

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 2455 (Gabriel)
Version: June 3, 2024
Hearing Date: June 11, 2024
Fiscal: Yes
Urgency: No
AM

SUBJECT

Whistleblower protection: state and local government procedures

DIGEST

This bill amends the California Whistleblower Protection Act (CWPA) to provide that improper governmental activity includes the misuse of state expenditures, including allocations, loans, or grants. The bill authorizes the California State Auditor (Auditor) or independent investigator to additionally report information from their investigations, if appropriate, to the Assembly and Senate Budget committees or the Joint Legislative Audit Committee. The bill authorizes the State Personnel Board to accept a complaint filed by a state employee of applicant within five years of the most recent act of reprisal alleged against that employee or applicant for making a complaint under the CWPA. The bill additionally authorizes a city, county, or city and county auditor or controller to identify a designee within the office responsible for the maintenance of that entity's whistleblower hotline. The bill also revises and recasts existing provisions authorizing those local entities to investigate complaints received regarding fraud, waste, or abuse by a local employee to instead authorize investigation of improper governmental activity, as defined, by a local employee or contractor or subcontractor.

EXECUTIVE SUMMARY

The CWPA authorizes the California State Auditor (Auditor) to receive and investigate complaints of alleged improper governmental activities, and also protects every state employee who files a complaint from suffering any retaliation by their state employer for having made the complaint. Additionally, local governments are authorized to maintain a whistleblower hotline to receive calls from persons who have information regarding fraud, waste, or abuse by local government employees. This bill seeks to modernize these provisions with the goal of increasing transparency and accountability. This bill is sponsored by the County of Los Angeles and is supported by various local governments and associations. No timely opposition was received by the Committee. Should this bill pass this Committee, it will next be heard in the Senate Local Government Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the CWPA, which prohibits “improper governmental activities” by state agencies and employees. (Gov. Code § 8547.2.¹)
 - a) Proclaims that the Legislature finds and declares that state employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution. (§ 8547.1.)

- 2) Establishes the California State Auditor's Office (CSAO), and states it is the intent of the Legislature that the CSAO has the independence necessary to conduct its audits in conformity with specified federal standards and be free of organizational impairments and from influence of existing state control agencies that could be the subject of audits conducted by the office. (§ 8543 & 8546.)

- 3) Requires the CSAO to accept complaints by mail and via Internet, and to conduct investigations of alleged improper governmental activities, and requires the CSAO to prepare an investigative report and send a copy to the head of the agency involved and the head of the agency that has direct oversight over the agency involved. (§§ 8547.4 & 8547.7.) Authorizes the reports to include the Auditor’s recommended actions to prevent the continuation or recurrence of the activity. (§ 8547.7(a).)
 - a) Authorizes the Auditor, if appropriate, to report the above information to the Attorney General, the policy committees of the Senate and Assembly having jurisdiction over the subject involved, and any other authority that the State Auditor determines is appropriate. (*Ibid.*)

- 4) 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 CSAO in a similar manner the Auditor is to conduct investigations under 3, above. (§ 8547.5.)
 - a) Authorizes the independent investigator, if the investigator deems it appropriate, to report the above information to the Attorney General, the policy committees of the Senate and Assembly having jurisdiction over the subject involved, and any other authority that the State Auditor determines is appropriate.

- 5) Provides for the confidentiality of all protected disclosures, including a good faith communication to the CSAO alleging an improper governmental activity and any evidence delivered to the CSAO in support of the allegation. (§ 8547.2(e).)

¹ All further statutory references are to the Government Code, unless otherwise indicated.

- 6) Prohibits state employees and officers from directly or indirectly using or attempting to use the official authority or influence of the employee for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person for the purpose of interfering with the rights conferred pursuant to the CWPA. (§ 8547.3(a).)
 - a) Provides that 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 protected disclosure, is subject to a fine not to exceed \$10,000 and imprisonment in the county jail for a period not to exceed one year. (§ 8547.8(b).)

- 7) Authorizes a state employee or applicant for state employment who files a written complaint with their supervisor, manager, or the appointing power alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts to also file a copy of the written complaint with the State Personnel Board (SPB), together with a sworn statement that the contents of the written complaint are true. (§ 8547.8.)
 - a) Requires a complaint filed with SPB to be filed within 12 months of the most recent act of reprisal complained about. (*Id.* at (a).)

- 8) Defines various terms for purposes of the CWPA, including:
 - a) "Employee" means an individual appointed by the governor or employed or holding office in a state agency. (§ 8547.2(a).)
 - b) "Protected disclosure" means a good faith communication that discloses or demonstrates an intention to disclose information that may show either (1) an improper governmental activity, or (2) a condition that may threaten the health or safety of employees or the public, if the purpose of disclosing is to remedy that condition. (§ 8547.2(e).)
 - c) "Improper governmental activity" means an activity by a state agency or by an employee that is undertaken in the performance of their 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 employment, and also meets at least one of the following criteria:
 - i. it 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, or willful omission to perform a duty;
 - ii. it 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; or
 - iii. it is economically wasteful, involves gross misconduct, incompetency, or inefficiency. (§ 8547.2(c).)

- 9) 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 fraud, waste, or abuse by local government employees. (§ 53087.6.)
 - a) Defines “fraud, waste, or abuse” as any activity by a local agency or employee that is undertaken in the performance of the employee’s official duties, including activities deemed to be outside the scope of their employment, that is in violation of any local, state, or federal law or regulation relating to corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform a duty, is economically wasteful, or involves gross misconduct. (*Id.* at (f)(2).)
 - b) Authorizes an investigation to be conducted upon receiving specific information that an employee or local government has engaged in an improper government activity. (*Id.* at (e).)
 - c) Provides for the confidentiality of any calls made to the whistleblower hotline and any investigative audit conducted, except as specified. (*Ibid.*)

This bill:

- 1) Authorizes the Auditor or independent investigator to additionally report information from their investigation, if deemed appropriate, to the Assembly and Senate Budget committees or the Joint Legislative Audit Committee (JLAC).
- 2) Expands the definition of improper governmental activity under the CWPA to include the misuse of state expenditures, including allocations, loans, or grants.
- 3) Authorizes 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 to receive calls from persons who have information regarding improper governmental activity by any agency, employee, or contractor or subcontractor.
 - a) Defines improper governmental activity in a similar manner to “fraud, abuse, or waste” under existing law except that it expands the definition to also include fraud, waste, or abuse and the misuse or misappropriation of government property, funds, or resources.
 - b) Defines “contractor or subcontractor” as 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.

- 4) Clarifies that a local agency “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.
- 5) Clarifies that “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.
- 6) Provides that 4) and 5), above, are declaratory of existing law and are not to be construed or interpreted as creating new law or as modifying or changing existing law.

COMMENTS

1. Stated need for the bill

The author writes:

Assembly Bill 2455, also known as The Whistleblower Protection Enhancement Act, strengthens and modernizes local and state whistleblower hotline laws and adds protections to prevent the misuse of state funds. These changes improve accountability, increase public trust, and ensure government actions and transactions are transparent.

2. This bill seeks to modernize the CWPA

a. Changes to the CWPA

This bill seeks to make several changes to the CWPA and the statute authoring a local government whistleblower hotline in order to modernize the statutes, strengthen and expand the types of activity that can be reported, and make other changes to provide more transparency and protections for the public. Under the bill, the Auditor or independent investigator is authorized to additionally report information from their investigation, if deemed appropriate, to the Assembly and Senate Budget committees or JLAC. Additionally, the bill expands the definition of improper governmental activity under the CWPA to include the misuse of state expenditures, including allocations, loans, or grants.

Under existing law a state employee or applicant for state employment who files a written complaint with their supervisor, manager, or the appointing power alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper

acts for making a complaint under the CWPA to also file a copy of the written complaint with the State Personnel Board (SPB), together with a sworn statement that the contents of the written complaint are true. A state employee or applicant is required to file their complaint within 12 months of the most recent act of reprisal being complained about by that employee or applicant. This bill would allow SPB to accept complaints within five years of the most recent act of reprisal complained about. The author may wish to amend the bill to make it clear that the five years authorization is notwithstanding the existing 12 month requirement for an employee or applicant to file a complaint with SPB.

b. Changes to the local agency whistleblower hotline

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 improper governmental activity. The bill authorizes 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. The bill revises and recasts these provisions to provide that the hotline may receive calls from persons who have information regarding improper governmental activity as opposed to fraud, abuse, or waste and expands the activity complained about to include contractors or subcontractors, as defined. Under the bill, the definition of improper governmental activity is generally similar to that of “fraud, waste, or abuse” under existing law; however, it additionally includes the misuse or misappropriation of government property, funds, or resources, and includes fraud, waste, or abuse in the definition. The author and sponsor claim that this change is needed because the term “improper governmental activity” is used in the statute as well as “fraud, waste, or abuse.” In 2010, AB 1666 (Swanson, Ch. 80, States. 2010) amended this section to, among other things, specify that the term “improper governmental activity” has the same meaning as “fraud, waste, or abuse” under the statute; however, the amendment was not done in the most clear way.² In order to avoid any confusion over the meaning of these two terms under the statute, the author may wish to amend the bill to specify that these two terms have the same definition. The specific amendment is below.

The bill also seeks to clarify that a “call” under the statute includes any method of communication by which a person may submit information to the auditor or controller and that a 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. The bill provides that these provisions are declaratory of existing law. Arguably, local governments would have been able to establish a whistleblower hotline even absent the specific statutory authority provided for in Section 53087.6 of the Government Code and; therefore, would have the authority

² Sen. Local Gov. Comm. analysis of AB 1666 (10029-10 reg. sess.) as amended June 9, 2010 at p. 2.

to decide how to receive complaints, i.e. not just by a phone call but also in person or via other electronic means.

3. Proposed amendment

In order to provide clarity within the definition of the terms “fraud, waste, or abuse” and “improper governmental activity” under Section 53087.6 of the Government Code, and to make it clear that SPB can accept complaints within five years, as opposed to the existing 12 month limitation to file a complaint, the author may wish to make the following amendments to the bill:³

Amendment 1

Section 8547.8 of the Government Code is amended to read:

8547.8. (a) A state employee or applicant for state employment who files a written complaint with their supervisor, manager, or the appointing power alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Section 8547.3, may also file a copy of the written complaint with the State Personnel Board, together with a sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury.

(1) The state employee or applicant for state employment shall file their complaint with the board within 12 months of the most recent act of reprisal complained about.

(2) ~~The~~ *Notwithstanding paragraph (1),* the board may accept the complaint filed by the state employee or applicant for state employment within five years of the most recent act of reprisal complained about.

(b) 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 protected disclosure, is subject to a fine not to exceed ten thousand dollars (\$10,000) and imprisonment in the county jail for a period not to exceed one year. Pursuant to Section 19683, any state civil service employee who intentionally engages in that conduct shall be disciplined by adverse action as provided by Section 19572.

(c) In addition to all other penalties provided by law, 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 protected disclosure shall be liable in an action for damages brought against them by the injured party.

³ The amendments may also include technical, nonsubstantive changes recommended by the Office of Legislative Counsel.

Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, any action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the State Personnel Board pursuant to subdivision (a), and the board has issued, or failed to issue, findings pursuant to Section 19683.

(d) This section is not intended to prevent an appointing power, manager, or supervisor from taking, directing others to take, recommending, or approving any personnel action or from taking or failing to take a personnel action with respect to any state employee or applicant for state employment if the appointing power, manager, or supervisor reasonably believes any action or inaction is justified on the basis of evidence separate and apart from the fact that the person has made a protected disclosure as defined in subdivision (b) of Section 8547.2.

(e) In any civil action or administrative proceeding, once it has been demonstrated by a preponderance of evidence that an activity protected by this article was a contributing factor in the alleged retaliation against a former, current, or prospective employee, the burden of proof shall be on the supervisor, manager, or appointing power 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 protected disclosures or refused an illegal order. If the supervisor, manager, or appointing power fails to meet this burden of proof in an adverse action against the employee in any administrative review, challenge, or adjudication in which retaliation has been demonstrated to be a contributing factor, the employee shall have a complete affirmative defense in the adverse action.

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

Amendment 2

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 improper governmental activity, ~~as defined by paragraph (5) of subdivision (f),~~ *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 improper government 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 improper government 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) "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.

(5) ~~Improper~~ "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 ~~fraud, waste, abuse,~~ 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.

4. Statements in support

SPUR writes in support stating:

AB 2455 is a “good government” measure which modernizes state and local whistleblower hotline laws and adds protections to prevent the misuse of state funds. These changes will strengthen accountability, increase public trust and ensure government actions and transactions are open and transparent.

In 2002, the Legislature passed the Whistleblower Protection Act to protect employees that report unlawful activities. This law inspired local governments to adopt their own whistleblower hotlines. These hotlines provide a location to file reports that disclose fraudulent and wasteful activity, save taxpayer money and make our government more efficient.

Recent incidents in state and local government underline the need to strengthen and improve California’s landmark accountability laws and modernize the whistleblower protections to maintain public trust and confidence in government.

SUPPORT

County of Los Angeles (sponsor)

California State Association of Counties

Rural County Representatives of California

San Francisco Bay Area Planning and Urban Research Association (SPUR)

State Association of County Auditors

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation: AB 2299 (Flora, 2024) requires the Labor Commissioner to develop a model list of employees’ rights and responsibilities under specified whistleblower laws, and specifies that an employer that posts the model list is deemed in compliance with the posting requirement. AB 2299 is currently pending in the Senate Committee on Labor, Public Employment and Retirement.

Prior Legislation:

AB 1666 (Swanson, Ch. 80, States. 2010) specified that a city, county, or city and county auditor or controller may maintain the whistleblower hotline to receive calls from persons who have information regarding fraud, waste, or abuse, and defined those terms.

AB 2001 (Swanson, Ch. 325, Stats 2008) authorized a city, county, or city and county auditor or controller to maintain a whistleblower hotline to receive calls from persons who have information regarding possible violations by local government employees of state, federal, or local statutes, rules, or regulations, and required any investigation conducted to be kept confidential except as specified.

PRIOR VOTES

Assembly Floor (Ayes 65, Noes 0)

Assembly Appropriations Committee (Ayes 14, Noes 0)

Assembly Public Employment and Retirement Committee (Ayes 7, Noes 0)

Assembly Judiciary Committee (Ayes 12, Noes 0)
