

ASSEMBLY BILL

No. 2700

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

April 24, 2012

An act to amend Sections 9149.22 and 19683 of, and to add Section 9149.24 to, the Government Code, relating to whistleblowers, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

AB 2700, 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.

This bill would declare that it is to take effect immediately as an urgency statute.

Vote: $\frac{2}{3}$. 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

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

3 ~~(d)~~

4 (e) "Person" means—~~any~~ *an* individual, corporation, trust,
5 association,~~any~~ state or local government, or~~any~~ *an* agency or
6 instrumentality of any of the foregoing.

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

18 ~~(e)~~

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

26 SEC. 2. Section 9149.24 is added to the Government Code, to
27 read:

28 9149.24. (a) A state employee or applicant for state
29 employment who files a written complaint with his or her
30 supervisor, manager, or the appointing power alleging actual or
31 attempted acts of reprisal, retaliation, threats, coercion, or similar
32 improper acts prohibited by Section 9149.23 may also file a copy
33 of the written complaint with the State Personnel Board, together
34 with a sworn statement that the contents of the written complaint
35 are true, or are believed by the affiant to be true, under penalty of
36 perjury. The complaint filed with the board shall be filed within
37 12 months of the most recent act of reprisal complained about.

38 (b) A person who intentionally engages in acts of reprisal,
39 retaliation, threats, coercion, or similar acts against a state
40 employee or applicant for state employment for having made a

1 protected disclosure is subject to a fine not to exceed ten thousand
2 dollars (\$10,000) and imprisonment in a county jail for a period
3 not to exceed one year. Pursuant to Section 19683, a state civil
4 service employee who intentionally engages in that conduct shall
5 be disciplined by adverse action as provided by Section 19571.

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

19 (d) This section is not intended to prevent an appointing power,
20 manager, or supervisor from taking, directing others to take,
21 recommending, or approving a personnel action or from failing to
22 take a personnel action with respect to a state employee or applicant
23 for state employment if the appointing power, manager, or
24 supervisor reasonably believes the action or inaction is justified
25 on the basis of evidence separate and apart from the fact that the
26 person has made a protected disclosure as defined in Section
27 9149.22.

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

1 a contributing factor, the employee shall have a complete
2 affirmative defense in the adverse action.

3 (f) Nothing in this article shall be deemed to diminish the rights,
4 privileges, or remedies of an employee under any other federal or
5 state law or under an employment contract or collective bargaining
6 agreement.

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

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

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

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

(d) ~~Whenever~~ If the board determines that a manager, supervisor, or employee; who is named a party to the retaliation complaint; has violated Section 8547.3 or 9149.23 and that violation constitutes legal cause for discipline under one or more subdivisions of Section 19572, it shall impose a just and proper penalty and cause an entry to that effect to be made in the manager's, supervisor's, or employee's official personnel records.

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

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

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

1 the meaning of Section 6 of Article XIII B of the California
2 Constitution.

3 SEC. 5. This act is an urgency statute necessary for the
4 immediate preservation of the public peace, health, or safety within
5 the meaning of Article IV of the Constitution and shall go into
6 immediate effect. The facts constituting the necessity are:

7 In order to encourage state employees and applicants for state
8 employment who witness fraud and abuse to report their findings
9 to the Legislature and to provide immediate protections to those
10 employees and applicants that are consistent with remedies
11 available when similar reports are filed with the State Auditor, it
12 is necessary that this bill take effect immediately.