Case No. S269456

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE ex rel. LILIA GARCIA-BROWER, as Labor Commissioner, etc.,
Plaintiff and Appellant

v.

KOLLA'S, INC. et al.,
Defendant and Respondent.

Fourth Appellate District, Division Three, Case No. G057831

Orange County Superior Court, Dept. C34
Case No. 30-2017-00950004-CU-WT-CJC
The Honorable Martha K. Gooding, Judge

REQUEST FOR JUDICIAL NOTICE

State of California, Department of Industrial Relations,
Division of Labor Standards Enforcement

Nicholas Patrick Seitz, SBN 287568
nseitz@dir.ca.gov
464 W. 4th Street, Suite 348
San Bernardino, CA 92401
Tel: 909-521-3853 · Fax: 415-703-4807

Attorney for Plaintiff, Appellant, and Petitioner
LILIA GARCIA-BROWER

Pursuant to California Rules of Court, rules 8.54, 8.252, and 8.520, and Evidence Code sections 451, 452, and 459, the Labor Commissioner moves for judicial notice of the following selections from Labor Code section 1102.5's legislative history:

1. Assem. Com. on Labor and Employment on Assem. Bill 2542 (1983-1984 Reg. Sess.) as introduced
2. Sen. Com. on Industrial Relations, Analysis of Assem. Bill 2452 (1983-1984 Reg. Sess.) as amended April 26, 1984
3. Div. of Labor Standards Enforcement, Enrolled Bill Rep. on Assem. Bill 2452 (1983-1984 Reg. Sess.), Aug. 22, 1984
4. Assemblywoman Waters, author of Assem. Bill 2452 (1983-1984 Reg. Sess.), letter to Governor Deukmejian, Aug. 23, 1984
5. Stats. 1984, ch. 1083 (Assem. Bill 2452)
6. Sen. Com. on Judiciary, Analysis of Sen. Bill 777 (2003-2004 Reg. Sess.) as introduced
7. Assem. Com. on Judiciary on Sen. Bill 777 (2003-2004 Reg. Sess.) as amended May 29, 2003
8. Stats. 2003, ch. 484 (Sen. Bill 777)
9. Assem. Com. on Labor and Employment, Analysis of Assem. Bill 263 (2013-2014 Reg. Sess.) as amended April 11, 2013
10. Assem. Com. on Judiciary, Analysis of Sen. Bill 666 (2013-2014 Reg. Sess.) as amended May 7, 2013
11. Sen. Rules Com., Analysis of Sen. Bill 666 (2013-2014 Reg. Sess.) as amended Sept. 4, 2013
12. Sen. Rules Com. on Sen. Bill 496 (2013-2014 Reg. Sess.) as amended Sept. 6, 2013
13. Stats. 2013, ch. 577 (Sen. Bill 666)

14. Stats. 2013, ch. 732 (Assem. Bill 263)
15. Stats. 2013, ch. 781 (Sen. Bill 496); and
16. Sen. Rules Com., Off. of Sen. Floor Analyses, 3d Reading Analysis of Assem. Bill 1947 (2019-2020 Reg. Sess.) as introduced

The Labor Commissioner also moves for judicial notice of the following selections from the legislative history of the federal Whistleblower Protection Act (WPA):

1. An excerpt of S. Rep. No. 112-155 (2012); and
2. Pub. L. No. 112-199 (Nov. 27, 2021) 126 Stat. 1465

True and correct copies of these selections are attached to the Declaration of Nicholas Patrick Seitz, Esq. as Exhibits A through R. The legislative history is relevant to whether section 1102.5(b) protects an employee from retaliation for disclosing unlawful activity to a person or agency that already knows about the unlawful activity.

MEMORANDUM OF POINTS AND AUTHORITIES

This Court may take judicial notice of the above selections from the legislative history. (Evid. Code §§ 451, subd. (a) [requiring judicial notice of "[t]he . . . public statutory law of this state and of the United States"], 452, subd. (c) [permitting judicial notice of "[o]fficial acts of the legislative [and] executive . . . departments of the United States and of any state of the United States"], 459, subd. (a).)

The legislative history of section 1102.5 demonstrates that the Legislature has repeatedly strengthened the statute and other whistleblower protections to encourage workers to speak up when their rights are violated. This includes an amendment to section 1102.5(b) to explicitly protect "internal complaints" about violations of law so workers can "report concerns to their employers without fear of retaliation or discrimination."

(Sen. Rules Com. on Sen. Bill 496 (2013-2014 Reg. Sess.) as amended Sept. 6, 2013, pp. 4-5; Stats. 2013, ch. 732 (Assem. Bill 263), § 1, subd. (h) [eff. Jan. 1, 2014].) The legislative history also reflects the Legislature's specific concern about protecting low-wage and immigrant workers who speak up about unlawful conduct in the workplace, especially as it relates to wage theft. (Assem. Com. on Judiciary, Analysis of Sen. Bill 666 (2013-2014 Reg. Sess.) as amended May 7, 2013, p. 4; Stats. 2013, ch. 732 (Assem. Bill 263), § 1, subds. (a), (c), (e)-(h).) Construing section 1102.5(b) to broadly protect internal complaints about violations of law furthers the legislative purposes underlying the statute.

The legislative history also shows that the Legislature used words and phrases like "report," "provide information," and "contact" interchangeably with "disclose" in the context of section 1102.5(b), thus confirming that the Legislature intended "disclose" as used in the statute to mean a report or communication. (See Sen. Com. on Industrial Relations, Analysis of Assem. Bill 2452 (1983-1984 Reg. Sess.) as amended April 26, 1984, pp. 1-2; Assem. Com. on Labor and Employment on Assem. Bill 2452 (1983-1984 Reg. Sess.) as introduced, pp. 1-2; Div. of Labor Standards Enforcement, Enrolled Bill Rep. on Assem. Bill 2452 (1983-1984 Reg. Sess.) Aug. 22, 1984, p. 1; Assemblywoman Waters, author of Assem. Bill 2452 (1983-1984 Reg. Sess.), letter to Governor Deukmejian, Aug. 23, 1984; Legis. Counsel's Dig., Sen. Bill 777 (2003-2004 Reg. Sess.), Stats. 2003, ch. 484; Stats. 2013, ch. 732 (Assem. Bill 263), § 1.)

As for the legislative history of the federal WPA, it reinforces that *Mize-Kurzman v. Marin Community College District* (2012) 202 Cal.App.4th 832, relied on by the majority to narrowly construe section 1102.5(b), was wrongly decided. Specifically, a few months after *Mize-*

Kurzman, Congress passed the Whistleblower Protection Enhancement Act of 2012, which amended the federal WPA "to *clarify* the disclosures of information protected from prohibited personnel practices." (Pub. L. No. 112-199 (Nov. 27, 2012) 126 Stat. 1465 [emphasis added].) In doing so, Congress criticized the Federal Circuit precedent *Mize-Kurzman* followed for ignoring earlier amendments to the federal WPA in 1994 that "were intended to reaffirm the Committee's long-held view that the WPA's plain language covers *any* disclosure," and for "continu[ing] to undermine the WPA's intended meaning by imposing limitations on the kinds of disclosures by whistleblowers that are protected under the WPA" "[d]espite the clear legislative history and the plain meaning of the 1994 amendments." (S. Rep. No. 112-155 (2012) at pp. 4-5 [original emphasis].)

Based on the foregoing, the Labor Commissioner respectfully requests that the Court grant this motion for judicial notice.

Dated: November 12, 2021

STATE OF CALIFORNIA,
DEPARTMENT OF INDUSTRIAL
RELATIONS, DIVISION OF LABOR
STANDARDS ENFORCEMENT

/s/ Nicholas Patrick Seitz
Nicholas Patrick Seitz
Attorney for Plaintiff,
Appellant, and Petitioner
LILIA GARCIA-BROWER

DECLARATION OF NICHOLAS PATRICK SEITZ, ESQ.

I, Nicholas Patrick Seitz, Esq., hereby declare:

(1) I am an attorney duly licensed to practice in the State of California.

(2) I am attorney of record for plaintiff and appellant Lilia Garcia-Brower, Labor Commissioner for the State of California.

(3) I have personal knowledge of the facts stated herein, which are known by me to be true and correct, and if called as a witness I could and would testify competently thereto.

(4) A true and correct copy of Assem. Com. on Labor and Employment on Assem. Bill 2542 (1983-1984 Reg. Sess.) as introduced is attached hereto as Exhibit A.

(5) A true and correct copy of Sen. Com. on Industrial Relations, Analysis of Assem. Bill 2452 (1983-1984 Reg. Sess.) as amended April 26, 1984 is attached hereto as Exhibit B.

(6) A true and correct copy of Div. of Labor Standards Enforcement, Enrolled Bill Rep. on Assem. Bill 2452 (1983-1984 Reg. Sess.), Aug. 22, 1984 is attached hereto as Exhibit C.

(7) A true and correct copy of Assemblywoman Waters, author of Assem. Bill 2452 (1983-1984 Reg. Sess.), letter to Governor Deukmejian, Aug. 23, 1984 is attached hereto as Exhibit D.

(8) A true and correct copy of Stats. 1984, ch. 1083 (Assem. Bill 2452) is attached hereto as Exhibit E.

(9) A true and correct copy of Sen. Com. on Judiciary, Analysis of Sen. Bill 777 (2003-2004 Reg. Sess.) as introduced is attached hereto as Exhibit F.

(10) A true and correct copy of Assem. Com. on Judiciary on Sen. Bill 777 (2003-2004 Reg. Sess.) as amended May 29, 2003 is attached hereto as Exhibit G.

(11) A true and correct copy of Stats. 2003, ch. 484 (Sen. Bill 777) is attached hereto as Exhibit H.

(12) A true and correct copy of Assem. Com. on Labor and Employment, Analysis of Assem. Bill 263 (2013-2014 Reg. Sess.) as amended April 11, 2013 is attached hereto as Exhibit I.

(13) A true and correct copy of Assem. Com. on Judiciary, Analysis of Sen. Bill 666 (2013-2014 Reg. Sess.) as amended May 7, 2013 is attached hereto as Exhibit J.

(14) A true and correct copy of Sen. Rules Com., Analysis of Sen. Bill 666 (2013-2014 Reg. Sess.) as amended Sept. 4, 2013 is attached hereto as Exhibit K.

(15) A true and correct copy of Sen. Rules Com. on Sen. Bill 496 (2013-2014 Reg. Sess.) as amended Sept. 6, 2013 is attached hereto as Exhibit L.

(16) A true and correct copy of Stats. 2013, ch. 577 (Sen. Bill 666) is attached hereto as Exhibit M.

(17) A true and correct copy of Stats. 2013, ch. 732 (Assem. Bill 263) is attached hereto as Exhibit N.

(18) A true and correct copy of Stats. 2013, ch. 781 (Sen. Bill 496) is attached hereto as Exhibit O.

(19) A true and correct copy of Sen. Rules Com., Off. of Sen. Floor Analyses, 3d Reading Analysis of Assem. Bill 1947 (2019-2020 Reg. Sess.) as introduced is attached hereto as Exhibit P.

(20) A true and correct copy of an excerpt of S. Rep. No. 112-155 (2012) is attached hereto as Exhibit Q.

(21) A true and correct copy of Pub. L. No. 112-199 (Nov. 27, 2021) 126 Stat. 1465 is attached hereto as Exhibit R.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at City of Rancho Cucamonga, County of San Bernardino, State of California, on November 12, 2021.

/s/ Nicholas Patrick Seitz
Nicholas Patrick Seitz, Esq., Declarant

PROOF OF SERVICE

Garcia-Brower v. Kolla's, Inc.
California Supreme Court, Case No. S269456
Fourth District Court of Appeal, Division Three, Case No. G057831
Orange County Superior Court, Case No. 30-2017-00950004-CU-WT-CJC

I, Mary Ann Galapon, declare as follows:

I am employed in the County of San Francisco, I am over 18 years of age and not a party to this action, and my business address is 455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102.

On November 12, 2021, I served the following document(s):

REQUEST FOR JUDICIAL NOTICE

✓ **By overnight delivery.** I enclosed the document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the person(s) at the address(es) below. I placed the sealed envelope or package for collection and overnight delivery with all fees fully prepaid.

Kolla's, Inc.
c/o Gonzalo Sanalla Estrada
23716 Marlin CV
Laguna Niguel, CA 92677

Gonzalo Sanalla Estrada
23716 Marlin CV
Laguna Niguel, CA 92677

Hon. Martha K. Gooding
Orange County Superior Court,
Dept. C34
Clerk of the Superior Court
700 Civic Center Drive West
Santa Ana, CA 92701

Fourth District Court of Appeal,
Division Three
Clerk/Executive Officer of the
Court of Appeal
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

✓ **By TrueFiling.** I electronically filed the document, which constituted service under California Rules of Court, rule 8.500(f).

Fourth District Court of Appeal,
Division Three
Clerk/Executive Officer of the
Court of Appeal
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at County of San Francisco, State of California, on November 12, 2021.

Mary Ann Galapon

Mary Ann Galapon, Declarant

EXHIBIT A

ASSEMBLY LABOR AND EMPLOYMENT COMMITTEE BILL NO.: AB 2452

ASSEMBLYMAN RICHARD E. FLOYD, CHAIRMAN HEARING DATE: 3/20/84

AB 2452, Maxine Waters, As Introduced January 24, 1984

SUBJECT:

Protection of employees reporting crimes and other violations of state and federal laws.

DIGEST:

Existing law does not specifically prohibit, except in certain instances, employers from discharging or discriminating against employees who report violations of law. Only in the narrow instance where an employer terminates or discriminates against an employee who makes a safety violation complaint to Cal-OSHA is the employee protected from the employer's actions.

This measure would prohibit employers from formulating any rule or policy preventing employees from reporting or contacting the state or federal government or law enforcement agencies concerning violations of law. Further, it would prohibit any employment discrimination of any employee who makes such a report. Violations of these provisions would be a misdemeanor, and employees damaged as a result of a violation would have a right to civil action.

The measure would not protect employees making disclosures when such action involved an employee's violation of the confidentiality of either a lawyer-client or physician-patient relationship.

FISCAL EFFECT:

Minor costs to the Labor Commissioner.

STAFF COMMENTS:

1. The intent of this measure is to afford employees some minimum protection against retribution by an employer when the employee reports crimes or violations of the law occurring at his or her place of employment. Although it is difficult to determine the prevalence of this type of discriminatory action, there are a number of reported instances where employees have been fired or threatened for "blowing the whistle" on illegal

activities of their employer. In this regard, state law does provide a limited mechanism for confidential reporting of illegal or wasteful activities by state agencies to the Office of the Auditor General.

2. An almost identical bill, AB 273 (M. Waters), was vetoed by the Governor last session on the basis that it was "overbroad" and might "endanger legitimate interest of an employer with respect to privileged or confidential information ...". To this end, the author has amended her legislation so it does not protect an employee disclosing confidential and privileged information involved in a physician-patient or lawyer-client relationship.

CONSULTANT: Britton McFetridge BILL NO.: AB 2452

AB 2452, Maxine Waters, As Introduced 1/24/84

SUPPORT:

American Civil Liberties Union (ACLU)

OPPOSITION:

Contra Costa County Board of Supervisors

Caterpillar Tractor Co., West Coast Governmental Affairs

EXHIBIT B

SENATE COMMITTEE ON INDUSTRIAL RELATIONS
SENATOR BILL GREENE, CHAIRMAN

1983-84 Regular Session

staff analysis

FISCAL: YES

URGENCY: NO

ASSEMBLY BILL 2452 (MAXINE WATERS)
As Amended April 26, 1984

A
B

2
4
5
2

SUBJECT: Employees' Disclosure of Information

HISTORY:

Source: American Civil Liberties Union

Prior Legislation: AB 273 (Maxine Waters) 1983-vetoed

SUPPORT: American Civil Liberties Union; California Labor Federation, AFL-CIO; California Teachers' Association; State Coalition of Probation Organizations; American Federation of State, County and Municipal Employees; Peace Officers' Research Association of California; California Union of Safety Employees; California State Fireman's Association; State Department of Education; Committee on Human Rights of the State Bar of California

OPPOSITION: Contra Costa City Board of Supervisors; Construction Industry Legislative Council

PURPOSE:

To protect employees from retaliation by an employer for providing information to a government or law enforcement agency concerning violations of state or federal laws.

ANALYSIS:

Under existing law, there are specific provisions which prohibit discrimination against persons who file complaints or testify in proceedings of the Division of Labor Standards Enforcement, the Division of Occupational Safety and Health, and the Workers' Compensation Appeals Board in the Department of Industrial Relations, and the Department of Fair Employment and Housing. Moreover, the California Supreme Court, in Tameny vs. Atlantic Richfield Co., ruled that an employee can recover damages from an employer for being terminated for refusing to violate the law. However, there is currently no provision

prohibiting retaliation against an employee for providing information to government agencies concerning a violation of state or federal laws.

This bill would make it a misdemeanor for an employer to (1) make, adopt, or enforce any rule, regulation or policy preventing an employee from disclosing information to a government or law enforcement agency, or (2) retaliate against an employee for disclosing such information. These prohibitions apply only where the employee has reasonable cause to believe that the information discloses a violation of a state or federal statute, or violation or noncompliance with a state or federal regulation.

The bill would not protect employees' disclosures regarding confidential information with respect to lawyer-client and physician-patient privileges or trade secret information.

COMMENTS:

(1) Proponents argue that the bill is needed to protect employees against retribution by employers when reporting crimes and law violations occurring in the workplace.

(2) Opponents argue that employees should be required to first report violations to the employer who should be given the opportunity to eliminate the problem. Otherwise, the opponents are fearful that the bill would be used to harass employers.

(3) The Governor vetoed a very similar bill, AB 273, last year on the basis that it was "overbroad and may endanger the legitimate interests of an employer with respect to privileged or confidential information relative to clients, customers, patients or to the employer's own protected trade secrets." The bill's provisions which exempt employee disclosures relating to confidential information, lawyer-client and physician-patient privileges and trade secrets, represent an attempt to meet the Governor's objections.

6/20/84
Consultant: Neil Burraston
Senate Industrial Relations Committee

EXHIBIT C

NROLLED BILL REPORT

A-117 (REV. 8/73

AGENCY	BILL NUMBER
Division of Labor Standards Enforcement	AB 2452
DEPARTMENT, BOARD OR COMMISSION INDUSTRIAL RELATIONS	AUTHOR Waters

SUMMARY

This bill would make it a misdemeanor for an employer to make, adopt, or enforce any rule, regulation or policy preventing an employee from, or retaliate against an employee for disclosing information to a government or law enforcement agency where the employee has reasonable cause to believe that the information discloses a violation of or non-compliance with a state or federal statute or regulation.

IMPACT ASSESSMENT

The intent of this bill is to protect the "whistleblower." It affords employees some protection against retribution by an employer when the employee reports crimes or violations of the law occurring at his or her place of employment. Although it is difficult to determine the prevalence of this type of discriminatory action, there are reported instances where employees have been fired or threatened for "blowing the whistle" on illegal activities of their employer. In this regard, state law does provide a limited mechanism for confidential reporting of illegal or wasteful activities by state agencies to the Office of the Auditor General.

Under the bill, the Labor Commissioner would be required to accept complaints, conduct investigations and prepare recommendations for district attorneys or other prosecuting attorneys for the issuance of misdemeanor complaints. The Labor Commissioner's office has had limited experience with the current law, but this bill greatly expands the coverage, and the number of complaints could significantly increase workload. The fiscal impact is difficult to estimate.

ARGUMENTS PRO AND CON

PRO: Any worker who wishes to disclose a possible violation of the law by his/her employer should, in the interests of law and order, have the right to do so without recrimination or retaliation in any form.

CON: The employer has the right to protect himself from frivilous and unwarranted charges by disgruntled employees. The nature of the employer-employee relationship should require that the employee's concerns be first expressed to the employer.

(continued on next page)

VOTE:

ASSEMBLY 51-23 SENATE

RECOMMENDATION

[X] SIGN [ ] VETO [ ] DEFER TO

DIVISION CHIEF	DATE 8-22-84
DEPARTMENT DIRECTOR Lance Moore	DATE 8/23/84

EXHIBIT D

REPLY TO
SACRAMENTO ADDRESS
STATE CAPITOL
SACRAMENTO 95814
(916) 445-2363

DISTRICT OFFICE
7900 SOUTH CENTRAL AVE.
LOS ANGELES 90001
(213) 582-7371

Assembly
California Legislature

MAXINE WATERS
ASSEMBLYWOMAN, FORTY-EIGHTH DISTRICT
MAJORITY WHIP

COMMITTEES:
CHAIRWOMAN, ELECTIONS, REAPPORTIONMENT AND CONSTITUTIONAL AMENDMENTS
RULES
JUDICIARY
JOINT LEGISLATIVE BUDGET COMMITTEE
WAYS AND MEANS

SUBCOMMITTEE:
CHAIRWOMAN, SUBCOMMITTEE #4 ON STATE GOVERNMENT

August 23, 1984

Honorable Governor Deukmejian
Governor, State of California
State Capitol, First Floor
Governor's Office
Sacramento, CA 95814

Dear Governor Deukmejian:

My bill, AB 2452, which prohibits an employer from firing an employee for reporting a violation of state or federal law to a government or law enforcement agency has passed the legislature and will soon be on your desk for signature.

You may recall last year you vetoed my bill AB 273 but stated in your veto message you supported the intent of this bill and would sign a more narrowly drawn version.

AB 2452 now contains those additional protections you requested. We have worked in cooperation with the California Manufacturers Association (C.M.A.) and have redrafted the bill to specifically excluded trade secret information along with violations of the lawyer/client and physician/patient confidentiality privilege.

As a result of these amendments we have had not opposition from the business community and I believe a representative from the C.M.A. has already informed your staff they have no objections to my bill.

I, therefore, hope you will sign AB 2452 and fulfill your promise of last year to support such a bill.

Sincerely,

Maxine Waters

MAXINE WATERS
ASSEMBLYWOMAN, 48th District

MW:SD:mw

EXHIBIT E

Assembly Bill No. 2452

CHAPTER 1083

An act to add Section 1102.5 to the Labor Code, relating to labor.

[Approved by Governor September 12, 1984. Filed with Secretary of State September 12, 1984.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2452, M. Waters. Employees: disclosure of information.

Existing law makes it a misdemeanor for an employer to forbid or prevent employees from participating in politics, to control or direct the political activities or affiliations of employees, or to coerce or influence employees by threat of loss of employment to adopt, follow, or refrain from political action.

This bill, in addition, would make it a misdemeanor for an employer to make, adopt, or enforce any rule, regulation, or policy or retaliate against an employee for disclosing information to a government or law enforcement agency where the employee has reasonable cause to believe that the information discloses a violation of state or federal law.

This bill would not apply to the confidential relationship of a lawyer-client, a physician-patient, or trade secret information.

Article XIII B of the California Constitution and Sections 2231 and 2234 of the Revenue and Taxation Code require the state to reimburse local agencies and school districts for certain costs mandated by the state. Other provisions require the Department of Finance to review statutes disclaiming these costs and provide, in certain cases, for making claims to the State Board of Control for reimbursement.

This bill would impose a state-mandated local program by creating a new misdemeanor.

However, this bill would provide that no appropriation is made and no reimbursement is required by this act for a specified reason.

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

SECTION 1. Section 1102.5 is added to the Labor Code, to read:

1102.5. (a) No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation.

(b) No employer shall retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information

discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation.

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

SEC. 2. No appropriation is made and no reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution or Section 2231 or 2234 of the Revenue and Taxation Code because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction.

O

EXHIBIT F

SENATE JUDICIARY COMMITTEE
Martha M. Escutia, Chair
2003-2004 Regular Session

SB 777	S
Senator Escutia	B
As Introduced	
Hearing Date: April 8, 2003	7
Labor Code	7
GMO:cjt	7

SUBJECT

Whistleblower Protections

DESCRIPTION

This bill would:

1) Expand protections for whistleblowers by prohibiting an employer from retaliating against an employee for refusing to participate in illegal employer activity or for having been a whistleblower in any former employment, and by imposing a new civil penalty of up to $10,000 per violation if the employer is a corporation or limited liability company (LLC);

2) Provide that in a civil action or an administrative proceeding pursuant to the whistleblower statute, once the employee has demonstrated by preponderance of the evidence that a proscribed activity was a contributing factor to the adverse employer action, the employer must show by clear and convincing evidence that the adverse action would have occurred for legitimate, independent reasons even if the employee did not engage in whistleblowing;

3) Create a whistleblower hotline in the Attorney General's office and require employers to post at the workplace a notice of employee's rights and responsibilities under the whistleblower laws, including the Attorney General's whistleblower hotline number;

4) Impose civil penalties of up to $10,000 on an officer or director of a corporation or member of an LLC and up to $5,000 on a financial manager of a corporation or LLC for failing to disclose to the Attorney General within 15 days of actual knowledge that the corporation or LLC, officer, director, member, manager or its agent is engaging or has engaged in specified finance-related activity intended to give a greater or lesser value of the company than it possesses or to deceive a regulatory agency;

(more)

5) Impose a civil penalty of up to $1,000,000 on a corporation or LLC for failing both to disclose to the Attorney General and to warn its shareholders and/or investors within 15 days of actual knowledge that the corporation or LLC, officer, director, member, manager or its agent is engaging or has engaged in specified finance-related activity intended to give a greater or lesser value of the company than it possesses or to deceive a regulatory agency.

The provisions for civil penalties would not apply:

- where a disclosure by an officer or director of a corporation, or LLC member, would violate client-lawyer privilege; or
- where the corporation, LLC, or officer, director, LLC member, or manager reasonably believed in good faith that notification to an appropriate agency was in compliance; or
- where disclosure would affect Fifth Amendment rights against self-incrimination of an officer, director, LLC member, or manager;
- the wrongful or inappropriate conduct to be reported was abated within 15 days of actual knowledge of the wrongful or inappropriate conduct.

The bill would apply only to corporations and LLCs that are required to register securities with the Securities and Exchange Commission and are publicly traded on a stock exchange.

The bill would clarify that under the whistleblower statute, a report made by a government employee to his or her agency is a disclosure of information made to a government or law enforcement agency, thus codifying Gardenhire v. City of Los Angeles Housing Authority (2000) 85 Cal.App.4th 236.

BACKGROUND

Except for two provisions and some clarifying changes, this bill is identical to SB 783 (Escutia, 2002). SB 783 contained the entire language of SB 1452 (Escutia, 2002), which was passed by this Committee and the Senate prior to the summer recess. SB 783 was vetoed by the Governor, with a message that he would sign legislation this year that would incorporate all of the components of SB 783, except for the provision imposing civil liability on "individuals who did not actually commit the wrongful act themselves." The Governor's veto message specifically objected to the civil liability of officers, directors and managers of corporations and members of limited liability companies for failing to report certain activities to the Attorney General or the shareholders.

Between the time SB 1452 was heard in this Committee and the enrollment of SB 783 to the Governor, Congress enacted the Sarbanes-Oxley Act of 2002. Sarbanes-Oxley addressed accounting industry reform and oversight, some corporate governance and financial reporting issues, and increased the penalties

for criminal conduct by executives. Comparison of SB 777 and the Sarbanes Oxley Act is further detailed in Comment 5.

The sponsor of this bill, the Foundation for Taxpayer and Consumer Rights, contends that while the Sarbanes-Oxley Act addresses major corporate accounting and reporting problems, the Act imposes penalties on corporate executives mostly for actions related to SEC filings and, where fraud is involved, only after damage has been done to shareholders, investors and employees. The sponsor states that SB 777 is needed in order to prevent the kind of damage to shareholders, investors, employees and the market that Enron and WorldCom, and now HealthSouth (see Comment 1) continue to cause.

CHANGES TO EXISTING LAW

1. Existing law prohibits an employer from adopting or enforcing any rule, regulation, or policy that prevents an employee from disclosing information to a government or law enforcement agency where the employee has reasonable cause to believe that the information discloses a violation of state or federal law or regulation. [Labor Code Section 1102.5(a). All references are to the Labor Code, unless otherwise indicated.] This statute is commonly known as the "Whistleblower Protection Statute" or "whistleblower statute."

   Existing law prohibits an employer from retaliating against an employee for making these disclosures. [Section 1102.5(b).]

   This bill would provide that an employer may not retaliate against an employee for refusing to participate in illegal activity or activity that may result in violations of state or federal statute or regulation.

   This bill would provide that an employer may not retaliate against an employee for having exercised his or her whistleblower rights in any former employment.

2. Existing law, for purposes of the above provisions, defines an "employee" to include persons who are employed by a state agency or its political subdivisions, a county or city and county, municipal or public corporation or political subdivision, a school district or community college district, or the University of California. [Section 1106.]

   This bill would provide that for government agency employees, reporting by the employee to the employer shall be deemed reporting to a government agency.

3. Under existing law, a violation of Section 1102.5 (the whistleblower protection statute) as well as other prohibited employer activity, is a misdemeanor,

punishable by imprisonment of up to one year or a fine of up to $1,000 in the case of an individual and up to $5,000 in the case of a corporation, or both imprisonment and fine. [Section 1103.]

This bill would make an employer that is a corporation or limited liability company liable for a civil penalty not exceeding $10,000 for each violation.

4. Existing case law provides that, after a plaintiff shows by a preponderance of evidence that the action taken by the employer is proscribed by the whistleblower statute, the burden shifts to the employer to show by a preponderance of the evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by the whistleblower statute. [Morgan v. Regents of University of California (2000) 88 Cal.App.4th 52; McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792.]

   This bill would instead require the employer to make that showing by clear and convincing evidence.

5. This bill would require the Attorney General to maintain a whistleblower hotline to receive calls about possible violations of state or federal statutes, rules or regulations, or violations of fiduciary responsibility by a corporation or LLC to its shareholders, investors or employees.

   This bill would require the AG to refer calls received on the whistleblower hotline to the appropriate government authority for review and possible investigation, and to hold in confidence information disclosed through the hotline.

   This bill would require an employer to display at the workplace a notice of an employee's rights and responsibilities under the whistleblower statutes, including the number of the Attorney General's whistleblower hotline.

6. Existing federal law, the Sarbanes-Oxley Act of 2002, imposes severe criminal penalties on various corporate fraud-related activities, including a provision for a maximum 25-year sentence and substantial fines for knowingly executing a scheme to defraud persons in connection with any security.

   This bill would make an officer or director of a corporation or a member of a limited liability company, liable for a civil penalty of up to $10,000 per violation, and a manager responsible for financial transactions in a corporation liable for a civil penalty of up to $5,000 per violation, to actually know and then to fail to notify the Attorney General or appropriate government agency within 15 days of acquiring that knowledge of specified

improper activity by the corporation or LLC, an officer or director, or a LLC member, or agent.

This bill would make a corporation or LLC liable for a civil penalty of up to $1,000,000 per violation for similar knowledge and inaction, including the failure to warn shareholders and investors in writing.

This bill would not require disclosure if the wrongful conduct is abated within the time period for reporting (15 days).

This bill would provide that the penalties would not apply for a failure to duly notify the Attorney General or appropriate government agency if the person has actual knowledge that the Attorney General or appropriate government agency has been notified, and, in the case of a corporation or LLC, that shareholders and investors have been warned. Further, no penalties would apply for the failure to duly notify the Attorney General if the corporation or LLC, officer, director, LLC member, or manager notified an appropriate governmental agency and reasonably and in good faith believed that such notification was compliance.

This bill would apply only to corporations and limited liability companies that are required to register securities with the United States Securities and Exchange Commission and are publicly traded on a stock exchange.

This bill would provide that the duty to disclose information is not intended to affect the Fifth Amendment right against self-incrimination of an officer or director of a corporation, LLC member, or financial manager, nor would it require a person to violate lawyer-client privilege.

This bill would provide that a civil action to assess the civil penalties under this bill may be brought by the Attorney General, a district attorney or a city attorney in the name of the people of the state.

COMMENT

1. Need for the bill

The sponsor of the bill, the Foundation for Taxpayer and Consumer Rights, states that if enacted, SB 777 would be the strongest whistleblower protection and corporate accountability law in the nation.

According to the sponsor, "while little can be heard above the din of war coverage, day after day, [newspaper] business sections around the country report new stories of corporate chicanery and financial fraud. Time and again, however, the information comes too late to prevent the damage and

protect workers, pensioners, investors, and others hurt by corporate fraud and misbehavior." Besides last year's major corporate newsmakers, they cite recent cases involving firings and guilty pleas from top executives of healthcare giant HealthSouth that surfaced only after more than a billion dollars' worth of accounting fraud was discovered, and "accounting trickery at an El Segundo, California-based technology firm [that] may cost retirees and other investors tens of millions of dollars."

The sponsor and other supporters of the bill state that despite passage of the Sarbanes-Oxley Act of 2002, these stories of corporate wrongdoing continue to surface because the new law largely ignored the invaluable role played by whistleblowers and the importance of requiring corporations to disclose fraud as soon as it becomes apparent. "Without an effective early warning system in place, the public cannot effectively preempt the devastation that comes with corporate fraud." SB 777, proponents hope, would give California an "early warning system."

2. SB 777 compared to enrolled version of SB 783/SB 1452

As stated above, SB 777 differs in only two respects from SB 1452, the bill passed by this Committee last year that was later amended into and became SB 783, which was enrolled to the Governor together with several other bills dealing with corporate responsibility:

a) the standard of proof to be applied in a civil action or administrative proceeding under the whistleblower statute is changed from "preponderance of evidence" to "clear and convincing evidence" for the employer to demonstrate that the alleged proscribed action would have been taken for other independent, legitimate reasons (see Comment 3c); and

b) the civil liability of corporate officers and directors and LLC members is reduced to $10,000, and to $5,000 for managers. (See Comment 5a.)

3. Expansion of whistleblower protections

a. Employer retaliation prohibited

In 1984 the Legislature enacted Labor Code Section 1102.5, commonly known as the "whistleblower protection statute" or "whistleblower statute." In 1992, AB 3486 (Friedman, Chapter 1230, Statutes of 1992) included employees of the state and its subdivisions and other public agencies under the protective umbrella of Section 1102.5.

Section 1102.5 prohibits an employer from adopting or enforcing any rule that prevents an employee from disclosing information to a government or law enforcement agency where the employer has reason to believe that the information discloses a violation of state or federal law or regulation. The law also prohibits an employer from retaliating against an employee for making these disclosures.

SB 777 would expand the protections of the whistleblower statute to employees who refuse to participate in employer activity that is in violation of state or federal law or rule or regulation, or who exercised his or her whistleblower rights in a former employment.

Under SB 777, an employee would not have to be an actual whistleblower, but could have simply refused to participate in the improper activities to be protected under the proposed change. Thus, Sharon Watkins, the former Enron employee who blew the whistle on Enron, for example, may not be retaliated against, or treated differently or in a negative way, by a new employer because of blowing the whistle on top Enron executives who knew of questionable activities the company engaged in that affected the value of the company in the marketplace.

This bill also would codify the appellate court's ruling in Gardenhire v. City of Los Angeles Housing Authority, supra, that a government employee who has made a disclosure to his or her employing agency is deemed to have made the disclosure to a government or law enforcement agency under the whistleblower statute. Thus, a Department of Insurance employee's report of inappropriate activities at the department, for example, to his or her superior at the department would be deemed to be a protected whistleblower activity under this bill (but note that disclosures made by government attorneys regarding their agency-clients are covered by ethics rules governing attorneys generally and would probably be subject to other rules).

b. Additional civil penalty for corporate employers

A violation of the whistleblower statute and other prohibited employer activities under the Labor Code is a misdemeanor, punishable by imprisonment in county jail for up to one year or a fine of up to $1,000 in the case of an individual or a fine of up to $5,000 in the case of a corporation, or both imprisonment and fine. [Sec. 1103.]

This bill would add a civil penalty, assessable against corporate employers only, of up to $10,000 for each violation of the whistleblower statute. This new civil penalty, according to proponents, would add a measure of deterrence to the whistleblower's corporate employer, because the

standard of proof that would be required for a civil penalty would be less than the "beyond a reasonable doubt" required for the misdemeanor penalty under Section 1103. The usual standard of proof for prosecuting a civil penalty is "preponderance of the evidence," unless a statute specifically states otherwise. [Evidence Code Sections 115,160, 500.]

c. Standard of proof in whistleblower suit is raised

According to proponents, one of the problems encountered in civil actions or administrative proceedings where an employee was retaliated against or discharged for whistleblowing activities is the standard of proof used by the courts. The rule has been, in California and in most states, that after the employee makes a showing, by preponderance of evidence, that an employer's adverse action is prohibited under Section 1102.5, the burden shifts to the employer to show, by preponderance of evidence, that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in whistleblowing activities. This, proponents state, has made it almost impossible for whistleblowers to win a challenged whistleblower lawsuit under Section 1102.5.

SB 777 would raise the standard of proof required for the employer to overcome the employees showing to proof by clear and convincing evidence.

By raising the standard of proof that the employer must meet, potential whistleblowers, proponents state, would find a safer haven, encourage reporting, and thus foster the early detection of financial fraud by a company.

This standard is currently in use by some jurisdictions, the District of Columbia, for example. Proponents state that national watchdog organizations are encouraging other states to enact the same change to their whistleblowing statutes.

d. Notice re: employee whistleblower rights and responsibilities, hotline number

This bill would require an employer to post a notice, in 14-point pica type, of an employee's rights and responsibilities under the whistleblower statute, including the Whistleblower Hotline number in the Attorney General's office. (For a discussion of the hotline, see Comment 4.)

The notice, proponents contend, would alert employees to their rights under the whistleblower statute and encourage those who would

otherwise be dissuaded by fears of retaliation to make relevant and substantive reports. Hopefully, they say, reports on this hotline will lead to substantive changes in the workplace or the prevention of Enron-type situations from occurring again. Specific notice of the employee's responsibilities would also give fair notice to employees and encourage them to act.

4. Whistleblower hotline in the Attorney General's office

This bill would establish a Whistleblower Hotline in the Attorney General's office. The hotline is for persons who have information regarding possible violations of state or federal statutes, rules, or regulations, or violations of fiduciary responsibility by a corporation or limited liability company (LLC) to its shareholders, investors, or employees. It is expected that this hotline would be used mainly by persons who would have no obligation to report under another section of this bill (see Comment 5, regarding obligation of officers, directors, and managers to report to the Attorney General).

So that the Attorney General (AG) would not be burdened with having to investigate every call received on the hotline, SB 777 gives the AG the authority to refer any call to an appropriate authority, including to itself, for review and possible investigation. Any information disclosed through the hotline would be held in confidence by the AG or the appropriate agency to whom the call may have been referred, during the initial review of the call. The information held confidential would include the name of the caller and the name of the employer. Thus, this hotline would not process anonymous calls.

The sponsor states that this is an extremely important component of a multi-pronged approach to the Enron-type situations that seem to pervade corporations in these times. As examples, they cite numerous emails posted on the Enron Message Board, recovered only after Enron filed for bankruptcy. One email, published in an article by James Felton, Associate Professor of Finance, Central Michigan University, in the Journal of Investing, states:

"It will soon be revealed that Enron is nothing more than a house of cards that will implode before anyone realizes what happened. Enron has been cooking the books with smoke and mirrors. The Enron executives have been operating an elaborate con scheme that has fooled even the most sophisticated analysts. When the truth is uncovered, those analysts and ENE investors will feel like a raped school girl. The first sign of trouble will be an earnings shortfall followed by more warnings. Criminal charges will be brought against ENE executives for their misdeeds. Class action lawsuits will complete the demise of ENE."

This email was number 11,460 on the message board, dated April 12, 2001, written by someone called "enron is a scam" and titled "Enron will soon collapse."

"ENE the virtual company. Profits for 10 years forward being taken in current years. When you shake it down what do you have? The paper mache company."

This was email number 238 from JanisJoplin298, dated June 17, 1998.

"Dig deep behind the Enron financials and you'll see a growing mountain of off-balance sheet debt which will eventually swallow this company. There's a reason they layer so many subsidiaries and affiliates. Be careful."

This email was posted on March 1, 2000 by arthur86plz.

The sponsor states that if the Whistleblower Hotline were in place at the time, whoever wrote these emails could have called in, knowing that his or her identity would be confidential as well as Enron's, during a review and possible investigation by the Attorney General or the Department of Corporations. The anonymity provided by the email, together with the privacy of the message board posting, makes it unlikely that a government agency with oversight responsibility over corporate reporting and disclosures could have ever discovered these warnings and initiated any investigation or review, the sponsor contends.

Last year's SB 1452/SB 783 contained similar hotline provisions, deemed by the Appropriations Committee to generate only minimal costs.

5. Civil penalties for failure to disclose knowledge of specified activity that distorts value of business

Section 6 of this bill would provide for civil penalties assessable against a corporation or its officers and directors or a limited liability company (LLC) or its members, and against managers who are responsible for financial transactions of the corporation or LLC, for having actual knowledge and then failing to disclose that knowledge of specific activities and statements that distort the value of the company or its shares.

This part of SB 777 is similar to provisions of the Corporate Criminal Liability Act of 1990 (Penal Code Section 387), which makes it a felony to know about and fail to report a hidden danger in the workplace setting or a product. SB 777 however would impose only civil penalties on offending corporations or

their officers and directors or limited liability companies and their members and managers.

a. For officers or directors of corporations, members of a limited liability company (LLC), or financial managers of a corporation or LLC

This bill would provide civil penalties of up to $10,000 for an officer or director of a corporation or a member of an LLC, and up to $5,000 for a manager responsible for financial transactions, for failing to make a disclosure to the Attorney General within 15 days of acquiring actual knowledge of specific improper activities of the corporation or LLC.

These specified activities are similar to those listed in Corporations Code Section 2254 and are related to material statements or omissions designed to give a distorted value to a company or its shares. Corporations Code Section 2254 is part of California's "blue skies" securities laws. Under SB 777, disclosure would be required if the corporation or its officers or directors, LLC or its members, or their agent:

i) is making or has made, published or concealed material facts about the condition of the company that are false and intended to give the company a greater or lesser apparent market value than it really possesses, whether made orally, or by written or electronic communication; or
ii) is refusing or has refused to make any book entry or post any notice as required by law; or
iii) is misstating or concealing or has misstated or concealed material facts in order to deceive or mislead a regulatory agency so as to avoid a regulatory or statutory duty or prohibition or limitation.

Under this bill, the duty to disclose would be excused if, within the 15-day period, the activity that creates a distorted value or deceives a regulatory agency was abated or the disclosure would violate a lawyer-client privilege. The latter provision was added to ensure that an officer or director of a corporation (or an LLC member) who is also legal counsel to the corporation or LLC would not be subject to the civil penalty when the lawyer-client privilege prevents him or her from making such a disclosure.

Also, under this bill an officer or director or an LLC member or a financial manager would not be relieved of the duty to disclose to the Attorney General if another person is also obligated to make the same disclosure. This, according to the sponsor of the bill, is important in order to

encourage all of those with actual knowledge of what is going on with the financial condition of the corporation or LLC to come forward with information. Thus, the AG or appropriate agency would have more information, rather than less, to work with in reviewing or investigating the disclosure.

b. For the corporation or LLC, a higher civil penalty

SB 777 would impose a civil penalty of up to $1 million per violation on a corporation or LLC that has actual knowledge of the same actions or information as described above and failed to do two things: (1) make the disclosure to the Attorney General in writing, and (2) warn its affected shareholders and investors in writing, unless the corporation or LLC has actual knowledge that the affected shareholders and investors have been warned.

Under the bill, the requirement to warn shareholders and investors is limited to the corporation or LLC, since it would have access to those who need to be warned and the facility for sending the warnings out.

This part of SB 777 is patterned after Section 387 of the Penal Code, which makes it a felony for a corporation to know about and then fail to report hidden dangers in the workplace or a product. That law, the only one of its kind in the country according to proponent Consumers Union (CU), has been used sparingly over the last twelve years since its enactment (only six times) and only in the most egregious cases of corporate wrongdoing. The CU believes that the existence of Penal Code Section 387 has had a deterrent effect on corporate crime. Therefore the group supports this bill as an "effort to prevent financial fraud before it grows large enough and serious enough to harm shareholders, pensioners, and consumers in the marketplace."

c. Limitations on liability for civil penalty

The bill limits applicability of the civil penalties imposed for failure to disclose as follows:

- The duty to disclose would be excused if the specified conduct, knowledge of which triggered the duty to warn the Attorney General, was abated before the 15-day period expired.
- The penalties would not apply for failure to notify the Attorney General if the corporation, LLC, officer, director, member or manager reasonably and in good faith believed that notification of an appropriate governmental agency was sufficient compliance with the duty to report to the Attorney General.

- It would apply only to corporations or LLCs that issue stocks or shares or other securities that are regulated by the federal Securities and Exchange Commission and are publicly traded on a stock exchange.
- It would not require disclosure that would result in a violation of the lawyer-client privilege. (See Comment 5a, page 11.)
- It may not be interpreted to deprive a person of the privilege against self-incrimination (i.e., one would not be obligated to report his or her own criminal wrongdoing) or to prevent a person from exercising that privilege.

By limiting the application of this part of the bill to publicly traded companies, the bill casts a smaller net to catch egregious conduct such as what executives in Enron and similarly situated companies did or did not do, yet leave the smaller, private corporations alone to conduct their business. The rationale, according to the sponsor, is that the effect of WorldCom and Enron-type situations on the market and the economy as a whole is more widespread, catastrophic even, and should be abated without creating a new duty, hence a burden, on smaller private corporations going about their business in compliance with the law.

d. Action for civil penalty may be brought by Attorney General, district or city attorney, acting on behalf of the people

This bill would allow the Attorney General (AG), district or city attorney, acting on behalf of the people, to file a civil suit to assess the civil penalties provided under this bill.

Opponents contend that the civil penalties imposed by the bill would encourage the filing of lawsuits under Business and Professions Code Section 17200, thus resulting in "legal shakedown lawsuits." Because this bill does not provide a private cause of action by a private citizen acting as a private attorney general, this contention has no merit.

5. Sarbanes-Oxley Act and SB 777

Opponents of SB 777 state that the passage of the Sarbanes-Oxley Act makes SB 777 unnecessary. Below are some comments regarding pertinent provisions of both pieces of legislation.

A. Whistleblower protections

(1) Federal protection only for disclosures in limited cases

The federal Act would protect corporate whistleblowers only if information is disclosed to Congress or to a federal agency. The

protections are also available when disclosure is made to a supervising internal authority in the corporation; however, this would apply only when the protected disclosure is made in connection with an investigation by a Congressional committee or federal agency (see Comment 2A(3) below.)
SB 777 would create a whistleblower hotline for financial fraud directly to the Attorney General, would require that the employer post whistleblower rights, and provide that the initial information provided on the hotline is confidential. Thus the protections afforded employees are greater than that available under the federal Act.

(2) Federal Act allows attorneys fees and costs, but not SB 777

The federal Act remedies for whistleblower violations allow for recovery of all "compensatory damages" (reinstatement with same seniority, back pay with interest, special damages, litigation costs and reasonable attorney's fees), and retention of rights under any state or federal law or collective bargaining agreement.

SB 777 does not provide for reasonable attorney's fees or costs of litigation (current Section 1102.5 does not), while current law already provides the rest of "compensatory damages" mentioned in the federal Act. SB 777 would not create any new recoverable damages for an employee who is discriminated against for whistleblowing.

(3) Federal Act protects only whistleblowers who provide information or participate in corporate fraud investigation; SB 777 does more

SB 777 would protect employees who refuse to perform illegal acts or conduct that would result in violations of law or regulations, whether state or federal. SB 777 also would protect from discrimination employees who were whistleblowers in former employment.

(4) Federal Act imposes more severe fines and jail terms; SB 777 imposes higher civil penalties

For violations of the federal whistleblowing statutes, Sarbanes-Oxley imposes severe fines and prison terms of up to 10 years, while SB 777 maintains the current penalties for misdemeanor violations but increases civil penalties on corporate or LLC employers from $5,000 to $10,000 per violation.

B. Obligations of officers, directors, LLC members and managers

(1) Federal Act focuses on financial statement filings; SB 777 on reporting specified acts to prevent fraud

Sarbanes-Oxley requires chief executive officers (CEOs) and chief financial officers (CFOs) only to certify financial statements submitted to the Securities and Exchange Commission or published for public consumption. It punishes officers, directors or their agents who coerce or influence an independent auditor for the purpose of rendering financial statements materially misleading.

SB 777 would require the CEO, CFO, and other directors and financial managers to report financial fraud to the Attorney General within 15 days, if they cannot stop the fraud internally. It also would require a warning to shareholders and investors. Proponents of SB 777 contend that this will help prevent corporate financial fraud while the federal Act will only come into play after the damage is done to investors and shareholders.

(2) Federal Act penalties for violations much heavier, but do not affect the goal of preventing fraud

Sarbanes-Oxley imposes penalties of up to 10 years in prison and/or up to $1 million in fines for violations regarding certification of the financial statements; for willful violations the penalty could be as high as 20 years imprisonment and/or up to $5 million in fines. The Act also requires disgorgement of certain profits and bonuses by a CEO/CFO, received during the 12-month period following the public issuance or filing of the misleading financial document with the SEC

SB 777 subjects a corporate executive or director or LLC member to a civil penalty of up to $10,000 and a manager to a penalty of up to $5,000 for a violation of the duty to warn the AG. For the corporation or LLC itself, the civil penalty could be as high as $1 million. The bill requires that the corporation or its officers/directors or the LLC or its members or financial managers have actual knowledge of fraudulent or misleading disclosures and that they each warn the Attorney General within 15 days (and in the case of corporations, shareholders also within the same 15 days), as a means of preventing financial disasters for investors, shareholders, and employees.

While the penalties under SB 777 are mild compared to those under Sarbanes-Oxley, proponents contend that SB 777 would be more effective in preventing the damage that corporate wrongdoing could cause. Their argument states that Sarbanes-Oxley penalizes acts or omissions related to filings with the SEC, and in the case of fraudulent

activities, only after the damage is done. SB 777 would instead encourage early reporting of corporate misbehavior, thus perhaps giving investors, shareholders and employees the opportunity to reassess their investments in the corporation or LLC.

Support: Sierra Club of California; Older Women's League; Consumers Union; California Independent Public Employees Legislative Council; California Labor Federation, AFL-CIO; California Conference Board of the Amalgamated Transit Union; Hotel Employees and Restaurant Employees International Union; California Conference of Machinists; United Food and Commercial Workers Region 8 States Council; Engineers and Scientists of California, IFPTE Local 20; Professional and Technical Engineers, IFPTE Local 21; The Teamsters Union; Consumer Attorneys of California; California Public Interest Research Group (CALPIRG); Gray Panthers

Opposition: American Electronics Association

HISTORY

Source: Foundation for Taxpayer and Consumer Rights

Related Pending Legislation: None Known

Prior Legislation: SB 1452 (Escutia) and SB 783 (Escutia). See Background and Comment 2

****

EXHIBIT G

Date of Hearing: June 17, 2003

ASSEMBLY COMMITTEE ON JUDICIARY
Ellen M. Corbett, Chair
SB 777 (Escutia) – As Amended: May 29, 2003

SENATE VOTE: 23-14

SUBJECT: WHISTLEBLOWER PROTECTIONS

KEY ISSUES:

1) SHOULD THE WHISTLEBLOWER PROTECTION STATUTE BE AMENDED TO MANDATE REPORTING OF IMPROPER ACTIVITY TO THE ATTORNEY GENERAL WHEN COMPANIES AND THEIR MANAGEMENT HAVE ACTUAL KNOWLEDGE OF WRONGDOING?

2) SHOULD THE ATTORNEY GENERAL MAINTAIN A HOTLINE FOR THE RECEIPT OF WHISTLEBLOWING COMPLAINTS?

SYNOPSIS

This bill is substantially similar to a vetoed measure carried by the author last year. It arises in response to the recent spate of false business reports and other illegal activity by Enron, WorldCom and others. It is designed to encourage earlier and more frequent reporting of wrongdoing by employees and corporate managers when they have knowledge of specified illegal acts. The bill seeks to do so by expanding employee protection against retaliation, requiring the Attorney General (AG) to maintain a whistleblower hotline, requiring employers to notify employees of their rights and remedies, requiring top company officials to report to the AG if they have actual knowledge of specified improper activity by the company, and permitting a court to impose a civil penalty against a company for failure to report. The bill provides for a civil action to be brought by the AG, district attorneys, and city attorneys. In response to the Governor's veto message last year, the author has removed a provision regarding individual liability for officers and directors. In addition, the author has added a new statutory affirmative defense to employer liability for retaliation in violation of the whistleblower statute when the employer can show that it would have made the same decision for legitimate and independent reasons. In opposition it is contended that the bill is duplicative of federal law and therefore unnecessary, and will unfairly expose companies to frivolous litigation.

SUMMARY: Amends the whistleblower protection statute. Specifically, this bill:

1) Extends the existing prohibition against employer retaliation to employees who report violations of state or federal rules, and to employees who refuse to participate in illegal activity or activity that may result in violations of state or federal statute, rule or regulation.

2) Provides that an employer may not retaliate against an employee for having exercised his or her whistleblower rights in any former employment.

3) Provides that for government agency employees, reporting by the employee to the employer shall be deemed reporting to a government agency.

4) Provides an affirmative defense against retaliation claims, even when the employee demonstrates that a proscribed activity was a contributing factor to the adverse employment action, if employer shows by clear and convincing evidence that the adverse action would have occurred for legitimate, independent reasons.

5) Requires the AG to maintain a Whistleblower Hotline to receive calls about possible violations of state or federal statutes, rules or regulations, or violations of fiduciary responsibility by a corporation or limited liability company to its shareholders, investors or employees.

6) Requires an employer to display at the workplace a notice of an employee's rights and responsibilities under the whistleblower statutes, including the number of the whistleblower hotline.

7) Makes an employer that is a corporation or limited liability company (LLC) liable for a civil penalty not exceeding $10,000 for each violation of the foregoing obligations.

8) Makes a corporation or LLC liable for a civil penalty of up to $1,000,000 per violation for similar knowledge and inaction, including the failure to warn shareholders and investors in writing. No such reporting is required if the wrongful conduct is abated within the time period for reporting (15 days). Further provides that the penalties would not apply for a failure to duly notify the AG or appropriate government agency if the person has actual knowledge that the AG or appropriate government agency has been notified, and in the case of a corporation or LLC, that shareholders and investors have been warned. Further, no penalties would apply for the failure to duly notify the AG if the corporation or LLC, officer, director, member, or manager notified an appropriate governmental agency and reasonably and in good faith believed that such notification was compliance.

9) Provides that a civil action to assess the civil penalties under this bill may be brought by the AG, a district attorney, or a city attorney.

EXISTING LAW:

1) Prohibits an employer from adopting or enforcing any rule, regulation, or policy that prevents an employee from disclosing information to a government or law enforcement agency where the employee has reasonable cause to believe that the information discloses a violation of state or federal law, or regulation. (Labor Code Section 1102.5(a). Whistleblower protection statute.) (All further statutory references are to this code unless otherwise indicated.)

2) Prohibits an employer from retaliating against an employee for making disclosures protected by the whistleblower protection statute. (Section 1102.5(b).)

3) For purposes of the whistleblower protection statute, defines an "employee" to include persons who are employed by a state agency or its political subdivisions, a county or city and county, municipal or public corporation or political subdivision, a school district or community college district, or the University of California. (Section 1106.)

4) Makes a violation of the whistleblower protection statute, as well as other prohibited employer activity, a misdemeanor, punishable by imprisonment of up to one year or a fine of up to $1,000 in the case of an individual and up to $5,000 in the case of a corporation, or both imprisonment and fine. (Section 1103.)

FISCAL EFFECT: As currently in print, this bill is keyed fiscal.

COMMENTS: The author states that, except for two provisions and some clarifying changes, this bill is identical to SB 783 (Escutia) of 2002. That bill was vetoed by the Governor, with a message that he would sign legislation this year that would incorporate all of the components of SB 783, except for the provision imposing civil liability on "individuals who did not actually commit the wrongful act themselves." This bill omits that provision.

The sponsor of the bill, the Foundation for Taxpayer and Consumer Rights (FTCR), states that if enacted, SB 777 would be the strongest whistleblower protection and corporate accountability law in the nation. According to the sponsor, "While little can be heard above the din of war coverage, day after day, [newspaper] business sections around the country report new stories of corporate chicanery and financial fraud. Time and again, however, the information comes too late to prevent the damage and protect workers, pensioners, investors, and others hurt by corporate fraud and misbehavior." Besides last year's major corporate newsmakers, FTCR cites recent cases involving firings and guilty pleas from top executives of healthcare giant HealthSouth that surfaced only after more than a billion dollars of accounting fraud was discovered, and "accounting trickery at an El Segundo, California-based technology firm [that] may cost retirees and other investors tens of millions of dollars."

Prevention and Early Warning. The sponsor and other supporters of the bill state that despite passage of the federal Sarbanes-Oxley Act of 2002, reports of corporate wrongdoing continue to surface because the federal law largely ignored the invaluable role played by whistleblowers and the importance of requiring corporations to disclose fraud as soon as it becomes apparent. "Without an effective early warning system in place, the public cannot effectively preempt the devastation that comes with corporate fraud," FTCR argues. SB 777, proponents hope, would give California an "early warning system."

Supporters argue that this bill is needed to provide for early detection of corporate fraud and protect the public from financial deception and other violations of the public trust. While existing state and federal laws provide penalties for those who engage in corporate fraud, existing law provides no incentive to report – or more accurately, disincentive not to report – wrongdoing at an early stage before more harm occurs. The sponsor states the public has reacted with outrage and frustration to the intertwining scandals involving Enron Corporation and its accounting firm, Arthur Andersen, not to mention the growing list of companies that appear to have engaged in suspect accounting practices. Pensioners who are suffering as a result of the Enron collapse ask why the executives who oversaw this debacle are not going to jail. It has been more than five months since Enron executives drove their company into the ground and a number of them have exercised their Fifth Amendment right against self-incrimination before Congress, yet nobody at that company has been arrested. And California ratepayers who are facing the highest electricity bills in the country read of internal price gouging strategies by Enron and other power companies wonder why nobody came forward before the disaster struck.

Employer Retaliation Prohibited. Current law prohibits an employer from adopting or enforcing any rule that prevents an employee from disclosing information to a government or law enforcement agency where the employee has reason to believe that the information discloses a violation of state or federal law or regulation. The law also prohibits an employer from retaliating against an employee for making these disclosures. SB 777 would expand the protections of the whistleblower statute to employees who refuse to participate in employer activity that is in violation of state or federal law or rule or regulation, or who exercised his or her whistleblower rights in a former employment. Thus, under SB 777, an employee would not have to be an actual whistleblower, but could have simply refused to participate in the improper activities to be protected under the proposed change. The author further states that this bill also would codify the appellate court's ruling in *Gardenhire v. City of Los Angeles Housing Authority* that a government employee who has made a disclosure to his or her employing agency is deemed to have made the disclosure to a government or law enforcement agency under the whistleblower statute. Thus, a Department of Insurance employee's report of inappropriate activities at the department, for example, to his or her superior at the department would be deemed to be a protected whistleblower activity under this bill.

Additional Civil Penalty For Corporate Employers. A violation of the whistleblower statute and other prohibited employer activity under the Labor Code is a misdemeanor, punishable by imprisonment in county jail for up to one year or a fine of up to $1,000 in the case of an individual or a fine of up to $5,000 in the case of a corporation, or both imprisonment and fine. This bill would add a civil penalty of up to $10,000, assessable only against corporate employers, for each violation of the whistleblower statute. This new civil penalty, according to proponents, would add a measure of deterrence for the whistleblower's corporate employer, because the standard of proof that would be required for a civil penalty would be less than the "beyond a reasonable doubt" required for the misdemeanor penalty under Section 1103. The usual standard of proof for prosecuting a civil penalty is "preponderance of the evidence," unless a statute specifically states otherwise.

Codification of a "Same-Decision" Defense for Employers. SB 777 codifies a new affirmative defense for employers. Under the bill, in a civil action or administrative proceeding brought pursuant to Section 1102.5, once an employee demonstrates that activity proscribed by section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer may nevertheless prevail if it can show by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5. The sponsor states that this defense is borrowed from federal law, including the Sarbanes-Oxley act and the federal employee Whistleblower Protection Act. According to the sponsor, this defense is currently in use in other jurisdictions, including the District of Columbia, and national watchdog organizations are encouraging other states to enact the same change to their whistleblowing statutes.

Whistleblower Hotline In The Attorney General's Office. This bill would establish a Whistleblower Hotline in the Attorney General's office. The hotline is for persons who have information regarding possible violations of state or federal statutes, rules, or regulations, or violations of fiduciary responsibility by a corporation or LLC to its shareholders, investors, or employees. So that the AG would not be burdened with having to investigate every call received on the hotline, the author states, the bill gives the AG the authority to refer any call to an appropriate authority, including to itself, for review and possible investigation. The author adds that any information disclosed through the hotline would be held in confidence by the AG or the

appropriate agency to whom the call may have been referred. The information held confidential would include the name of the caller and the name of the employer. Thus, according to the author, this hotline would not process anonymous calls. The sponsor states that this is an extremely important component of a multi-pronged approach to the Enron-type situations that seem to pervade corporations in these times. As examples, they cite numerous emails posted on the Enron Message Board, recovered only after Enron filed for bankruptcy. The author and sponsor state that they have worked with the AG's staff on this portion of the bill, to ensure that the AG's office would not be unduly burdened with the creation and maintenance of a whistleblower hotline mandated by this bill. According to the Senate Appropriations Committee analysis, the costs would be minimal.

Notice Regarding Employee Whistleblower Rights And Responsibilities. This bill would require an employer to post a notice, in 14-pica type, of an employee's rights and responsibilities under the whistleblower statute, including the Whistleblower Hotline number in the AG's office discussed next. The notice, proponents contend, would alert employees to their rights under the whistleblower statute and encourage those who would otherwise be dissuaded by fears of retaliation to make relevant and substantive reports. Hopefully, supporters say, reports on this hotline will lead to substantive changes in the workplace or the prevention of Enron-type situations from occurring again. Specific notice of the employee's responsibilities would also give fair notice to employees and encourage them to act.

Civil Penalties On Companies For Failure To Disclose Knowledge Of Specified Activity That Distorts Value Of Business. Section 6 of this bill would provide for a civil penalty civil penalty of up to $1 million per violation on a corporation or LLC that has actual knowledge of and fails to disclose specific activities and statements that distort the value of the company or its shares. The author states that this part of the bill is similar to provisions of the Corporate Criminal Liability Act of 1990 (Penal Code Section 387), which makes it a felony to know about and fail to report a hidden danger in a workplace or a product. SB 777 however is more limited in that it would impose only civil penalties. Also, unlike last year's SB 783, the author has amended this bill to remove any civil penalties against officers, directors or managers.

The author states that current Penal Section 387 makes it a felony for a corporation to know about and then fail to report hidden dangers in the workplace or a product. That law, the only one of its kind in the country according to proponent Consumers Union (CU), has been used sparingly over the last 12 years since its enactment (only six times) and only in the most egregious cases of corporate wrongdoing. The CU believes that the existence of Penal Code Section 387 has had a deterrent effect on corporate crime. Therefore, the group supports this bill as an "effort to prevent financial fraud before it grows large enough and serious enough to harm shareholders, pensioners, and consumers in the marketplace."

Limitations On Liability For Civil Penalty. The bill provides several limitations to the applicability of the civil penalties imposed for failure to disclose: the duty to disclose would be excused if the specified conduct knowledge of which triggered the duty was abated before the 15-day period expired. The penalties would not apply for failure to notify the Attorney General if the corporation, LLC, officer, director, member or manager reasonably and in good faith believed that notification of an appropriate governmental agency was in compliance. It would apply only to corporations or LLCs that issue stocks or shares or other securities that are regulated by the federal SEC and traded on a stock exchange (*i.e.*, publicly traded companies only). By limiting the application of this part of the bill to publicly traded companies, the bill

casts a smaller net to catch egregious conduct such as what executives in Enron and similarly situated companies did or did not do, yet leaves the smaller, private corporations alone to conduct their business. The rationale, according to the sponsor, is that the effect of Enron-type situations on the market and the economy as a whole is more widespread, catastrophic even, and should be abated without creating a new duty, hence a burden, on smaller private corporations going about their business in compliance with the law.

Attorney General, District Or City Attorney May Bring Action For Civil Penalty – But Not a Citizen Acting As Private Attorney General. This bill would allow the AG, district or city attorney to file a civil suit by which a court may assess civil penalties. In response to concerns expressed by opponents regarding earlier incarnations of this measure, the author has deleted an earlier provision allowing enforcement by private attorneys general provision.

ARGUMENTS IN OPPOSITION: In opposition to the bill, the American Electronics Association (AEA) argues that it duplicates existing securities laws and regulations, as well as common law fraud and unfair competition laws, and unfairly exposes companies to frivolous litigation.

In particular, AEA argues that SB 777 is unnecessary because it overlaps the recently-enacted federal Sarbanes-Oxley Act. AEA states that under the Sarbanes-Oxley Act, all periodic financial statements filed with the SEC must be accompanied by a written certification stating that the information contained in the report fairly represents all material information relating to the financial condition and results from operation of the company. AEA further states that the federal act creates significant new penalties, including criminal sanctions, for corporate executives who violate securities laws, and requires disgorgement of executive bonuses and other incentive compensation as well as profits from the sale of securities.

Supporters respond that Sarbanes-Oxley requires chief executive officers (CEOs) and chief financial officers (CFOs) only to certify financial statements submitted to SEC or published for public consumption. It punishes officers, directors or their agents who coerce or influence an independent auditor for the purpose of rendering financial statements materially misleading. Proponents of SB 777 contend that it will help prevent corporate financial fraud, while the federal Act will only come into play after the damage is done to investors and shareholders.

In addition, supporters argue, the federal Act protects corporate whistleblowers only if information is disclosed to Congress or to a federal agency. The protections are also available when disclosure is made to a supervising internal authority in the corporation when the protected disclosure is made in connection with an investigation by a Congressional committee or federal agency. On the other hand, supporters state, SB 777 creates a whistleblower hotline for financial fraud directly to the AG, requires that the employer post whistleblower rights, and provides that the initial information provided on the hotline is confidential. Thus, supporters argue, the protections afforded employees are greater than those available under the federal Act.

Prior Related Legislation. As discussed above, SB 783 (Escutia) of 2002 was a substantially similar but farther-reaching measure that passed this Committee but was vetoed by the Governor.

REGISTERED SUPPORT / OPPOSITION:

Support

Foundation for Individual and Taxpayer Rights (sponsor)
California Conference Board of the Amalgamated Transit Union
California Conference of Machinists
California Employment Lawyers Association
California Independent Public Employees Legislative Council
California Labor Federation, AFL-CIO
California Nurses Association
California Public Interest Research Group (CALPIRG)
Congress of California Seniors
Consumer Attorneys of California
Consumers for Auto Reliability and Safety
Consumers Union
Engineers and Scientists of California, IFPTE Local 20
Gray Panthers
Hotel Employees and Restaurant Employees International Union
Older Women's League
Professional and Technical Engineers, IFPTE Local 21
Sierra Club of California
Teamsters Union
United Food and Commercial Workers Region 8 States Council

Opposition

American Electronics Association

Analysis Prepared by: Kevin G. Baker / JUD. / (916) 319-2334

EXHIBIT H

Senate Bill No. 777

CHAPTER 484

An act to amend Sections 1102.5 and 1106 of, and to add Sections 1102.6, 1102.7, 1102.8, and 1102.9 to, the Labor Code, relating to whistleblowers.

[Approved by Governor September 22, 2003. Filed with Secretary of State September 22, 2003.]

LEGISLATIVE COUNSEL'S DIGEST

SB 777, Escutia. Whistleblowers.

Existing law prohibits employers from making, adopting, or enforcing a policy that prevents an employee from disclosing violations of a state or federal statute, or a violation or noncompliance with a state or federal regulation to a government or law enforcement agency, or from retaliating against an employee who makes a disclosure. It makes a violation punishable as a misdemeanor.

This bill would extend these protections to employees who report a violation of a state or federal rule, who refuse to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation, or who exercised these rights in former employment. This bill would prohibit an employer from retaliating against an employee for exercising any of these rights, including those provided under existing law, would add an additional civil penalty for violations, and would establish the evidentiary burdens of the parties participating in a civil action or administrative hearing involving an alleged violation of the bill's provisions. This bill would establish a "whistleblower hotline" within the office of the Attorney General to receive telephone reports of violations of state or federal statutes, rules, or regulations, or fiduciary responsibilities, by an employer. The bill would require the Attorney General to refer calls received on this hotline to the appropriate government authority, as specified.

This bill would also require an employer to display, as specified, a list of an employee's rights under whistleblower laws, including the telephone number of the hotline created by the bill.

Because a violation of the provisions added by this bill would constitute a misdemeanor, this bill would create 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.

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

SECTION 1. The Legislature finds and declares that unlawful activities of private corporations may result in damages not only to the corporation and its shareholders and investors, but also to employees of the corporation and the public at large. The damages caused by unlawful activities may be prevented by the early detection of corporate wrongdoing. The employees of a corporation are in a unique position to report corporate wrongdoing to an appropriate government or law enforcement agency.

The Legislature finds and declares that it is the public policy of the State of California to encourage employees to notify an appropriate government or law enforcement agency when they have reason to believe their employer is violating laws enacted for the protection of corporate shareholders, investors, employees, and the general public.

It is the intent of the Legislature to protect employees who refuse to act at the direction of their employer or refuse to participate in activities of an employer that would result in a violation of law.

SEC. 2. Section 1102.5 of the Labor Code is amended to read:

1102.5. (a) An employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

(b) An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

(c) An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

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

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

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

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

SEC. 3. Section 1102.6 is added to the Labor Code, to read:

1102.6. In a civil action or administrative proceeding brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.

SEC. 4. Section 1102.7 is added to the Labor Code, to read:

1102.7. (a) The office of the Attorney General shall maintain a whistleblower hotline to receive calls from persons who have information regarding possible violations of state or federal statutes, rules, or regulations, or violations of fiduciary responsibility by a corporation or limited liability company to its shareholders, investors, or employees.

(b) The Attorney General shall refer calls received on the whistleblower hotline to the appropriate government authority for review and possible investigation.

(c) During the initial review of a call received pursuant to subdivision (a), the Attorney General or appropriate government agency shall hold in confidence information disclosed through the whistleblower hotline, including the identity of the caller disclosing the information and the employer identified by the caller.

(d) A call made to the whistleblower hotline pursuant to subdivision (a) or its referral to an appropriate agency under subdivision (b) may not be the sole basis for a time period under a statute of limitation to commence. This section does not change existing law relating to statutes of limitation.

SEC. 5. Section 1102.8 is added to the Labor Code, to read:

1102.8. (a) An employer shall prominently display in lettering larger than size 14 pica type a list of employees' rights and responsibilities under the whistleblower laws, including the telephone number of the whistleblower hotline described in Section 1102.7.

(b) Any state agency required to post a notice pursuant to Section 8548.2 of the Government Code or subdivision (b) of Section 6128 of the Penal Code shall be deemed in compliance with the posting requirement set forth in subdivision (a) if the notice posted pursuant to Section 8548.2 of the Government Code or subdivision (b) of Section 6128 of the Penal Code also contains the whistleblower hotline number described in Section 1102.7.

SEC. 7. Section 1106 of the Labor Code is amended to read:

1106. For purposes of Sections 1102.5, 1102.6, 1102.7, 1102.8, 1104, and 1105, "employee" includes, but is not limited to, any individual employed by the state or any subdivision thereof, any county, city, city and county, including any charter city or county, and any school district, community college district, municipal or public corporation, political subdivision, or the University of California.

SEC. 8. 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 the meaning of Section 6 of Article XIII B of the California Constitution.

O

EXHIBIT I

Date of Hearing: May 1, 2013

ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT
Roger Hernández, Chair
AB 263 (Roger Hernández) – As Amended: April 11, 2013

SUBJECT: Employment: retaliation: immigrant-related practices.

SUMMARY: Enacts a number of provisions related to retaliation against workers and unfair immigration-related practices. Specifically, this bill:

1) Provides that it shall be unlawful for an employer or any other person or entity to engage in, or to direct another person or entity to engage in, unfair immigration-related practices against any person for the purpose of, or with the intent of, retaliating against any person for exercising any right protected under the Labor Code or by any local ordinance applicable to employees, including the following:

    a) Filing a complaint or informing any person of an employer's or other party's alleged violation of this code or local ordinance, so long as the complaint or disclosure is made in good faith.
    b) Seeking information regarding whether an employer or other party is in compliance with this code or local ordinance.
    c) Informing a person of his or her potential rights and remedies under this code or local ordinance, and assisting him or her in asserting those rights.

2) Defines "unfair immigration-related practice" to mean any of the following practices, when undertaken for a retaliatory purpose:

    a) Requesting more or different documents than are required under Section 1324a(b) of Title 8 of the United States Code, or a refusal to honor documents tendered pursuant to that section that on their face reasonably appear to be genuine.
    b) Using the federal E-Verify system to check the employment authorization status of a person at a time or in a manner not required under Section 1324a(b) of Title 8 of the United States Code, or not authorized under any memorandum of understanding governing the use of the federal E-Verify system.
    c) Threatening to file or the filing of a false police report.
    d) Threatening to contact immigration authorities.

3) Specifies that engaging in an unfair immigration-related practice against a person within 90 days of the person's exercise of rights protected under this code or local ordinance applicable to employees shall raise a rebuttable presumption of having done so in retaliation for the exercise of those rights.

4) Provides that an employee or other person who is the subject of an unfair immigration-related practice prohibited by this section, or a representative of that employee or person, may bring a civil action for equitable relief and any damages or penalties, in accordance with this section.

5) Provides the following remedies upon a finding of violation by a court of applicable jurisdiction:

   a) For a first violation, the court shall order the appropriate government agencies to suspend all licenses subject to this chapter that are held by the violating party for a period of 90 days.
   b) For a second or subsequent violation, the court shall order the appropriate government agencies to revoke permanently all licenses that are held by the violating party specific to the business location or locations where the unfair immigration-related practice occurred.

6) Defines "license" to mean any agency permit, certificate, approval, registration, charter, or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state, including any of the following:

   a) Articles of incorporation.
   b) Certificate of partnership, partnership registration, or articles of organization.
   c) Transaction privilege tax license.

7) Permits an employee or other person who is the subject of an unfair immigration-document practice prohibited by this section, and who prevails in an action authorized by this section to recover reasonable attorney's fees and costs, including any expert witness costs.

8) Requires that the Attorney General shall maintain copies of court orders that are received pursuant to this section, shall maintain a database of the violating parties and business locations that have violated this section, and make any applicable court orders available on the Attorney General's Internet Web site.

9) Provides that an employer may not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against an employee because the employee updates or attempts to update his or her personal information, unless the changes are directly related to the skill set, qualifications, or knowledge required for the job.

10) Adds non-employers to the existing prohibition applicable to employers not to:

   a) make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation;
   b) retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation;
   c) retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation; not to retaliate against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any former employment.

11) Adds a prohibition against retaliation or adverse action to the existing law forbidding any person to discriminate against any employee or applicant for employment because the

employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the employee or applicant for employment has filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his or her rights, which are under the jurisdiction of the Labor Commissioner, or because the employee has initiated any action or notice pursuant to Section 2699, or has testified or is about to testify in -a proceeding pursuant to that section, or because of the exercise by the employee or applicant for employment on behalf of himself, herself, or others of any rights afforded him or her, and provides that a person aggrieved by a violation of this provision shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by those acts of the employer, and in addition to other remedies available, an employer who violates this section is liable for a civil penalty not exceeding ten thousand dollars ($10,000) per employee for each violation of this section.

12) Makes related legislative declarations and findings.

EXISTING LAW:

1) Provides that a person may not discharge an employee or in any manner discriminate against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the employee or applicant for employment has filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his or her rights, which are under the jurisdiction of the Labor Commissioner, or because the employee has initiated any action or notice pursuant to Section 2699, or has testified or is about to testify in any such proceeding or because of the exercise by the employee or applicant for employment on behalf of himself, herself, or others of any rights afforded him or her. (Labor Code section 98.6.)

2) Provides that any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the employee has made a bona fide complaint or claim to the division pursuant to this part, or because the employee has initiated any action or notice pursuant to Section 2699 shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by those acts of the employer. (Labor Code section 98.6.)

3) Provides that an employer who willfully refuses to hire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by law, is guilty of a misdemeanor. (Labor Code section 98.6.)

4) Provides that any applicant for employment who is refused employment, who is not selected for a training program leading to employment, or who in any other manner is discriminated against in the terms and conditions of any offer of employment because the applicant engaged in any conduct delineated in this chapter, including the conduct described in

subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the applicant has made a bona fide complaint or claim to the division pursuant to this part, or because the employee has initiated any action or notice pursuant to Section 2699 shall be entitled to employment and reimbursement for lost wages and work benefits caused by the acts of the prospective employer. (Labor Code section 98.6.)

FISCAL EFFECT: Unknown

COMMENTS: This bill addresses concerns that have been raised about retaliation and other abuse directed at immigrant workers. These concerns were the subject of a recent hearing of this Committee on March 6, 2013.

Brief Background on Abuse and Retaliation Against Immigrant Workers

Immigrant workers represent a large segment of the workforce. As one recent study noted:

> "According to the Pew Hispanic Center, there were 11.2 million undocumented immigrants living in the United States as of March 2010, constituting 5.2 percent (8 million) of the U.S. labor force. The percentage of unauthorized immigrants in the labor force may decrease as beneficiaries of the Deferred Action for Childhood Arrivals (DACA) initiative (also known as "DREAMers") become eligible for deferred action and obtain work authorization. The Migration Policy Institute estimates that among the 1.26 million prospective beneficiaries of the DACA program, 58 percent (close to 740,000) are in the labor force.
>
> Undocumented workers earn considerably less than documented and U.S.-born workers. The Urban Institute estimated in 2004 that about two-thirds of undocumented workers earn less than twice the minimum wage, compare with only one-third of all workers. The Pew Hispanic Center found that the median household income of undocumented immigrants in 2007 was $36,000, well below the $50,000 median household income for U.S.-born residents. Some of the low-wage sectors and industries with high shares of undocumented workers as of 2008 include agriculture (25 percent), construction (17 percent), building, groundskeeping, and maintenance (19 percent), and food preparation and serving (12 percent)."[1]

As mentioned above, immigrant workers are particularly at risk for various forms of workplace abuse and violations of the law. As the same study stated:

> "A landmark national survey of 4,387 low-wage workers in three largest cities, New York, Chicago, and Los Angeles, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in American Cities,* found that undocumented workers are far more likely to experience wage and hour violations than U.S.-born workers and documented workers. Thirty seven percent of undocumented workers were not paid the minimum wage in the workweek preceding the survey, compared to 21 percent of documented workers and 16 percent of U.S.-born workers. The survey also found that in the immigrant workforce, women experienced a higher rate of wage and hour violations

[1] Yoon, Haeyoung, Tsedeye Gebresalassie, and Rebecca Smith. "Workplace Rights and Remedies for Undocumented Workers: A Legal Treatise." National Employment Law Project (January 2013).

> then men did – 47 percent of undocumented women experienced the minimum wage violations while the violation rate among men were 30 percent. *Broken Laws* also reported that of those who complained about a workplace issue or attempted to form a union in the past 12 months, 47 percent of workers experienced employer threats to fire workers or call immigration authorities.
>
> Underreporting of workplace injuries and illnesses is also a serious problem among immigrant workers across low-wage industries. Many workers, due to language barriers or their employers' lack of robust safety programs, are unaware of the risks they face on the job. Others may feel that there is little choice but to accept those risks. A study of largely unionized immigrant hotel workers found that only 20 percent of those who had experienced work-related pain had filed workers' compensation claims, for fear of getting "in trouble" or being fired. In a study on immigrant workers' perceptions of workplace health and safety, researchers from UCLA observed that "[w]orkers worried because they know the work they did was dangerous, and also because they knew that if they got injured they would have limited medical care options. Some respondents said that they could not really 'afford to worry' because they needed the job and had little control over the working conditions." Similarly, researchers in North Carolina observed that "[m]any immigrant workers believe that in a dangerous work situation, they have no choice but to perform the task, despite the risk."[2]

Those immigrant workers who stand up to such forms of substantive abuse on the job face the additional difficulty of employer intimidation and retaliation. As a result report[3] by the National Employment Law Project (NELP) stated:

> "Employers and their agents have far too frequently shown that they will use immigration status as a tool against labor organizing campaigns and worker claims. From New York to California, Washington to Georgia, immigrant workers themselves bear the brunt of these illegal tactics…"
>
> "… Silencing or intimidating a large percentage of workers in any industry means that workers are hobbled in their efforts to protect and improve their jobs. As long as unscrupulous employers can exploit some low-wage workers with impunity, all low-wage workers suffer compromised employment protections and economic security. Law-abiding employers are forced to compete with illegal practices, perpetuating low-wages in a whole host of industries."

The NELP report found that, while threats of job loss have an especially serious consequence in this job market, an employer's threat to alert immigration or local law enforcement of an undocumented immigrant worker's status carries added force. Such action is at least as frequent as other forms of retaliation. According to NELP, an analysis of more than 1,000 NLRB certification elections between 1999 and 2003 found that "[i]n 7% of all campaigns – but 50% of campaigns with a majority of undocumented workers and 41% with a majority of recent immigrants – employers make threats of referral to Immigration Customs and Enforcement (ICE)." Immigration worksite enforcement data for a 30-month period in the New York region

---

[2] *Id.*
[3] Smith, Rebecca and Eunice Hyunhye Cho. "Workers' Rights on ICE: How Immigration Reform Can Stop Retaliation and Advance Labor Rights." National Employment Law Project (February 2013).

between 1997 and 1999 show that more than half of raided worksites had been subject to at least one formal complaint to, or investigation by, a labor agency.

In addition, NELP states that anecdotal reports show that in recent years, employers who seek to retaliate against immigrant workers have increasingly filed reports with local law enforcement agencies, in addition to direct reports to federal immigration officials.

Document-related retaliation is another form of abuse cited by NELP in its report. In limited circumstances, employers may re-verify, or ask workers to produce their I-9 work authorization documentation again, after the employer's initial verification at the time of hire, without running afoul of anti-discrimination or retaliation protections. However, in some cases, employers have improperly conducted I-9 self-audits just after employees have filed workplace-based complaints, or in the midst of labor disputes or collective bargaining, creating a climate of fear. In other instances, employers have attempted to re-verify workers following a reinstatement order, an illegal practice under the National Labor Relations Act. Employers often provide little or no notice to workers about the reason for the I-9 re-verification, and fail to provide a reasonable period of time for employees to respond to the self-audit, even when they are proper.

An Opportunity for Change? – Federal Comprehensive Immigration Reform

The current debate around comprehensive immigration reform at the federal level has resulted in a renewed focus on these issues and may represent an opportunity to further strengthen federal law to protect immigrant workers from various forms of abuse.

In addition, on June 14, 2011, U.S. Senator Robert Menendez re-introduced to the Senate the Protect Our Workers from Exploitation and Retaliation (POWER) Act, while a House version was introduced by Reps. George Miller and Judy Chu. The POWER Act is designed to protect the right of immigrant workers to expose labor abuses without fear of retaliation—which will secure job opportunities, wages, and working conditions for U.S.-born workers as well.

According to supporters of the POWER Act, too often, when immigrant workers attempt to organize to combat exploitation, employers use immigration enforcement as a weapon to quash organizing efforts and trump labor law. The POWER Act ensures that immigrant workers who try to exercise their basic civil and labor rights are protected from retaliation. Simultaneously, the bill ensures that American workers' wages and conditions are not undermined by employers who pit them against a captive workforce of exploited immigrant workers.

Is There Still Room for State Action to Protect Immigrant Workers?

Protecting immigrant workers from workplace abuse, exploitation and retaliation is obviously complicated by issues of federal preemption, which holds that the federal government generally has jurisdiction over immigration-related matters. However, the states are not completely powerless to act. Numerous federal and state court decisions have held that immigrant workers enjoy certain protections under state law regardless of their immigration status, especially when it comes to issues surrounding work already performed. In addition, several states have taken affirmative steps in enacting legislation to specifically protect immigrant workers[4].

[4] In addition, in a recent decision the United States Supreme Court, while acknowledging that "the power to regulate immigration is unquestionably…a federal power," emphasized that states "possess broad authority under their police

While federal immigration reform, should it be enacted, will dramatically alter the landscape and the law affecting immigrant workers, the author argues that states should continue to explore opportunities within the confines of federal law to protect immigrant workers. This is especially true in light of the fact that workers placed on a path to documentation or citizenship will continue to be vulnerable to workplace abuse, particularly if their status is somehow tied to continued employment (such as through guest-worker programs).

This Bill Would Also Prohibit Retaliation Against Other Workers

The Labor Code currently prohibits discrimination against employees and applicants for employment because he or she engaged in specified conduct, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the employee or applicant for employment has filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his or her rights, which are under the jurisdiction of the Labor Commissioner, or because the employee has initiated any action or notice pursuant to Section 2699, or has testified or is about to testify in a proceeding pursuant to that section, or because of the exercise by the employee or applicant for employment on behalf of himself, herself, or others of any rights afforded him or her. Current law provides that an employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of his or her employment in violation of the law shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by those acts of the employer.

This bill adds retaliation and adverse employment action to this prohibition, and provides that in addition to other remedies available, an employer who violates this section is liable for a civil penalty not exceeding $10,000 per employee for each violation of this section. The bill further provides that in the enforcement of this section, there is no requirement that an individual exhaust administrative remedies or procedures.

The sponsor of this bill states that this will strengthen retaliation protection for all workers by ensuring that a meaningful penalty is available whether a worker complains to a state agency or directly to an employer.

Extension of Existing Anti-Retaliation Rule To Persons Other Than Employers

Under existing law it is improper for an employer to make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. Similarly, employers may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. In addition, an employer

---

powers to regulate the employment relationship to protect workers within the [s]tate." *Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968, 1974 (2011). At issue in that case was an Arizona law that provided for state employer licenses to be suspended or revoked if they knowingly or intentionally employ unauthorized workers. The Court held that the law fell within IRCA's savings clause within the express preemption provision for "state licensing and similar laws."

may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. Likewise, an employer may not retaliate against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any former employment. This bill would extend these prohibitions from employers to all persons and entities.

ARGUMENTS IN SUPPORT:

The author states the following in support of this bill:

> "Immigrant workers represent perhaps the most vulnerable segment of the workforce population in both the United States and California. First, many immigrant workers are highly-concentrated in low-wage, 'underground economy' industries – garment manufacturing, agriculture, construction, restaurants, domestic work, janitorial or building maintenance work, and car washes, among others. As such, immigrant workers work often work under harsh working conditions, earn very low wages with little or no benefits, risk serious and fatal injuries on the job, and are susceptible to employer harassment and other forms of abuse. Second, immigrant workers are especially vulnerable to retaliation and often face the additional risk that unscrupulous employers will threaten to report them to immigration authorities. Other employers engage in other forms of retaliation and coercion that chill employees from exercising their rights under the law."

This bill is sponsored by the California Labor Federation, AFL-CIO, who states the following:

> "Almost one-quarter of all undocumented immigrants in the U.S. live in California and one in ten workers here is undocumented. These workers are forced to live in the shadows, with no path to legalization, leaving them extremely vulnerable to employer abuse. A recent study by the National Employment Law Project, entitled "Workers' Rights on ICE: How Immigration Reform can Stop Retaliation and Advance Labor Rights," found widespread and pervasive abuses against immigrant workers. 76% of undocumented workers surveyed worked off the clock without pay; 85% did not receive overtime. 29% of California workers killed in industrial accidents are immigrants. So long as workers are willing to endure widespread wage theft and unsafe working conditions, these employers do not ask about immigration status. It is only when workers speak out about unfair or illegal conditions that employers turn to tools like real or threatened immigration audits, Immigration & Customs Enforcement (ICE) raids, and implementation of e-verify as retaliation. In fact, the report provides multiple examples of employers using immigration threats to try to get away with wage theft.
>
> The reality is that immigration-related retaliation and threats undermine workers' rights for all workers. Those who might be willing to act as whistleblowers and expose unfair and illegal treatment worry they will be the cause of serious harm to their co-workers for calling attention to abuses. Meanwhile, employers who are following the law are at a competitive disadvantage against those that exploit workers.
>
> [This bill] will prohibit employers from engaging in immigration-related retaliation against workers who have spoken up about unpaid wages, unsafe working conditions, or unfair treatment. The State has both a right and an obligation to protect workers and to

> ensure that basic labor laws can be enforced. Employers who engage in these forms of retaliation must be held accountable. [This bill] allows a court to order the relevant agency to revoke an employer's business license if they are using immigration threats to exploit, intimidate, and hold workers hostage."

ARGUMENTS IN OPPOSITION:

The California Employment Law Council (CELC), representing management lawyers in labor and employment matters, argues in opposition:

> "While there is a legitimate policy question about the activities delineated, one major problem with AB 263 is that the bill essentially provides a 'two strikes and you are out' penalty for violations. The bill would require courts to permanently revoke all licenses possessed by the business for second or subsequent violations of unfair immigration-related practices, except for professional licenses. This would appear to require a court, for example, to permanently revoke applicable business licenses for two violations by a rogue supervisor of a large employer, permanently putting the business out of operation at a given location.
>
> We pledge to work with the author to address concerns about unfair immigration practices with employers, but the provisions of AB 263 are vastly overbroad and could threaten the operation of responsible businesses."

A group calling itself Save our State argues that the bill "is being offered in a disguised attempt to dissuade employers from reporting illegal aliens to ICE or other federal immigration authorities." This group concludes, "California's people and businesses shall retain their rights to report crime, and the legislature shall make no law infringing upon the right to freely speak, and especially so, to access law enforcement on matters of their choosing without fear of reprisal."

REGISTERED SUPPORT / OPPOSITION:

Support

AFSCME
Amalgamated Transit Union, California
California Conference of Machinists
California Employment Lawyers Association
California Federation of Teachers
California Immigrant Policy Center
California Labor Federation, AFL-CIO (sponsor)
California Rural Legal Assistance Foundation
California Nurses Association
California Professional Firefighters
California Teachers Association
California Teamsters Public Affairs Council
Engineers and Scientists of CA
International Longshore and Warehouse Union
Maintenance Cooperation Trust Fund
Mexican American Legal Defense and Educational Fund

National Employment Law Project
Prof. and Tech. Engineers, Local 21
San Mateo County Central Labor Council
Service Employees International Union
Services, Immigrant Rights and Education Network
UAW Local 5810
United Food and Commercial Workers Union, Western States
UNITE HERE
Utility Workers Union of America, Local 132

Opposition

California Employment Law Council
Save Our State

Analysis Prepared by: Ben Ebbink / L. & E. / (916) 319-2091

EXHIBIT J

Date of Hearing: June 18, 2013

ASSEMBLY COMMITTEE ON JUDICIARY
Bob Wieckowski, Chair
SB 666 (Steinberg) – As Amended: May 7, 2013

SENATE VOTE: 31-7

SUBJECT: EMPLOYMENT: RETALIATION

KEY ISSUE: SHOULD THE LEGISLATURE ENACT FURTHER PROTECTIONS AGAINST IMMIGRATION-RELATED RETALIATION AND OTHER IMPROPER ACTS BY EMPLOYERS AND OTHER PERSONS?

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

SYNOPSIS

This measure is similar to pending legislation, AB 263 (Hernández), which passed this Committee and is currently pending in the Senate. This bill would allow for suspension or revocation of a business license if the licensee retaliates against an employee based on his or her citizenship or immigration status. This bill would also provide for the suspension, disbarment, or other discipline of an attorney who threatens to report the immigration status of a witness or party to a civil or administrative action because the witness or party exercises or has exercised a right related to his or her employment. The bill would also authorize a civil penalty up to $10,000 per employee against a corporate or limited liability company employer who discriminates, retaliates, or takes adverse action against an employee who makes a written or oral complaint for unpaid wages. This bill would also extend whistleblower protections to employees who provide information to or testify before any public body conducting an investigation, hearing, or inquiry regarding employer violations of federal or state laws. Supporters argue that immigrant workers are particularly vulnerable to exploitation and intimidation and that bolstering legal protections will help ensure compliance with appropriate minimum labor standards. The bill has no known opposition.

SUMMARY: Prohibits retaliation against employees and others on the basis of citizenship and immigration status. Specifically, this bill:

1) Provides that a business licensee is subject to suspension or revocation of the license for threatening to retaliate or retaliating, through the use of the employee's citizenship or immigration status, against a current, former, or prospective employee of the licensee who attempts to exercise an employment right protected by law, provided however that an employer shall not be subject to suspension or revocation for requiring a prospective or current employee to submit, within three business days of the first day of work for pay, an I-9 Employment Eligibility Verification form.

2) Authorizes the suspension, disbarment, or other discipline against a licensed attorney who reports the immigration status, or threatens to report the immigration status, of a witness or party to a civil or administrative action, or his or her family member, to a federal, state, or local agency because the witness or party exercises, or has exercised, a right related to his or

her employment. For purposes of this provision, this bill defines "family member" to mean a spouse, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, or grandchild related by blood, adoption, marriage, or domestic partnership.

3) Clarifies that the employee or job applicant is also protected under the above provision from retaliation or adverse actions by the employer. This bill also provides these protections to the employee or job applicant for making a written or oral complaint that he or she is owed unpaid wages.

4) Authorizes, in addition to any other remedies available, a civil penalty, not to exceed $10,000 per employee for each violation, to be imposed against a corporate or limited liability company employer.

5) Clarifies that an employee or job applicant is not required to exhaust administrative remedies or procedures in order to bring a civil action under any provision of the Labor Code, unless the provision under which the action is brought expressly requires exhaustion of an administrative remedy.

6) Provides that reporting or threatening to report an employee's, former employee's, or prospective employee's citizenship or immigration status, or the citizenship or immigration status of his or her family member, to a federal, state, or local agency because the employee, former employee, or prospective employee exercises a right under the provisions of the Labor Code, the Government Code, or the Civil Code constitutes an adverse action for purposes of establishing a violation of an employee's, former employee's, or prospective employee's rights. For purposes of this provision, this bill defines "family member" to mean a spouse, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, or grandchild related by blood, adoption, marriage, or domestic partnership.

7) Prohibits any person acting on behalf of the employer from preventing or retaliating against an employee who makes use of anti-retaliation protections.

8) Provides protection to a person for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry.

9) Specifies that its provisions are severable, and if any of its provisions are held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

EXISTING LAW:

1) Subjects a business licensee to suspension or revocation for various unlawful conduct, including knowingly making a false statement of or knowingly omitting to state, a material fact in an application for a license, conviction of a crime, commission of any act involving dishonesty, fraud or other deceit with the intent to substantially benefit himself, herself, or another, or substantially injure another, or commission of any act which would be grounds for suspension or revocation of a license. (Bus. & Prof. Code Sec. 475.)

2) Under the State Bar Act, provides statutory licensing requirements for attorneys practicing law in the state. (Bus. & Prof. Code Sec. 6000 *et seq.*) The State Bar also provides

disciplinary measures, including suspension and disbarment, of attorneys for acts of dishonesty, moral turpitude, and corruption. (Bus. & Prof. Code Sec. 6100 *et seq.*)

3) Provides that all protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state. For purposes of enforcing state labor and employment laws, existing law provides that a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws, no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law. (Lab. Code Sec. 1171.5, Civ. Code Sec. 3339, Gov. Code Sec. 7285, Health & Saf. Code Sec. 24000.)

4) Prohibits discrimination against an employee or job applicant for exercising his or her rights, including initiating an action or testifying in any proceeding thereto, delineated under the Labor Code. (Lab. Code Sec. 98.6.)

5) Prohibits employers from withholding an employee's wages and prohibits discrimination, retaliation, and adverse actions by an employer against an employee or job applicant who exercises his or her rights under the law. (Lab. Code Sec. 200 *et seq.*) Various statutes under the Labor Code require the employee or applicant to first file a claim against the employer with the Labor Commissioner, and other statutes authorize the claimant to either file a complaint with the Labor Commissioner or file a civil action.

6) Prohibits an employer from preventing an employee from disclosing information, or retaliating against an employee who discloses information, to a government or law enforcement agency where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. (Lab. Code Sec. 1102.5.)

COMMENTS: In support of the bill the author states:

> This bill empowers workers to exercise their rights under California law without fear that employers will retaliate by reporting their immigration status or that of their family members to government officials. The bill's provisions will deter unscrupulous employers from violating the rights of immigrant workers laboring in California. The bill empowers immigrant workers to speak up against labor abuses in the judicial process, agency proceeding, and before the legislature. The bill deters unscrupulous businesses and attorneys from using an employee's immigration status or that of their family to prevent an employee from exercising his or her rights. The provisions make it clear that threatening to report or reporting a worker or their family member to a government agency, including immigration authorities, because that worker attempts to exercise a right under the law is an adverse action to prove up retaliation for purposes of establishing the violation of the employee's right. A law-breaking business can lose their license to operate and an unscrupulous attorney can lose their ability to practice law if they use a person's immigration status in this way. And, bad acting businesses that retaliate against workers under section 98.6 are subject to a $10,000 civil penalty.

> An employer or attorney's threat to alert immigration or law enforcement of an undocumented immigrant or their family is an enormous force against justice. It silences the worker and the entire workplace. And, it gives a law-breaking business strong incentive to run a shop that falls far short of respecting California's employment laws. Law-abiding businesses are forced to compete with these law-breakers whose costs are lowered by engaging in illegal activities like wage theft and shortcuts in safety.
>
> Our current state statutory scheme does little to deter a law-breaking boss or business from using the immigration status of the worker, co-worker, or family member to create an atmosphere of fear to prevent workers from demanding their rights in the workplace. Our state statutes do not deter an unscrupulous employer from retaliating against a worker by calling immigration authorities when that worker demands that the employer comply with California's labor laws. This bill is needed to empower workers to exercise their rights under California law without fear that employers will retaliate by reporting their immigration status or that of their family members to government officials. Senate Bill 666 will deter unscrupulous employers from violating the rights of immigrant workers laboring in California and therefore lift the veil of silence in the workplace.

Evidence of Retaliation Against Immigrants. According to a recent study, there are approximately 2.6 million undocumented individuals in California. (Cho and Smith, *Workers' Rights on ICE: How Immigration Reform Can Stop Retaliation and Advance Labor Rights*, National Employment Law Project (Feb. 2013) <http://www.nelp.org/page/-/Justice/2013/Workers-Rights-on-ICE-Retaliation-Report-California.pdf?nocdn=1>.) The study found that "[m]ost undocumented immigrants work in traditionally low-wage occupations such as agriculture, construction, manufacturing, and service industries, where workers face the greatest risk for exploitation. Undocumented workers are far more likely to experience violations of wage and hour laws." (*Id.*) The study states that many undocumented workers do not file claims against their employers out of fear of "'getting in trouble' or being fired." (*Id.)* The study also found that "[w]hile threats of job loss have an especially serious consequence in this job market, an employer's threat to alert immigration or local law enforcement of an undocumented immigrant worker's status carries added force. Such action is at least as frequent as other forms of retaliation." (*Id.* at pp. 2-3.)

The National Employment Law Project (NELP), in support, asserts that "[a]s our recent report, *Worker Rights on ICE*, has documented, immigrant workers are often deterred from exercising their core labor rights because employers threaten to report them on false grounds to local law enforcement agencies, federal immigration enforcement agencies, threaten to re-verify immigration work authorization documents, or enroll in voluntary electronic verifications systems such as E-Verify. These vulnerable workers – including victims of forced labor, sexual assault, and extortion – consequently fear coming forward to report abuse due to their fear of being reported."

Further, NELP provided the following examples of employer misconduct identified in its report:

- An employer in Garden Grove, California falsely accuses a day laborer of robbery in order to avoid paying him for work performed. Local police officers arrest the worker. Although the police find no merit to the charges, he is turned over to Immigration and Customs Enforcement (ICE).

- After workers at a Latino grocery store chain in the San Francisco Bay Area attempt to organize a union, the employer announces that it needs to re-verify workers' authorization and that it will enroll in the voluntary E-Verify program, leading to widespread fear.
- After the California Labor Commissioner found that a San Jose, California employer owed an immigrant worker $50,000 for unpaid wages, the employer harasses the worker in his home and threatens to report him to immigration.

NELP argues that "[s]ilencing or intimidating a large percentage of workers in any industry means that workers are hobbled in their efforts to protect and improve their jobs. As long as unscrupulous employers can exploit some low-wage workers with impunity, all low-wage workers suffer compromised employment protections and economic security. Law-abiding employers are forced to compete with illegal practices, perpetuating low-wages in a whole host of industries."

Additionally, Worksafe, in support, asserts that "[c]urrent law lacks strong and specific language with regard to retaliation based upon immigration status. This creates an ambiguity that allows employers to exercise a retaliation tactic that effectively chills the voices of workers attempting to voice their concerns about health and safety, as well as other issues on the job."

Discrimination And Retaliation Based On Citizenship Status. Existing law prohibits employers from withholding an employee's wages and prohibits discrimination, retaliation, and adverse actions by an employer against an employee or job applicant who exercises his or her rights under the law. (Lab. Code Sec. 200 *et seq.*)

Although courts have sometimes misconstrued the law, existing statutes provide protections, rights, and remedies available under state law to all individuals, regardless of immigration status, who have applied for employment, or who are or who have been employed, in this state. Further, California's labor laws provide anti-retaliation protection for employees, who make claims against their employers for violations of labor laws. (*Cf. Salas v. Sierra Chemical Co.*, (2011) 198 Cal. App. 4th 29, *review granted, depublished,* 133 Cal. Rptr. 3d 392, 2011 Cal. LEXIS 12056.)

In order to further address employer retaliation against employees who assert their rights under the Labor Code, and to reaffirm the Legislative protections available to all employees, regardless of citizenship status, this bill would prohibit retaliation against an employee based on the citizenship or immigration status of the employee or his or her family members. This bill would also clarify that an employer is prohibited from discriminating, retaliating, or taking adverse action against an employee who makes a written or oral complaint that the employee is owed unpaid wages, and provides up to a $10,000 penalty for violations thereof.

The bill would also subject a business licensee to disciplinary action for threatening to retaliate or retaliating against an employee based on the employee's citizenship or immigration status. This bill would also provide for disciplinary action against an attorney who threatens to report the immigration status of a witness or party to a civil or administrative proceeding, as specified.

This bill would also supplement Labor Code anti-retaliation law by protecting an employee who provides information to, or testifies before, any public body conducting an investigation, hearing, or inquiry into improper employer conduct, as specified.

The bill would provide that an adverse action taken by an employer would include reporting or threatening to report an employee's, former employee's, or prospective employee's citizenship or immigration status, or the citizenship or immigration status of his or her family member, to a federal, state, or local agency because the employee, former employee, or prospective employee exercises a right under the provisions of the Labor Code, the Government Code, or the Civil Code.

The federal Immigration Reform and Control Act (IRCA) prohibits intimidation, threats, coercion, or retaliation (these acts are considered discrimination under IRCA) against any individual for the purpose of interfering with any right or privilege provided under IRCA or because the individual intends to file or has filed a charge or complaint, testified, or participated in an investigation, proceeding or hearing, and immigration-related employment practices such as discriminating on the basis of citizenship or national origin. (8 U.S.C.S. 1324b(g)(2)(B).) While IRCA may provide this protection only for citizens and permanent resident immigrants, this bill extends similar anti-discrimination and retaliation protections based on California's existing protections for workers who make claims under the Labor Code, a right available to all California employees, regardless of citizenship or immigration status. This bill, by further defining that an employer's adverse action against an employee includes the reporting or threatening to report an employee's or family member's citizenship or immigration status, will strengthen existing anti-retaliation protections.

Civil Penalties And Right Of Civil Action: This bill would authorize, in addition to any other remedies available, a civil penalty, not to exceed $10,000 per employee for each violation, to be imposed against a corporate or limited liability company employer who unlawfully discriminates, retaliates, or takes adverse action against an employee making a claim under the Labor Code, as specified. The bill would also clarify that an employee or job applicant is not required to exhaust administrative remedies or procedures in order to bring a civil action under any provision of the Labor Code, unless the provision under which the action is brought expressly requires exhaustion of an administrative remedy.

Worksafe asserts that "[c]urrent law lacks sufficient teeth to penalize employers for retaliatory activity based on immigration status. Without really significant penalties, or a strong deterrence to break the law, all workers, irrespective of immigration status, suffer when workplace health and safety rights are violated." Accordingly, the author argues that a statutory civil penalty is necessary to offset the large amounts of money that many undocumented immigrant workers lose as a result of the predatory tactics utilized by unscrupulous employers, and to serve as a deterrent to those defrauding these workers.

In addition, proponents of this bill argue that such penalties and a private right of action for harmed workers are warranted in order to effectively deter employers from deliberately misclassifying employees as independent contractors. The proponents argue that, because governmental entities do not have the resources or time to go after all employers who abuse and threaten undocumented workers, and employers know this, significant penalties and a private right of action are the most effective deterrents to the wrongful conduct.

Attorney Discipline. The State Bar Act provides statutory licensing requirements for attorneys practicing law in the state. (Bus. & Prof. Code Sec. 6000 *et seq.*) The State Bar also provides disciplinary measures, including suspension and disbarment, of attorneys who demonstrate acts

of dishonesty, moral turpitude, and corruption. (Bus. & Prof. Code Sec. 6100 *et seq.*) This bill would authorize the suspension, disbarment, or other discipline against a licensed attorney who reports immigration status or threatens to report immigration status of a witness or party to a civil or administrative action or his or her family member to a federal, state, or local agency because the witness or party exercises or has exercised a right related to his or her employment.

The author asserts that "[u]nscrupulous lawyers representing these [law-breaking employers] have also used these immigration-related threats to keep people from testifying or showing up to depositions in support of workers trying to enforce their rights." The bill, by prohibiting attorneys from discouraging employees from testifying at hearings and depositions through immigration-related threats, would reaffirm California's interest in protecting employees and their ability to seek redress under California law.

Extending Whistleblower Protection. In a recent Assembly Committee on Labor and Employment informational hearing, employees testified that they feared retribution by their employers for making claims against their employers. These claims included seeking full payment of wages owed to the employees and prohibiting employees from participating in union meetings. The employees testified that they feared that, by testifying at the committee hearing and exposing the egregious conduct perpetrated by their employers, they would face termination by their employers or be reported by their employers to immigration authorities.

Existing Labor Code section 1102.5 prohibits an employer from preventing an employee from disclosing information, or retaliating against an employee who discloses information, to a government or law enforcement agency where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. This bill would additionally prohibit any person acting on behalf of the employer from preventing an employee from disclosing information or retaliating against an employee who does disclose information and would protect a person who provides information to, or testifies before, any public body conducting an investigation, hearing, or inquiry regarding employer violations of the law.

Worksafe, in support, argues that "[c]urrent law lacks clear language regarding protection for all workers with regard to whistleblowing. This creates a culture of fear and intimidation that can no longer be tolerated. In the UCLA study [*Wage Theft and Workplace Violations in Los Angeles: The Failure of Employment and Labor Law for Low-Wage Workers*], a large percentage of workers indicated that they had not complained about serious and dangerous work conditions because of the fear of retaliation[,] i.e. losing their job or having hours cut. Without laws that fully protect all workers when whistleblowing, unscrupulous employers can and will continue to threaten and exploit workers who stand up for their workplace health and safety rights."

This bill would encourage individuals to testify at public hearings to expose unlawful conduct. In this way, this bill would further the underlying purpose of the WPS, which is to shed light on unlawful employer conduct.

Related Pending Legislation: AB 263 (Hernandez) contains similar anti-retaliation protections regarding immigration-related practices. AB 263 passed this Committee and is currently pending in the Senate.

REGISTERED SUPPORT / OPPOSITION:

Support

California Labor Federation (sponsor)
California Federation of Teachers
California Immigrant Policy Center
California Nurses Association
California Professional Firefighters
California Rural Legal Assistance Foundation
California School Employees Association
Central American Resource Center
Coalition for Humane Immigrants Rights of Los Angeles
Equal Rights Advocates
Mexican American Legal Defense and Educational Fund
National Employment Law Project
San Mateo County Central Labor Council
SEIU
State Bar of California
United Auto Workers Local 5810
United Farm Workers
Worksafe

Opposition

None on file

Analysis Prepared by: Kevin G. Baker / JUD. / (916) 319-2334

EXHIBIT K

SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 651-1520 Fax: (916) 327-4478

UNFINISHED BUSINESS

Bill No: SB 666
Author: Steinberg (D), et al.
Amended: 9/4/13
Vote: 21

SENATE LABOR & INDUSTRIAL RELATIONS COMMITTEE: 4-0, 4/24/13
AYES: Lieu, Wyland, Leno, Yee
NO VOTE RECORDED: Padilla

SENATE JUDICIARY COMMITTEE: 6-1, 4/30/13
AYES: Evans, Walters, Corbett, Jackson, Leno, Monning
NOES: Anderson

SENATE APPROPRIATIONS COMMITTEE: 5-2, 5/23/13
AYES: De León, Hill, Lara, Padilla, Steinberg
NOES: Walters, Gaines

SENATE FLOOR: 31-7, 5/28/13
AYES: Beall, Block, Calderon, Cannella, Corbett, Correa, De León, DeSaulnier, Emmerson, Evans, Galgiani, Hancock, Hernandez, Hill, Hueso, Jackson, Lara, Leno, Lieu, Liu, Monning, Padilla, Pavley, Price, Roth, Steinberg, Torres, Wolk, Wright, Wyland, Yee
NOES: Anderson, Berryhill, Fuller, Gaines, Knight, Nielsen, Walters
NO VOTE RECORDED: Huff, Vacancy

ASSEMBLY FLOOR: 52-17, 9/9/13 - See last page for vote

SUBJECT: Employment: retaliation

SOURCE: California Labor Federation

CONTINUED

DIGEST: This bill provides for a suspension or revocation of an employer's business license for retaliation against employees and others on the basis of citizenship and immigration status, and establishes a civil penalty up to $10,000 per violation.

Assembly Amendments (1) revise the bill to provide that business license may be suspended or revoked if the licensee has been determined by the Labor Commissioner or the court to have violated subdivision (b) of Section 244 of the Labor Code and the court or Labor Commissioner has taken into consideration any harm such suspension or revocation would cause to employees of the licensee, as well as the good faith efforts of the licensee to resolve any alleged violations after receiving notice; (2) provide that a licensee who violates Section 244 may be subject to disciplinary action from their respective licensing body; and (3) add double-jointing language with SB 496 (Wright).

ANALYSIS: Existing state and federal law contains provisions that define unlawful discrimination and lawful employment practices by employers and employment agencies to protect both prospective and current employees against employment discrimination.

1. Existing law, among other things, provides the following:

   A. Prohibits an employer from discharging, or in any manner discriminating against, any employee or applicant for employment because he/she has engaged in prescribed protected conduct relating to the enforcement of the employee's or applicant's rights.

   B. Any employee that is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of his/her employment because the employee engaged in any protected conduct – such as making a bona fide complaint or claim to the Division of Labor Standards Enforcement – is entitled to reinstatement and reimbursement for lost wages and work benefits.

   C. Any employer who willfully refuses to hire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by law, is guilty of a misdemeanor.

2. Regarding employee sharing of information with government entities, existing law:

CONTINUED

A. Specifies that an employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where he/she has reasonable cause to believe that the information discloses a violation or noncompliance with state or federal law.

B. Prohibits and employer from retaliating against an employee for disclosing this type of information to a government or law enforcement agency.

C. Under existing law, in addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding $10,000 for each violation.

However, these provisions do not apply to rules, regulations, or policies implementing the confidentiality of the lawyer-client privilege, the physician-patient privilege, or trade secret information.

The existing Fair Employment and Housing Act prohibits harassment and discrimination in employment because of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, mental and physical disability, medical condition, age, pregnancy, denial of medical and family care leave, or pregnancy disability leave and/or retaliation for protesting illegal discrimination related to one of these categories.

Under existing state law, all protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or have been employed in the state. In addition, for purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability or in proceedings, where no inquiry is permitted into a person's immigration status except where the person seeking the inquiry has shown, by clear and convincing evidence, that the inquiry is necessary in order to comply with federal immigration law.

Existing law establishes grounds for suspension or revocation of certain business and professional licenses.

Under the existing State Bar Act, specific causes are established for the disbarment or suspension of a member of the State Bar.

CONTINUED

This bill:

1. Provides that a business license regulated by the Business and Professions Code may be subject to suspension or revocation if the licensee has been determined by the Labor Commissioner or the court to have violated subdivision (b) of Section 244 of the Labor Code and the court or Labor Commissioner has taken into consideration any harm such suspension or revocation would cause to employees of the licensee, as well as the good faith efforts of the licensee to resolve any alleged violations after receiving notice, provided however that a licensee of an agency within the Department of Consumer Affairs who has been found by the Labor Commissioner or the court to have violated subdivision (b) of Section 244 of the Labor Code.

2. Provides that an employer shall not be subject to suspension or revocation for requiring a prospective or current employee to submit, within three business days of the first day of work for pay, an I-9 Employment Eligibility Verification form.

3. Authorizes the suspension, disbarment, or other discipline against a licensed attorney who reports the suspected immigration status, or threatens to report the suspected immigration status, of a witness or party to a civil or administrative action, or his/her family member, to a federal, state, or local agency because the witness or party exercises, or has exercised, a right related to his/her employment. For purposes of this provision, this bill defines "family member" to mean a spouse, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, or grandchild related by blood, adoption, marriage, or domestic partnership.

4. Clarifies that the employee or job applicant is also protected under the above provision from retaliation or adverse actions by the employer. This bill also provides these protections to the employee or job applicant for making a written or oral complaint that he or she is owed unpaid wages.

5. Authorizes, in addition to any other remedies available, a civil penalty, not to exceed $10,000 per employee for each violation, to be imposed against a corporate or limited liability company employer.

6. Provides that reporting or threatening to report an employee's, former employee's, or prospective employee's suspected citizenship or immigration status, or the suspected citizenship or immigration status of his/her family

CONTINUED

member, to a federal, state, or local agency because the employee, former employee, or prospective employee exercises a right under the provisions of the Labor Code, the Government Code, or the Civil Code constitutes an adverse action for purposes of establishing a violation of an employee's, former employee's, or prospective employee's rights. For purposes of this provision, this bill defines "family member" to mean a spouse, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, or grandchild related by blood, adoption, marriage, or domestic partnership.

7. Prohibits any person acting on behalf of the employer from preventing or retaliating against an employee who makes use of anti-retaliation protections.

8. Provides protection to a person for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry.

9. Specifies that its provisions are severable, and if any of its provisions are held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

Comments

Hiring Process – Federal Law. Under existing law, it is illegal for a person or other entity to "knowingly" hire, recruit, or refer for employment an unauthorized individual or any individual without complying with specified employment verification procedures. Among other things, the law requires employers to verify that every new hire is either a United States (U.S.) citizen or authorized to work in the United States. All employers are required to have new employees complete form I-9, Employment Eligibility Verification, upon hire. New employees, within three days of being hired, must show their employers documentation establishing identity and eligibility to work in the U.S.

The E-Verify Program is an internet-based system, operated by the U.S. Citizenship and Immigration Service in partnership with the Social Security Administration, which enables participating employers to use the program, on a voluntary basis, to verify that the employees they hire are authorized to work in the U.S. The effectiveness of E-Verify, however, has been the subject of concern for many including the U.S. Government Accountability Office (GAO). A 2010 GAO report, titled "Employment Verification: Federal Agencies Have Taken Steps to Improve E-Verify, but Significant Challenges Remain," found that the system still faces challenges, including the rate of tentative non-confirmation letters (TNCs) that may occur because of an employee's failure to update his/her nationalization

CONTINUED

status in SSA databases, failure to report a change in his/her name to SSA or an employer's error in entering the employee's data into the system. The GAO report notes that of the 22,512 TNCs resulting from name mismatches in 2009; approximately 76% were for citizens and approximately 24% for noncitizens.

Both state and federal law contain various provisions prohibiting employment discrimination on different bases, including, but not limited to, the race, color, sex, religion, or marital status of a person. In addition, existing federal law pertaining to E-Verify specifies that, among other things, employers may not use E-Verify to discriminate against any job applicant or new hire on the basis of his/her national origin, citizenship, or immigration status; employers may not use the system to pre-screen applicants for employment; employers may not verify newly hired employees selectively; and employers cannot take any adverse action against an employee based upon E-Verify unless the program issues a Final Non-confirmation.

Background on California's Immigrant Workforce. Immigrants comprise a growing part of the United States labor force. Immigrant workers, both documented and undocumented, are a significant presence in California's workplace and economy. According to a National Employment Law Project (NELP) report, in 2010, 23.1 million foreign-born persons participated in the civilian labor force. Of these workers, 5.2% (about eight million) form part of the U.S. undocumented labor force. An estimated 2.6 million undocumented immigrants reside in California— approximately seven percent of the State's total population and one-fourth of the population of undocumented immigrants nationwide. Almost one in every ten workers in California is undocumented. ("Workers' Rights on ICE: How Immigration Reform Can Stop Retaliation and Advance Labor Rights," NELP, February 2013)

Most undocumented immigrants work in traditionally low-wage occupations such as agriculture, construction, manufacturing, and service industries, where workers face the greatest risk for exploitation and are more likely to experience violations of wage and hour laws. A landmark study of low-wage workers in Los Angeles ("Wage Theft and Workplace Violations in LA: The Failure of Employment and Labor Law for Low-Wage Workers," UCLA 2010) found that almost 76% of undocumented workers had worked off-the-clock without pay and over 85% had not received overtime pay. The study also found that undocumented workers experienced these violations at rates higher than their native-born counterparts. Moreover, immigrant workers are disproportionately likely to be injured or killed on the job.

CONTINUED

The NELP report found that employers and their agents have far too frequently shown that they will use immigration status as a tool against worker exercising their employment rights. The report offers several examples, including one in which the Labor Commissioner found that a San Jose, California employer owed an immigrant worker $50,000 for unpaid wages. Upset with the ruling, the employer harassed the worker in his home and threatened to report him to immigration.

Prior legislation

AB 1236 (Fong, Chapter 691, Statutes of 2011) enacted the Employment Acceleration Act to prohibit the state, or a city, county, city and county, or special district, from requiring an employer to use an electronic employment verification system except when required by federal law or as a condition of receiving federal funds.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: Yes

According to the Senate Appropriations Committee, Department of Industrial Relations estimates that it incurs costs of $665,000 (special funds) ongoing to implement the provisions of this bill.

SUPPORT: (Verified 9/10/13)

California Labor Federation (source)
California Federation of Teachers
California Immigrant Policy Center
California Nurses Association
California Professional Firefighters
California Rural Legal Assistance Foundation
California School Employees Association
California State Association of Electrical Workers
California State Pipe Trades Council
Central American Resource Center
Coalition for Humane Immigrant Rights of Los Angeles
Equal Rights Advocates
Mexican American Legal Defense and Educational Fund
National Employment Law Project
San Mateo County Central Labor Council
Service Employees International Union California
State Bar of California

CONTINUED

UAW Local 5810
United Farm Workers
Western States Council of Sheet Metal Workers
Worksafe

ARGUMENTS IN SUPPORT: According to the author's office, there are countless examples of immigrant workers attempting to exercise their employment rights only to have their employer threaten to report them or actually report them or their family members to immigration or law enforcement under false charges. The reality, proponents argue, is that immigration-related retaliation and threats undermine workers' rights for all workers. Those who might be willing to act as whistleblowers and expose unfair and illegal treatment worry they will be the cause of serious harm to their co-workers for calling attention to abuses. Meanwhile, employers who are following the law are at a competitive disadvantage against those that exploit workers. Also, the author notes, "The discipline provided for in Section 6103.7 does not supplant, but is cumulative to, existing disciplinary sanctions. In particular, the enactment of Section 6103.7 is not intended to limit or abrogate an attorney's duty to comply with Rule 5-100 of the Rules of Professional Conduct of the State Bar of California, or to limit or preclude the State Bar's enforcement of Rule 5-100."

Additionally, proponents argue that unscrupulous attorneys representing these law-breaking employers have also used these immigration related threats to keep people from testifying or showing up to depositions in support of workers trying to enforce their rights. Proponents argue that our current statutory scheme does little to deter a law-breaking business from using the immigration status of the worker, co-worker, or family member to create an atmosphere of fear that prevents workers from demanding their rights in the workplace. They argue that this bill is needed to empower workers to exercise their rights under California law without fear that employers will retaliate by reporting their immigration status or that of their family members to government officials. Proponents contend that this bill will not only deter unscrupulous employers from violating the rights of immigrant workers, but will also lift the veil of silence in the workplace.

Overall, proponents argue that the state has both a right and an obligation to protect workers and to ensure that basic labor laws can be enforced. Employers who engage in these forms of retaliation must be held accountable. They argue that this bill clarifies, strengthens and expands existing retaliation statutes to better address the realities of workplace retaliation, especially as it affects immigrant workers.

CONTINUED

ASSEMBLY FLOOR: 52-17, 9/9/13

AYES: Alejo, Ammiano, Atkins, Bloom, Bocanegra, Bonilla, Bonta, Bradford, Brown, Buchanan, Ian Calderon, Campos, Chau, Chesbro, Cooley, Daly, Dickinson, Eggman, Fong, Frazier, Garcia, Gatto, Gomez, Gonzalez, Gordon, Gorell, Gray, Roger Hernández, Holden, Jones-Sawyer, Levine, Lowenthal, Medina, Mitchell, Mullin, Muratsuchi, Nazarian, Pan, Perea, V. Manuel Pérez, Quirk, Quirk-Silva, Rendon, Salas, Skinner, Stone, Ting, Weber, Wieckowski, Williams, Yamada, John A. Pérez

NOES: Achadjian, Conway, Dahle, Donnelly, Beth Gaines, Grove, Hagman, Jones, Logue, Maienschein, Melendez, Nestande, Olsen, Patterson, Wagner, Waldron, Wilk

NO VOTE RECORDED: Allen, Bigelow, Chávez, Fox, Hall, Harkey, Linder, Mansoor, Morrell, Vacancy, Vacancy

PQ:JA:d 9/10/13 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

****** END ******

EXHIBIT L

SENATE RULES COMMITTEE SB 496
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 651-1520 Fax: (916) 327-4478

UNFINISHED BUSINESS

Bill No: SB 496
Author: Wright (D)
Amended: 9/6/13
Vote: 21

SENATE PUBLIC EMPLOYMENT & RETIREMENT COMM: 5-0, 4/22/13
AYES: Beall, Walters, Block, Gaines, Yee

SENATE APPROPRIATIONS COMMITTEE: Senate Rule 28.8

SENATE FLOOR: 34-0, 5/13/13 (Consent)
AYES: Anderson, Beall, Berryhill, Block, Cannella, Corbett, Correa, De León, DeSaulnier, Emmerson, Evans, Fuller, Galgiani, Hancock, Hernandez, Hill, Hueso, Huff, Jackson, Knight, Lara, Leno, Lieu, Liu, Monning, Nielsen, Padilla, Pavley, Roth, Steinberg, Wolk, Wright, Wyland, Yee
NO VOTE RECORDED: Calderon, Gaines, Price, Walters, Vacancy, Vacancy

ASSEMBLY FLOOR: Not available

SUBJECT: California Whistleblower Protection Act: administrative procedure

SOURCE: Author

DIGEST: This bill makes several technical and substantive changes to the whistleblower protection statutes for public employees and clarifies procedural rules for the State Personnel Board's (SPB) administrative hearings and litigation over procedural questions regarding the right to sue.

Assembly Amendments delete provisions related to the following: 1) an informal hearing following a complaint; 2) authorization of an executive officer to consolidate a complaint with a related appeal; 3) authorization of an aggrieved

CONTINUED

party to file a petition for writ of mandate for review of the decision; 4) authorization of the complainant to file a civil action for damages; 5) provisions that the executive officer's findings of the informal hearing are not binding; 6) specifications that the filing of a civil action by a complainant does not preclude the request for an evidentiary hearing as specified; and instead modify these requirements to require the SPB to render its decision on the consolidated matter within six months of the date of the order of consolidation, as specified; and specify this bill incorporates additional changes to the Labor Code proposed by SB 666 (Steinberg) and AB 263 (Monning) that would become operative if this bill and either SB 666 or AB 263, or both, are enacted and this bill is enacted last.

ANALYSIS: Existing law:

1. Protects the right of state employees to report improper government activity, as defined, without fear of retribution through the California Whistleblower Protection Act (Act).

2. Prohibits any state employee from using his or her official authority for the purposes of interfering with another's right to report improper government activity, as defined.

3. Requires a whistleblower who alleges retaliation for reporting improper governmental activity to file a written complaint, as specified.

4. Requires SPB to initiate an investigation or hearing within 10 days of receiving the complaint and requires SPB's Executive Officer to complete findings of the investigation or hearing within 60 working days thereafter (i.e., 70 days total).

5. Permits the Executive Officer to consolidate the retaliation claim with other related claims by the whistleblower, in which case, the 70-day time frame is not applicable.

6. Subjects any person found to have intentionally engaged in retaliation prohibited by the Act to penalties, as defined.

7. Provides a whistleblower alleging retaliation a right to bring a separate civil action independent of the SPB administrative process, as defined.

8. Permits a state employee who is found by the SPB to have illegally retaliated against a whistleblower, to request a hearing before the SPB regarding the findings.

CONTINUED

This bill:

1. Requires the SPB to render decisions on consolidated complaints under the Whistleblower Protection Act (WPA) within a reasonable time after the conclusion of the hearing or investigation, except that the period does not exceed six months from the date of the order of consolidation, unless extended by the SPB for a period of not more than 45 additional days from the expiration of the six-month period.

2. Clarifies existing law that an action for damages pursuant to the WPA is exempt from the presentation requirements of the Government Claims Act.

3. Prohibits an employer from retaliating against an employee because the employer believes that the employee disclosed or 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 or noncompliance, 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, regardless of whether disclosing the information is part of the employee's job duties.

4. Prohibits 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.

5. Incorporates additional changes to the Labor Code proposed by SB 666 (Steinberg) and AB 263 (Monning) that would become operative if this bill and either SB 666 or AB 263, or both, are enacted and this bill is enacted last.

Prior Legislation

SB 1505 (Yee), 2008, would have extended the protections of the Act to former state employees and added reasonable attorney's fees to the relief one may recover under the Act. This bill was vetoed by Governor Schwarzenegger.

SB 1267 (Yee), 2008, would have extended the Act's provisions to specified former employees, eliminated its "notice of findings" process, limited the SPB's administrative hearing process in these cases, and provided whistleblowers with an immediate right-to-sue letter option. This bill died in the Senate Appropriations Committee.

CONTINUED

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: Yes

According to the Assembly Appropriations Committee:

- Minor absorbable costs to the SPB and the Department of Human Resources, as the bill is generally consistent with current practice and existing caseloads are not significant. According to the SPB's most recent Whistleblower Complaint Report, for 2011, 62 whistleblower retaliation complaints were filed. Of those, 12 were accepted, of which nine were dismissed and three were consolidated with a pending evidentiary hearing.

- Any costs to local governments are not state reimbursable.

SUPPORT: (Verified 9/10/13)

California Conference Board of the Amalgamated Transit Union
California Conference of Machinists
California Employment Lawyers Association
California Teamsters Public Affairs Council
Engineers and Scientists of California
International Longshore & Warehouse Union
Professional & Technical Engineers, Local 21
United Food and Commercial Workers Union, Western States Council
Union of American Physicians and Dentists
UNITE HERE
Utility Workers Union of America, Local 132

ARGUMENTS IN SUPPORT: This bill clarifies rights and procedures under the California Whistleblower Protection Act and related laws. Supporters argue that clarification will improve protections and give greater guidance to parties, administrative agencies and the courts. Although as amended the bill no longer codifies the *State Board of Chiropractic Examiners v. Superior Court (Arbuckle) 2009 45 Cal. 4th 963.* case, neither does it disturb the court's holding.

The bill further clarifies that notice of WPA claims is accomplished by filing with the SPB, obviating the need for additional presentment under the Government Claims Act, consistently with existing law.

The bill makes prudent changes to the corresponding anti-retaliation provisions of the Labor Code so that complaints about alleged violations of local law are

CONTINUED

covered, as well as internal complaints and perceived or anticipatory retaliation. Consistently with existing law, these claims are not subject to administrative exhaustion.

JL:nl 9/10/13 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

****** END ******

EXHIBIT M

Senate Bill No. 666

CHAPTER 577

An act to add Sections 494.6 and 6103.7 to the Business and Professions Code, and to amend Sections 98.6 and 1102.5 of, and to add Section 244 to, the Labor Code, relating to employment.

[Approved by Governor October 5, 2013. Filed with Secretary of State October 5, 2013.]

LEGISLATIVE COUNSEL'S DIGEST

SB 666, Steinberg. Employment: retaliation.

Existing law establishes grounds for suspension or revocation of certain business and professional licenses.

This bill would subject those business licenses to suspension or revocation, with a specified exception, if the licensee has been determined by the Labor Commissioner or the court to have violated specified law and the court or Labor Commissioner has taken into consideration any harm such a suspension or revocation would cause to employees of the licensee, as well as the good faith efforts of the licensee to resolve any alleged violations after receiving notice. The bill would subject a licensee of an agency within the Department of Consumer Affairs who has been found by the Labor Commissioner or the court to have violated specified law to disciplinary action by his or her respective licensing agency.

The State Bar Act establishes specific causes for the disbarment or suspension of a member of the State Bar.

This bill would make it a cause for suspension, disbarment, or other discipline for any member of the State Bar to report suspected immigration status or threaten to report suspected immigration status of a witness or party to a civil or administrative action or his or her family member, as defined, to a federal, state, or local agency because the witness or party exercises or has exercised a right related to his or her employment.

Existing law establishes various rights and protections relating to employment and civil rights that may be enforced by civil action.

This bill would provide that it is not necessary to exhaust administrative remedies or procedures in order to bring a civil action enforcing designated rights. Under the bill, reporting or threatening to report an employee's, former employee's, or prospective employee's suspected citizenship or immigration status, or the suspected citizenship or immigration status of the employee's or former employee's family member, as defined, to a federal, state, or local agency because the employee, former employee, or prospective employee exercises a designated right would constitute an adverse action for purposes of establishing a violation of the designated right. Because a violation of certain of those designated rights is a

misdemeanor, this bill would impose a state-mandated local program by changing the definition of a crime.

Existing law prohibits an employer from discharging an employee or in any manner discriminating against any employee or applicant for employment because the employee or applicant has engaged in prescribed protected conduct relating to the enforcement of the employee's or applicant's rights. Existing law makes it a misdemeanor for an employer to take adverse employment action against employees who file bona fide complaints.

This bill would also prohibit an employer from retaliating or taking any adverse action against any employee or applicant for employment because the employee or applicant has engaged in protected conduct. The bill would expand the protected conduct to include a written or oral complaint by an employee that he or she is owed unpaid wages. The bill would subject an employer to a civil penalty of up to $10,000 per violation of these provisions.

Existing law entitles an employee to reinstatement and reimbursement for lost wages and benefits if the employee has been discharged, demoted, suspended, or in any way discriminated against because the employee engaged in protected conduct or because the employee made a bona fide complaint or claim or initiated any action or notice, as prescribed.

This bill would similarly grant these entitlements to an employee who is retaliated against or subjected to an adverse action.

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, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. Existing law further prohibits an employer from retaliating against an employee for such a disclosure. Under existing law, a violation of these provisions by an employer is a crime.

This bill would additionally prohibit any person acting on behalf of the employer from making, adopting, or enforcing any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, as provided, and would extend those prohibitions to preventing an employee from, or retaliating against an employee for, providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry. Because a violation of these provisions by an employer would be a crime, this bill would impose a state-mandated local program.

This bill would incorporate additional changes to Section 1102.5 of the Labor Code proposed by SB 496 that would become operative if this bill and SB 496 are enacted and this bill is enacted last.

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.

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

SECTION 1. Section 494.6 is added to the Business and Professions Code, to read:

494.6. (a) A business license regulated by this code may be subject to suspension or revocation if the licensee has been determined by the Labor Commissioner or the court to have violated subdivision (b) of Section 244 of the Labor Code and the court or Labor Commissioner has taken into consideration any harm such suspension or revocation would cause to employees of the licensee, as well as the good faith efforts of the licensee to resolve any alleged violations after receiving notice.

(b) Notwithstanding subdivision (a), a licensee of an agency within the Department of Consumer Affairs who has been found by the Labor Commissioner or the court to have violated subdivision (b) of Section 244 of the Labor Code may be subject to disciplinary action by his or her respective licensing agency.

(c) An employer shall not be subject to suspension or revocation under this section for requiring a prospective or current employee to submit, within three business days of the first day of work for pay, an I-9 Employment Eligibility Verification form.

SEC. 2. Section 6103.7 is added to the Business and Professions Code, to read:

6103.7. It is cause for suspension, disbarment, or other discipline for any member of the State Bar to report suspected immigration status or threaten to report suspected immigration status of a witness or party to a civil or administrative action or his or her family member to a federal, state, or local agency because the witness or party exercises or has exercised a right related to his or her employment, broadly interpreted. As used in this section, "family member" means a spouse, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, or grandchild related by blood, adoption, marriage, or domestic partnership.

SEC. 3. Section 98.6 of the Labor Code is amended to read:

98.6. (a) A person shall not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the employee or applicant for employment has filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his or her rights that are under the jurisdiction of the Labor Commissioner, made a written or oral complaint that he or she is owed unpaid wages, or because the employee has initiated any action or notice pursuant to Section 2699, or has testified or is about to testify in a proceeding pursuant to that section, or because of the exercise by the employee or applicant for employment on behalf of himself, herself, or others of any rights afforded him or her.

(b) (1) Any employee who is discharged, threatened with discharge, demoted, suspended, retaliated against, subjected to an adverse action, or in any other manner discriminated against in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the employee has made a bona fide complaint or claim to the division pursuant to this part, or because the employee has initiated any action or notice pursuant to Section 2699 shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by those acts of the employer.

(2) Any employer who willfully refuses to hire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by law, is guilty of a misdemeanor.

(3) In addition to any other remedies available, an employer who violates this section is liable for a civil penalty not exceeding ten thousand dollars ($10,000) per employee for each violation of this section.

(c) (1) Any applicant for employment who is refused employment, who is not selected for a training program leading to employment, or who in any other manner is discriminated against in the terms and conditions of any offer of employment because the applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the applicant has made a bona fide complaint or claim to the division pursuant to this part, or because the employee has initiated any action or notice pursuant to Section 2699 shall be entitled to employment and reimbursement for lost wages and work benefits caused by the acts of the prospective employer.

(2) This subdivision shall not be construed to invalidate any collective bargaining agreement that requires an applicant for a position that is subject to the collective bargaining agreement to sign a contract that protects either or both of the following as specified in subparagraphs (A) and (B), nor shall this subdivision be construed to invalidate any employer requirement of an applicant for a position that is not subject to a collective bargaining agreement to sign an employment contract that protects either or both of the following:

(A) An employer against any conduct that is actually in direct conflict with the essential enterprise-related interests of the employer and where breach of that contract would actually constitute a material and substantial disruption of the employer’s operation.

(B) A firefighter against any disease that is presumed to arise in the course and scope of employment, by limiting his or her consumption of tobacco products on and off the job.

(d) The provisions of this section creating new actions or remedies that are effective on January 1, 2002, to employees or applicants for employment do not apply to any state or local law enforcement agency, any religious

association or corporation specified in subdivision (d) of Section 12926 of the Government Code, except as provided in Section 12926.2 of the Government Code, or any person described in Section 1070 of the Evidence Code.

SEC. 4. Section 244 is added to the Labor Code, to read:

244. (a) An individual is not required to exhaust administrative remedies or procedures in order to bring a civil action under any provision of this code, unless that section under which the action is brought expressly requires exhaustion of an administrative remedy. This subdivision shall not be construed to affect the requirements of Section 2699.3.

(b) Reporting or threatening to report an employee's, former employee's, or prospective employee's suspected citizenship or immigration status, or the suspected citizenship or immigration status of a family member of the employee, former employee, or prospective employee, to a federal, state, or local agency because the employee, former employee, or prospective employee exercises a right under the provisions of this code, the Government Code, or the Civil Code constitutes an adverse action for purposes of establishing a violation of an employee's, former employee's, or prospective employee's rights. As used in this subdivision, "family member" means a spouse, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, or grandchild related by blood, adoption, marriage, or domestic partnership.

SEC. 5. Section 1102.5 of the Labor Code is amended to read:

1102.5. (a) An employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, where 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.

(b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information to a government or law enforcement agency, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, where 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.

(c) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a state or federal rule or regulation.

(d) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any former employment.

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

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

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

SEC. 5.5. Section 1102.5 of the Labor Code is amended to read:

1102.5. (a) An employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, or to a person with authority over the employee or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, 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, regardless of whether disclosing the information is part of the employee's job duties.

(b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or 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 or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, 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, regardless of whether disclosing the information is part of the employee's job duties.

(c) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.

(d) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any former employment.

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

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

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

SEC. 6. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 7. Section 5.5 of this bill incorporates amendments to Section 1102.5 of the Labor Code proposed by both this bill and Senate Bill 496. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2014, (2) each bill amends Section 1102.5 of the Labor Code, and (3) this bill is enacted after Senate Bill 496, in which case Section 5 of this bill shall not become operative.

SEC. 8. 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 the meaning of Section 6 of Article XIII B of the California Constitution.

O

EXHIBIT N

Assembly Bill No. 263

CHAPTER 732

An act to amend Sections 98.6, 98.7, 1102.5, and 1103 of, to add Section 1024.6 to, and to add Chapter 3.1 (commencing with Section 1019) to Part 3 of Division 2 of, the Labor Code, relating to employment.

[Approved by Governor October 11, 2013. Filed with Secretary of State October 11, 2013.]

LEGISLATIVE COUNSEL'S DIGEST

AB 263, Roger Hernández. Employment: retaliation: immigration-related practices.

Existing law prohibits an employer from discharging an employee or in any manner discriminating against any employee or applicant for employment because the employee or applicant has engaged in prescribed protected conduct relating to the enforcement of the employee's or applicant's rights. Existing law provides that an employee who made a bona fide complaint, and was consequently discharged or otherwise suffered an adverse action, is entitled to reinstatement and reimbursement for lost wages. Existing law makes it a misdemeanor for an employer to willfully refuse to reinstate or otherwise restore an employee who is determined by a specified procedure to be eligible for reinstatement.

This bill would also prohibit an employer from retaliating or taking adverse action against any employee or applicant for employment because the employee or applicant has engaged in protected conduct. The bill would expand the protected conduct to include a written or oral complaint by an employee that he or she is owed unpaid wages. The bill would provide that an employee who was retaliated against or otherwise was subjected to an adverse action is entitled to reinstatement and reimbursement for lost wages. The bill would subject a person who violates these provisions to a civil penalty of up to $10,000 per violation. The bill would also provide that it is not necessary to exhaust administrative remedies or procedures in the enforcement of specified provisions. Because the willful refusal by an employer to reinstate or reimburse an employee who suffered a retaliatory action under these provisions would be a misdemeanor, the bill would expand the scope of a crime and impose a state-mandated local program.

Existing law declares that an individual who has applied for employment, or who is or has been employed in this state, is entitled to the protections, rights, and remedies available under state law, regardless of his or her immigration status. Existing law declares that an inquiry into a person's immigration status for purposes of enforcing state labor and employment laws shall not be permitted, unless a showing is made, by clear and

convincing evidence, that the inquiry is necessary in order to comply with federal immigration law.

This bill would make it unlawful for an employer or any other person to engage in, or direct another person to engage in, an unfair immigration-related practice, as defined, against a person for the purpose of, or with the intent of, retaliating against any person for exercising a right protected under state labor and employment laws or under a local ordinance applicable to employees, as specified. The bill would also create a rebuttable presumption that an adverse action taken within 90 days of the exercising of a protected right is committed for the purpose of, or with the intent of, retaliation.

The bill would authorize a civil action by an employee or other person who is the subject of an unfair immigration-related practice. The bill would authorize a court to order the appropriate government agencies to suspend certain business licenses held by the violating party for prescribed periods based on the number of violations. The bill would require the court to consider prescribed circumstances in determining whether a suspension of all licenses is appropriate.

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, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. Existing law further prohibits an employer from retaliating against an employee for that disclosure. Under existing law, a violation of these provisions by the employer is a misdemeanor. Existing law additionally subjects an employer that is a corporation or a limited liability company to a civil penalty not exceeding $10,000 for each violation of these provisions.

This bill would additionally prohibit any person acting on behalf of the employer from making, adopting, or enforcing any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, as provided, and from retaliating against an employee for such a disclosure. The bill would also expand the prohibited actions to include preventing an employee from, or retaliating against an employee for, providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry. The bill would provide that any person or entity that violates these provisions is guilty of a misdemeanor, and would further subject an entity that violates these provisions that is a corporation or limited liability company to a civil penalty not exceeding $10,000 for each violation of these provisions. By expanding the scope of a crime, this bill would impose a state-mandated local program.

Existing law prohibits an employer or prospective employer, with the exception of certain financial institutions, from obtaining a consumer credit report, as defined, for employment purposes unless it is for a specified position, including, among others, a position in the state Department of

Justice, a managerial position, as defined, or a position that involves regular access to $10,000 or more of cash, as specified.

This bill would prohibit an employer from discharging an employee or in any manner discriminating, retaliating, or taking any adverse action against an employee because the employee updates or attempts to update his or her personal information, unless the changes are directly related to the skill set, qualifications, or knowledge required for the job.

This bill would incorporate additional changes to Section 1102.5 of the Labor Code proposed by SB 496 that would become operative if this bill and SB 496 are enacted and this bill is enacted last.

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.

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

SECTION 1. The Legislature finds and declares all of the following:

(a) Wage theft is a serious and widespread problem that causes severe hardship to low-wage workers, their families, and their communities.

(b) When a worker is denied wages or forced to work "off the clock," there is an immediate and irreparable harm to the worker and his or her family.

(c) Low-wage, often immigrant, workers are the most frequent victims of wage theft and are also exposed to the greatest hazards at work.

(d) Immigrant workers have the greatest number of work-related injuries and fatalities.

(e) Far too often, when workers come forward to expose unfair, unsafe, or illegal conditions, they face retaliation from the employer.

(f) Where there are immigrant workers involved, employer retaliation often involves threats to contact law enforcement agencies, including immigration enforcement agencies, if a worker engages in protected conduct.

(g) No employee should have to fear adverse action, whether it involves threats to cut hours, move a worker to night shift, or contact law enforcement agencies, simply for engaging in rights the State of California has deemed so important that they are protected by law.

(h) It is in the public policy interest of the State of California that workers be able to report concerns to their employers without fear of retaliation or discrimination.

(i) It is in the public policy interest of the State of California for workers to be willing to come forward to expose hazardous, unsafe, and unfair conditions at their worksites so that local, state, and federal agencies can effectively enforce the laws.

(j) It is essential to the enforcement of this state's labor laws that we have broad, clear, and effective protections for workers engaging in conduct

protected by law from all forms of employer retaliation, including prohibiting immigration-related threats.

SEC. 2. Section 98.6 of the Labor Code is amended to read:

98.6. (a) A person shall not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the employee or applicant for employment has filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his or her rights that are under the jurisdiction of the Labor Commissioner, made a written or oral complaint that he or she is owed unpaid wages, or because the employee has initiated any action or notice pursuant to Section 2699, or has testified or is about to testify in a proceeding pursuant to that section, or because of the exercise by the employee or applicant for employment on behalf of himself, herself, or others of any rights afforded him or her.

(b) (1) Any employee who is discharged, threatened with discharge, demoted, suspended, retaliated against, subjected to an adverse action, or in any other manner discriminated against in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the employee has made a bona fide complaint or claim to the division pursuant to this part, or because the employee has initiated any action or notice pursuant to Section 2699 shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by those acts of the employer.

(2) An employer who willfully refuses to hire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by law, is guilty of a misdemeanor.

(3) In addition to other remedies available, an employer who violates this section is liable for a civil penalty not exceeding ten thousand dollars ($10,000) per employee for each violation of this section.

(c) (1) Any applicant for employment who is refused employment, who is not selected for a training program leading to employment, or who in any other manner is discriminated against in the terms and conditions of any offer of employment because the applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the applicant has made a bona fide complaint or claim to the division pursuant to this part, or because the employee has initiated any action or notice pursuant to Section 2699 shall be entitled to employment and reimbursement for lost wages and work benefits caused by the acts of the prospective employer.

(2) This subdivision shall not be construed to invalidate any collective bargaining agreement that requires an applicant for a position that is subject to the collective bargaining agreement to sign a contract that protects either or both of the following as specified in subparagraphs (A) and (B), nor shall this subdivision be construed to invalidate any employer requirement of an applicant for a position that is not subject to a collective bargaining agreement to sign an employment contract that protects either or both of the following:

(A) An employer against any conduct that is actually in direct conflict with the essential enterprise-related interests of the employer and where breach of that contract would actually constitute a material and substantial disruption of the employer's operation.

(B) A firefighter against any disease that is presumed to arise in the course and scope of employment, by limiting his or her consumption of tobacco products on and off the job.

(d) The provisions of this section creating new actions or remedies that are effective on January 1, 2002, to employees or applicants for employment do not apply to any state or local law enforcement agency, any religious association or corporation specified in subdivision (d) of Section 12926 of the Government Code, except as provided in Section 12926.2 of the Government Code, or any person described in Section 1070 of the Evidence Code.

SEC. 3. Section 98.7 of the Labor Code is amended to read:

98.7. (a) Any person who believes that he or she has been discharged or otherwise discriminated against in violation of any law under the jurisdiction of the Labor Commissioner may file a complaint with the division within six months after the occurrence of the violation. The six-month period may be extended for good cause. The complaint shall be investigated by a discrimination complaint investigator in accordance with this section. The Labor Commissioner shall establish procedures for the investigation of discrimination complaints. A summary of the procedures shall be provided to each complainant and respondent at the time of initial contact. The Labor Commissioner shall inform complainants charging a violation of Section 6310 or 6311, at the time of initial contact, of his or her right to file a separate, concurrent complaint with the United States Department of Labor within 30 days after the occurrence of the violation.

(b) Each complaint of unlawful discharge or discrimination shall be assigned to a discrimination complaint investigator who shall prepare and submit a report to the Labor Commissioner based on an investigation of the complaint. The Labor Commissioner may designate the chief deputy or assistant Labor Commissioner or the chief counsel to receive and review the reports. The investigation shall include, where appropriate, interviews with the complainant, respondent, and any witnesses who may have information concerning the alleged violation, and a review of any documents that may be relevant to the disposition of the complaint. The identity of a witness shall remain confidential unless the identification of the witness becomes necessary to proceed with the investigation or to prosecute an

action to enforce a determination. The investigation report submitted to the Labor Commissioner or designee shall include the statements and documents obtained in the investigation, and the findings of the investigator concerning whether a violation occurred. The Labor Commissioner may hold an investigative hearing whenever the Labor Commissioner determines, after review of the investigation report, that a hearing is necessary to fully establish the facts. In the hearing the investigation report shall be made a part of the record and the complainant and respondent shall have the opportunity to present further evidence. The Labor Commissioner shall issue, serve, and enforce any necessary subpoenas.

(c) If the Labor Commissioner determines a violation has occurred, he or she shall notify the complainant and respondent and direct the respondent to cease and desist from the violation and take any action deemed necessary to remedy the violation, including, where appropriate, rehiring or reinstatement, reimbursement of lost wages and interest thereon, payment of reasonable attorney's fees associated with any hearing held by the Labor Commissioner in investigating the complaint, and the posting of notices to employees. If the respondent does not comply with the order within 10 working days following notification of the Labor Commissioner's determination, the Labor Commissioner shall bring an action promptly in an appropriate court against the respondent. If the Labor Commissioner fails to bring an action in court promptly, the complainant may bring an action against the Labor Commissioner in any appropriate court for a writ of mandate to compel the Labor Commissioner to bring an action in court against the respondent. If the complainant prevails in his or her action for a writ, the court shall award the complainant court costs and reasonable attorney's fees, notwithstanding any other law. Regardless of any delay in bringing an action in court, the Labor Commissioner shall not be divested of jurisdiction. In any action, the court may permit the claimant to intervene as a party plaintiff to the action and shall have jurisdiction, for cause shown, to restrain the violation and to order all appropriate relief. Appropriate relief includes, but is not limited to, rehiring or reinstatement of the complainant, reimbursement of lost wages and interest thereon, and any other compensation or equitable relief as is appropriate under the circumstances of the case. The Labor Commissioner shall petition the court for appropriate temporary relief or restraining order unless he or she determines good cause exists for not doing so.

(d) (1) If the Labor Commissioner determines no violation has occurred, he or she shall notify the complainant and respondent and shall dismiss the complaint. The Labor Commissioner may direct the complainant to pay reasonable attorney's fees associated with any hearing held by the Labor Commissioner if the Labor Commissioner finds the complaint was frivolous, unreasonable, groundless, and was brought in bad faith. The complainant may, after notification of the Labor Commissioner's determination to dismiss a complaint, bring an action in an appropriate court, which shall have jurisdiction to determine whether a violation occurred, and if so, to restrain the violation and order all appropriate relief to remedy the violation.

Appropriate relief includes, but is not limited to, rehiring or reinstatement of the complainant, reimbursement of lost wages and interest thereon, and other compensation or equitable relief as is appropriate under the circumstances of the case. When dismissing a complaint, the Labor Commissioner shall advise the complainant of his or her right to bring an action in an appropriate court if he or she disagrees with the determination of the Labor Commissioner, and in the case of an alleged violation of Section 6310 or 6311, to file a complaint against the state program with the United States Department of Labor.

(2) The filing of a timely complaint against the state program with the United States Department of Labor shall stay the Labor Commissioner's dismissal of the division complaint until the United States Secretary of Labor makes a determination regarding the alleged violation. Within 15 days of receipt of that determination, the Labor Commissioner shall notify the parties whether he or she will reopen the complaint filed with the division or whether he or she will reaffirm the dismissal.

(e) The Labor Commissioner shall notify the complainant and respondent of his or her determination under subdivision (c) or paragraph (1) of subdivision (d), not later than 60 days after the filing of the complaint. Determinations by the Labor Commissioner under subdivision (c) or (d) may be appealed by the complainant or respondent to the Director of Industrial Relations within 10 days following notification of the Labor Commissioner's determination. The appeal shall set forth specifically and in full detail the grounds upon which the appealing party considers the Labor Commissioner's determination to be unjust or unlawful, and every issue to be considered by the director. The director may consider any issue relating to the initial determination and may modify, affirm, or reverse the Labor Commissioner's determination. The director's determination shall be the determination of the Labor Commissioner. The director shall notify the complainant and respondent of his or her determination within 10 days of receipt of the appeal.

(f) The rights and remedies provided by this section do not preclude an employee from pursuing any other rights and remedies under any other law.

(g) In the enforcement of this section, there is no requirement that an individual exhaust administrative remedies or procedures.

SEC. 4. Chapter 3.1 (commencing with Section 1019) is added to Part 3 of Division 2 of the Labor Code, to read:

Chapter 3.1. Unfair Immigration-Related Practices

1019. (a) It shall be unlawful for an employer or any other person or entity to engage in, or to direct another person or entity to engage in, unfair immigration-related practices against any person for the purpose of, or with the intent of, retaliating against any person for exercising any right protected under this code or by any local ordinance applicable to employees.

Exercising a right protected by this code or local ordinance includes, but is not limited to, the following:

(1) Filing a complaint or informing any person of an employer's or other party's alleged violation of this code or local ordinance, so long as the complaint or disclosure is made in good faith.

(2) Seeking information regarding whether an employer or other party is in compliance with this code or local ordinance.

(3) Informing a person of his or her potential rights and remedies under this code or local ordinance, and assisting him or her in asserting those rights.

(b) (1) As used in this chapter, "unfair immigration-related practice" means any of the following practices, when undertaken for the retaliatory purposes prohibited by subdivision (a):

(A) Requesting more or different documents than are required under Section 1324a(b) of Title 8 of the United States Code, or a refusal to honor documents tendered pursuant to that section that on their face reasonably appear to be genuine.

(B) Using the federal E-Verify system to check the employment authorization status of a person at a time or in a manner not required under Section 1324a(b) of Title 8 of the United States Code, or not authorized under any memorandum of understanding governing the use of the federal E-Verify system.

(C) Threatening to file or the filing of a false police report.

(D) Threatening to contact or contacting immigration authorities.

(2) "Unfair immigration-related practice" does not include conduct undertaken at the express and specific direction or request of the federal government.

(c) Engaging in an unfair immigration-related practice against a person within 90 days of the person's exercise of rights protected under this code or local ordinance applicable to employees shall raise a rebuttable presumption of having done so in retaliation for the exercise of those rights.

(d) (1) An employee or other person who is the subject of an unfair immigration-related practice prohibited by this section, or a representative of that employee or person, may bring a civil action for equitable relief and any damages or penalties, in accordance with this section.

(2) Upon a finding by a court of applicable jurisdiction of a violation this section:

(A) For a first violation, the court in its discretion, may order the appropriate government agencies to suspend all licenses subject to this chapter that are held by the violating party for a period of up to 14 days. For the purposes of this paragraph, the licenses that are subject to suspension are all licenses held by the violating party specific to the business location or locations where the unfair immigration-related practice occurred. In determining whether a suspension of all licenses is appropriate, the court shall consider whether the employer knowingly committed an unfair immigration practice, the good faith efforts of the employer to resolve any alleged unfair immigration related practice after receiving notice of the

violations, as well as the harm other employees of the employer, or employees of other employers on a multiemployer jobsite, will suffer as a result of the suspension of all licenses. On receipt of the court's order and notwithstanding any other law, the appropriate agencies shall suspend the licenses according to the court's order.

(B) For a second violation, the court, in its discretion, may order the appropriate government agencies to suspend all licenses that are held by the violating party specific to the business location or locations where the unfair immigration-related practice occurred, for a period of up to 30 days. In determining whether a suspension of all licenses is appropriate, the court shall consider whether the employer knowingly committed an unfair immigration practice, the good faith efforts of the employer to resolve any alleged unfair immigration related practice after receiving notice of the violations, as well as the harm other employees of the employer, or employees of other employers on a multiemployer jobsite, will suffer as a result of the suspension of all licenses. On receipt of the court's order and notwithstanding any other law, the appropriate agencies shall immediately suspend the licenses.

(C) For a third violation, or any violation thereafter, the court, in its discretion, may order the appropriate government agencies to suspend for a period of up to 90 days all licenses that are held by the violating party specific to the business location or locations where the unfair immigration-related practice occurred. In determining whether a suspension of all licenses is appropriate, the court shall consider whether the employer knowingly committed an unfair immigration practice, the good faith efforts of the employer to resolve any alleged unfair immigration related practice after receiving notice of the violations, as well as the harm other employees of the employer, or employees of other employers on a multiemployer jobsite, will suffer as a result of the suspension of all licenses. On receipt of the court's order and notwithstanding any other law, the appropriate agencies shall immediately suspend the licenses.

(3) An employee or other person who is the subject of an unfair immigration-document practice prohibited by this section, and who prevails in an action authorized by this section, shall recover its reasonable attorney's fees and costs, including any expert witness costs.

(e) As used in this chapter:

(1) "License" means any agency permit, certificate, approval, registration, or charter that is required by law and that is issued by any agency for the purposes of operating a business in this state. "License" does not include a professional license.

(2) "Violation" means each incident when an unfair immigration practice was committed, without reference to the number of employees involved in the incident.

SEC. 5. Section 1024.6 is added to the Labor Code, to read:

1024.6. An employer may not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against an employee because the employee updates or attempts to update his or her personal

information, unless the changes are directly related to the skill set, qualifications, or knowledge required for the job.

SEC. 6. Section 1102.5 of the Labor Code is amended to read:

1102.5. (a) An employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, where 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.

(b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information to a government or law enforcement agency, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, where 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.

(c) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a state or federal rule or regulation.

(d) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any former employment.

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

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

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

SEC. 6.5. Section 1102.5 of the Labor Code is amended to read:

1102.5. (a) An employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, or to a person with authority over the employee or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, 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, regardless of whether disclosing the information is part of the employee's job duties.

(b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or 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 or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, 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, regardless of whether disclosing the information is part of the employee's job duties.

(c) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.

(d) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any former employment.

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

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

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

SEC. 7. Section 1103 of the Labor Code is amended to read:

1103. An employer or any other person or entity that violates this chapter is guilty of a misdemeanor punishable, in the case of an individual, by imprisonment in the county jail not to exceed one year or a fine not to exceed one thousand dollars ($1,000) or both that fine and imprisonment, or, in the case of a corporation, by a fine not to exceed five thousand dollars ($5,000).

SEC. 8. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 9. Section 6.5 of this bill incorporates amendments to Section 1102.5 of the Labor Code proposed by both this bill and Senate Bill 496. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2014, (2) each bill amends Section 1102.5 of the

Labor Code, and (3) this bill is enacted after Senate Bill 496, in which case Section 6 of this bill shall not become operative.

SEC. 10. 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 the meaning of Section 6 of Article XIII B of the California Constitution.

O

EXHIBIT O

Senate Bill No. 496

CHAPTER 781

An act to amend Sections 905.2 and 19683 of, and to add Section 8547.15 to, the Government Code, and to amend Section 1102.5 of the Labor Code, relating to employment.

[Approved by Governor October 12, 2013. Filed with Secretary of State October 12, 2013.]

LEGISLATIVE COUNSEL'S DIGEST

SB 496, Wright. Improper governmental activity: disclosure: protection.

(1) The Government Claims Act sets forth the general procedure for the presentation of a claim for money or damages against the state.

This bill would create an exception to the general procedure for a claim alleging a violation of the California Whistleblower Protection Act.

(2) The California Whistleblower Protection Act prohibits acts of reprisal, retaliation, coercion, or similar acts against a state employee or an applicant for state employment who made a protected disclosure relating to an improper governmental activity, as defined. The State Civil Service Act 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 and the executive officer of the board to complete the findings of the hearing or investigation within 60 working days. The State Civil Service Act authorizes the executive officer to consolidate a case with the same or similar allegations to those contained in an appeal and exempts consolidated cases from the time limits for hearings, investigations, and findings.

This bill would modify these requirements to instead require the board to render its decision on the consolidated matter within 6 months of the date of the order of consolidation, 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.

(3) 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 believes that the employee disclosed or 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.

(4) This bill would incorporate additional changes to Section 1102.5 of the Labor Code proposed by SB 666 and AB 263 that would become operative if this bill and either SB 666 or AB 263, or both, are enacted and this bill is enacted last.

(5) 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.

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

SECTION 1. Section 905.2 of the Government Code is amended to read:

905.2. (a) This section shall apply to claims against the state filed with the California Victim Compensation and Government Claims Board.

(b) There shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) all claims for money or damages against the state:

(1) For which no appropriation has been made or for which no fund is available but the settlement of which has been provided for by statute or constitutional provision.

(2) For which the appropriation made or fund designated is exhausted.

(3) For money or damages on express contract, or for an injury for which the state is liable.

(4) For which settlement is not otherwise provided for by statute or constitutional provision.

(c) Claimants shall pay a filing fee of twenty-five dollars ($25) for filing a claim described in subdivision (b). This fee shall be deposited into the General Fund and may be appropriated in support of the board as reimbursements to Item 1870-001-0001 of Section 2.00 of the annual Budget Act.

(1) The fee shall not apply to the following persons:

(A) Persons who are receiving benefits pursuant to the Supplemental Security Income (SSI) and State Supplemental Payments (SSP) programs (Section 12200 to 12205, inclusive, of the Welfare and Institutions Code), the California Work Opportunity and Responsibility to Kids Act (CalWORKs) program (Chapter 2 (commencing with Section 11200) of Part 3 of Division 9 of the Welfare and Institutions Code), the Food Stamp Program (7 U.S.C. Sec. 2011 et seq.), or Section 17000 of the Welfare and Institutions Code.

(B) Persons whose monthly income is 125 percent or less of the current monthly poverty line annually established by the Secretary of California Health and Human Services pursuant to the federal Omnibus Budget Reconciliation Act of 1981 (Public Law 97-35), as amended.

(C) Persons who are sentenced to imprisonment in a state prison or confined in a county jail, or who are residents in a state institution and, within 90 days prior to the date the claim is filed, have a balance of one hundred dollars ($100) or less credited to the inmate's or resident's trust account. A certified copy of the statement of the account shall be submitted.

(2) Any claimant who requests a fee waiver shall attach to the application a signed affidavit requesting the waiver and verification of benefits or income and any other required financial information in support of the request for the waiver.

(3) Notwithstanding any other provision of law, an applicant shall not be entitled to a hearing regarding the denial of a request for a fee waiver.

(d) The time for the board to determine the sufficiency, timeliness, or any other aspect of the claim shall begin when any of the following occur:

(1) The claim is submitted with the filing fee.

(2) The fee waiver is granted.

(3) The filing fee is paid to the board upon the board's denial of the fee waiver request, so long as payment is received within 10 calendar days of the mailing of the notice of the denial.

(e) Upon approval of the claim by the board, the fee shall be reimbursed to the claimant, except that no fee shall be reimbursed if the approved claim was for the payment of an expired warrant. Reimbursement of the filing fee shall be paid by the state entity against which the approved claim was filed. If the claimant was granted a fee waiver pursuant to this section, the amount of the fee shall be paid by the state entity to the board. The reimbursement to the claimant or the payment to the board shall be made at the time the claim is paid by the state entity, or shall be added to the amount appropriated for the claim in an equity claims bill.

(f) The board may assess a surcharge to the state entity against which the approved claim was filed in an amount not to exceed 15 percent of the total approved claim. The board shall not include the refunded filing fee in the surcharge calculation. This surcharge shall be deposited into the General Fund and may be appropriated in support of the board as reimbursements to Item 1870-001-0001 of Section 2.00 of the annual Budget Act.

(1) The surcharge shall not apply to approved claims to reissue expired warrants.

(2) Upon the request of the board in a form prescribed by the Controller, the Controller shall transfer the surcharges and fees from the state entity's appropriation to the appropriation for the support of the board. However, the board shall not request an amount that shall be submitted for legislative approval pursuant to Section 13928.

(g) The filing fee required by subdivision (c) shall apply to all claims filed after June 30, 2004, or the effective date of this statute. The surcharge authorized by subdivision (f) may be calculated and included in claims paid after June 30, 2004, or the effective date of the statute adding this subdivision.

(h) This section shall not apply to claims made for a violation of the California Whistleblower Protection Act (Article 3 (commencing with Section 8547) of Chapter 6.5 of Division 1 of Title 2).

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

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

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

19683. (a) The State Personnel Board shall initiate a hearing or investigation of a written complaint of conduct prohibited by Section 8547.3 within 10 working days of its submission. The executive officer shall complete findings of the hearing or investigation within 60 working days thereafter, and shall provide a copy of the findings to the complaining state employee or applicant for state employment and to the appropriate supervisor, manager, employee, or appointing authority. When the allegations

contained in a complaint of reprisal or retaliation are the same as, or similar to, those contained in another appeal, the executive officer may consolidate the appeals into the most appropriate format. In these cases, the time limits described in this subdivision shall not apply. The board shall render its decision on the consolidated matter within a reasonable time after the conclusion of the hearing or investigation, except that the period shall not exceed six months from the date of the order of consolidation unless extended by the board for a period of not more than 45 additional days from the expiration of the six-month period.

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

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

(d) Whenever the board determines that a manager, supervisor, or employee, who is named a party to the retaliation complaint, has violated Section 8547.3 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 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 act prohibited by Section 8547.3, 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. Section 1102.5 of the Labor Code is amended to read:

1102.5. (a) An employer shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, or to a person with authority over the employee or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, 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, regardless of whether disclosing the information is part of the employee's job duties.

(b) An employer shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or 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 or noncompliance, 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, regardless of whether disclosing the information is part of the employee's job duties.

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

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

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

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

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

SEC. 4.1. Section 1102.5 of the Labor Code is amended to read:

1102.5. (a) An employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, 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, regardless of whether disclosing the information is part of the employee's job duties.

(b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, 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, regardless of whether disclosing the information is part of the employee's job duties.

(c) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.

(d) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any former employment.

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

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

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

SEC. 5. Section 4.1 of this bill incorporates amendments to Section 1102.5 of the Labor Code proposed by this bill, Senate Bill 666, and Assembly Bill 263. It shall only become operative if (1) both this bill and either Senate Bill 666 or Assembly Bill 263 are enacted and become effective on or before January 1, 2014, (2) this bill and either Senate Bill 666 or

Assembly Bill 263, or both, are enacted to amend Section 1102.5 of the Labor Code, and (3) this bill is enacted after Senate Bill 666 or Assembly Bill 263, or both, in which case Section 4 of this bill shall not become operative.

SEC. 6. 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 the meaning of Section 6 of Article XIII B of the California Constitution.

O

EXHIBIT P

Office of Senate Floor Analyses
(916) 651-1520 Fax: (916) 327-4478

THIRD READING

Bill No: AB 1947
Author: Kalra (D) and Gonzalez (D), et al.
Introduced: 1/17/20
Vote: 21

SENATE JUDICIARY COMMITTEE: 7-2, 7/30/20
AYES: Jackson, Durazo, Lena Gonzalez, Monning, Stern, Umberg, Wieckowski
NOES: Borgeas, Melendez

SENATE APPROPRIATIONS COMMITTEE: 5-2, 8/20/20
AYES: Portantino, Bradford, Hill, Leyva, Wieckowski
NOES: Bates, Jones

ASSEMBLY FLOOR: 46-23, 6/10/20 - See last page for vote

SUBJECT: Employment violation complaints: requirements: time

SOURCE: California Employment Lawyers Association
Coalition for Humane Immigrant Rights
Santa Clara County Wage Theft Coalition
Service Employees International Union California

DIGEST: This bill extends the time that workers have to file a claim with the California Labor Commissioner if their employer retaliates against them for exercising their workplace rights under the Labor Code. This bill also authorizes an attorneys' fee award to a worker who prevails on a whistleblower claim.

ANALYSIS:

Existing law:

1) Prohibits an employer, or any person acting on behalf of the employer, from discharging or otherwise discriminating, retaliating against, or taking any adverse action against any employee because the employee engaged in certain protected conduct. Allows employees who believe that they been discharged or

otherwise discriminated against in violation of any law under the jurisdiction of the Labor Commission to file a complaint with the Division of Labor Standards Enforcement (DLSE) within six months of the occurrence of the violation. (Lab. Code § 98.7.)

2) Prohibits an employer, or any person acting on behalf of the employer, from discharging, retaliating against, and taking any other adverse action against an employee who discloses information about a violation to law enforcement, a government agency, or any supervisor or any other person, including another employee, with authority to investigate the violation. (Lab. Code § 1102.5.)

This bill:

1) Extends the filing period with the DLSE to one year for complaints based on a person's belief that they have been discharged or discriminated against by an employer in violation of any law under the jurisdiction of the Labor Commissioner.

2) Authorizes a court to award reasonable attorneys' fees to an employee plaintiff who brings a successful action for a violation of their right to disclose information that the plaintiff has reasonable cause to believe concerns a violation by the employer of, among other things, a state or federal statute.

Comments

Workplace anti-retaliation laws and this bill. Workplace anti-retaliation laws are the bedrock upon which all other workplace rights rest. As a practical matter, employees have no real right to minimum wage, overtime, rest breaks, worksite safety, or to be free from harassment if, upon attempting to exercise those rights, they can be fired immediately.

The California Labor Code contains two key workplace anti-retaliation laws. This bill proposes to fortify both of them, each in slightly different ways.

Labor Code Section 98.7 empowers workers to file retaliation claims with the California Labor Commissioner. Such a claim triggers an administrative investigation which, if it bears out the claim, can lead to penalties against the employer and reinstatement of the worker, among other potential remedies. Under existing law, workers must file their claim of retaliation under Labor Code Section 98.7 within six months of whatever adverse action was taken against them. This bill extends that deadline to one year.

Labor Code Section 1102.5 is a whistleblower law, providing protection to workers who, in good faith, come forward to disclose legal violations taking place in the workplace. Under existing law, workers who prevail in lawsuits alleging that their employer violated these protections may obtain damages, but they will still be stuck paying their own attorneys' fees, unless they can find another way to convince the judge to make the employer pay those fees. This bill would alter that dynamic by authorizing courts to award reasonable attorneys' fees to a worker than prevails on a claim of retaliation for blowing the whistle on legal misconduct at their workplace.

Similar bill last session and Governor's veto. This bill is a narrower version of AB 403 (Kalra, 2019). Whereas this bill would extend the deadline for filing a retaliation claim with the Labor Commissioner from six months to one year, AB 403 proposed to extend the deadline all the way out to two years from the time of the retaliatory act. The bill cleared both houses of the Legislature, but it was then vetoed by Governor Newsom. In rejecting AB 403, however, the Governor strongly suggested he would approve of the narrower approach taken by this bill. In his veto message, the Governor wrote:

> The Legislature has recognized that swift enforcement action by the Labor Commissioner is one of the most effective tools to combat retaliation and mitigate against its chilling effect on the rights of workers. I urge the Legislature to consider an approach that is consistent with other anti-retaliation statute of limitations in the Labor Code which are set to one year.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

According to the Senate Appropriations Committee, the Department of Industrial Relations (DIR) indicates that it would incur first-year costs ranging between $1.1 million and $1.6 million, and $1 million to $1.5 million annually thereafter, to implement the provisions of the bill (Labor Enforcement and Compliance Fund).

SUPPORT: (Verified 8/20/20)

California Employment Lawyers Association (co-source)
Coalition for Humane Immigrant Rights (co-source)
Santa Clara County Wage Theft Coalition (co-source)
Service Employees International Union California (co-source)
9 to 5

Alliance of Californians for Community Empowerment
American Association of University Women
American Civil Liberties Union of California
American Federation of State, County and Municipal Employees
California Asset Building Coalition
California Childcare Resource and Referral Network
California Domestic Workers Coalition
California Federation of Teachers
California Immigrant Policy Center
California Labor Federation
California Latinas for Reproductive Justice
California Partnership
California Rural Legal Assistance Foundation, Inc.
California Women's Law Center
California Work and Family Coalition
Career Ladders Project
Center for Workers' Rights
Child Care Law Center
Church State Council
Communication Workers of America, AFL-CIO District 9
Community Legal Services of East Palo Alto
Consumer Attorneys of California
Disability Rights California
End Hunger!
Equal Rights Advocates
Koreatown Immigrant Workers' Alliance
Legal Aid at Work
Mujeres Unidas y Activas
National Council of Jewish Women
National Employment Law Project
Opportunity Institute
Parent Voices
Public Counsel
Raising California Together
Stronger California Advocates Network
The Center for Popular Democracy
The Women's Foundation of California
Tradeswomen, Inc.
United Food and Commercial Workers, Western States Council
Voices for Progress

Western Center on Law and Poverty
Work Equity
Worksafe

OPPOSITION: (Verified 8/20/20)

Acclamation Insurance Management Services
Agricultural Council of California
Allied Managed Care
Associated General Contractors
Associated General Contractors of California
Brea Chamber of Commerce
California Apartment Association
California Association for Health Services at Home
California Association of Boutique and Breakfast Inns
California Association of Joint Powers Authorities
California Association of Winegrape Growers
California Building Industry Association
California Chamber of Commerce
California Employment Law Council
California Farm Bureau Federation
California Food Producers
California Grocers Association
California Hotel & Lodging Association
California Landscape Contractors Association
California Manufacturers and Technology Association
California Professional Association of Specialty Contractors
California Restaurant Association
California Retailers Association
California Special Districts Association
California State Council of the Society for Human Resource Management
Civil Justice Association of California
Coalition of Small and Disabled Veteran Businesses
Cook Brown, LLP
CSAC Excess Insurance Authority
Flasher Barricade Association
Greater Coachella Valley Chamber of Commerce
Hospitality Santa Barbara
Hotel Association of Los Angeles
Lake Elsinore Valley Chamber of Commerce
League of California Cities

Long Beach Hospitality Alliance
Menifee Valley Chamber of Commerce
Murrieta/Wildomar Chamber of Commerce
National Federation of Independent Business (NFIB)
Official Police Garage Association of Los Angeles
Official Police Garages of Los Angeles
Santa Maria Valley Chamber of Commerce
Society for Human Resource Management
Southwest California Legislative Council
Temecula Valley Chamber of Commerce
Torrance Area Chamber of Commerce
Tulare Chamber of Commerce
Western Electrical Contractors Association
Western Growers Association

ARGUMENTS IN SUPPORT: According to the author:

> Workers who have faced retaliation, especially in the extreme forms of termination or violence, need more time to gather their resources and seek assistance. Without income, they often have to address immediate financial issues, such as finding another job or making arrangements for their family before being able to file a claim. Extending the statute of limitations for filing a worker retaliation claim will give people the opportunity to consider their livelihood and then their next steps for recourse.
>
> Additionally, these workers, often low-wage, have difficulty seeking legal counsel because state law does not allow for attorney's fees for prevailing parties in a claim under Labor Code 1102.5. As a result, few attorneys can offer pro bono services for these whistleblowers who come forward. Three years ago, the Legislature adopted and the Governor signed SB 96 (Chapter 28, Statutes of 2017) into law, which provided the Department of Labor Standards and Enforcement the right to reasonable attorney's fees from the employer if the Labor Commissioner prevails. By providing this same right to private attorneys, AB 1947 will bring parity between public, private, and non-profit attorneys and help low-wage workers obtain legal representation.

As sponsor of the bill, the California Employment Lawyers Association writes:

> […] AB 1947 […] addresses a fundamental equal access to justice problem. Under current law, workers may pursue two avenues to enforce their rights if they are retaliated against for engaging in protected activity. First, the worker could pursue a civil action and would have two years to file a claim. […] The second route a worker could pursue is through the state's Labor Commissioner's office. Here, the worker has only six months to file a claim and is often unrepresented by an attorney. […]
>
> So, which workers are able to access the court system, have a longer period to file their claim, and begin discussions with the employer right away and which workers have only months to file their claim, just to have those claims languish for years before an investigation even begins? Typically, low-wage workers, those who are the most vulnerable to abuse and in need of legal representation, are the ones whose claims get lost or languish in our justice system.
>
> AB 1947 will help address this inequity in our justice system […].

As another sponsor of the bill, the Coalition for Humane Immigrant Rights writes:

> Whistleblower protections have always been regarded as one of the most important laws for exposing waste, fraud, abuse by public and private entities, by ensuring that workers are protected when they blow the whistle or participate in investigations involving violations of law. Workers are often the ones who discover these violations, and thus, robust protections for those workers are imperative. […] Two of the biggest barriers workers face when threatened with retaliation is the relatively short timeline for filing a retaliation claim and the difficulty in securing an attorney who can help them navigate the legal process […]. AB 1947 will help address these significant barriers […].

ARGUMENTS IN OPPOSITION: In opposition to the bill, the California Chamber of Commerce and 46 co-signatory organizations write:

California is already widely perceived as having a hostile litigation environment for employers. One factor that contributes to this negative perception is high damage awards and the threat of attorney's fees in civil litigation that often dwarf the financial recovery the plaintiff actually receives. We do not believe attorney's fees should be added; however, if they are added, they should not be one-sided.

Instead, a two-way attorney's fee-shifting provision provides a level playing field for litigation that will help deter any frivolous cases from being filed due to concern that the litigant could ultimately pay for the costs of litigation, including attorney's fees. […]

Both parties should have some financial risk in pursuing litigation in order to minimize frivolous lawsuits that overburden the courts' dockets and preclude valid claims from being resolved on a timely basis.

ASSEMBLY FLOOR: 46-23, 6/10/20
AYES: Aguiar-Curry, Bauer-Kahan, Berman, Bloom, Boerner Horvath, Bonta, Burke, Calderon, Carrillo, Cervantes, Chau, Chiu, Chu, Eggman, Friedman, Gabriel, Cristina Garcia, Eduardo Garcia, Gipson, Gloria, Gonzalez, Holden, Irwin, Jones-Sawyer, Kalra, Kamlager, Levine, Limón, Low, Maienschein, McCarty, Medina, Mullin, Muratsuchi, Nazarian, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Santiago, Mark Stone, Ting, Weber, Wicks, Wood, Rendon
NOES: Bigelow, Brough, Chen, Choi, Cooley, Cunningham, Megan Dahle, Diep, Flora, Fong, Frazier, Gallagher, Gray, Kiley, Lackey, Mathis, Obernolte, Patterson, Petrie-Norris, Quirk-Silva, Salas, Voepel, Waldron
NO VOTE RECORDED: Arambula, Cooper, Daly, Grayson, Mayes, O'Donnell, Quirk, Ramos, Blanca Rubio, Smith

Prepared by: Timothy Griffiths / JUD. / (916) 651-4113
8/21/20 17:38:09

****** END ******

EXHIBIT Q

Calendar No. 358

112th Congress
2d Session

SENATE

REPORT
112–155

WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2012

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 743

TO AMEND CHAPTER 23 OF TITLE 5, UNITED STATES CODE, TO CLARIFY THE DISCLOSURES OF INFORMATION PROTECTED FROM PROHIBITED PERSONNEL PRACTICES, REQUIRE A STATEMENT IN NON-DISCLOSURE POLICIES, FORMS, AND AGREEMENTS THAT SUCH POLICIES, FORMS, AND AGREEMENTS CONFORM WITH CERTAIN DISCLOSURE PROTECTIONS, PROVIDE CERTAIN AUTHORITY FOR THE SPECIAL COUNSEL, AND FOR OTHER PURPOSES

APRIL 19, 2012.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 2012

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

JOSEPH I. LIEBERMAN, Connecticut, *Chairman*

CARL LEVIN, Michigan	SUSAN M. COLLINS, Maine
DANIEL K. AKAKA, Hawaii	TOM COBURN, Oklahoma
THOMAS R. CARPER, Delaware	SCOTT P. BROWN, Massachusetts
MARK L. PRYOR, Arkansas	JOHN MCCAIN, Arizona
MARY L. LANDRIEU, Louisiana	RON JOHNSON, Wisconsin
CLAIRE MCCASKILL, Missouri	ROB PORTMAN, Ohio
JON TESTER, Montana	RAND PAUL, KENTUCKY
MARK BEGICH, Alaska	JERRY MORAN, Kansas

MICHAEL L. ALEXANDER, *Staff Director*
BETH M. GROSSMAN, *Deputy Staff Director and Chief Counsel*
LAWRENCE B. NOVEY, *Chief Counsel for Governmental Affairs*
LISA M. POWELL, *Staff Director, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia*
NICKOLAS A. ROSSI, *Minority Staff Director*
MARK B. LEDUC, *Minority General Counsel*
JOHN A. KANE, *Minority Professional Staff Member*
TRINA DRIESSNACK TYRER, *Chief Clerk*

CONTENTS

	Page
I. Purpose and Summary	1
II. Background	2
A. Clarification of What Constitutes a Protected Disclosure	4
B. Reasonable Belief—Irrefragable Proof	9
C. All-Circuit Review	11
D. Office of Special Counsel—Amicus Curiae Authority	12
E. Burden of Proof in Office of Special Counsel Disciplinary Actions	14
F. Office of Special Counsel Attorney's Fees	15
G. Anti-Gag Provisions	16
H. Retroactive Exemption of Agency Employees from Whistleblower Protections	17
I. Whistleblower Protection for Transportation Security Administration Employees	18
J. Penalties for Retaliatory Investigations	20
K. Clarification of Whistleblower Rights for Critical Infrastructure Information	22
L. Right to a Full Hearing	23
M. Disclosures of Scientific Censorship	24
N. Reporting Requirements	25
O. Alternative Review	25
P. MSPB Summary Judgment Authority	28
Q. Classified Disclosures to Congress for Employees under the Whistleblower Protection Act	28
R. Whistleblower Protection Ombudsman	32
S. Intelligence Community Whistleblower Protections	32
T. Review of Security Clearance or Access Determinations	35
III. Legislative History	40
IV. Section-by-Section Analysis	41
V. Estimated Cost of Legislation	52
VI. Evaluation of Regulatory Impact	55
VII. Changes in Existing Law	55

Calendar No. 358

112th Congress
2d Session

SENATE

REPORT
112–155

WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2012

APRIL 19, 2012.—Ordered to be printed

Mr. LIEBERMAN, from the Committee on Homeland Security and Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 743]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 743) to amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in non-disclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill (as amended) do pass.

I. PURPOSE AND SUMMARY

The Whistleblower Protection Enhancement Act of 2012 will strengthen the rights of and protections for federal whistleblowers so that they can more effectively help root out waste, fraud, and abuse in the federal government. Whistleblowers play a critical role in keeping our government honest and efficient. Moreover, in a post–9/11 world, we must do our utmost to ensure that those with knowledge of problems at our nation's airports, borders, law enforcement agencies, and nuclear facilities are able to reveal those problems without fear of retaliation or harassment. Unfortunately, federal whistleblowers have seen their protections diminish in recent years, largely as a result of a series of decisions by the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over many cases brought under the Whistleblower

Protection Act (WPA).[1] Specifically, the Federal Circuit has wrongly accorded a narrow definition to the type of disclosure that qualifies for whistleblower protection. Additionally, the lack of remedies under current law for most whistleblowers in the intelligence community and for whistleblowers who face retaliation in the form of withdrawal of the employee's security clearance leaves unprotected those who are in a position to disclose wrongdoing that directly affects our national security.

S. 743 would address these problems by restoring the original congressional intent of the WPA to adequately protect whistleblowers, by strengthening the WPA, and by creating new whistleblower protections for intelligence employees and new protections for employees whose security clearance is withdrawn in retaliation for having made legitimate whistleblower disclosures. More specifically, S. 743 would, among other things, clarify the broad meaning of "any" disclosure of wrongdoing that, under the WPA, a covered employee may make with legal protection; expand the availability of a protected channel to make disclosures of classified information to appropriate committees of Congress; allow certain whistleblowers to bring their cases in federal district court (this provision being subject to a five-year sunset); allow whistleblowers to appeal decisions on their cases to any federal court of appeals (this provision also being subject to a five-year sunset); provide whistleblower and other employee protections to employees of the Transportation Security Administration (TSA); clarify that those who disclose scientific censorship are protected under the WPA; establish a remedy for certain employees of the intelligence community who are not protected under the WPA, modeled on the whistleblower protections for Federal Bureau of Investigation (FBI) employees; and provide federal employees with a way to challenge security clearance determinations made in retaliation against protected whistleblower disclosures.

II. BACKGROUND

The Civil Service Reform Act of 1978 (CSRA) first established statutory protections for federal employees to encourage disclosure of government illegality, waste, fraud, and abuse. As explained in the accompanying Senate Report:

> Often, the whistleblower's reward for dedication to the highest moral principles is harassment and abuse. Whistleblowers frequently encounter severe damage to their careers and substantial economic loss. Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses

[1] Whistleblower Protection Act of 1989, Public Law No. 101–12, 103 Stat. 16 (1989).

> billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.[2]

The CSRA established the Office of Special Counsel (OSC) to investigate and prosecute allegations of prohibited personnel practices or other violations of the merit system and established the Merit Systems Protection Board (the MSPB or the Board) to adjudicate such cases. However, in 1984, the MSPB reported that the Act had no effect on the number of whistleblowers, and that an increased percentage of federal employees who observed wrongdoing failed to report it because they feared reprisal.[3] This Committee subsequently reported that employees felt that the OSC engaged in apathetic and sometimes detrimental practices toward employees seeking its assistance. The Committee also found that restrictive decisions by the MSPB and federal courts hindered the ability of whistleblowers to win redress.[4]

In response, Congress in 1989 unanimously passed the WPA, which forbids retaliation against a federal employee who discloses what the employee reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. As discussed in more detail below, the WPA makes it a prohibited personnel practice to take an adverse personnel action against a covered employee because that employee makes a protected disclosure. An employee who claims to have suffered retaliation for having made a protected disclosure may seek a remedy from the MSPB, may ask the OSC investigate the situation and advocate for the employee, or may file a grievance under a negotiated grievance procedure contained in a collective bargaining agreement. The stated congressional intent of the WPA was to strengthen and improve protections for the rights of federal employees, to prevent reprisals, and to help eliminate wrongdoing within the government.[5] The Committee emphasized in its report on the legislation that, although it is important to discipline those who commit prohibited personnel practices, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.[6]

Congress substantially amended the WPA in 1994, as part of legislation to reauthorize the OSC and the MSPB.[7] The amendments were designed, in part, to address a series of actions by the OSC and decisions by the MSPB and the Federal Circuit that Congress deemed inconsistent with its intent in the 1989 Act.[8] Now, seventeen years after the last major revision of the WPA, it is again necessary for Congress to reform and strengthen several aspects of the

---

[2] S. Rep. No. 95–969, at 8 (1978).
[3] *See* Merit Systems Protection Board, *Blowing the Whistle in the Federal Government: A Comparative Analysis of 1980 and 1983 Survey Findings*, at 5–6 (October 1984).
[4] S. Rep. No. 100–413, at 6–16 (1988).
[5] *Id*. at 9.
[6] *Id*. at 23.
[7] An Act to authorize appropriations for the United States Office of Special Counsel, the Merit Systems Protection Board, and for other purposes, Public Law No. 103–424, 108 Stat. 4361 (1994).
[8] H. Rep. No. 103–769, at 12–18 (1994).

whistleblower protection statutes in order to achieve the original intent and purpose of the laws.

A. Clarification of what constitutes a protected disclosure

In order to make a claim under the WPA, an individual must qualify as a covered employee and allege that a personnel action was taken, or threatened, because of "any disclosure" of information by the individual that he or she believes evidences: 1) a violation of any law, rule, or regulation; or 2) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to the public health or safety.[9]

Unfortunately, in the years since Congress passed the WPA, the MSPB and the Federal Circuit narrowed the statute's protection of "any disclosure" of certain types of wrongdoing, with the effect of denying coverage to many individuals Congress intended to protect. Both the House and Senate committee reports accompanying the 1994 amendments criticized decisions of the MSPB and the Federal Circuit limiting the types of disclosures covered by the WPA. Specifically, this Committee explained that the 1994 amendments were intended to reaffirm the Committee's long-held view that the WPA's plain language covers *any* disclosure:

> The Committee . . . reaffirms the plain language of the Whistleblower Protection Act, which covers, by its terms, "any disclosure," of violations of law, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. The Committee stands by that language, as it explained in its 1988 report on the Whistleblower Protection Act. That report states: "The Committee intends that disclosures be encouraged. The OSC, the Board and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue."[10]

The House Committee on the Post Office and the Civil Service similarly stated:

> Perhaps the most troubling precedents involve the [MSPB's] inability to understand that "any" means "any." The WPA protects "any" disclosure evidencing a reasonable belief of specified misconduct, a cornerstone to which the MSPB remains blind. The only restrictions are for classified information or material the release of which is specifically prohibited by statute. Employees must disclose that type of information through confidential channels to maintain protection; otherwise there are no exceptions.[11]

Despite the clear legislative history and the plain language of the 1994 amendments, the Federal Circuit and the MSPB have continued to undermine the WPA's intended meaning by imposing limita-

[9] 5 U.S.C. 2302(b)(8).
[10] S. Rep. No. 103–358 (1994), at 10 (quoting S. Rep. No. 100–413 (1988) at 13).
[11] H. Rep. No. 103–769, at 18 (1994).

tions on the kinds of disclosures by whistleblowers that are protected under the WPA. S. 743 makes clear, once and for all, that Congress intends to protect "any disclosure" of certain types of wrongdoing in order to encourage such disclosures. It is critical that employees know that the protection for disclosing wrongdoing is extremely broad and will not be narrowed retroactively by future MSPB or court opinions. Without that assurance, whistleblowers will hesitate to come forward.

Section 101 of S. 743 overturns several court decisions that narrowed the scope of protected disclosures. For example, in *Horton v. Department of the Navy*, the court ruled that disclosures to the alleged wrongdoer are not protected, because the disclosures are not made to persons in a position to remedy wrongdoing.[12] In *Willis v. Department of Agriculture*, the court stated that a disclosure made as part of an employee's normal job duties is not protected.[13] And in *Meuwissen v. Department of Interior*, the court held that disclosures of information already known are not protected.[14]

These holdings are contrary to congressional intent for the WPA. The court wrongly focused on whether or not disclosures of wrongdoing were protected, instead of applying the very broad protection required by the plain language of the WPA. The merits of these cases, instead, should have turned on the factual question of whether personnel action at issue in the case occurred "because of" the protected disclosure.

Section 101 of S. 743 amends the WPA to overturn decisions narrowing the scope of protected disclosures by clarifying that a whistleblower is not deprived of protection just because the disclosure was made to an individual, including a supervisor, who participated in the wrongdoing; or revealed information that had been previously disclosed; or was not made in writing; or was made while the employee was off duty. The bill also clarifies that an employee does not lose protection simply because of the employee's motive for making the disclosure, or because of the amount of time that elapsed between the events described in the disclosure and the making of the disclosure.

Finally, an employee is not deprived of protection merely because the employee made the disclosure in the normal course of the employee's duties, provided that actual reprisal occurred—in other words, provided that the employee can show not only that the agency took the personnel action "because of" the disclosure, but also that the agency took the action with an improper, retaliatory motive. This extra proof requirement when an employee makes a disclosure in the normal course of duties is intended to facilitate adequate supervision of employees, such as auditors and investigators, whose job is to regularly report wrongdoing. Personnel actions affecting auditors, for example, would ordinarily be based on the

---

[12] 66 F.3d 279, 282 (Fed. Cir. 1995). The Court did not explain its reasoning that a wrongdoer is not in a position to halt his or her own actions, stating conclusorily that such a disclosure is criticism rather than whistleblowing.

[13] 141 F.3d 1139, 1144 (Fed. Cir. 1998) (reasoning that because Willis, as a compliance inspector, was required to report farms that were out of compliance as a regular part of his job duties, such reports could not constitute protected disclosures under the WPA). *But see Johnson v. Department of Health and Human Services*, 87 M.S.P.R. 204, 210 (2000) (limiting *Willis* to its factual context); *Askew v. Department of the Army*, 88 M.S.P.R. 674, 679–80 (2001) (cautioning that *Willis* ought not be read too broadly and rejecting the proposition that *Willis* held that "disclosure of information in the course of an employee's performance of her normal duties cannot be protected whistleblowing").

[14] 234 F.3d 9, 12–13 (Fed. Cir. 2000).

auditor's track-record with respect to disclosure of wrongdoing; and therefore a provision forbidding any personnel action taken because of a disclosure of wrongdoing would sweep too broadly. However, it is important to preserve protection for such disclosures, for example where an auditor can show that she was retaliated against for refusing to water down a report. This provision is intended to strike the balance of protecting disclosures made in the normal course of duties but imposing a slightly higher burden to show that the personnel action was made for the actual purpose of retaliating against the auditor for having made a protected whistleblower disclosure.

The evident tendency of adjudicative bodies to scale back the intended scope of protected disclosures appears to have arisen, at least in part, from concern that management of the federal workforce may be unduly burdened if employees can successfully claim whistleblower status in ordinary employment disputes.[15] Taking this concern seriously, the Committee has concluded that the strong national interest in protecting good faith whistleblowing requires broad protection of whistleblower disclosures, recognizing that the responsible agencies and courts can take other steps to deter and weed out frivolous whistleblower claims. Under decisions of the U.S. Court of Appeals for the Federal Circuit and the MSPB, for example, a whistleblower case cannot proceed unless an employee has first made non-frivolous allegations satisfying the elements for a *prima facie* case that the employee has suffered unlawful retaliation for having made a protected disclosure. Unless the employee can do this, there will be no hearing and the agency will be under no burden to present an affirmative defense.[16] Moreover, the MSPB's procedural rules may be available to curtail frivolous litigation under certain circumstances, including in cases under the WPA. These rules generally authorize an administrative judge at the MSPB to impose sanctions necessary to meet the interests of justice and to issue protective orders in cases of harassment of a witness, including harassment of a party to a case.[17] S. 743 does not affect these decisions or regulations.

In addition, to make a *prima facie* whistleblower case, the employee must show that he or she reasonably believed that the disclosed information evidenced a violation of law, gross mismanagement, or one of the other types of wrongdoing enumerated in 5 U.S.C. § 2302(b)(8). As detailed further below, the Federal Circuit has held that this reasonable-belief test is an objective one: whether a disinterested observer with knowledge of the facts known to and readily ascertainable by the employee reasonably could conclude that the conduct evidences a violation of law, gross mismanagement, or other matters identified in 5 U.S.C. 2302(b)(8).[18] The Committee believes it is prudent to codify that objective test in the whistleblower statute, and has done so in section 103 of S. 743. Thus, in screening out frivolous claims, the focus for the MSPB and the courts would properly shift to whether the employ-

---

[15] *See, e.g., Herman v. Department of Justice,* 193 F.3d 1375, 1381 (Fed. Cir. 1999); *Frederick v. Department of Justice,* 73 F.3d 349, 353 (Fed. Cir. 1996).

[16] *See, e.g., Yunus v. Department of Veterans Affairs,* 242 F.3d 1367 (Fed. Cir. 2001); *Rusin v. Department of Treasury,* 92 M.S.P.R. 1298 (2002).

[17] *See* 5 C.F.R. §§ 1201.43 & 1201.55(d).

[18] *Lachance v. White,* 174 F.3d 1378, 1381 (Fed. Cir. 1999); *accord Rusin v. Department of the Treasury,* 92 M.S.P.R. 298 (2002).

ee's belief was objectively reasonable, rather than whether the employee's disclosure of information meets the statutory definition of "disclosure." In the Committee's view, any potential mischief that might otherwise arise from expanding the scope of what kinds of "disclosure" are protected will be countered by the application of this objective reasonable-belief test. In cases not so filtered, the agency would still prevail on its defense if it could demonstrate that it would have taken the same personnel action against the employee even absent the disclosure.

Moreover, to further address the concern that the WPA might impose an undue burden on agency management if employees could claim whistleblower protections in cases of ordinary workplace disputes, S. 743 requires the Government Accountability Office (GAO) to evaluate the implementation of the Act, including any trends in the number of cases filed, the disposition of those cases, and any patterns of abuse. S. 743 also requires the MSPB to report yearly on the number of cases filed, the number of petitions for review filed, and the disposition of cases alleging violations of the WPA. The Committee believes that these provisions will enable Congress to examine closely how this bill is implemented and to intervene, if necessary, if an unintended consequence of the legislation should become evident.

In restoring and enlarging the broad protection of whistleblowers under the WPA, the Committee decided it was necessary to codify one narrow, reasonable limitation on the subject matter of disclosures that are protected. The issue first emerged during the hearing on this bill's predecessor, S. 1358, in 2003 during the 108th Congress. At the hearing, the Senior Executives Association expressed concern that, if the scope of protected disclosures were completely unrestricted, the WPA could be construed to protect employees who disclose disagreements with their supervisors' or managers' lawful policy decisions, and the Association recommended that the bill be clarified to deny protection of disclosures relating to policy disagreements.[19] Put another way, an employee who discloses general philosophical or policy disagreements with agency decisions or actions should not be protected as a whistleblower. Section 102 of S. 743 imposes that limitation by excluding communications concerning policy decisions that are a lawful exercise of discretionary authority. This exclusion reflects congressional intent at the inception of statutory whistleblower protection.[20] At the same time, the Committee seeks to ensure that the WPA covers disclosures of substantial misconduct, even if the misconduct flows from a policy decision. S. 743 balances both of these policy objectives by codifying that an employee is still protected against retaliation for disclosing evidence of illegality, gross waste, gross mismanagement, abuse of authority or a substantial and specific danger to public health or safety, regardless of whether the information arguably relates to a policy decision, whether properly or im-

[19] S. 1358—The Federal Employee Protection of Disclosures Act: Amendments to the Whistleblower Protection Act: Hearing on S. 1358 before the Committee on Governmental Affairs, S. Hrg. 108–414, at 163 (2003).

[20] *See* S. Rep. No. 969, 95th Cong., 2d Sess. 8 (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2730 ("the Committee intends that only disclosures of public health or safety dangers which are both substantial and specific are to be protected. Thus, for example, general criticisms by an employee of the Environmental Protection Agency that the agency is not doing enough to protect the environment would not be protected under this subsection.").

properly implemented. This language is consistent with Federal Circuit precedent.[21]

A second limitation that had been included in a prior version of the bill is not included in S. 743. To address concerns that minor, accidental violations of law committed in good faith would become the basis for protected disclosures, the Committee accepted an amendment to a version of the bill considered during the 111th Congress, S. 372, to exclude disclosures of "an alleged violation that is minor, inadvertent, and occurs during conscientious carrying out of official duties."[22] The language of this provision was intended to codify case law finding that disclosures of trivial or *de minimis* violations are not protected under the WPA.[23] However, whistleblower advocates expressed concerns that this provision might invite inquiry into the substance and importance of the behavior the employee disclosed, rather than the employee's reasonable belief that he or she disclosed wrongdoing protected under the WPA, as discussed in the next section. The statute is intended to encourage disclosure of wrongdoing, and the Committee has concluded that an exception that may cause would-be whistleblowers to hesitate for fear that their disclosures might be deemed too minor for protection could be counterproductive. Accordingly, that exception was not included in S. 743. Moreover, section 101 of the bill underscores the breadth of the WPA's protections by changing the term "a violation" to the term "any violation" in two places in the WPA.[24]

Additionally, the Committee notes that, with respect to a disclosure of "gross mismanagement," a "gross waste" of funds, or a "substantial and specific danger to public health or safety," the statute requires more than disclosure of *de minimis* wrongdoing. In applying these provisions of the WPA, the Merit Systems Protection Board used an appropriate definition of "gross mismanagement" in *Swanson v. General Services Administration.*[25] In *Swanson,* the Board held that "[g]ross mismanagement means more than *de minimis* wrongdoing or negligence; it means a management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission."[26]

In sum, the intentionally broad scope of protected disclosures should be clear. The Committee emphasizes that the Board and the courts should not create new exceptions to protected disclosures in place of those overturned by S. 743.

---

[21] *Gilbert v. Department of Commerce,* 194 F.3d 1332 (Fed. Cir. 1999).

[22] Whistleblower Protection Enhancement Act (S. 372), 111th Congress, section 101(a)(1)(B).

[23] *See* S. Rep. No. 111–101, at 6–7 (*citing Drake v. Agency for International Development,* 543 F.3d 1377, 1381 (Fed. Cir. 2008)).

[24] Cases may nevertheless arise where an employee disclosed wrongdoing so trivial that the employee cannot succeed in gaining protection under the WPA. For example, the Federal Circuit has found that, to be protected, an employee must have reasonably believed he or she was reporting a "genuine violation." *See Drake*, 543 F.3d at 1381–82 (recognizing that a "trivial or *de minimis* exception" may apply in an appropriate case, though it "is not appropriate in this case" because "Mr. Drake reported intoxication which he could reasonably believe constituted a *genuine* violation of a law, rule, or regulation.") (emphasis added). Additionally, in some cases, it may be difficult to prove that a disclosure involving a trivial or *de minimis* violation actually caused the relevant personnel action. As an example, it may be easier to demonstrate to a fact-finder that an employee was fired for having complained that other employees accept bribes, than to demonstrate that the employee was fired for having complained about another employee arriving ten minutes late for work.

[25] 110 M.S.P.R. 278 (2008).

[26] *Id.* at 284–85, *citing Shriver v. Department of Veterans Affairs*, 89 M.S.P.R. 239 (2001).

EXHIBIT R

Public Law 112–199
112th Congress

An Act

To amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in non-disclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.

Nov. 27, 2012
[S. 743]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Whistleblower Protection Enhancement Act of 2012.
5 USC 101 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Whistleblower Protection Enhancement Act of 2012".

TITLE I—PROTECTION OF CERTAIN DISCLOSURES OF INFORMATION BY FEDERAL EMPLOYEES

SEC. 101. CLARIFICATION OF DISCLOSURES COVERED.

(a) IN GENERAL.—Section 2302(b)(8) of title 5, United States Code, is amended—

(1) in subparagraph (A)(i), by striking "a violation" and inserting "any violation"; and

(2) in subparagraph (B)(i), by striking "a violation" and inserting "any violation (other than a violation of this section)".

(b) PROHIBITED PERSONNEL PRACTICES UNDER SECTION 2302(b)(9).—

(1) TECHNICAL AND CONFORMING AMENDMENTS.—Title 5, United States Code, is amended—

(A) in subsections (a)(3), (b)(4)(A), and (b)(4)(B)(i) of section 1214 and in subsections (a), (e)(1), and (i) of section 1221, by inserting "or section 2302(b)(9) (A)(i), (B), (C), or (D)" after "section 2302(b)(8)" each place it appears; and

(B) in section 2302(a)(2)(C)(i), by inserting "or section 2302(b)(9) (A)(i), (B), (C), or (D)" after "(b)(8)".

(2) OTHER REFERENCES.—(A) Title 5, United States Code, is amended in subsection (b)(4)(B)(i) of section 1214 and in subsection (e)(1) of section 1221 by inserting "or protected activity" after "disclosure" each place it appears.

(B) Section 2302(b)(9) of title 5, United States Code, is amended—

(i) by striking subparagraph (A) and inserting the following:

"(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—

"(i) with regard to remedying a violation of paragraph (8); or

"(ii) other than with regard to remedying a violation of paragraph (8);"; and

(ii) in subparagraph (B), by inserting "(i) or (ii)" after "subparagraph (A)".

(C) Section 2302 of title 5, United States Code, is amended by adding at the end the following:

"(f)(1) A disclosure shall not be excluded from subsection (b)(8) because—

"(A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);

"(B) the disclosure revealed information that had been previously disclosed;

"(C) of the employee's or applicant's motive for making the disclosure;

"(D) the disclosure was not made in writing;

"(E) the disclosure was made while the employee was off duty; or

"(F) of the amount of time which has passed since the occurrence of the events described in the disclosure.

"(2) If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8) if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure.".

SEC. 102. DEFINITIONAL AMENDMENTS.

Section 2302(a)(2) of title 5, United States Code, is amended—

(1) in subparagraph (B)(ii), by striking "and" at the end;

(2) in subparagraph (C)(iii), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(D) 'disclosure' means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences—

"(i) any violation of any law, rule, or regulation; or

"(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.".

SEC. 103. REBUTTABLE PRESUMPTION.

Section 2302(b) of title 5, United States Code, is amended by amending the matter following paragraph (12) to read as follows: "This subsection shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress. For purposes of paragraph (8), (i) any presumption relating to the performance of a duty by an employee whose conduct is the subject of a disclosure as defined under subsection (a)(2)(D) may be rebutted

Determination.

by substantial evidence, and (ii) a determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.".

SEC. 104. PERSONNEL ACTIONS AND PROHIBITED PERSONNEL PRACTICES.

(a) PERSONNEL ACTION.—Section 2302(a)(2)(A) of title 5, United States Code, is amended—

(1) in clause (x), by striking "and" after the semicolon; and

(2) by redesignating clause (xi) as clause (xii) and inserting after clause (x) the following:

"(xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and".

(b) PROHIBITED PERSONNEL PRACTICE.—

(1) IN GENERAL.—Section 2302(b) of title 5, United States Code, is amended—

(A) in paragraph (11), by striking "or" at the end;

(B) in paragraph (12), by striking the period and inserting "; or"; and

(C) by inserting after paragraph (12) the following:

"(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: 'These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.'.".

(2) AGENCY WEBSITES.—Agencies making use of any nondisclosure policy, form, or agreement shall also post the statement required under section 2302(b)(13) of title 5, United States Code (as added by this Act) on the agency website, accompanied by the specific list of controlling Executive orders and statutory provisions. 5 USC 2302 note.

(3) NONDISCLOSURE POLICY, FORM, OR AGREEMENT IN EFFECT BEFORE THE EFFECTIVE DATE.—With respect to a nondisclosure policy, form, or agreement that was in effect before the effective date of this Act, but that does not contain the statement required under section 2302(b)(13) of title 5, United States Code (as added by this Act) for implementation or enforcement— 5 USC 2302 note.

(A) it shall not be a prohibited personnel practice to enforce that policy, form, or agreement with regard to a current employee if the agency gives such employee notice of the statement; and

(B) it shall not be a prohibited personnel practice to enforce that policy, form, or agreement after the effective date of this Act with regard to a former employee if the agency complies with paragraph (2) of this subsection.

(c) RETALIATORY INVESTIGATIONS.—

(1) AGENCY INVESTIGATION.—Section 1214 of title 5, United States Code, is amended by adding at the end the following:

"(h) Any corrective action ordered under this section to correct a prohibited personnel practice may include fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.".

(2) DAMAGES.—Section 1221(g) of title 5, United States Code, is amended by adding at the end the following:

"(4) Any corrective action ordered under this section to correct a prohibited personnel practice may include fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.".

SEC. 105. EXCLUSION OF AGENCIES BY THE PRESIDENT.

Section 2302(a)(2)(C) of title 5, United States Code, is amended by striking clause (ii) and inserting the following:

"(ii)(I) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office; and

Determination.

"(II) as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, provided that the determination be made prior to a personnel action; or".

SEC. 106. DISCIPLINARY ACTION.

Section 1215(a)(3) of title 5, United States Code, is amended to read as follows:

"(3)(A) A final order of the Board may impose—

Time period.

"(i) disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, or reprimand;

"(ii) an assessment of a civil penalty not to exceed $1,000; or

"(iii) any combination of disciplinary actions described under clause (i) and an assessment described under clause (ii).

"(B) In any case brought under paragraph (1) in which the Board finds that an employee has committed a prohibited personnel practice under section 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D), the Board may impose disciplinary action if the Board finds that the activity protected under section 2302(b)(8), or 2302(b)(9)

(A)(i), (B), (C), or (D) was a significant motivating factor, even if other factors also motivated the decision, for the employee's decision to take, fail to take, or threaten to take or fail to take a personnel action, unless that employee demonstrates, by a preponderance of the evidence, that the employee would have taken, failed to take, or threatened to take or fail to take the same personnel action, in the absence of such protected activity.".

SEC. 107. REMEDIES.

(a) ATTORNEY FEES.—Section 1204(m)(1) of title 5, United States Code, is amended by striking "agency involved" and inserting "agency where the prevailing party was employed or had applied for employment at the time of the events giving rise to the case".

(b) DAMAGES.—Sections 1214(g)(2) and 1221(g)(1)(A)(ii) of title 5, United States Code, are amended by striking all after "travel expenses," and inserting "any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs)." each place it appears.

SEC. 108. JUDICIAL REVIEW.

(a) IN GENERAL.—Section 7703(b) of title 5, United States Code, is amended by striking the matter preceding paragraph (2) and inserting the following:

"(b)(1)(A) Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board. Deadlines. Notices.

"(B) During the 2-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, a petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.". Time period.

(b) REVIEW OBTAINED BY OFFICE OF PERSONNEL MANAGEMENT.—Section 7703(d) of title 5, United States Code, is amended to read as follows:

"(d)(1) Except as provided under paragraph (2), this paragraph shall apply to any review obtained by the Director of the Office of Personnel Management. The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless Applicability. Deadlines. Notices. Determinations.

the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

Time period.

"(2) During the 2-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, this paragraph shall apply to any review obtained by the Director of the Office of Personnel Management that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D). The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the court of appeals. The granting of the petition for judicial review shall be at the discretion of the court of appeals.".

SEC. 109. PROHIBITED PERSONNEL PRACTICES AFFECTING THE TRANSPORTATION SECURITY ADMINISTRATION.

(a) IN GENERAL.—Chapter 23 of title 5, United States Code, is amended—

(1) by redesignating sections 2304 and 2305 as sections 2305 and 2306, respectively; and

(2) by inserting after section 2303 the following:

"§ 2304. Prohibited personnel practices affecting the Transportation Security Administration

"(a) IN GENERAL.—Notwithstanding any other provision of law, any individual holding or applying for a position within the Transportation Security Administration shall be covered by—

"(1) the provisions of section 2302(b) (1), (8), and (9);

"(2) any provision of law implementing section 2302(b) (1), (8), or (9) by providing any right or remedy available to an employee or applicant for employment in the civil service; and

"(3) any rule or regulation prescribed under any provision of law referred to in paragraph (1) or (2).

"(b) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to affect any rights, apart from those described in subsection (a), to which an individual described in subsection (a) might otherwise be entitled under law.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 23 of title 5, United States Code, is amended by striking the items relating to sections 2304 and 2305, respectively, and inserting the following:

"2304. Prohibited personnel practices affecting the Transportation Security Administration.
"2305. Responsibility of the Government Accountability Office.
"2306. Coordination with certain other provisions of law.".

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of enactment of this section. 5 USC 2304 note.

SEC. 110. DISCLOSURE OF CENSORSHIP RELATED TO RESEARCH, ANALYSIS, OR TECHNICAL INFORMATION. 5 USC 2302 note.

(a) DEFINITIONS.—In this subsection—

(1) the term "agency" has the meaning given under section 2302(a)(2)(C) of title 5, United States Code;

(2) the term "applicant" means an applicant for a covered position;

(3) the term "censorship related to research, analysis, or technical information" means any effort to distort, misrepresent, or suppress research, analysis, or technical information;

(4) the term "covered position" has the meaning given under section 2302(a)(2)(B) of title 5, United States Code;

(5) the term "employee" means an employee in a covered position in an agency; and

(6) the term "disclosure" has the meaning given under section 2302(a)(2)(D) of title 5, United States Code.

(b) PROTECTED DISCLOSURE.—

(1) IN GENERAL.—Any disclosure of information by an employee or applicant for employment that the employee or applicant reasonably believes is evidence of censorship related to research, analysis, or technical information—

(A) shall come within the protections of section 2302(b)(8)(A) of title 5, United States Code, if—

(i) the employee or applicant reasonably believes that the censorship related to research, analysis, or technical information is or will cause—

(I) any violation of law, rule, or regulation; or

(II) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; and

(ii) such disclosure is not specifically prohibited by law or such information is not specifically required by Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs; and

(B) shall come within the protections of section 2302(b)(8)(B) of title 5, United States Code, if—

(i) the employee or applicant reasonably believes that the censorship related to research, analysis, or technical information is or will cause—

(I) any violation of law, rule, or regulation; or

(II) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; and

(ii) the disclosure is made to the Special Counsel, or to the Inspector General of an agency or another person designated by the head of the agency to receive such disclosures, consistent with the protection of sources and methods.

(2) DISCLOSURES NOT EXCLUDED.—A disclosure shall not be excluded from paragraph (1) for any reason described under section 2302(f)(1) or (2) of title 5, United States Code.

(3) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to imply any limitation on the protections of employees and applicants afforded by any other provision of law, including protections with respect to any disclosure of information believed to be evidence of censorship related to research, analysis, or technical information.

SEC. 111. CLARIFICATION OF WHISTLEBLOWER RIGHTS FOR CRITICAL INFRASTRUCTURE INFORMATION.

Section 214(c) of the Homeland Security Act of 2002 (6 U.S.C. 133(c)) is amended by adding at the end the following: "For purposes of this section a permissible use of independently obtained information includes the disclosure of such information under section 2302(b)(8) of title 5, United States Code.".

SEC. 112. ADVISING EMPLOYEES OF RIGHTS.

Section 2302(c) of title 5, United States Code, is amended by inserting ", including how to make a lawful disclosure of information that is specifically required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs to the Special Counsel, the Inspector General of an agency, Congress, or other agency employee designated to receive such disclosures" after "chapter 12 of this title".

SEC. 113. SPECIAL COUNSEL AMICUS CURIAE APPEARANCE.

Section 1212 of title 5, United States Code, is amended by adding at the end the following:

"(h)(1) The Special Counsel is authorized to appear as amicus curiae in any action brought in a court of the United States related to section 2302(b) (8) or (9), or as otherwise authorized by law. In any such action, the Special Counsel is authorized to present the views of the Special Counsel with respect to compliance with section 2302(b) (8) or (9) and the impact court decisions would have on the enforcement of such provisions of law.

"(2) A court of the United States shall grant the application of the Special Counsel to appear in any such action for the purposes described under subsection (a).".

SEC. 114. SCOPE OF DUE PROCESS.

(a) SPECIAL COUNSEL.—Section 1214(b)(4)(B)(ii) of title 5, United States Code, is amended by inserting ", after a finding that a protected disclosure was a contributing factor," after "ordered if".

(b) INDIVIDUAL ACTION.—Section 1221(e)(2) of title 5, United States Code, is amended by inserting ", after a finding that a protected disclosure was a contributing factor," after "ordered if".

5 USC 2302 note.

SEC. 115. NONDISCLOSURE POLICIES, FORMS, AND AGREEMENTS.

(a) IN GENERAL.—

(1) REQUIREMENT.—Each agreement in Standard Forms 312 and 4414 of the Government and any other nondisclosure policy, form, or agreement of the Government shall contain the following statement: "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.".

(2) AGENCY WEBSITES.—Agencies making use of any nondisclosure policy, form, or agreement shall also post the statement required under paragraph (1) on the agency website, accompanied by the specific list of controlling Executive orders and statutory provisions.

(3) ENFORCEABILITY.—

(A) IN GENERAL.—Any nondisclosure policy, form, or agreement described under paragraph (1) that does not contain the statement required under paragraph (1) may not be implemented or enforced to the extent such policy, form, or agreement is inconsistent with that statement.

(B) NONDISCLOSURE POLICY, FORM, OR AGREEMENT IN EFFECT BEFORE THE EFFECTIVE DATE.—With respect to a nondisclosure policy, form, or agreement that was in effect before the effective date of this Act, but that does not contain the statement required under paragraph (1) for implementation or enforcement—

(i) it shall not be a prohibited personnel practice to enforce that policy, form, or agreement with regard to a current employee if the agency gives such employee notice of the statement; and

(ii) it shall not be a prohibited personnel practice to enforce that policy, form, or agreement after the effective date of this Act with regard to a former employee if the agency complies with paragraph (2).

(b) PERSONS OTHER THAN GOVERNMENT EMPLOYEES.—Notwithstanding subsection (a), a nondisclosure policy, form, or agreement that is to be executed by a person connected with the conduct of an intelligence or intelligence-related activity, other than an employee or officer of the United States Government, may contain provisions appropriate to the particular activity for which such document is to be used. Such policy, form, or agreement shall, at a minimum, require that the person will not disclose any classified information received in the course of such activity unless specifically authorized to do so by the United States Government. Such nondisclosure policy, form, or agreement shall also make it clear that such forms do not bar disclosures to Congress or to an authorized official of an executive agency or the Department of Justice that are essential to reporting a substantial violation of law, consistent with the protection of sources and methods.

SEC. 116. REPORTING REQUIREMENTS.

(a) GOVERNMENT ACCOUNTABILITY OFFICE.—

(1) REPORT.—Not later than 4 years after the date of enactment of this Act, the Comptroller General shall submit a report to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives on the implementation of this title.

(2) CONTENTS.—The report under this subsection shall include—

(A) an analysis of any changes in the number of cases filed with the Merit Systems Protection Board alleging violations of section 2302(b)(8) or (9) of title 5, United States Code, since the effective date of this Act;

(B) the outcome of the cases described under subparagraph (A), including whether or not the Merit Systems Protection Board, the United States Court of Appeals for the Federal Circuit, or any other court determined the allegations to be frivolous or malicious as well as a recommendation whether Congress should grant the Merit Systems Protection Board summary judgment authority for cases described under subparagraph (A);

(C) a recommendation regarding whether Congress should grant jurisdiction for some subset of cases described under subparagraph (A) to be decided by a district court of the United States and an evaluation of the impact that would have on the Merit Systems Protection Board and the Federal court system; and

(D) any other matter as determined by the Comptroller General.

31 USC 1116 note.

(b) MERIT SYSTEMS PROTECTION BOARD.—

(1) IN GENERAL.—Each report submitted annually by the Merit Systems Protection Board under section 1116 of title 31, United States Code, shall, with respect to the period covered by such report, include as an addendum the following:

(A) Information relating to the outcome of cases decided by the Merit Systems Protection Board during the period covered by such report in which violations of section 2302(b)(8) or (9)(A)(i), (B)(i), (C), or (D) of title 5, United States Code, were alleged.

(B) The number of such cases filed in the regional and field offices, and the number of petitions for review filed in such cases, during the period covered by such report, and the outcomes of any such cases or petitions for review (irrespective of when filed) decided during such period.

Time period.

(2) FIRST REPORT.—The first report described under paragraph (1) submitted after the date of enactment of this Act shall include an addendum required under that paragraph that covers the period beginning on the effective date of this Act and ending at the end of the fiscal year in which such effective date occurs.

SEC. 117. WHISTLEBLOWER PROTECTION OMBUDSMAN.

(a) IN GENERAL.—Section 3 of the Inspector General Act of 1978 (5 U.S.C. App.) is amended by striking subsection (d) and inserting the following:

"(d)(1) Each Inspector General shall, in accordance with applicable laws and regulations governing the civil service— Appointments.

"(A) appoint an Assistant Inspector General for Auditing who shall have the responsibility for supervising the performance of auditing activities relating to programs and operations of the establishment;

"(B) appoint an Assistant Inspector General for Investigations who shall have the responsibility for supervising the performance of investigative activities relating to such programs and operations; and

"(C) designate a Whistleblower Protection Ombudsman who shall educate agency employees— Designation.

"(i) about prohibitions on retaliation for protected disclosures; and

"(ii) who have made or are contemplating making a protected disclosure about the rights and remedies against retaliation for protected disclosures.

"(2) The Whistleblower Protection Ombudsman shall not act as a legal representative, agent, or advocate of the employee or former employee.

"(3) For the purposes of this section, the requirement of the designation of a Whistleblower Protection Ombudsman under paragraph (1)(C) shall not apply to—

"(A) any agency that is an element of the intelligence community (as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))); or

"(B) as determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counter intelligence activities.". Determination. President.

(b) TECHNICAL AND CONFORMING AMENDMENT.—Section 8D(j) of the Inspector General Act of 1978 (5 U.S.C. App.) is amended—

(1) by striking "section 3(d)(1)" and inserting "section 3(d)(1)(A)"; and

(2) by striking "section 3(d)(2)" and inserting "section 3(d)(1)(B)".

(c) SUNSET.— 5 USC app. 3 note.

(1) IN GENERAL.—The amendments made by this section shall cease to have effect on the date that is 5 years after the date of enactment of this Act.

(2) RETURN TO PRIOR AUTHORITY.—Upon the date described in paragraph (1), section 3(d) and section 8D(j) of the Inspector General Act of 1978 (5 U.S.C. App.) shall read as such sections read on the day before the date of enactment of this Act.

TITLE II—SAVINGS CLAUSE; EFFECTIVE DATE

SEC. 201. SAVINGS CLAUSE. 5 USC 2302 note.

Nothing in this Act shall be construed to imply any limitation on any protections afforded by any other provision of law to employees and applicants.

5 USC 1204 note.

SEC. 202. EFFECTIVE DATE.

Except as otherwise provided in section 109, this Act shall take effect 30 days after the date of enactment of this Act.

Approved November 27, 2012.

LEGISLATIVE HISTORY—S. 743 (H.R. 3289):

HOUSE REPORTS: No. 112–508, Pt. 1 (Comm. on Oversight and Government Reform) accompanying H.R. 3289.

SENATE REPORTS: No. 112–155 (Comm. on Homeland Security and Governmental Affairs).

CONGRESSIONAL RECORD, Vol. 158 (2012):

May 8, considered and passed Senate.

Sept. 28, considered and passed House, amended.

Nov. 13, Senate concurred in House amendment.

○