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AB-2455 Whistleblower protection: state and local government procedures. (2023-2024)

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Assembly Bill No. 2455

CHAPTER 568

An act to amend Sections 8547.2, 8547.5, 8547.7, and 53087.6 of the Government Code, relating to whistleblower protection.

[Approved by Governor September 25, 2024. Filed with Secretary of State September 25, 2024.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2455, Gabriel. Whistleblower protection: state and local government procedures.

(1) Existing law authorizes a city, county, or city and county auditor or controller to maintain a whistleblower hotline to receive calls from persons who have information regarding fraud, waste, or abuse by local government employees, as specified. Existing law authorizes the auditor or controller to refer calls received on the whistleblower hotline to the appropriate government authority for review and possible investigation. During the initial review of a call, existing law requires the auditor, controller, or other appropriate governmental agency to hold in confidence information disclosed through the whistleblower hotline, as specified. Upon receiving specific information that an employee or local government has engaged in an improper government activity, existing law authorizes a city or county auditor or controller to conduct an investigative audit of the matter, as specified. Existing law requires the identity of the individual or individuals reporting the improper government activity and the subject employee or employees to be kept confidential, except as specified. Existing law defines "fraud, waste, or abuse" to mean any activity by a local agency or employee that is undertaken in the performance of the employee's official duties, as described, that is in violation of any local, state, or federal law or regulation relating to, among other things, corruption.

This bill would also authorize a city, county, or city and county auditor or controller to maintain a whistleblower hotline to receive calls from persons who have information regarding improper governmental activity, and would recast information regarding fraud, waste, or abuse by local government employees as improper governmental activity. The bill would instead authorize a city or county auditor or controller, or auditor's or controller's designee, to conduct an investigative audit of the matter upon receiving specific information that an employee or local government has engaged in a fraud, waste, or abuse or improper governmental activity, as specified. The bill would also require the identity of the individual or individuals reporting the fraud, waste, or abuse and the subject employee or employees to be kept confidential, except as specified. The bill would expand the above-described duties and authorizations to the auditor's or controller's designee, as specified. The bill would revise the definition of "fraud, waste, or abuse" to also define "improper governmental activity," and expand the scope of those terms to include activity by a local agency, employee, or contractor or subcontractor.

(2) Existing law, the California Whistleblower Protection Act, prohibits an employee from directly or indirectly using or attempting to use the official authority or influence of the employee to interfere with a person's rights to disclose improper activity. The act requires the California State Auditor to administer these provisions and to investigate and report on improper governmental activities.

The act defines “improper governmental activity” to mean an activity by a state agency or by an employee that is, among other things, undertaken in the performance of the employee’s duties and that meets specified criteria, including that it is in violation of any state or federal law or regulation, including, among other things, corruption.

This bill would specify that the list of violations of any state or federal law or regulation within the definition of an “improper governmental activity” also includes the misuse of state expenditures, including allocations, loans, or grants.

The act requires the California State Auditor to create the means for the submission of allegations of improper governmental activity by, among other things, electronic submission through an internet website portal, as specified, and requires the auditor to create an alternative system for submission to an independent investigator of allegations of improper governmental activity engaged or participated in by employees of the California State Auditor’s Office, as specified. The act requires the independent investigator to conduct those investigations, as specified, and to, if the independent investigator determines it to be appropriate, report that information to the Attorney General, specified policy committees of the Senate and Assembly, and other authorities, as specified.

This bill would require the independent investigator to, as described above, also report information to the Assembly and Senate budget committees and the Joint Committee on Legislative Audit.

The act requires the California State Auditor to, after investigating an allegation and finding that a state agency or employee may have engaged or participated in an improper governmental activity, prepare an investigative report and send a copy of the report to, if appropriate, the Attorney General, specified policy committees of the Senate and Assembly, and other authorities, as specified.

This bill would require the California State Auditor to, if appropriate, also send a copy of the report to the Assembly and Senate budget committees and the Joint Committee on Legislative Audit.

Existing law authorizes a city, county, or city and county auditor or controller who is elected to office to maintain a whistleblower hotline to receive calls from persons who have information regarding specified conduct by local government employees, and requires a city, county, or city and county auditor or controller who is appointed by, or is an employee of, a legislative body or the government agency that is governed by the city, county, or city and county, to obtain approval of that legislative body or the government agency prior to establishing the whistleblower hotline.

This bill would authorize a city, county, or city and county auditor or controller to identify a designee within the office responsible for the maintenance of the whistleblower hotline as described above.

Existing constitutional provisions require that a statute that limits the right of access to the meetings of public bodies or the writings of public officials and agencies be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

This bill would make legislative findings to that effect.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. This bill shall be known, and may be cited, as the Whistleblower Protection Enhancement Act.

SEC. 2. Section 8547.2 of the Government Code is amended to read:

8547.2. For the purposes of this article, the following terms have the following meanings:

(a) (1) “Employee” means either of the following:

(A) An individual appointed by the Governor, or employed or holding office in a state agency as defined by Section 11000, including, for purposes of Sections 8547.3 to 8547.7, inclusive, an employee of the California State University, or an individual appointed by the Legislature to a state board or commission and who is not a Member or employee of the Legislature.

(B) A person employed by the Supreme Court, a court of appeal, a superior court, or the Administrative Office of the Courts for the purposes of Sections 8547.3 to 8547.7, inclusive, and Section 8547.13, except for those provisions of Section 8547.4 concerning notice of adverse action and the State Personnel Board.

(2) “Employee” includes a former employee who met the criteria of this subdivision during their employment.

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

(c) (1) "Improper governmental activity" means an activity by a state agency or by an employee that is undertaken in the performance of the employee's duties, undertaken inside a state office, or, if undertaken outside a state office by the employee, directly relates to state government, whether or not that activity is within the scope of their employment, and that meets any of the following criteria:

(A) The activity is in violation of any state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, misuse of state expenditures, including allocations, loans, or grants, or willful omission to perform duty.

(B) The activity is in violation of an Executive order of the Governor, a California Rule of Court, or any policy or procedure mandated by the State Administrative Manual or State Contracting Manual.

(C) The activity is economically wasteful, involves gross misconduct, incompetency, or inefficiency.

(2) For purposes of Sections 8547.4, 8547.5, 8547.7, 8547.10, and 8547.11, "improper governmental activity" includes any activity by the University of California or by an employee, including an officer or faculty member, who otherwise meets the criteria of this subdivision.

(3) For purposes of Sections 8547.4, 8547.5, and 8547.13, "improper governmental activity" includes any activity by the Supreme Court, a court of appeal, a superior court, or the Administrative Office of the Courts, or by an employee thereof, who otherwise meets the criteria of this subdivision.

(d) "Person" means an individual, corporation, trust, association, a state or local government, or an agency or instrumentality of any of the foregoing.

(e) (1) "Protected disclosure" means a good faith communication, including a communication based on, or when carrying out, job duties, that discloses or demonstrates an intention to disclose information that may evidence either of the following circumstances:

(A) An improper governmental activity.

(B) A condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition.

(2) "Protected disclosure" specifically includes a good faith communication to the California State Auditor's Office alleging an improper governmental activity and any evidence delivered to the California State Auditor's Office in support of the allegation.

(3) "Protected disclosure" also includes, but is not limited to, a complaint made to the Commission on Judicial Performance.

(f) (1) "State agency" is defined by Section 11000.

(2) "State agency" includes the University of California for purposes of Sections 8547.5 to 8547.7, inclusive, and the California State University for purposes of Sections 8547.3 to 8547.7, inclusive.

(3) Sections 8547.3 to 8547.7, inclusive, shall apply to the Supreme Court, the courts of appeal, the superior courts, and the Administrative Office of the Courts in the same manner as they apply to a state agency.

SEC. 3. Section 8547.5 of the Government Code is amended to read:

8547.5. (a) The California State Auditor shall create the means for the submission of allegations of improper governmental activity both by transmission via mail or other carrier to a specified mailing address and electronic submission through an internet website portal. The California State Auditor may request that a person submitting an allegation provide their name and contact information and provide the names and contact information for any persons who could help to substantiate the claim. However, the California State Auditor shall not require any person submitting an allegation to provide their name or contact information and shall clearly state on the agency internet website that this information is not required in order to submit an allegation.

(b) Upon receiving specific information that any employee or state agency has engaged in an improper governmental activity, the California State Auditor may conduct an investigation of the matter. The identity of the person providing the information that initiated the investigation, or of any person providing information in confidence to further an investigation, shall not be disclosed

without the express permission of the person providing the information except that the California State Auditor may make the disclosure to a law enforcement agency that is conducting a criminal investigation.

(c) (1) The California State Auditor shall create an alternative system for submission to an independent investigator of allegations of improper governmental activity engaged or participated in by employees of the California State Auditor's Office. The system shall allow for submission of allegations both by delivery to a specified mailing address and electronic submission through an internet website portal. The system may request that people submitting allegations provide their name and contact information and the names and contact information for any persons who could help to substantiate the claim. However, the system shall not require people submitting an allegation to provide their name or contact information and shall clearly state that this information is not required to submit an allegation. The system shall ensure that all submissions are promptly and directly delivered to the Employment and Administrative Mandate Section of the Department of Justice without prior review by the California State Auditor. The Employment and Administrative Mandate Section of the Department of Justice shall review submissions. If the Employment and Administrative Mandate Section of the Department of Justice determines that a submission constitutes an allegation of improper governmental activity, it shall transmit the submission to the independent investigator for further action in accordance with this section.

(2) (A) The independent investigator shall conduct investigations in a manner consistent with the provisions of this article relating to other state civil service employees. If the independent investigator finds that the facts support a conclusion that an employee engaged or participated in improper governmental activities, the investigator shall prepare a confidential investigative report and, subject to the limitations of this section, send a copy of the report and all evidence gathered during the investigation to the California State Auditor, the Chief Deputy California State Auditor, and the California State Auditor's Office chief counsel and human resource manager.

(B) If the independent investigator determines it to be appropriate, the independent investigator shall report this information to the Attorney General, to the policy committees of the Senate and Assembly having jurisdiction over the subject the Assembly and Senate budget committees, the Joint Legislative Audit Committee, and to any other authority that the independent investigator determines appropriate. Subject to the limitations of this section, the independent investigator may provide to the California State Auditor any evidence gathered during the investigation that, in the judgment of the independent investigator, is necessary to support any of the report's recommendations. Within 60 days of receiving the independent investigator's report, the California State Auditor shall report to the independent investigator any actions that it has taken or that it intends to take to implement the recommendations. The California State Auditor shall file subsequent reports on a monthly basis until final action has been taken.

(3) (A) Within 60 days after receiving a copy of the independent investigator's report, the California State Auditor's Office shall either serve a notice of adverse action upon the employee who is the subject of the investigative report, or submit to the independent investigator in writing its reasons for not taking adverse action.

(B) If the California State Auditor's Office elects not to serve a notice of adverse action upon the employee who is the subject of the investigative report, then, within 10 days of receiving the reasons provided by the California State Auditor's Office pursuant to subparagraph (A), the independent investigator shall:

(i) Notify the Joint Legislative Audit Committee, as described in Section 10501, that it has provided a report to the California State Auditor's Office pursuant to this paragraph.

(ii) Upon request, provide a copy of the report described in this paragraph, redacted to remove all information that could identify any reporting party, witness, or employee, to the Joint Legislative Audit Committee, as described in Section 10501.

(C) If the California State Auditor's Office does not take adverse action, the independent investigator may seek consent from the State Personnel Board to file charges in accordance with Section 19583.5.

(D) The following shall not be confidential:

(i) A notice of adverse action served by the California State Auditor.

(ii) A request to file charges filed by the independent investigator with the State Personnel Board.

(4) The California State Auditor's Office shall reimburse the Employment and Administrative Mandate Section of the Department of Justice for the costs of retaining the independent investigator.

(5) For purposes of this subdivision and any investigation conducted pursuant thereto, "improper governmental activity" has the same meaning as set forth in subdivision (c) of Section 8547.2, except that it shall not include violations of an executive order of the Governor, any policy or procedure mandated by the State Administrative Manual or State Contracting Manual, or any

other rule, regulation, or requirement that the California State Auditor's Office, because of its independence from executive branch and legislative control, is not required to follow.

(d) For purposes of this section, "independent investigator" means an investigator who is retained by the Employment and Administrative Mandate Section of the Department of Justice who is all of the following:

(1) An attorney who is licensed to practice law in this state or a certified fraud examiner.

(2) A person who is experienced in investigating allegations of improper governmental activity in a confidential manner.

(3) A person who is outside of, and independent from, the California State Auditor's Office and also independent of the executive branch and legislative control.

SEC. 4. Section 8547.7 of the Government Code is amended to read:

8547.7. (a) If, after investigating an allegation, the California State Auditor finds that a state agency or employee may have engaged or participated in an improper governmental activity, the California State Auditor shall prepare an investigative report and send a copy of the report to the head of the agency involved and to the head of any other agency that has direct oversight over that involved agency. The investigative report may include the California State Auditor's recommended actions to prevent the continuation or recurrence of the activity. If appropriate, the California State Auditor shall report this information to the Attorney General, the policy committees of the Senate and Assembly having jurisdiction over the subject involved, the Assembly and Senate budget committees, the Joint Legislative Audit Committee, and to any other authority that the California State Auditor determines appropriate. Subject to the limitations of Section 8547.5, the California State Auditor may provide to the involved agency any evidence gathered during the investigation that, in the judgment of the California State Auditor, is necessary to support any of the recommendations. Within 60 days of receiving the California State Auditor's investigative report, the involved agency shall report to the California State Auditor any actions that it has taken or that it intends to take to implement the recommendations. The agency shall file subsequent reports on a monthly basis until final action has been taken.

(b) The California State Auditor shall not have any enforcement power. In any case in which the California State Auditor finds that a state agency or employee may have engaged in an improper governmental activity, the California State Auditor may provide the finding, and any evidence supporting the finding, subject to the limitations of Section 8547.5, to a criminal law enforcement agency, an administrative law enforcement agency, or a licensing agency that has authority to investigate the matter.

(c) The California State Auditor shall keep confidential every investigation, including, but not limited to, all investigative files and work product, except that the California State Auditor, whenever the California State Auditor determines it necessary to serve the interests of the state, and subject to the limitations of Section 8547.5, may issue a public report of an investigation that has substantiated an improper governmental activity, keeping confidential the identity of the employee or employees involved. In addition, subject to the limitations of Section 8547.5, the California State Auditor may release any findings or evidence supporting any findings resulting from an investigation conducted pursuant to this article whenever the California State Auditor determines it necessary to serve the interests of the state.

(d) This section does not limit any authority conferred upon the Attorney General or any other department or agency of government to investigate any matter.

SEC. 5. Section 53087.6 of the Government Code is amended to read:

53087.6. (a) (1) A city, county, or city and county auditor or controller who is elected to office may maintain a whistleblower hotline to receive calls from persons who have information regarding fraud, waste, or abuse or improper governmental activity.

(2) A city, county, or city and county auditor or controller who is appointed by, or is an employee of, a legislative body or the governmental agency that is governed by the city, county, or city and county, shall obtain approval of that legislative body or the governmental agency, as the case may be, prior to establishing the whistleblower hotline.

(3) A city, county, or city and county auditor or controller may identify a designee within the office responsible for the maintenance of the whistleblower hotline pursuant to this section.

(b) The auditor or controller, or the auditor's or controller's designee, may 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 auditor or controller, or the auditor's or controller's designee, or other appropriate governmental agency, shall hold in confidence information disclosed through the whistleblower hotline, including the identity of the caller disclosing the information and the parties 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.

(e) (1) Upon receiving specific information regarding fraud, waste, or abuse or improper governmental activity, a city or county auditor or controller, or auditor's or controller's designee, may conduct an investigative audit of the matter. The identity of the person providing the information that initiated the investigative audit shall not be disclosed without the written permission of that person, unless the disclosure is to a law enforcement agency that is conducting a criminal investigation. If the specific information is in regard to fraud, waste, or abuse or improper governmental activity that occurred under the jurisdiction of another city, county, or city and county, the information shall be forwarded to the appropriate auditor or controller for that city, county, or city and county.

(2) Any investigative audit conducted pursuant to this subdivision shall be kept confidential, except to issue any report of an investigation that has been substantiated, or to release any findings resulting from a completed investigation that are deemed necessary to serve the interests of the public. In any event, the identity of the individual or individuals reporting the fraud, waste, or abuse or improper governmental activity and the subject employee or employees shall be kept confidential.

(3) Notwithstanding paragraph (2), the auditor or controller may provide a copy of a substantiated audit report that includes the identities of the subject employee or employees and other pertinent information concerning the investigation to the appropriate appointing authority for disciplinary purposes. The substantiated audit report, any subsequent investigatory materials or information, and the disposition of any resulting disciplinary proceedings are subject to the confidentiality provisions of applicable local, state, and federal statutes, rules, and regulations.

(f) For purposes of this section, the following definitions apply:

(1) "Call" means any method of communication by which a person may submit information to the auditor or controller, including, but not limited to, a whistleblower hotline established under this section, that may include in-person notification, telephone call or voicemail, electronic mail, electronic text message, online form submission, facsimile, or other similar means. This paragraph is declaratory of existing law and shall not be construed or interpreted as creating new law or as modifying or changing existing law.

(2) "Contractor or subcontractor" means a person, firm, corporation, partnership, vendor, or association and its responsible managing officer, as well as any directors, owners, coowners, shareholders, partners, supervisors, managers, employees, and other individuals associated with the contractor or subcontractor who has submitted a bid or proposal; seeks to contract with, contracted with, or is in a contractual relationship with; or receives funding, including, but not limited to, grants from a city, county, or city and county, or nonprofit, agency, commission, or department created by the city, county, or city and county.

(3) "Employee" means any individual employed by any county, city, or city and county, including any charter city or county, and any school district, community college district, municipal or public corporation, or political subdivision that falls under the auditor's or controller's jurisdiction.

(4) "Fraud, waste, or abuse" or "improper governmental activity" means any activity by a local agency, employee, or contractor or subcontractor that may be in violation of any local, state, or federal law, ordinance, or regulation relating to corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse or misappropriation of government property, funds, or resources, or willful omission to perform a duty, is economically wasteful, or involves gross misconduct.

(5) "Hotline" means any method of communication established by a city, county, or a city and county auditor or controller or the auditor's or controller's authorized representatives, as directed by a legislative body or the governmental agency that is governed by the city, county, or city and county. This paragraph is declaratory of existing law and shall not be construed or interpreted as creating new law or as modifying or changing existing law.

SEC. 6. The Legislature finds and declares that Section 5 of this act, which amends Section 53087.6 of the Government Code, imposes a limitation on the public's right of access to the meetings of public bodies or the writings of public officials and agencies within the meaning of Section 3 of Article I of the California Constitution. Pursuant to that constitutional provision, the Legislature makes the following findings to demonstrate the interest protected by this limitation and the need for protecting that interest:

In order to protect whistleblowers, the California State Auditor or Controller, and any designee of the auditor or controller from undue exposure or retaliation while also protecting the actual and perceived integrity of investigations and preventing malfeasance, it is necessary to preserve the confidentiality of this information.