

AMENDED IN ASSEMBLY JUNE 11, 2013

AMENDED IN SENATE APRIL 15, 2013

**SENATE BILL**

**No. 496**

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**Introduced by Senator Wright**

February 21, 2013

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An act to amend ~~Section~~ *Sections 905 and 19683 of the Government Code, relating to whistleblower protection*, and to add *Section 8547.15 to, the Government Code, and to amend Section 1102.5 of the Labor Code, relating to employment.*

LEGISLATIVE COUNSEL'S DIGEST

SB 496, as amended, Wright. California Whistleblower Protection Act: administrative procedure.

Existing law, the California Whistleblower Protection Act, provides that a person making a protected disclosure, as defined, about an improper governmental activity is to be free of intimidation or threat and that a person who intentionally engages in acts of reprisal, retaliation, coercion, or similar acts against a state employee or an applicant for state employment for having made a protected disclosure is subject to civil liability and criminal penalties. Existing law also provides that civil damages are available to an injured party only if the State Personnel Board has issued, or failed to issue, findings pursuant to specified procedures. Existing law requires the State Personnel Board to initiate a hearing or investigation of a complaint of reprisal or retaliation in violation of the California Whistleblower Protection Act within 10 working days. Existing law also requires the executive officer of the board to complete findings of the hearing or investigation within 60 working days, but if the allegations contained in the complaint of reprisal or retaliation are the same or similar to those contained in

another appeal, the executive officer may consolidate the appeals, in which case the time limits do not apply.

This bill would instead require a ~~preliminary~~ *an informal* hearing or investigation to occur within 10 days of submission of a complaint, followed by an evidentiary hearing, as specified. The bill would provide that after an evidentiary hearing, an aggrieved party to the decision may file a petition for writ of mandate for review of the decision, as specified. The bill would further provide ~~that,~~ *that* the complainant is deemed to have exhausted his or her administrative remedies and may file an action for civil damages *after 70 days* ~~after~~ *from* submitting the complaint to the board or sooner if the executive officer issues findings or refers a consolidated appeal to an evidentiary hearing, as specified. The bill would provide that the executive officer's findings of the ~~preliminary~~ *informal* hearing or investigation are not binding in a subsequent State Personnel Board evidentiary hearing or in a civil action for damages. The bill would specify that the filing of a civil action by a complainant does not preclude the request for an evidentiary hearing by a supervisor, manager, employee, or appointing power whom the executive office has found to have retaliated against the complainant nor does the request for an evidentiary hearing preclude the complainant's right to file an independent civil action, as specified. The bill would also make other technical changes.

*The act further authorizes the State Auditor to investigate and report whether it finds that a state agency or employee may have engaged or participated in an improper governmental activity. Under the act, any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment for having made a disclosure that may evidence an improper governmental activity or dangerous condition is subject to, among other things, liability in an action for damages brought against him or her by the injured party. Existing law, the Government Claims Act, sets forth the general procedure for the presentation of claims as a prerequisite to commencement of actions for money or damages against the State of California, counties, cities, cities and counties, districts, local authorities, and other political subdivisions of the state, and against the officers, employees, and servants of those entities.*

*This bill would establish an exception for an action for damages pursuant to the California Whistleblower Protection Act from the claims presentation requirements of the Government Claims Act.*

*Existing law prohibits an employer from making, adopting, or enforcing any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a state or federal rule or regulation. Existing law prohibits any employer from retaliating against an employee for disclosing information to a government or law enforcement agency pursuant to these provisions or for refusing to participate in an activity that would result in a violation of a state or federal statute or noncompliance with a state or federal rule or regulation. Under existing law, an employer who violates these provisions is guilty of a crime.*

*This bill would expand these provisions to prohibit an employer from making, adopting, or enforcing any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, if the employee has reasonable cause to believe that the information discloses a violation of or noncompliance with a local rule or regulation. The bill would prohibit an employer from retaliating against an employee because the employer perceives that the employee may disclose information to a government or law enforcement agency, or to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation. The bill would also prohibit an employer from retaliating against an employee for disclosing, or refusing to participate in an activity that would result in, a violation of or noncompliance with a local rule or regulation.*

*Because this bill would change the definition of a 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: ~~no~~-yes.

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

1     **SECTION 1.** *Section 905 of the Government Code is amended*  
2 *to read:*

3     905. There shall be presented in accordance with Chapter 1  
4 (commencing with Section 900) and Chapter 2 (commencing with  
5 Section 910) all claims for money or damages against local public  
6 entities except any of the following:

7     (a) Claims under the Revenue and Taxation Code or other statute  
8 prescribing procedures for the refund, rebate, exemption,  
9 cancellation, amendment, modification, or adjustment of any tax,  
10 assessment, fee, or charge or any portion thereof, or of any  
11 penalties, costs, or charges related thereto.

12     (b) Claims in connection with which the filing of a notice of  
13 lien, statement of claim, or stop notice is required under any law  
14 relating to liens of mechanics, laborers, or materialmen.

15     (c) Claims by public employees for fees, salaries, wages,  
16 mileage, or other expenses and allowances.

17     (d) Claims for which the workers' compensation authorized by  
18 Division 4 (commencing with Section 3200) of the Labor Code is  
19 the exclusive remedy.

20     (e) Applications or claims for any form of public assistance  
21 under the Welfare and Institutions Code or other provisions of law  
22 relating to public assistance programs, and claims for goods,  
23 services, provisions, or other assistance rendered for or on behalf  
24 of any recipient of any form of public assistance.

25     (f) Applications or claims for money or benefits under any public  
26 retirement or pension system.

27     (g) Claims for principal or interest upon any bonds, notes,  
28 warrants, or other evidences of indebtedness.

29     (h) Claims that relate to a special assessment constituting a  
30 specific lien against the property assessed and that are payable  
31 from the proceeds of the assessment, by offset of a claim for  
32 damages against it or by delivery of any warrant or bonds  
33 representing it.

34     (i) Claims by the state or by a state department or agency or by  
35 another local public entity or by a judicial branch entity.

36     (j) Claims arising under any provision of the Unemployment  
37 Insurance Code, including, but not limited to, claims for money  
38 or benefits, or for refunds or credits of employer or worker

1 contributions, penalties, or interest, or for refunds to workers of  
2 deductions from wages in excess of the amount prescribed.

3 (k) Claims for the recovery of penalties or forfeitures made  
4 pursuant to Article 1 (commencing with Section 1720) of Chapter  
5 1 of Part 7 of Division 2 of the Labor Code.

6 (l) Claims governed by the Pedestrian Mall Law of 1960 (Part  
7 1 (commencing with Section 11000) of Division 13 of the Streets  
8 and Highways Code).

9 (m) Claims made pursuant to Section 340.1 of the Code of Civil  
10 Procedure for the recovery of damages suffered as a result of  
11 childhood sexual abuse. This subdivision shall apply only to claims  
12 arising out of conduct occurring on or after January 1, 2009.

13 (n) Claims made pursuant to Section 701.820 of the Code of  
14 Civil Procedure for the recovery of money pursuant to Section  
15 26680.

16 (o) Claims made pursuant to Section 49013 of the Education  
17 Code for reimbursement of pupil fees for participation in  
18 educational activities.

19 (p) *Claims made for a violation of Article 3 (commencing with*  
20 *Section 8547) of Chapter 6.5 of Division 1 of Title 2.*

21 *SEC. 2. Section 8547.15 is added to the Government Code, to*  
22 *read:*

23 *8547.15. An action for damages pursuant to this article shall*  
24 *not be subject to the claims presentation requirements of the*  
25 *Government Claims Act (Division 3.6 (commencing with Section*  
26 *810) of Title 1).*

27 ~~SECTION 4.~~

28 *SEC. 3. Section 19683 of the Government Code is amended*  
29 *to read:*

30 19683. (a) The State Personnel Board shall initiate—a  
31 ~~preliminary~~ *an informal* hearing or investigation of a written  
32 complaint of reprisal or retaliation as prohibited by Section 8547.3  
33 within 10 working days of its submission. The executive officer  
34 shall complete findings of the—~~preliminary informal~~ hearing or  
35 investigation within 60 working days thereafter, and shall provide  
36 a copy of the findings to the complaining state employee or  
37 applicant for state employment and to the appropriate supervisor,  
38 manager, employee, or appointing authority.

39 (b) The complainant is deemed to have exhausted his or her  
40 administrative remedies and may file an independent action for

1 civil damages, pursuant to Section 8547.8, *after* 70 working days  
2 ~~after from~~ submitting the complaint to the State Personnel Board,  
3 or sooner upon either of the following:

4 (1) The executive officer issues the findings of the ~~preliminary~~  
5 *informal* hearing or investigation, as set forth in subdivision (a).

6 (2) The executive officer consolidates the complainant's multiple  
7 appeals pursuant to subdivision (e) and refers the consolidated  
8 appeal directly to an evidentiary hearing.

9 (c) If, after the ~~preliminary~~ *informal* hearing, the executive  
10 officer finds that the supervisor, manager, employee, or appointing  
11 power retaliated against the complainant for engaging in protected  
12 whistleblower activities, the supervisor, manager, employee, or  
13 appointing power may request an evidentiary hearing before the  
14 State Personnel Board regarding the findings of the executive  
15 officer. A complainant's filing of a civil action does not preclude  
16 the request for an evidentiary hearing by the supervisor, manager,  
17 employee, or appointing power under this subdivision, nor does  
18 the request for hearing preclude the complainant's right to file an  
19 independent civil action pursuant to subdivision (b). The request  
20 for hearing and any subsequent determination by the board shall  
21 be made in accordance with the board's normal rules governing  
22 appeals, hearings, investigations, and disciplinary proceedings.

23 (d) The executive officer's findings of the ~~preliminary~~ *informal*  
24 hearing or investigation, as set forth in subdivision (a), are not  
25 binding in a subsequent State Personnel Board evidentiary hearing  
26 requested by the complainant or pursuant to subdivision (c) or (e),  
27 nor in a civil action for damages, pursuant to subdivision (b).

28 (e) If the allegations contained in a complaint of reprisal or  
29 retaliation are the same as, or similar to, those contained in another  
30 appeal to the State Personnel Board by the complainant as  
31 authorized by another law or under a separate cause of action, the  
32 executive officer may consolidate the appeals into the most  
33 appropriate format. In these cases, the time limits described in  
34 subdivision (a) shall not apply.

35 (f) After an evidentiary hearing requested by the complainant  
36 or pursuant to subdivision (c) or (e) the State Personnel Board  
37 shall issue a decision. Any aggrieved party to the decision may  
38 file a petition for writ of mandate with the superior court for review  
39 of the decision pursuant to Section 1094.5 of the Code of Civil  
40 Procedure. This subdivision shall not apply to a claimant's right

1 to pursue an independent action for civil damages pursuant to  
2 subdivision (b). *A decision by the State Personnel Board shall not*  
3 *be binding in any concurrent or subsequent independent civil*  
4 *action pursuant to subdivision (b).*

5 (g) If, after the evidentiary hearing, the State Personnel Board  
6 determines that a violation of Section 8547.3 occurred, or if no  
7 evidentiary hearing is requested and the findings of the executive  
8 officer conclude that the complainant was retaliated against, the  
9 board may order any appropriate relief, including, but not limited  
10 to, reinstatement, backpay, restoration of lost service credit,  
11 compensatory damages, and the expungement of any adverse  
12 records of the state employee or applicant for state employment  
13 who was the subject of the alleged acts of misconduct prohibited  
14 by Section 8547.3.

15 (h) Whenever the board determines that a manager, supervisor,  
16 or employee, who is named a party to the retaliation complaint,  
17 has violated Section 8547.3 and that violation constitutes legal  
18 cause for discipline under one or more subdivisions of Section  
19 19572, it shall impose a just and proper penalty and cause an entry  
20 to that effect to be made in the manager's, supervisor's, or  
21 employee's official personnel records.

22 (i) Whenever the board determines that a manager, supervisor,  
23 or employee, who is not named a party to the retaliation complaint,  
24 may have engaged in or participated in any act prohibited by  
25 Section 8547.3, the board shall notify the manager's, supervisor's,  
26 or employee's appointing power of that fact in writing. Within 60  
27 days after receiving the notification, the appointing power shall  
28 either serve a notice of adverse action on the manager, supervisor,  
29 or employee, or set forth in writing its reasons for not taking  
30 adverse action against the manager, supervisor, or employee. The  
31 appointing power shall file a copy of the notice of adverse action  
32 with the board in accordance with Section 19574. If the appointing  
33 power declines to take adverse action against the manager,  
34 supervisor, or employee, it shall submit its written reasons for not  
35 doing so to the board, which may take adverse action against the  
36 manager, supervisor, or employee as provided in Section 19583.5.  
37 A manager, supervisor, or employee who is served with a notice  
38 of adverse action pursuant to this section may file an appeal with  
39 the board in accordance with Section 19575.

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

8 *SEC. 4. Section 1102.5 of the Labor Code is amended to read:*

9 1102.5. (a) An employer ~~may~~ *shall* not make, adopt, or enforce  
10 any rule, regulation, or policy preventing an employee from  
11 disclosing information to a government or law enforcement agency,  
12 ~~where~~ *if* the employee has reasonable cause to believe that the  
13 information discloses a violation of state or federal statute, or a  
14 violation *of* or noncompliance with a ~~state~~ *local, state,* or federal  
15 rule or regulation.

16 (b) An employer ~~may~~ *shall* not retaliate against an employee  
17 for disclosing ~~information~~ *information, or because the employer*  
18 *perceives that the employee may disclose information,* to a  
19 government or law enforcement agency, ~~where~~ *or to a person with*  
20 *authority over the employee or another employee who has the*  
21 *authority to investigate, discover, or correct the violation, if the*  
22 *employee has* reasonable cause to believe that the information  
23 discloses a violation of state or federal statute, or a violation *of* or  
24 noncompliance with a ~~state~~ *local, state,* or federal rule or  
25 regulation.

26 (c) An employer ~~may~~ *shall* not retaliate against an employee  
27 for refusing to participate in an activity that would result in a  
28 violation of state or federal statute, or a violation *of* or  
29 noncompliance with a ~~state~~ *local, state,* or federal rule or  
30 regulation.

31 (d) An employer ~~may~~ *shall* not retaliate against an employee  
32 for having exercised his or her rights under subdivision (a), (b),  
33 or (c) in any former employment.

34 (e) A report made by an employee of a government agency to  
35 his or her employer is a disclosure of information to a government  
36 or law enforcement agency pursuant to subdivisions (a) and (b).

37 (f) In addition to other penalties, an employer that is a  
38 corporation or limited liability company is liable for a civil penalty  
39 not exceeding ten thousand dollars (\$10,000) for each violation  
40 of this section.

1 (g) This section does not apply to rules, regulations, or policies  
2 ~~which~~ *that* implement, or to actions by employers against  
3 employees who violate, the confidentiality of the lawyer-client  
4 privilege of Article 3 (commencing with Section 950), the  
5 physician-patient privilege of Article 6 (commencing with Section  
6 990) of Chapter 4 of Division 8 of the Evidence Code, or trade  
7 secret information.

8 *SEC. 5. No reimbursement is required by this act pursuant to*  
9 *Section 6 of Article XIII B of the California Constitution because*  
10 *the only costs that may be incurred by a local agency or school*  
11 *district will be incurred because this act creates a new crime or*  
12 *infraction, eliminates a crime or infraction, or changes the penalty*  
13 *for a crime or infraction, within the meaning of Section 17556 of*  
14 *the Government Code, or changes the definition of a crime within*  
15 *the meaning of Section 6 of Article XIII B of the California*  
16 *Constitution.*

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