

California Whistleblower Protection Act Amendments

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Problems With Current Law

During my tenure as California's Acting Insurance Commissioner (July 2000 to September 2000), I had occasion to study California's whistleblower statutes. I found the existing statutes confusing and vague in important details. In particular, the statutes suffer from the following defects:

1. There are at least three overlapping and somewhat conflicting sets of statutes that regulate disclosures to the Legislature and State Auditor, and that restrict the power of a state agency or employee to retaliate against someone who makes such a disclosure. *See* Gov't Code §§ 8547 to 8547.12; 9149.20 to 9149.23; and 19251.5. These statutes should be rationalized into one set of coordinated provisions.
2. The primary whistleblower statutes (§§ 8547.3 & 9149.23) do not clearly set forth a right to make a protected disclosure. Instead, these sections as drafted clearly assume that there is such a right, but they fail to make a positive, unequivocal statement that employees and others have such a right. The statutes should be amended so that the right of making a protected disclosure is expressly set forth.
3. As amended in 1999, Section 8547.3 does not clearly indicate to whom a protected disclosure is supposed to be made. While it appears that Section 8547.3 may be intended to regulate only disclosures to the State Auditor, since the section is located within that portion of the Government Code which deals with the State Auditor, the language in Section 8547.3(a) is opaque on this point. The statutes should be clarified so that employees and others know to whom they should report improper government activities.
4. None of the whistleblower statutes unambiguously cover situations

involving the disclosure of information that is privileged, confidential or a trade secret. Sections 8547.3(d) and 9149.23(c) provide that “nothing in this section shall be construed to authorize an individual to disclose information otherwise prohibited by or under law.” It is unclear under this language whether an unauthorized disclosure of confidential information is supposed to be protected by the whistleblower statutes. Moreover, Section 19251.5 does not deal at all with the disclosure of privileged or confidential information. The statutes should be amended to make it clear how they apply to this type of disclosure.

The draft below includes the entirety of the California Whistleblower Protection Act (§§ 8547-8547.12), the Whistleblower Protection Act (§§ 9149.20-9149.23), and Section 19251.5, with amendments I am proposing that address all of the problems identified above. For each section, there is a comment that explains the reason for the recommended amendment. Here are two examples which show how the whistleblower act as amended would work in practice:

Example Under the Proposed Amendments: Disclosure by Government Employee

The act extends its protection to all government employees, including all state agency employees, employees of the University of California and California State University, any public entity as defined by Section 7260 of the Government Code and any agency of local government. Gov’t Code § 8547.2(a) (all citations are to the act as it is proposed to be amended pursuant to the draft below). Section 8547.3(a) expressly and clearly gives to government employees “the right to make a protected disclosure to the State Auditor.” In addition, employees of the University of California have “the additional right to make a protected disclosure to a University of California official, designated for that purpose by the regents.”

A “protected disclosure” is defined as “any good faith communication that discloses or demonstrates an intention to disclose information that may evidence (1) an improper governmental activity or (2) any 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’t Code § 8547.2(d).

Section 8547.3(a) makes it clear that a government employee may make a protected disclosure to the State Auditor even if the information being disclosed is protected by a legal privilege or is otherwise confidential. Section 8547.3(a) does this by expressly providing that the right to make a protected disclosure is a right that may be exercised “[n]otwithstanding any other provision of law or contract, and irrespective of

whether any of the information disclosed is privileged, confidential or a trade secret.”

There are legitimate concerns about the potential for a public disclosure of privileged or confidential information. Such disclosures have the real potential to harm entirely innocent persons and to compromise important public and private interests. The act as amended accommodates this interest in several ways. First, the act expressly provides that “[a] disclosure to the State Auditor of privileged or confidential information or of a trade secret shall not affect the validity of the privilege, confidence or trade secret.” Gov’t Code § 8657.7(e). This provision will ensure that the disclosure to the State Auditor does not, by itself, cause a privilege, confidence or trade secret to be lost. Second, the act provides that the State Auditor is required to keep such information confidential unless certain procedures are followed. In particular, the State Auditor “shall not disclose privileged or confidential information or a trade secret without giving the holder of the privilege, the person to whom the duty to maintain confidentiality is owing, or the owner of the trade secret notice of the State Auditor’s intention to make a disclosure and an opportunity to seek a judicial order preventing the State Auditor’s disclosure or conditioning the disclosure upon such terms as the court deems appropriate.” Gov’t Code § 8657.7(e). This provision essentially requires the State Auditor to secure permission to make a disclosure or to secure a court order permitting the disclosure. As currently drafted, the act does not provide the court with a standard for deciding whether to permit a disclosure, and this issue should be further explored by the Legislature.

The act does *not* provide protection to a government employee who makes a protected disclosure to anyone other than the State Auditor. Thus, a disclosure to a member or employee of the Legislature would *not* come under the protection of the act. There are several reasons for limiting the whistleblower protection in this way. First, as a simple matter of training government employees, it is much clearer and simpler to have a single point of contact for whistleblower disclosures. Government employees should not have to face the uncertainty of knowing to whom disclosures can be made. Second, there are separation of powers concerns in having government employees making disclosures directly to members or employees of the Legislature. While the Legislature clearly has important and legitimate oversight responsibilities, direct and unauthorized contacts between executive branch employees and the Legislature create unnecessary friction between the branches. Third, requiring disclosure to the State Auditor ensures that a proper use will be made of the disclosed information. The State Auditor has the power to conduct an appropriate investigation of improper governmental activity revealed by a protected disclosure (Gov’t Code § 8547.5) and is required to make appropriate reports to other governmental officials pursuant to Section 8547.7(a), which provides as follows:

If the State Auditor determines that there is reasonable cause to

believe that an employee or state agency has engaged in any improper governmental activity, he or she shall report the nature and details of the activity to the head of the employing agency, or the appropriate appointing authority. 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.

A government employee who makes a protected disclosure secures significant protections under the act. Pursuant to Section 8547.3(c), “[a]n employee may not directly or indirectly interfere with the right of disclosure . . . by 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 who has exercised the right of disclosure.” In short, retaliation against a whistleblower is forbidden. The remedies for retaliation include a civil action for damages (Gov’t Code §§ 8547.3(d) & 8547.3(c)), criminal penalties (Gov’t Code § 8547.8(b)), and adverse disciplinary action (Gov’t Code § 8547.8(b)).

Example Under the Proposed Amendments: Disclosure by Someone Other Than a Government Employee

As amended, the whistleblower act would also extend limited protection to a member of the public (i.e., someone other than a government employee) who makes a protected disclosure. Such a person would be protected from retaliatory pressures and threats from government employees. Gov’t Code § 8547.3(c). Pursuant to Section 8547.3(b), “[a]ny person other than an employee has the right to make a protected disclosure to a member or employee of the Legislature or to the State Auditor or, when the disclosure relates to a matter of concern to the University of California, to a University of California official, designated for that purpose by the regents.” It is appropriate to expand the group of persons to whom a disclosure can be made by a member of the public since members of the public cannot reasonably be expected to have knowledge of the State Auditor’s existence and special role in government. Members of the public who are whistleblowers are likely to think of the Legislature as an appropriate target for the information. That reasonable expectation should be honored.

As explained above, government employees are permitted to make a protected disclosure even if the information is privileged or confidential. However, with respect to members of the public, the proposed legislation would *not* extend to the disclosure of privileged or confidential information. Section 8547.3(b) specifically provides that “the right granted by this subdivision does not extend to a disclosure that is otherwise prohibited by or under law or contract, including but not limited to a disclosure of

information that is privileged, confidential or constitutes a trade secret.” Whether the protections of the whistleblower statute should extend to a member of the public who discloses privileged or confidential information presents a close question. In this draft, the balance between private interests in protecting privileged and confidential information and the public’s interest in the disclosure of improper governmental activities by a member of the public has been drawn in favor of protecting the private interests. The Legislature should consider whether that is the appropriate balance.

Conclusion

I wish to acknowledge the substantial assistance of two of my students, David D. Kremenetsky and Andrew Schroeder, in researching relevant issues and proposing draft language for consideration. We look forward to any comments or criticisms of this draft language.

Sincerely,

J. Clark Kelso

Government Code
Title 2. Government of the State of California
Division 1. General
Chapter 6.5. State Auditor
Article 3. Reporting of Improper Governmental Activities

1 **§ 8547. Short title**

2 8547. This article shall be known and may be cited as the "California
3 Whistleblower Protection Act."

4 **Comment.** No change recommended to this section.

5 The Legislature may wish to consider amending the title of Article 3 to
6 read "California Whistleblower Protection."
7

8 **§ 8547.1 (amended). Legislative findings and declarations**

9 8547.1. The Legislature finds and declares that state employees should be free to
10 report waste, fraud, abuse of authority, violation of law, or threat to public health without
11 fear of retribution. The Legislature further finds and declares that public servants best
12 serve the citizenry when they can be candid and honest without reservation in conducting
13 the people's business. *It is the intent of the Legislature that state employees and other*
14 *persons should disclose, to the extent not expressly prohibited by law, improper*
15 *governmental activities.*

16 **Comment.** The new language is taken from Section 9149.21, which is
17 recommended for repeal below.
18

19 **§ 8547.2 (amended). Definitions**

20 8547.2. For the purposes of this article:

21 (a) "Employee" means any individual appointed by the Governor or employed or
22 holding office in a state agency as defined by Section 11000, including, for purposes of
23 *this article Sections 8547.3 to 8547.7, inclusive, any employee of the California State*
24 *University and the University of California, or any public entity as defined by Section*
25 *7260, or any agency of local government, as defined in subdivision (d) of Section 8 of*
26 *Article XIII B of the California Constitution.*

27 (b) "Improper governmental activity" means any activity by a state agency or by an
28 employee that is undertaken in the performance of the employee's official duties, whether
29 or not that action is within the scope of his or her employment, and that (1) is in violation
30 of any state or federal law or regulation, including, but not limited to, corruption,
31 malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion,
32 conversion, malicious prosecution, misuse of government property, or willful omission to
33 perform duty, or (2) is economically wasteful, or involves gross misconduct,
34 incompetency, or inefficiency. ~~For purposes of Sections 8547.4, 8547.5, 8547.10, and~~
35 ~~8547.11, "improper governmental activity" includes any activity by the University of~~

1 ~~California or by an employee, including an officer or faculty member, who otherwise~~
2 ~~meets the criteria of this subdivision.~~

3 (c) "Person" means any individual, corporation, trust, association, any state or local
4 government, or any agency or instrumentality of any of the foregoing.

5 (d) "Protected disclosure" means any good faith communication that discloses or
6 demonstrates an intention to disclose information that may evidence (1) an improper
7 governmental activity or (2) any condition that may significantly threaten the health or
8 safety of employees or the public if the disclosure or intention to disclose was made for
9 the purpose of remedying that condition.

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

14 (f) "State agency" is defined by Section 11000. *For purposes of this article, "State*
15 *agency" includes the University of California for purposes of Sections 8547.5 to 8547.7,*
16 *inclusive, and the California State University for purposes of Sections 8547.3 to 8547.7,*
17 *inclusive.*

18 (g) *"Use of official authority or influence" includes promising to confer, or*
19 *conferring, any benefit; effecting, or threatening to effect, any reprisal; or taking, or*
20 *directing others to take, or recommending, processing, or approving, any personnel*
21 *action, including, but not limited to, appointment, promotion, transfer, assignment,*
22 *performance evaluation, suspension, or other disciplinary action.*

23 **Comment.** Subdivision (a) is amended to conform to the definition of
24 "employee" contained in Gov't Code § 9149.22(b). Subdivision (b) is amended to
25 conform to the definition of "improper governmental activity" contained in Gov't
26 Code § 9149.22(c). Subdivision (f) is amended to remove confusion about the
27 applicability to the University of California and California State University
28 systems of the basic right to make a protected disclosure. Subdivision (g) is added
29 to conform to the definition of "use of official authority or influence" contained in
30 Gov't Code § 9149.22(e). The identical language found in existing Section
31 8547.3(b) is repealed below.
32

33 **§ 8547.3 (amended). Use or attempted use official authority or influence to interfere**
34 **with disclosure of information; prohibition; civil liability**

35 8547.3. (a) *Notwithstanding any other provision of law or contract, and*
36 *irrespective of whether any of the information disclosed is privileged, confidential or a*
37 *trade secret, an employee has the right to make a protected disclosure to the State*
38 *Auditor, and an employee of the University of California has the additional right to make*
39 *a protected disclosure to a University of California official, designated for that purpose*
40 *by the regents.*

41 (b) *Any person other than an employee has the right to make a protected*

1 *disclosure to a member or employee of the Legislature or to the State Auditor or, when*
2 *the disclosure relates to a matter of concern to the University of California, to a*
3 *University of California official, designated for that purpose by the regents; provided,*
4 *however, that the right granted by this subdivision does not extend to a disclosure that is*
5 *otherwise prohibited by or under law or contract, including but not limited to a*
6 *disclosure of information that is privileged, confidential or constitutes a trade secret.*

7 (c) An employee may not directly or indirectly *interfere with the right of disclosure*
8 *conferred by subdivisions (a) and (b) by using or attempting use or attempt* to use the
9 official authority or influence of the employee for the purpose of intimidating,
10 threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or
11 command any person *who has exercised the right of disclosure conferred by subdivisions*
12 *(a) and (b) for the purpose of interfering with the rights conferred pursuant to this article.*

13 ~~(b) For the purpose of subdivision (a), "use of official authority or influence"~~
14 ~~includes promising to confer, or conferring, any benefit; effecting, or threatening to~~
15 ~~effect, any reprisal; or taking, or directing others to take, or recommending, processing,~~
16 ~~or approving, any personnel action, including, but not limited to, appointment, promotion,~~
17 ~~transfer, assignment, performance evaluation, suspension, or other disciplinary action.~~

18 ~~——(c) (d) Any employee who violates subdivision (a) (c) may be liable in an action for~~
19 ~~civil damages brought against the employee by the offended party.~~

20 ~~(d) Nothing in this section shall be construed to authorize an individual to disclose~~
21 ~~information otherwise prohibited by or under law.~~

22 **Comment.** This section is amended to make a clear statement of the rights
23 granted by this Article. Existing Section 8547.3 used to refer to the “right of that
24 person to disclose to the State Auditor matters within the scope of this article.” It
25 was amended in 1999 so that it referred simply to “rights conferred pursuant to this
26 article.” However, the article did not expressly indicate what rights were granted,
27 apparently leaving that issue to be resolved by implication. This gap leaves the act
28 unnecessarily vague. Particularly in light of the risks that a whistleblower takes in
29 making a disclosure, employees and members of the public should not have to
30 guess what their rights are with respect to making protected disclosures. Those
31 rights should be clearly spelled out.

32 New subdivision (a) makes it clear that government employees may always
33 make a protected disclosure to the State Auditor (or, in the case of an employee of
34 the University of California, to an official designated by the regents) even if the
35 information being disclosed may be subject to a privilege (e.g., the attorney-client
36 privilege) or is otherwise confidential or is a trade secret. This provision gives
37 crystal clear guidance to government employees who otherwise may be unsure to
38 whom a protected disclosure should be made.

39 In giving protection to disclosures of even privileged and confidential
40 information, it appears that new subdivision (a) may go further than existing
41 Section 8547.3, which provides in existing subdivision (d) that “Nothing in this
42 section shall be construed to authorize an individual to disclose information

1 otherwise prohibited by or under law.” It is appropriate to protect government
2 employees who disclose even privileged or confidential information to the State
3 Auditor since, as shown by the Quackenbush scandal, such disclosures can be
4 necessary to uncover significant abuses of power. New language in subdivision (e)
5 of Section 8547.7 makes it clear that a disclosure to the State Auditor does not
6 affect the validity of the underlying privilege, and that the State Auditor is required
7 to take steps to protect such confidential information from unnecessary public
8 disclosure.

9 The 1999 amendments to this article arguably expanded the scope of
10 protection to include disclosures to someone other than the State Auditor, although
11 the amendments left it ambiguous to whom a protected disclosure should or could
12 be made. Subdivision (a) is amended to make it clear that government employees
13 who seek the protection of the whistleblower act must make the disclosure to the
14 State Auditor. It is appropriate to identify for government employees a single
15 point of contact for whistleblower disclosures.

16 New subdivision (b) is based upon Gov’t Code § 9149.23, which extended
17 its whistleblower protections to all persons (not just government employees) who
18 make protected disclosures. Section 9149.23(a) was limited to disclosures made to
19 “a legislative committee,” but this limitation is not grounded in a persuasive public
20 policy and seems likely only to create confusion in practice. Suppose a disclosure
21 is made to a member or to an employee of the Legislature who is not assigned to
22 any particular committee? Would such disclosures be to “a legislative
23 committee”? Should a person be expected to know that the whistleblower
24 protections extend only to disclosures to legislative committees? To avoid these
25 practical problems, subdivision (b) has been drafted to protect a disclosure made to
26 a member or employee of the Legislature, which is language taken from Gov’t
27 Code § 19251.5, or to the State Auditor.

28 Unlike subdivision (a), subdivision (b) does not extend whistleblower
29 protections to the disclosure of privileged or confidential information. Existing
30 Section 9149.23, which is the basis for subdivision (b), is ambiguous on the issue
31 of whether its provisions apply to the disclosure of privileged or confidential
32 information. Section 9149.23(c) provides that “[n]othing in this section shall be
33 construed to authorize an individual to disclose information otherwise prohibited
34 by or under law.” By this language, Section 9149.23(c) seems to recognize the
35 importance of maintaining privileged and confidential information. As explained
36 above, when the disclosure is made by a government employee to the State
37 Auditor under subdivision (a), the State’s interest in promoting disclosure by
38 government employees outweighs the interest in strictly maintaining privileges and
39 confidential information held by the State, particularly since the State Auditor will
40 be responsible for preventing public disclosures of such information. However,
41 when a non-governmental employee possesses privileged or confidential
42 information, the private interest in maintaining those confidences outweighs the
43 interest in disclosure to the Legislature and the substantial risk of subsequent
44 public disclosure.

1 New subdivision (c) is amended to clarify the rights which are subject to
2 protection under this section. The definition in old subdivision (b) has been
3 moved to Section 8547.2, and the definition may be stricken in this section. Old
4 subdivision (d) is unnecessary in light of the language found in new subdivisions
5 (a) and (b), which clarify the situations in which the right of disclosure extends to
6 privileged or confidential information.
7

8 **§ 8547.4. Administrative authority**

9 The State Auditor shall administer the provisions of this article and shall
10 investigate and report on improper governmental activities.

11 **Comment.** No change recommended.
12

13 **§ 8547.5. Investigative audits**

14 Upon receiving specific information that any employee or state agency has
15 engaged in an improper governmental activity, the State Auditor may conduct an
16 investigative audit of the matter. The identity of the person providing the information that
17 initiated the investigative audit shall not be disclosed without the written permission of
18 the person providing the information unless the disclosure is to a law enforcement agency
19 that is conducting a criminal investigation.

20 **Comment.** No change recommended.
21

22 **§ 8547.6. Assistance in conduct of investigative audits**

23 The State Auditor may request the assistance of any state department, agency, or
24 employee in conducting any investigative audit required by this article. If an investigative
25 audit conducted by the State Auditor involves access to confidential academic peer review
26 records of University of California academic personnel, these records shall be provided in
27 a form consistent with university policy effective on August 1, 1992. No information
28 obtained from the State Auditor by any department, agency, or employee as a result of the
29 State Auditor's request for assistance, nor any information obtained thereafter as a result
30 of further investigation, shall be divulged or made known to any person without the prior
31 approval of the State Auditor.

32 **Comment.** No change recommended.
33

34 **§ 8547.7. Report of improper governmental activities; enforcement authority**

35 (a) If the State Auditor determines that there is reasonable cause to believe that an
36 employee or state agency has engaged in any improper governmental activity, he or she
37 shall report the nature and details of the activity to the head of the employing agency, or
38 the appropriate appointing authority. If appropriate, the State Auditor shall report this
39 information to the Attorney General, the policy committees of the Senate and Assembly
40 having jurisdiction over the subject involved, and to any other authority that the State
41 Auditor determines appropriate.

1 (b) The State Auditor shall not have any enforcement power. In any case in which
2 the State Auditor submits a report of alleged improper activity to the head of the
3 employing agency or appropriate appointing authority, that individual shall report to the
4 State Auditor with respect to any action taken by the individual regarding the activity, the
5 first report being transmitted no later than 30 days after the date of the State Auditor's
6 report and monthly thereafter until final action has been taken.

7 (c) Every investigative audit shall be kept confidential, except that the State
8 Auditor may issue any report of an investigation that has been substantiated, keeping
9 confidential the identity of the individual or individuals involved, or release any findings
10 resulting from an investigation conducted pursuant to this article that is deemed necessary
11 to serve the interests of the state.

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

14 (e) *A disclosure to the State Auditor of privileged or confidential information or of*
15 *a trade secret shall not affect the validity of the privilege, confidence or trade secret. The*
16 *State Auditor shall not disclose privileged or confidential information or a trade secret*
17 *without giving the holder of the privilege, the person to whom the duty to maintain*
18 *confidentiality is owing, or the owner of the trade secret notice of the State Auditor's*
19 *intention to make a disclosure and an opportunity to seek a judicial order preventing the*
20 *State Auditor's disclosure or conditioning the disclosure upon such terms as the court*
21 *deems appropriate.*

22 **Comment.** Subdivision (e) is added to ensure that a disclosure of
23 privileged or confidential information, or of a trade secret, to the State Auditor
24 does not affect the validity of the privilege, confidence or trade secret.
25 Subdivision (e) also creates a mechanism for the holder or owner of a privilege,
26 confidence or trade secret to seek a court order preventing the State Auditor from
27 disclosing such information or conditioning any disclosure as the court deems
28 appropriate (e.g., by requiring the State Auditor to secure confidentiality
29 agreements from anyone to whom the State Auditor discloses the information).
30

31 **§ 8547.8. Reprisals or other improper acts for making a protected disclosure;**
32 **complaints; limitation of actions; civil and criminal penalties; burden of proof;**
33 **other rights and remedies**

34 (a) A state employee or applicant for state employment who files a written
35 complaint with his or her supervisor, manager, or the appointing power alleging actual or
36 attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited
37 by Section 8547.3, may also file a copy of the written complaint with the State Personnel
38 Board, together with a sworn statement that the contents of the written complaint are true,
39 or are believed by the affiant to be true, under penalty of perjury. The complaint filed
40 with the board, shall be filed within 12 months of the most recent act of reprisal
41 complained about.

1 (b) Any person who intentionally engages in acts of reprisal, retaliation, threats,
2 coercion, or similar acts against a state employee or applicant for state employment for
3 having made a protected disclosure, is subject to a fine not to exceed ten thousand dollars
4 (\$10,000) and imprisonment in the county jail for a period not to exceed one year. Any
5 state civil service employee who intentionally engages in that conduct shall be disciplined
6 by adverse action as provided by Section 19572. If no adverse action is instituted by the
7 appointing power, the State Personnel Board shall invoke adverse action as provided in
8 Section 19583.5.

9 (c) In addition to all other penalties provided by law, any person who intentionally
10 engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state
11 employee or applicant for state employment for having made a protected disclosure shall
12 be liable in an action for damages brought against him or her by the injured party.
13 Punitive damages may be awarded by the court where the acts of the offending party are
14 proven to be malicious. Where liability has been established, the injured party shall also
15 be entitled to reasonable attorney's fees as provided by law. However, any action for
16 damages shall not be available to the injured party unless the injured party has first filed a
17 complaint with the State Personnel Board pursuant to subdivision (a), and the board has
18 failed to reach a decision regarding any hearing conducted pursuant to Section 19683.

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

26 (e) In any civil action or administrative proceeding, once it has been demonstrated
27 by a preponderance of evidence that an activity protected by this article was a contributing
28 factor in the alleged retaliation against a former, current, or prospective employee, the
29 burden of proof shall be on the supervisor, manager, or appointing power to demonstrate
30 by clear and convincing evidence that the alleged action would have occurred for
31 legitimate, independent reasons even if the employee had not engaged in protected
32 disclosures or refused an illegal order. If the supervisor, manager, or appointing power
33 fails to meet this burden of proof in an adverse action against the employee in any
34 administrative review, challenge, or adjudication in which retaliation has been
35 demonstrated to be a contributing factor, the employee shall have a complete affirmative
36 defense in the adverse action.

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

40 **Comment.** Subdivision (d) contains an incorrect cross-reference to
41 subdivision (b) of Section 8547.2. The cross-reference is unnecessary in any

1 event, and is therefore stricken, since there is no need to cross-reference a well-
2 defined statutory term when, as here, there is no ambiguity that the term used in
3 subdivision (d) will be given the definition found in Section 8547.2.
4

5 **§ 8547.9. Transmission of investigative report to state auditor**

6 Notwithstanding Section 19572, if the State Personnel Board determines that there
7 is a reasonable basis for an alleged violation, or finds an actual violation of Section
8 8547.3 or 19683, it shall transmit a copy of the investigative report to the State Auditor.
9 All working papers pertaining to the investigative report shall be made available under
10 subpoena in a civil action brought under Section 19683.

11 **Comment.** No change recommended.
12

13 **§ 8547.10. University of California employees; complaints of reprisals or other**
14 **improper acts for making a protected disclosure; civil and criminal penalties;**
15 **burden of proof; other rights and remedies**

16 (a) A University of California employee, including an officer or faculty member, or
17 applicant for employment may file a written complaint with his or her supervisor or
18 manager, or with any other university officer designated for that purpose by the regents,
19 alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar
20 improper acts for having made a protected disclosure, together with a sworn statement
21 that the contents of the written complaint are true, or are believed by the affiant to be true,
22 under penalty of perjury. The complaint shall be filed within 12 months of the most
23 recent act of reprisal complained about.

24 (b) Any person who intentionally engages in acts of reprisal, retaliation, threats,
25 coercion, or similar acts against a University of California employee, including an officer
26 or faculty member, or applicant for employment for having made a protected disclosure, is
27 subject to a fine not to exceed ten thousand dollars (\$10,000) and imprisonment in the
28 county jail for up to a period of one year. Any university employee, including an officer
29 or faculty member, who intentionally engages in that conduct shall also be subject to
30 discipline by the university.

31 (c) In addition to all other penalties provided by law, any person who intentionally
32 engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a university
33 employee, including an officer or faculty member, or applicant for employment for having
34 made a protected disclosure shall be liable in an action for damages brought against him
35 or her by the injured party. Punitive damages may be awarded by the court where the acts
36 of the offending party are proven to be malicious. Where liability has been established,
37 the injured party shall also be entitled to reasonable attorney's fees as provided by law.
38 However, any action for damages shall not be available to the injured party unless the
39 injured party has first filed a complaint with the university officer identified pursuant to
40 subdivision (a), and the university has failed to reach a decision regarding that complaint
41 within the time limits established for that purpose by the regents.

1 (d) This section is not intended to prevent a manager or supervisor from taking,
2 directing others to take, recommending, or approving any personnel action or from taking
3 or failing to take a personnel action with respect to any university employee, including an
4 officer or faculty member, or applicant for employment if the manager or supervisor
5 reasonably believes any action or inaction is justified on the basis of evidence separate
6 and apart from the fact that the person has made a protected disclosure.

7 (e) In any civil action or administrative proceeding, once it has been demonstrated
8 by a preponderance of the evidence that an activity protected by this article was a
9 contributing factor in the alleged retaliation against a former, current, or prospective
10 employee, the burden of proof shall be on the supervisor, manager, or appointing power
11 to demonstrate by clear and convincing evidence that the alleged action would have
12 occurred for legitimate, independent reasons even if the employee had not engaged in
13 protected disclosures or refused an illegal order. If the supervisor, manager, or appointing
14 power fails to meet this burden of proof in an adverse action against the employee in any
15 administrative review, challenge, or adjudication in which retaliation has been
16 demonstrated to be a contributing factor, the employee shall have a complete affirmative
17 defense in the adverse action.

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

21 **Comment.** No change recommended.
22

23 **§ 8547.11 (repealed). Use or attempt by University of California employees to use**
24 **official authority or influence to interfere with disclosure of information;**
25 **prohibition; civil liability**

26 ~~(a) A University of California employee, including an officer or faculty member,~~
27 ~~may not directly or indirectly use or attempt to use the official authority or influence of~~
28 ~~the employee for the purpose of intimidating, threatening, coercing, commanding, or~~
29 ~~attempting to intimidate, threaten, coerce, or command any person for the purpose of~~
30 ~~interfering with the right of that person to disclose to a University of California official,~~
31 ~~designated for that purpose by the regents, or the State Auditor matters within the scope~~
32 ~~of this article.~~

33 ~~—(b) For the purpose of subdivision (a), "use of official authority or influence"~~
34 ~~includes promising to confer, or conferring, any benefit, effecting, or threatening to~~
35 ~~effect, any reprisal; or taking or directing others to take, or recommending, processing, or~~
36 ~~approving, any personnel action, including, but not limited to, appointment, promotion,~~
37 ~~transfer, assignment, performance evaluation, suspension, or other disciplinary action.~~

38 ~~—(c) Any employee who violates subdivision (a) may be liable in an action for civil~~
39 ~~damages brought against the employee by the offended party.~~

40 ~~—(d) Nothing in this section shall be construed to authorize an individual to disclose~~
41 ~~information otherwise prohibited by or under law.~~

1 **Comment.** In light of the amendments to Section 8547.3 and the
2 expansion in the definition of “employee” in Section 8547.2(a), this section is now
3 obsolete and should be repealed.
4

5 **§ 8547.12. University of California employees; complaints alleging reprisals or**
6 **other actual or attempted acts in response to making a protected disclosure; civil**
7 **and criminal penalties; burden of proof; other rights and remedies; conflict with**
8 **memorandum of understanding.**

9 (a) A California State University employee, including an officer or faculty
10 member, or applicant for employment may file a written complaint with his or her
11 supervisor or manager, or with any other university officer designated for that purpose by
12 the trustees, alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or
13 similar improper acts for having made a protected disclosure, together with a sworn
14 statement that the contents of the written complaint are true, or are believed by the affiant
15 to be true, under penalty of perjury. The complaint shall be filed within 12 months of the
16 most recent act of reprisal complained about.

17 (b) Any person who intentionally engages in acts of reprisal, retaliation, threats,
18 coercion, or similar acts against a California State University employee, including an
19 officer or faculty member, or applicant for employment for having made a protected
20 disclosure, is subject to a fine not to exceed ten thousand dollars (\$10,000) and
21 imprisonment in the county jail for up to a period of one year. Any university employee,
22 including an officer or faculty member, who intentionally engages in that conduct shall
23 also be subject to discipline by the university.

24 (c) In addition to all other penalties provided by law, any person who intentionally
25 engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a university
26 employee, including an officer or faculty member, or applicant for employment for having
27 made a protected disclosure shall be liable in an action for damages brought against him
28 or her by the injured party. Punitive damages may be awarded by the court where the acts
29 of the offending party are proven to be malicious. Where liability has been established,
30 the injured party shall also be entitled to reasonable attorney's fees as provided by law.
31 However, any action for damages shall not be available to the injured party unless the
32 injured party has first filed a complaint with the university officer identified pursuant to
33 subdivision (a), and the university has failed to reach a decision regarding that complaint
34 within the time limits established for that purpose by the trustees. Nothing in this section
35 is intended to prohibit the injured party from seeking a remedy if the university has not
36 satisfactorily addressed the complaint within 18 months.

37 (d) This section is not intended to prevent a manager or supervisor from taking,
38 directing others to take, recommending, or approving any personnel action, or from taking
39 or failing to take a personnel action with respect to any university employee, including an
40 officer or faculty member, or applicant for employment if the manager or supervisor
41 reasonably believes any action or inaction is justified on the basis of evidence separate

1 and apart from the fact that the person has made a protected disclosure.

2 (e) In any civil action or administrative proceeding, once it has been demonstrated
3 by a preponderance of the evidence that an activity protected by this article was a
4 contributing factor in the alleged retaliation against a former, current, or prospective
5 employee, the burden of proof shall be on the supervisor, manager, or appointing power
6 to demonstrate by clear and convincing evidence that the alleged action would have
7 occurred for legitimate, independent reasons even if the employee had not engaged in
8 protected disclosures or refused an illegal order. If the supervisor, manager, or appointing
9 power fails to meet this burden of proof in an adverse action against the employee in any
10 administrative review, challenge, or adjudication in which retaliation has been
11 demonstrated to be a contributing factor, the employee shall have a complete affirmative
12 defense in the adverse action.

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

16 (g) If the provisions of this section are in conflict with the provisions of a
17 memorandum of understanding reached pursuant to Chapter 12 (commencing with
18 Section 3560) of Division 4 of Title 1, the memorandum of understanding shall be
19 controlling without further legislative action.

20 **Comment.** No change recommended.

21
22 **§ 9149.20 (repealed). Short title**

23 ~~9149.20. This article shall be known and may be cited as the Whistleblower~~
24 ~~Protection Act.~~

25 **Comment.** The Whistleblower Protection Act, found at Gov't Code §§
26 9149.20 to 9149.23, is obsolete in light of amendments to Sections 8547.2 and
27 8547.3.

28
29 **§ 9149.21 (repealed). Legislative intent**

30 ~~9149.21. It is the intent of the Legislature that state employees and other persons~~
31 ~~should disclose, to the extent not expressly prohibited by law, improper governmental~~
32 ~~activities.~~

33 **Comment.** The Whistleblower Protection Act, found at Gov't Code §§
34 9149.20 to 9149.23, is obsolete in light of amendments to Sections 8547.2 and
35 8547.3.

36
37 **§ 9149.22 (repealed). Definitions**

38 ~~9149.22. For the purposes of this article, the following words have the following~~
39 ~~meanings:~~

40 ~~—— (a) "Committee" means any investigating committee of the Legislature.~~

41 ~~—— (b) "Employee" means any individual appointed by the Governor or employed or~~

1 ~~holding office in a state agency, as defined by Section 11000, including the California~~
2 ~~State University and the University of California, or any public entity as defined by~~
3 ~~Section 7260, or any agency of local government, as defined in subdivision (d) of Section~~
4 ~~8 of Article XIII B of the California Constitution.~~

5 ~~—— (c) "Improper governmental activity" means any activity by a governmental agency~~
6 ~~or by an employee that is undertaken in the performance of the employee's official duties,~~
7 ~~whether or not that action is within the scope of his or her employment, and that (1) is in~~
8 ~~violation of any state or federal law or regulation, including, but not limited to,~~
9 ~~corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud,~~
10 ~~coercion, conversion, malicious prosecution, misuse of government property, or willful~~
11 ~~omission to perform duty, or (2) is economically wasteful, or involves gross misconduct,~~
12 ~~incompetency, or inefficiency.~~

13 ~~—— (d) "Person" means any individual, corporation, trust, association, any state or local~~
14 ~~government, or any agency or instrumentality of any of the foregoing.~~

15 ~~—— (e) "Use of official authority or influence" includes promising to confer, or~~
16 ~~conferring, any benefit, effecting, or threatening to effect, any reprisal; or taking, or~~
17 ~~directing others to take, or recommending, processing, or approving, any personnel~~
18 ~~action, including, but not limited to, appointment, promotion, transfer, assignment,~~
19 ~~performance evaluation, suspension, or other disciplinary action.~~

20 **Comment.** The Whistleblower Protection Act, found at Gov't Code §§
21 9149.20 to 9149.23, is obsolete in light of amendments to Sections 8547.2 and
22 8547.3.
23

24 **§ 9149.23 (repealed). Interference with person's right to disclose improper**
25 **governmental activities; civil liability**

26 ~~9149.23. (a) An employee may not directly or indirectly use or attempt to use the~~
27 ~~official authority or influence of the employee for the purpose of intimidating,~~
28 ~~threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or~~
29 ~~command any person for the purpose of interfering with the right of that person to~~
30 ~~disclose to a legislative committee improper governmental activities.~~

31 ~~—— (b) Any employee who violates subdivision (a) may be liable in an action for civil~~
32 ~~damages brought against the employee by the offended party.~~

33 ~~—— (c) Nothing in this section shall be construed to authorize an individual to disclose~~
34 ~~information otherwise prohibited by or under law.~~

35 ~~—— (d) Nothing in this section shall be construed to abrogate or limit any other theory~~
36 ~~of liability or any other remedy that is otherwise available at law.~~

37 **Comment.** The Whistleblower Protection Act, found at Gov't Code §§
38 9149.20 to 9149.23, is obsolete in light of amendments to Sections 8547.2 and
39 8547.3.
40

41 **§ 19251.5 (amended). Communication with members and employees of the**

1 **Legislature.**

2 19251.5. ~~All state employees and employees of the University of California and the~~
3 ~~California State University shall have the right to communicate with Members and~~
4 ~~employees of the Legislature.~~

5 A state employee, employee of the University of California, or employee of the
6 California State University may raise as a defense, at an adverse action hearing, the right
7 to *make a protected disclosure as provided for in section 8547.3* ~~communicate with~~
8 ~~Members and employees of the Legislature as provided for in this section~~ whenever he or
9 she believes that the basis for that adverse action is retaliation for that communication.

10 **Comment.** This section is found in the civil service chapter of the
11 Government Code. By its terms, it gives state employees an unfettered right to
12 communicate with members and employees of the Legislature, including
13 communicating information that would otherwise be protected by privilege,
14 confidentiality or trade secrecy. This section, enacted in 1974, appears to have
15 been an early version of a whistleblower statute. It appears to have been
16 overlooked in 1979 when the more comprehensive whistleblower statutes were
17 enacted at Gov't Code §§ 10540-10548, the predecessor to what is now Sections
18 8547-8547.12. The section is amended to make it conform to the rights created by
19 the whistleblower act.