board shall be made in accordance with the
25 board's normal rules governing appeals, hearings, investigations,
26 and disciplinary proceedings.

27 (c) If, after the hearing, the State Personnel Board determines
28 that a violation of Section 8547.3 *or* 9149.23 occurred, or if no
29 hearing is requested and the findings of the executive officer
30 conclude that improper activity has occurred, the board may order
31 any appropriate relief, including, but not limited to, reinstatement,
32 backpay, restoration of lost service credit, if appropriate,
33 compensatory damages, and the expungement of any adverse
34 records of the state employee or applicant for state employment
35 who was the subject of the alleged acts of misconduct prohibited
36 by Section 8547.3 *or* 9149.23.

37 (d) ~~Whenever~~ If the board determines that a manager, supervisor,
38 or employee; who is named a party to the retaliation complaint;
39 has violated Section 8547.3 *or* 9149.23 and that violation
40 constitutes legal cause for discipline under one or more

1 subdivisions of Section 19572, it shall impose a just and proper
2 penalty and cause an entry to that effect to be made in the
3 manager’s, supervisor’s, or employee’s official personnel records.

4 (e) ~~Whenever~~ *If* the board determines that a manager, supervisor,
5 or employee; who is not named a party to the retaliation complaint;
6 may have engaged in or participated in ~~any~~ *an* act prohibited by
7 Section 8547.3 *or 9149.23*, the board shall notify the manager’s,
8 supervisor’s, or employee’s appointing power of that fact in
9 writing. Within 60 days after receiving the notification, the
10 appointing power shall either serve a notice of adverse action on
11 the manager, supervisor, or employee; or set forth in writing its
12 reasons for not taking adverse action against the manager,
13 supervisor, or employee. The appointing power shall file a copy
14 of the notice of adverse action with the board in accordance with
15 Section 19574. If the appointing power declines to take adverse
16 action against the manager, supervisor, or employee, it shall submit
17 its written reasons for not doing so to the board, which may take
18 adverse action against the manager, supervisor, or employee as
19 provided in Section 19583.5. A manager, supervisor, or employee
20 who is served with a notice of adverse action pursuant to this
21 section may file an appeal with the board in accordance with
22 Section 19575.

23 (f) In order for the Governor and the Legislature to determine
24 the need to continue or modify state personnel procedures as they
25 relate to the investigations of reprisals or retaliation for the
26 disclosure of information by public employees, the State Personnel
27 Board, by June 30 of each year, shall submit a report to the
28 Governor and the Legislature regarding complaints filed, hearings
29 held, and legal actions taken pursuant to this section.

30 SEC. 4. No reimbursement is required by this act pursuant to
31 Section 6 of Article XIII B of the California Constitution because
32 the only costs that may be incurred by a local agency or school
33 district will be incurred because this act creates a new crime or
34 infraction, eliminates a crime or infraction, or changes the penalty
35 for a crime or infraction, within the meaning of Section 17556 of
36 the Government Code, or changes the definition of a crime within
37 the meaning of Section 6 of Article XIII B of the California
38 Constitution.

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