

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 947 (Wilk)
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Fiscal: Yes
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TSG

SUBJECT

Whistleblowers: private entities awarded no-bid contracts

DIGEST

This bill provides heightened whistleblower protections for private sector employees performing work on a state government contract worth \$25 million or more and awarded without a competitive bidding process.

EXECUTIVE SUMMARY

Whistleblower protections are laws that shield workers from interference or retaliation when they report certain activity or conditions in the workplace. In the private sector, whistleblower laws generally only protect workers who report *unlawful* conditions or activity to company or government officials. Public sector workers, by contrast, enjoy heightened whistleblower protections for reporting a broader range of things including waste, gross misconduct, incompetency, and inefficiency. State employees even have a designated body – the State Auditor’s Office – to receive and investigate their reports. The idea is that, as stewards of the public trust and resources, public sector workers should be encouraged to report things like government waste, fraud, and abuse, even if what is taking place does not necessarily rise to the level of being unlawful. As the author of this bill points out though, the same public stewardship considerations that apply to the public sector also arise when a private company is working on a government contract. The public stewardship concern is especially acute, the author believes, when a large amount of public money is at stake and the usual government contracting procedures have been waived in favor of a no-bid arrangement. Accordingly, this bill proposes that when private sector employees are working on a state government contract worth \$25 million or more that has been awarded without a competitive bidding process, those private sector employees should have the same whistleblower protections that state workers enjoy.

The bill is author-sponsored. Support comes from advocates for government whistleblowers, plaintiffs’ attorneys, and tax watchdogs. There is no opposition on file. If the bill passes out of this Committee, it will next be heard by the Senate Appropriations Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Prohibits a private sector employer, or any person acting on behalf of that employer, from making, adopting, or enforcing any rule, regulation, or policy which prevents 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. (Lab. Code § 1102.5(a).)
- 2) Prohibits a private sector employer, or any person acting on behalf of that employer, from retaliating 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. (Lab. Code § 1102.5(b).)
- 3) Prohibits a private sector employer, or any person acting on behalf of that employer, from retaliating 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. (Lab. Code § 1102.5(c).)
- 4) Prohibits a private sector employer, or any person acting on behalf of that employer, from retaliating against an employee because the employee is a family member of a person who has, or is perceived to have, engaged in any of the acts protected pursuant to (1), (2), or (3), above. (Lab. Code § 1102.5(h).)
- 5) Authorizes a court to award reasonable attorney's fees to a plaintiff who brings a successful action for a violation of (1), (2), (3), or (4), above. (Lab. Code § 1102.5(j).)

- 6) Provides that in a civil action or administrative proceeding seeking redress for a violation of (1), (2), (3), or (4), above, once it has been demonstrated by a preponderance of the evidence that retaliation for disclosing unlawful workplace activity was a contributing factor to the adverse action taken against the employee, the private sector employer shall have the burden of proof to demonstrate by clear and convincing evidence that the adverse action would have occurred for legitimate, independent reasons even if the employee had not blown the whistle on the employer. (Lab. Code § 1102.6.)
- 7) Requires the California Attorney General to 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. (Lab. Code Sec. 1102.7.)
- 8) Prohibits discharging or in any manner discriminating against any employee because the employee has done any of the following:
 - a) made any oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, their employer, or their representative;
 - b) instituted or caused to be instituted any proceeding under or relating to their rights or has testified or is about to testify in the proceeding or because of the exercise by the employee on behalf of themselves, or others of any rights afforded to them;
 - c) participated in an occupational health and safety committee established as specified; or
 - d) reported a work-related fatality, injury, or illness, requested access to specified occupational injury or illness reports and records, or exercised any other rights protected by the federal Occupational Safety and Health Act, except in cases where the employee alleges they have been retaliated against because they have filed or made known their intention to file a workers' compensation claim, which is under the exclusive jurisdiction of the Workers' Compensation Appeals Board. (Lab. Code § 6310(a).)
- 9) 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 employment by their employer because the employee has made a bona fide oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, their employer, or their representative, of unsafe working conditions, or work practices, in their employment or place of employment, or has participated in an employer-employee occupational health and safety committee, shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer. Any employer who

willfully refuses to rehire, 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. (Lab. Code § 6310(b).)

- 10) Establishes the California Whistleblower Protection Act (CWPA). (Gov. Code § 8547 *et seq.*)
- 11) Defines the following terms, among others, for purposes of the CWPA:
 - a) “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 the employee’s employment, and that is in violation of any state or federal law or regulation, as specified, or is economically wasteful, or involves gross misconduct, incompetency, or inefficiency; and
 - b) “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 (1) an improper governmental activity, or (2) 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. (Gov. Code § 8547.2(c) and (e).)
- 12) Prohibits state officials, pursuant to the CWPA, from interfering or attempting to interfere with a state employee’s attempt to report improper governmental activity. (Gov. Code § 8547.3.)
- 13) Establishes a system, pursuant to the CWPA, for state employees to provide anonymous tips or to make civil complaints regarding improper governmental activity and empowers the California State Auditor to investigate and report on improper governmental activities. (Gov. Code §§ 8547.4 and 8547.5.)
- 14) Empowers the California State Auditor to request the assistance of any state department, agency, or employee in evaluating an allegation or conducting any investigation of an improper governmental activity, including, but not limited to, providing access to documents or other information in a timely manner, as specified. (Gov. Code § 8547.6(a).)
- 15) Authorizes the California State Auditor, as an alternative to conducting its own investigation of an improper governmental activity, to refer the allegation to the involved state agency, or to another state agency having direct oversight of the involved state agency, to conduct an investigation of the allegation under the State Auditor’s supervision. That state agency must investigate the allegation and report

the results of the investigation to the State Auditor within 60 days of the referral and monthly thereafter until final action has been taken. (Gov. Code § 8547.6(b).)

- 16) Empowers the State Auditor to refer an allegation of improper governmental activity to a criminal or administrative law enforcement agency in lieu of conducting or supervising an investigation of the matter. (Gov. Code § 8547.6(b).)
- 16) Directs the State Auditor, upon finding that a state agency or employee may have engaged or participated in an improper governmental activity, to prepare an investigative report and send a copy of that report to the head of the agency involved and to the head of any other agency that has direct oversight over that involved agency, with any recommended actions to prevent the continuation or recurrence of the activity. Gives the State Auditor discretion to report this information to the Attorney General and to any other authority that the State Auditor determines appropriate. (Gov. Code § 8547.7(a).)
- 17) Requires a state agency who has been the subject of a State Auditor's report finding that improper government activity took place to report back to the State Auditor within 60 days any actions that the agency has taken or that it intends to take to implement the State Auditor's recommendations. The agency shall file subsequent reports on a monthly basis until final action has been taken. (Gov. Code § 8547.7(a).)
- 18) Denies the State Auditor any power to enforce CWPA, but does permit the State Auditor to refer matters to other enforcement agencies, as specified. (Gov. Code § 8547.7(b).)
- 19) Obligates the State Auditor to keep its investigations confidential except that the State Auditor may issue a public report on an investigation when the State Auditor determines it necessary to serve the interests of the state. (Gov. Code § 8547.7(c).)
- 20) Provides, pursuant to the CWPA, 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 ten thousand dollars (\$10,000) and imprisonment in the county jail for a period not to exceed one year. (Gov. Code § 8547.8(b).)
- 21) Specifies, pursuant to the CWPA, that 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 that person by the injured party. 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 and the board has issued, or failed to issue, specified findings. (Gov. Code § 8547.8(c).)

- 22) Establishes, pursuant to the CWPA, that in any civil action or administrative proceeding, once it has been demonstrated by a preponderance of evidence that an activity protected by the CWPA 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. (Gov. Code § 8547.8(e).)

This bill:

- 1) Defines “competitive bidding or proposals” to mean scenarios in which the state or state agency seeking to enter into a contract secured at least three bids or proposals for that contract.
- 2) Defines “private entity awarded a no-bid contract” to mean a person, business entity, combination of persons and business entities, or a combination of business entities, which has entered into a contract with the state that (1) did not require competitive bidding or proposals, and (2) is for an amount equal to or greater than twenty-five million dollars (\$25,000,000).
- 3) Extends the complaint process, investigatory procedures, anti-interference protections, anti-retaliation protections, reporting, and other remedies of the California Whistleblower Protection Act, summarized under existing law (10) to (22), above, to employees of a private entity awarded a no-bid contract.

COMMENTS

1. Impetus for the bill

According to the author:

This legislation is in response to the recent whistleblower reports from the Valencia Branch Laboratory, a COVID-19 testing lab. In 2021, the state awarded a \$1.7 billion “no-bid” contract to PerkinElmer for a COVID testing lab in Valencia. The California Department of Public Health (CDPH) contracted with the firm to process hundreds of thousands of COVID tests with a two-day turnaround time for results. The lab has failed to meet that mark and is consistently ranked among the slowest COVID labs in the state, processing only about 25,000 tests per day.

Brave whistleblowers from the lab risked their livelihoods to expose unlicensed lab techs sleeping on the job, a lack of supervision over untrained staff, contaminated tests, swapped samples, testing errors, a high rate of “inconclusive” results, and inaccurate results, with no process for addressing or rectifying errors.

These whistleblowers are now subject to litigation¹ in response to their brave actions to expose the abuse of state funding in the lab, and the potential public health issues stemming from improperly processing and handling COVID 19 specimens.

It is beyond the scope of this analysis to assess the credibility of the allegations leveled against the Valencia Branch Laboratory by the author or to evaluate whether or not a no-bid contracting process was warranted in this circumstance given public health warnings about the urgent need, at that time, to procure and process an extraordinarily high volume of COVID-19 tests.

For purposes of analyzing the policy implications of this bill, what matters is that a scenario *like* the one alleged above is perfectly plausible. The State of California regularly contracts with private entities to provide goods or perform services on the state’s behalf. There are times, no doubt, when these goods and services are supplied wastefully or incompetently. The private entity’s inept performance may even endanger the public, as the author believes happened at the Valencia Branch Laboratory. Because public resources and public safety may be at stake, there is a strong public interest in knowing what is taking place within the private entity. This information is unlikely to surface, however, unless the private entity’s employees feel they are at liberty to disclose it without risking their livelihoods in the process.

The intent behind this bill is to establish the necessary protections and mechanisms for private sector employees to feel that they have that liberty in circumstances where such disclosures matter most. The bill seeks to achieve that intent by extending the whistleblower laws applicable to state government employees to private sector employees working on large state contracts awarded without bidding.

2. Comparison between private sector and state government whistleblower protections

This bill proposes to extend the whistleblower laws applicable to state government employees to private sector employees working on large state contracts awarded without bidding. To understand what this means in detail, it is useful to examine the difference between the whistleblower protections currently available to private sector

¹ Case 2:21-cv-01619, US District Court, Central District of California.

employees and to contrast them with the protections available to state government employees.

Though other whistleblower-like protections apply to them in specific circumstances,² the core whistleblower protections for private sector employees are contained in Labor Code Sections 1102.5 and 6310. The core whistleblower protections for state workers are found in the California Whistleblower Protection Act, which begins at Government Code Section 8547.

a. What types of disclosure are protected?

In general, private sector employers cannot interfere with any attempt by their employees to report information about activities or conditions in the workplace that the employee has reasonable cause to think are unlawful. This includes potential violations or the failure to comply with federal and state statutes, as well as local, state, or federal rules and regulations. (Lab. Code § 1102.5(a) and (b).) In the context of workplace safety, private sector employees are similarly protected against interference or retaliation when they report information about unsafe working conditions that threaten the safety of workers. (Lab. Code § 6310.)

State workers, by contrast, are protected for disclosure of a broader range of information. In addition to protection for reporting information about potentially unlawful activity in the workplace, state workers are also protected when they report anything that is economically wasteful or involves gross misconduct, incompetency or inefficiency. (Lab. Code § 8547(c).) Similarly, state workers are have the same protections for disclosing conditions which threaten the health or safety of themselves or their co-workers, but they are also protected for disclosure of information about threats to the public health and safety more broadly, so long as the disclosure is made for the purpose of having that threat addressed. (Lab. Code § 8547(e).)

b. To whom must the disclosure be made for it to be protected?

In the private sector, the law protects whistleblowers who report their concerns internally to a person with authority over the issue, or externally to a government or law enforcement agency. (Lab. Code § 1102.5(a) and (b).) The law also protects private sector employees who testify before any public body conducting an investigation, hearing, or inquiry. (*Ibid.*) Private sector whistleblower protections relating to workplace safety are similar: the only protected disclosures are those made to the employer itself or to a government agency with jurisdiction over the matter. (Lab. Code § 6310(a) and (b).) Disclosures to other people or entities – most notably the media – are not protected in the private sector context.

² See, e.g., Gov. Code § 12940(h) (opposing unlawful discrimination in the workplace) and Gov. Code § 12653 (reporting or trying to stop theft of government funds by an employer).

The law protecting state employees who blow the whistle is much broader in this regard. State workers are protected whenever they make “protected disclosure,” which the CWSA defines as a “good faith communication [...] that discloses or demonstrates an intention to disclose information that may evidence (1) an improper governmental activity, or (2) a condition that may significantly threaten the health or safety of employees or the public.” (Gov. Code 9547.2(e).) It does not appear to matter to whom the state worker makes the disclosure. The only limitation in the statute is that, to be protected, the disclosure has to be made “for the purpose of remedying” the thing that the whistleblower is exposing. (*Ibid.*)

c. How do courts analyze claims of retaliation?

Legal disputes involving whistleblower protections nearly always involve a scenario in which a worker makes some sort of a protected disclosure and sometime after that, the employer takes some kind of adverse action against the worker, such as a pay cut, a demotion, reduced hours, assignment to less pleasant duties, or simply being fired. The worker then alleges that the employer took the adverse action to retaliate against the worker for having made the protected disclosure. Frequently, the employer responds by saying that, on the contrary, the adverse action was warranted for reasons having nothing to do with the disclosure.

Courts adjudicate scenarios like this using burden-shifting schemes. Once one party provides the court with evidence that some key aspect of the case is true, the burden shifts to the other party to convince the court that some other thing is true, and so on. In many retaliation scenarios, the *McDonnell-Douglas* burden shifting analysis applies. Under *McDonnell-Douglas*, the employee begins with the burden of producing evidence that the employee made a protected disclosure and was subjected to adverse action as a result. If the employee succeeds at meeting this burden, the burden shifts to the employer who must then produce evidence that the employer had a legitimate, non-retaliatory business reason for why it took the adverse action against the worker. If the employer succeeds in meeting this burden, then the burden once again shifts back to the employee. In this last stage, the employee must convince the court, by a preponderance of the evidence, that the justification proffered for the employer’s the adverse action against the employee was, in fact, merely pretextual. (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792.)

In the past, California courts used the *McDonnell-Douglas* burden-shifting analysis to rule on private sector whistleblower claims at the summary judgment phase. The California Supreme Court recently held, however, that when it comes to whistleblower claims in the private sector a different burden-shifting analysis applies which is more protective of workers making disclosures. (*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal. 5th 703.) Under this more protective standard, the employee demonstrates by a preponderance of the evidence that the employee made a protected disclosure and that was a contributing factor in the employer’s decision to take action

against the employee, then the burden shifts to convince the court, by clear and convincing evidence, that employer would have taken the action against the employee for legitimate, independent reasons even if the employee had not blown the whistle. (Lab. Code 1102.6.)

The newly affirmed burden shifting analysis for private sector whistleblower claims is essentially identical to the one the CWPA calls for in whistleblower actions involving state workers, whether in court or as part of a personnel hearing. (Gov. Code 8547.13(g).)

In light of the recent California Supreme Court ruling, therefore, there is currently little or no difference in how courts apply burden-shifting to whistleblower claims, whether they involve state or private sector employees.

d. What are the consequences for retaliating against a whistleblower?

There are significant potential legal penalties for private sector employers who violate the rights of an employee as a whistleblower.

As an initial matter, the employee may seek injunctive relief – most likely in the form of any order to rescind any adverse action against the employee. (Lab. Code § 1102.62.) In deciding whether to order such injunctive relief, the court is admonished not just to consider the harms to the whistleblower themselves, but also the chilling effect on other employees who might otherwise come forward. (Lab. Code § 1102.62(b).)

Courts may impose criminal fines on the employer or even sentence the employer for up to a year in jail. (Lab. Code § 1103.) Employers that are corporations or limited liability companies can also be hit with civil penalties for violations, though such penalties are capped at \$10,000 each. (Lab. Code § 1102.5(f).) Finally, courts have the discretion to award reasonable attorney's fees to a plaintiff who prevails in an action to vindicate their rights as a whistleblower. (Lab. Code § 1102.5(j).)

Similarly remedies are available to state workers if their right to blow the whistle is violated. The person responsible for the violation is subject to a fine of up to \$10,000 and up to a year of jail time. The person may also be disciplined through the state personnel system. (Gov. Code §§ 8547.8(b) and 19683(d).)

If found responsible for violating a state worker's whistleblower's rights, the employing agency is liable to the worker for damages, attorney's fees, and even punitive damages if the actions are proven to be malicious. In order to bring suit, however, the state worker has to have filed a complaint with the State Personnel Board first. (Gov. Code § 8547.8(c).) Through that personnel complaint, the whistleblower can obtain "any appropriate relief" including things like reinstatement, back pay, and restoration of any lost service credits, among others. (*Ibid.*)

e. State agency investigation of whistleblower complaints

The final significant distinction between what the law makes available to private sector whistleblowers as compared with their state employee counterparts has to do with the availability of designated state agencies to investigate their claims. As previously discussed, private sector employees are protected if they report information about unlawful or unsafe conditions in the workplace to a state agency. There is no single agency dedicated to receiving whistleblower reports from private employees, however, and no system devoted to investigating them.

State workers, by contrast, have the State Auditor's Office. Under the CWPA, the State Auditor is charged with receiving whistleblower complaints. (Gov. Code § 8547.5.) Upon receiving whistleblower complaints, the State Auditor may undertake an investigation itself or refer the complaint back to the state agency and have it undertake an investigation under the State Auditor's guidance. (Gov. Code 8547.6.) Ultimately, the State Auditor has no enforcement power itself, but if its investigations reveal that unlawful, unsafe, wasteful, or inept work is being done, the State Auditor has the authority to publish reports, make and follow up on recommendations to agencies, or even refer matters to law enforcement. (Gov. Code § 8547.7.)

3. Anti-interference incorporated into the bill

When reading the bill, it is easy to observe that the bill applies the anti-retaliation provisions of the CWPA to private employees working on large, no-bid state contractors, as they appear within the text of the bill itself. More subtly, the bill also extends the anti-interference provisions of the CWPA found at Government Code Section 8547.3 to such workers as well. That extension is accomplished through the change in the definition of employee in the bill. Under the bill, an "employee" would include private sector employees working on a large, no-bid state contract. As a result, all of Government Code Section 8547.3's language prohibiting employee's from using their authority or influence to deter a whistleblower from making a disclosure would, if this bill is enacted, apply in private sector scenarios involving work on large, no-bid state contracts. In other words, the bill would not only protect private sector employees in these scenarios against retaliation *after* they have blown the whistle, it also prohibits efforts to try to deter the whistleblower from ever making the report in the first place.

4. Considerations regarding scope of application

The author has limited the scope of this bill's protections to private sector employees working on large state contracts procured without the use of the usual competitive bidding process. While there may be some increased risk of wasteful, dangerous, or shoddy performance by the private entity in a no-bid scenario, the public interest in knowing about the possibility that public resources are being utilized inappropriately is just as strong regardless of how a contract was established. Competitive bidding helps

to ensure that government is obtaining goods and services at the best possible price, but once a contract has been executed, there is nothing in particular about how that contract was procured that guarantees the contractor will not try to cut corners or that the work will be done properly. Competitively-bid contracts are, in this sense, equally susceptible to waste or incompetence as a no-bid contract. Indeed, in the competitive context, the very need to bid low in order to win a contract from the state might actually constrain how well the contractor can perform the work.

With this in mind, the Committee may wish to consider whether to amend the bill to apply to work performed on any large state contract, regardless of whether it was awarded through a competitive bidding process or as a no-bid contract.

Similarly, while particularly large state contracts are theoretically where the greatest amount of waste would occur, there is still a strong public interest in ensuring that employees feel at liberty to expose waste and ineptitude even when the amounts are smaller. For that reason, the Committee may wish to consider whether to lower the threshold contract value that would trigger the additional protections.

5. Potential for constraints on state procurement

The public interest in ensuring private sector employees feel safe blowing the whistle when working on large public contracts arguably justifies the heightened protections proposed by this bill. In theory, this heightened level of whistleblower protections should not scare any private entities away from seeking state contracts. After all, these private entities have nothing to fear from these protections unless aspects of their work are unlawful, unsafe, wasteful, or inept, or the company plans to try to silence any of their workers who suggest as much, accurately or not. In practice, however, some private entities might view this bill as significantly increasing their risk of litigation. If the bill is enacted, therefore, at least some private entities may shy away from entering into contracts to perform work for the state, potentially making it more difficult and more costly for the state to obtain the goods and services it needs to function.

6. Proposed amendments

In order to address the issues set forth in the Comments, above, the author proposes to incorporate amendments into the bill that would:

- extend the bill's protections to private entities working on government contracts, whether as a result of a no-bid process or as a result of a competitive bid process;
- lower the threshold value of a contract that would be covered by the bill from \$25 million to \$5 million; and
- ensure that whistleblowers under the bill would not have to make an internal complaint about retaliation before proceeding with a lawsuit if the person to whom the internal complaint would be addressed is the person who engaged in

the retaliation or operates under the authority of the person who engaged in the retaliation.

A mock-up of the amendments in context is attached to this analysis.

7. Arguments in support of the bill

According to the author:

While California state employees receive protection from retaliation for reporting improper activities by their employer, employees of private entities contracting with the state do not enjoy the full complement of protections provided to formal state employees. These employees are working on behalf of the state, using state dollars to generate work product for use by the state, and should be free to report fraud, waste, and abuse with the same level of protection from retaliation that state employees enjoy. SB 947 ensures that these employees are protected, empowering them to protect the state and taxpayers from fraud, abuse, improper governmental activities, and public health concerns.

In support, the Consumer Attorneys of California write:

Existing protections for private employees simply do not go far enough. Employees conducting work through state contracts are working on behalf of the state, using state funds to accomplish state goals, and should be free to report fraud, waste, and abuse with the same level of protection from retaliation that state employees enjoy.

In further support, the Howard Jarvis Taxpayers Association writes:

Employees conducting work through state contracts are working on behalf of the state, using state funds to accomplish state goals, and should be free to report fraud, waste, and abuse with the same level of protection from retaliation that state employees enjoy. Following several recent newsworthy and questionable no-bid contracts, existing protections for private employees who do business with the state simply do not go far enough in protecting Californians.

SUPPORT

Consumer Attorneys of California
Howard Jarvis Taxpayers Association
National Whistleblower Center

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: AB 1723 (Patterson, 2022) expands the types of protected disclosure that will trigger state whistleblower protections to include a complaint made to a Member of the Legislature, the Legislature, or any subdivision thereof. AB 1723 is currently pending consideration in the Assembly Judiciary Committee.

Prior Legislation:

AB 1961 (Patterson, 2020) would have expanded the types of protected disclosure that will trigger state whistleblower protections to include a complaint made to a Member of the Legislature, the Legislature, or any subdivision thereof. AB 1961 died without referral.

SB 951 (Hayden, Ch. 673, Stats. 1999) made revisions to the Reporting of Improper Governmental Activities Act and renamed it the California Whistleblower Protection Act.

SB 37 (Maddy, Ch. 12, Stats. 1993) established the State Auditor's office and enacted the Reporting of Improper Governmental Activities Act.

Amended Mock-up for 2021-2022 SB-947 (Wilk (S))

**Mock-up based on Version Number 99 - Introduced 2/8/22
Submitted by: Griffiths, SJUD**

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

SECTION 1. Section 8547.1 of the Government Code is amended to read:

8547.1. The Legislature finds and declares that state employees and employees of ~~certain~~ private entities awarded large no bid state contracts should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution. The Legislature further finds and declares that public servants and employees of ~~certain~~ private entities awarded large no bid state contracts best serve the citizenry when they can be candid and honest without reservation in conducting the people's business.

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) "Competitive bidding or proposals" means the state or state agency secured at least three bids or proposals for the contract.~~

~~(a)~~ (1) "Employee" means:

(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.

(C) An employee of a private entity awarded a no bid large state contract.

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

(~~bc~~) “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.

(~~cd~~) “Improper governmental activity” means an activity by a state agency, by an employee, or by a private entity awarded a ~~no-bid~~large state contract 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 or private entity awarded a ~~no-bid~~large state contract, directly relates to state government, whether or not that activity is within the scope of the employee’s employment, and that (1) 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 duty, (2) 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 (3) is economically wasteful, involves gross misconduct, incompetency, or inefficiency. 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. 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. For purposes of Sections 8547.5, 8547.6, 8547.7, and 8547.14, “improper governmental activity” includes any activity by a private entity awarded a ~~no-bid~~large state contract or by an employee, who otherwise meets the criteria of this subdivision.

(~~de~~) “Person” means an individual, private entity, corporation, trust, association, a state or local government, or an agency or instrumentality of any of the foregoing.

(f) “Private entity awarded a ~~no-bid~~ large state contract” means a person, business entity, combination of persons and business entities, or a combination of business entities, which has entered into a contract with the state or a state agency ~~and which contract (1) did not require competitive bidding or proposals, and (2) is~~ for an amount equal to or greater than ~~twenty~~-five million dollars (~~\$~~25,000,000).

(g) “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 (1) an improper governmental activity, or (2) 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. 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. "Protected disclosure" also includes, but is not limited to, a complaint made to the Commission on Judicial Performance.

(h) "State agency" is defined by Section 11000. "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. 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 Web site 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 Web site that this information is not required in order to submit an allegation.

(b) Upon receiving specific information that any employee, state agency, or private entity awarded a ~~no-bid~~large state contract 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 Web site 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 involved, 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 8547.6 of the Government Code is amended to read:

8547.6. (a) The State Auditor may request the assistance of any state department, agency, employee, or private entity awarded a ~~no-bid~~large state contract in evaluating an allegation or conducting any investigation of an improper governmental activity as authorized by this article. In response to a request for assistance from the State Auditor, that state department, agency, employee, or private entity awarded a ~~no-bid~~large state contract shall provide the assistance, including, but not limited to, providing access to documents or other information in a timely manner, as required by Section 8545.2. If an investigation conducted by the State Auditor involves access to confidential academic peer review records of University of California academic personnel, these records shall be provided in a form consistent with university policy effective on August 1, 1992. No information obtained from the State Auditor by any department, agency, employee, or private entity awarded a ~~no-bid~~large state contract as a result of the State Auditor's request for assistance, nor any information obtained thereafter as a result of further investigation, shall be divulged or made known to any person without the prior approval of the State Auditor.

(b) As an alternative to conducting its own investigation, if the State Auditor determines that there is reasonable cause to believe that a state agency, employee, or private entity awarded a ~~no-bid~~ large state contract may have engaged in an improper governmental activity, the State Auditor, subject to the limitations of Section 8547.5, may refer the allegation to the involved state agency or private entity awarded a ~~no-bid~~ large state contract or to another state agency having direct oversight ~~of~~ over the involved state agency or private entity awarded a ~~no-bid~~ large state contract, to conduct an investigation of the allegation under the State Auditor's supervision. If the State Auditor refers an allegation to the involved state agency or private entity awarded a ~~no-bid~~ large state contract or to another state agency having direct oversight of the involved state agency or private entity awarded a ~~no-bid~~ large state contract, that state agency or private entity awarded a large state contract shall investigate the allegation and report the results of the investigation to the State Auditor within 60 days of the referral and monthly thereafter until final action has been taken. In addition, whenever the State Auditor determines that there is reasonable cause to believe that a state agency, employee, or private entity awarded a ~~no-bid~~ large state contract may have engaged in an improper governmental activity, the State Auditor, subject to the limitations of Section 8547.5, may refer the allegation to a criminal or administrative law enforcement agency in lieu of conducting or supervising an investigation of the matter.

SEC. 5. Section 8547.7 of the Government Code is amended to read:

8547.7. (a) If, after investigating an allegation, the State Auditor finds that a state agency, employee, or private entity awarded a ~~no-bid~~ large state contract may have engaged or participated in an improper governmental activity, the State Auditor shall prepare an investigative report and send a copy of that report to the head of the agency or entity involved and to the head of any other agency that has direct oversight over that involved agency or entity. The investigative report may include the State Auditor's recommended actions to prevent the continuation or recurrence of the activity. If appropriate, the State Auditor shall report this information to the Attorney General, the policy committees of the Senate and Assembly having jurisdiction over the subject involved, and to any other authority that the State Auditor determines appropriate. Subject to the limitations of Section 8547.5, the State Auditor may provide to the involved agency or entity any evidence gathered during the investigation that, in the judgment of the State Auditor, is necessary to support any of the recommendations. Within 60 days of receiving the State Auditor's investigative report, the involved agency or entity shall report to the State Auditor any actions that it has taken or that it intends to take to implement the recommendations. The involved agency or entity shall file subsequent reports on a monthly basis until final action has been taken.

(b) The State Auditor shall not have any enforcement power. In any case in which the State Auditor finds that a state agency, employee, or private entity awarded a ~~no-bid~~ large state contract may have engaged in an improper governmental activity, the 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 State Auditor shall keep confidential every investigation, including, but not limited to, all investigative files and work product, except that the State Auditor, whenever they determine 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 State Auditor may release any findings or evidence supporting any findings resulting from an investigation conducted pursuant to this article whenever the 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. 6. Section 8547.14 is added to the Government Code, to read:

8547.14. (a) An employee of a private entity awarded a no-bidlarge state contract may file a written complaint with their supervisor or manager, or with any other officer designated for that purpose by the private entity, alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts for having made a protected disclosure, 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. The complaint shall be filed within 12 months 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 an employee of a private entity awarded a no-bidlarge state contract 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 up to a period of one year.

(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 an employee of a private entity awarded a no-bidlarge state contract for having made a protected disclosure shall be liable in an action for damages brought against them by the injured party. 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 person identified pursuant to subdivision (a), and the private entity awarded a no-bid contract has failed to reach a decision regarding that complaint within the time limits established for that purpose by the private entity. The requirement to file a complaint with the person identified pursuant to subdivision (a) shall not apply if that person, or anyone with the authority over that person, is the person who engaged in the reprisal, retaliation, threats, coercion, or

similar acts against the employee who made the protected disclosure. Nothing in this section is intended to prohibit the injured party from seeking a remedy if the private entity awarded a no-bid/large state contract has not satisfactorily addressed the complaint within 18 months.

(d) This section is not intended to prevent a 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 employee of a private entity awarded a no-bid/large state contract if the 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.

(e) In any civil action or administrative proceeding, once it has been demonstrated by a preponderance of the 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 or manager 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 or manager 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) This article shall not 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.

SEC. 7. 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.