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City Attorney's Office

OAKLAND CITY COUNCIL

RESOLUTION NO. _____ C.M.S.

INTRODUCED BY COUNCILMEMBER DAN KALB, VICE MAYOR ANNIE CAMPBELL WASHINGTON, & CITY ATTORNEY BARBARA PARKER

**RESOLUTION IN SUPPORT OF ASSEMBLY BILL 403 (MELENDEZ)
THAT WOULD PROHIBIT INTERFERENCE WITH OR RETALIATION
AGAINST THE RIGHT OF STATE LEGISLATIVE EMPLOYEES TO
MAKE PROTECTED DISCLOSURES OF ETHICS VIOLATIONS**

WHEREAS, the California Whistleblower Protection Act, which prohibits a person from retaliating against a state employee or applicant for reporting improper or illegal governmental conduct, protects executive and judicial branch employees but not employees of the California Legislature; and

WHEREAS, as more and more accounts of sexual harassment throughout our society surface, some legislative staffers have only recently felt confident enough to share their stories of sexual harassment while working for the Legislature; and

WHEREAS, the lack of protection discourages legislative employees from reporting questionable behavior by Legislators or other employees of the Legislature; and

WHEREAS, the Legislature has a responsibility to protect its staff and the integrity of the institution by creating an atmosphere of transparency and accountability; and

WHEREAS, Assembly Bill (AB) 403 (Melendez), the Legislative Employee Whistleblower Protection Act, would prohibit members of the Legislature or legislative employees from interfering with or retaliating against the right of state legislative employees, interns, volunteers, fellows, and applicants to make protected disclosures; and

WHEREAS, AB 403 defines "protected disclosure" as any good faith allegation of activity that may constitute a violation of any law, including sexual harassment, or legislative code of conduct made as a disclosure under the Fair Employment and Housing Act or made to the Senate Committee on Rules, the Assembly Committee on Rules, the Joint Committee on Rules, a state or local law enforcement agency, a state

agency authorized to investigate potential violations of law, or an individual who has authority over the legislative employee or authority investigate or correct the violation; and

WHEREAS, AB 403 is supported by California Common Cause, Sunlight Foundation, and California Forward; now, therefore, be it

RESOLVED: That the Oakland City Council hereby endorses AB 403 and urges the California State Legislature and Governor Jerry Brown to support its enactment into law.

IN COUNCIL, OAKLAND, CALIFORNIA,

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, CAMPBELL WASHINGTON, GALLO, GIBSON MCELHANEY, GUILLÉN, KALB, KAPLAN, AND PRESIDENT REID

NOES -

ABSENT -

ABSTENTION -

ATTEST: _____
LATONDA SIMMONS
City Clerk and Clerk of the Council of
the City of Oakland, California

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Councilmember Dan Kalb

CITY OF OAKLAND

CITY HALL - ONE FRANK H. OGAWA PLAZA, 2ND FLOOR - OAKLAND - CALIFORNIA 94612

Agenda Memorandum

To: Rules & Legislation Committee

From: Councilmember Dan Kalb, Vice Mayor Annie Campbell Washington, & City Attorney

Date: February 1, 2018

Subject: Support of AB 403:

Colleagues on the City Council and Members of the Public,

With our Resolution of Support for AB 403 (Melendez), we are submitting the attached Fact Sheet and text of the bill.

Respectfully submitted,

A handwritten signature in cursive script that reads "Dan Kalb".

Dan Kalb, Councilmember

Annie Campbell Washington, Vice Mayor

Barbara Parker, City Attorney

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LEGISLATIVE BACKGROUND SHEET

November 3, 2017

*Assemblywoman Melissa A. Melendez
67th District*

Background

The California Whistleblower Protection Act prohibits an employee from using his or her official authority to intimidate or threaten any person to prevent them from reporting improper or illegal governmental activity.

While judicial and executive branch employees are protected under the California Whistleblower Protection act, employees of the Legislature are not.

Problem Being Addressed

Assemblymembers, Senators, legislative staffers, and lobbyists have only recently felt confident enough to share their stories of sexual harassment while working for the Legislature. They have shared allegations of groping, sexual innuendos, and threats and promises about their future careers to keep them silent.

This lack of protection discourages legislative employees from reporting questionable behavior by Legislators or other employees of the Legislature.

We cannot continue to allow our legislative staff to risk their careers and their livelihood if they report sexual harassment or any other type of illegal/unethical behavior.

The Legislature has a responsibility to protect the integrity of the institution by creating an atmosphere of transparency and accountability.

Assembly Bill 403

Summary

AB 403 would provide the same protection other state workers receive under the California Whistleblower Protection Act to legislative employees by establishing the Legislative Employee Whistleblower Protection Act.

This bill will prohibit any Assemblymember, Senator, or legislative employee from preventing any person through intimidation from reporting sexual harassment, sexual assault, and any other type of illegal activity. This legislation would prohibit retaliation against legislative employees who make protected disclosures. Those who violate this act would face criminal and civil liability.

Support:

California Common Cause
Southwest California Legislative Council
Sunlight Foundation
California Forward

Code Section

Government Code Section 9149.30

Staff Contact

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Samantha.henson@asm.ca.gov

AMENDED IN SENATE JANUARY 29, 2018

AMENDED IN SENATE JANUARY 23, 2018

CALIFORNIA LEGISLATURE—2017—18 REGULAR SESSION

ASSEMBLY BILL

No. 403

**Introduced by Assembly Members Melendez, Dahle,
~~Cristina Garcia, and Friedman, and Cristina Garcia~~**

(Principal coauthors: Senators Portantino and Vidak)

**(Coauthors: Assembly Members Acosta, Travis Allen, Arambula,
Baker, Berman, Bigelow, Bonta, Brough, Cervantes, Chau,
Chávez, Chen, Chiu, Choi, Chu, Flora, Fong, Gallagher, Gray,
Harper, Irwin, Kiley, Lackey, Levine, Limón, Maienschein,
Mayes, Mullin, Muratsuchi, Nazarian, Patterson, Quirk,
Rodriguez, Steinorth, Ting, Voepel, Waldron, and Wood)**

(Coauthors: Senators Allen, Anderson, Bates, Berryhill, Bradford,
Cannella, Dodd, Fuller, Gaines, Galgiani, Hill, Leyva, McGuire,
Moorlach, Morrell, Nguyen, Nielsen, Roth, Stone, Wiener, and Wilk)

February 9, 2017

An act to add Article 11 (commencing with Section 9149.30) to Chapter 1.5 of Part 1 of Division 2 of Title 2 of the Government Code, relating to the Legislature, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

AB 403, as amended, Melendez. Legislature: Legislative Employee Whistleblower Protection Act.

Existing law generally protects employees who disclose illegal or improper workplace activities by prohibiting interference with, and retaliation for, making such disclosures. Existing law provides

procedures for a person to file a complaint alleging violations of legislative ethics. Existing law also authorizes each house of the Legislature to adopt rules for its proceedings and to select committees necessary for the conduct of its business.

This bill would impose criminal and civil liability on a Member of the Legislature or legislative employee, as defined, who interferes with, or retaliates against, a legislative employee's exercise of the right to make a protected disclosure, which is defined as a good faith allegation made by a legislative employee to specified entities that a Member of the Legislature or a legislative employee has engaged in, or will engage in, activity that may constitute a violation of law, including sexual harassment, or a violation of a legislative standard of conduct. ~~The bill would provide that the identity of disclosures and witnesses, as well as records relating to investigations of protected disclosures, are confidential, except as specified.~~ *The bill would also impose civil liability on an entity that interferes with, or retaliates against, a legislative employee's exercise of the right to make a protected disclosure, as specified.*

By creating new crimes, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

This bill would declare that it is to take effect immediately as an urgency statute.

Vote: 2/3. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

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

- 1 SECTION 1. Article 11 (commencing with Section 9149.30)
- 2 is added to Chapter 1.5 of Part 1 of Division 2 of Title 2 of the
- 3 Government Code, to read:
- 4
- 5 Article 11. Legislative Employee Whistleblower Protection Act
- 6
- 7 9149.30. This article shall be known and may be cited as the
- 8 Legislative Employee Whistleblower Protection Act.

1 9149.31. The Legislature finds and declares ~~that that~~, in
2 addition to existing retaliation protections under Section 1102.5
3 of the Labor Code and under the California Fair Employment and
4 Housing Act (Part 2.8 (commencing with Section 12900) of
5 Division 3 of Title 2 of the Government Code), it is necessary to
6 establish a specific process for legislative employees ~~should be~~
7 free to who report legal and ethical ~~violations~~ violations, so that
8 they may do so without fear of retribution.

9 9149.32. For the purposes of this article, the following terms
10 have the following meanings:

11 (a) "Interfere" means to intimidate, threaten, coerce, or
12 command, or attempt to intimidate, threaten, coerce, or command
13 a legislative employee who attempts to make a protected disclosure.

14 (b) "Legislative employee" means an individual, other than a
15 Member of either house of the Legislature, who is, or has been,
16 employed by either house of the Legislature. "Legislative
17 employee" includes volunteers, interns, fellows, and applicants.

18 (c) ~~(1)~~ "Protected disclosure" means a ~~good faith~~
19 communication made by a legislative employee to an entity listed
20 in paragraph ~~(2)~~ alleging that is made in good faith alleging that
21 a Member of the Legislature or legislative employee engaged in,
22 or will engage in, activity that may constitute a violation of any
23 law, including sexual harassment, or of a legislative code of
24 conduct. A protected disclosure is a disclosure that is protected
25 under the California Fair Employment and Housing Act (Part 2.8
26 (commencing with Section 12900) of Division 3 of Title 2 of the
27 Government Code) or made to any of the following entities:

28 ~~(2)~~ A protected disclosure may be made to any of the following
29 entities:

30 (A)

31 (1) The Senate Committee on Rules, or its publicly identified
32 designee.

33 (B)

34 (2) The Assembly Committee on Rules, or its publicly identified
35 designee.

36 (C)

37 (3) The Joint Committee on Rules, or its publicly identified
38 designee.

39 (D)

40 (4) A state or local law enforcement agency.

1 (E)

2 (5) A state agency authorized to investigate potential violations
3 of state law.

4 (6) *An individual with authority over the legislative employee,
5 or another legislative employee who has authority to investigate,
6 discover, or correct the violation or noncompliance.*

7 (d) “Retaliate” means ~~to commit an act of retaliation; to take~~
8 *any action that would dissuade a reasonable individual from*
9 *making or supporting a protected disclosure*, including issuing a
10 reprisal, threatening, coercing, or taking any similarly improper
11 action against a legislative employee who makes a protected
12 disclosure.

13 (e) “Use of official authority or influence” includes promising
14 to confer, or conferring, any benefit; effecting, or threatening to
15 effect, any reprisal; ~~and or~~ taking, or directing others to take, or
16 recommending, processing, or approving, any personnel action,
17 including an appointment, promotion, transfer, assignment,
18 performance evaluation, suspension, or other disciplinary action.

19 9149.33. (a) A Member of the Legislature or legislative
20 employee shall not directly or indirectly use or attempt to use that
21 ~~person’s individual’s~~ official authority or influence for the purpose
22 of interfering with the right of a legislative employee to make a
23 protected disclosure.

24 (b) ~~A person~~ *An individual* who violates this section is subject
25 to a fine not to exceed ten thousand dollars (\$10,000) and
26 imprisonment in a county jail for a period not to exceed one year.

27 (c) In addition to all other ~~penalties~~ *penalties, rights, or remedies*
28 ~~provided by law, a person who violates this section~~ *an individual*
29 *or entity that uses or attempts to use its official authority or*
30 *influence for the purpose of interfering with the right of a*
31 *legislative employee to make a protected disclosure* is liable in a
32 civil action for damages brought by a legislative employee.

33 (d) This section shall not be construed to authorize an individual
34 to disclose information the disclosure of which is prohibited by
35 law.

36 9149.34. (a) ~~A recipient of a protected disclosure shall keep~~
37 ~~confidential the identity of the person or persons who made the~~
38 ~~protected disclosure and of any witnesses unless expressly~~
39 ~~authorized by those persons to reveal them or disclosure is~~
40 ~~otherwise required by law.~~

1 ~~(b) Records relating to an investigation of the allegations in a~~
2 ~~protected disclosure, including investigative files and work product,~~
3 ~~are confidential, unless disclosure is otherwise required by law.~~

4 ~~9149.35.~~

5 ~~9149.34. A person~~ *An individual* who intentionally retaliates
6 against a legislative employee for having made a protected
7 disclosure is subject to a fine not to exceed ten thousand dollars
8 (\$10,000) and imprisonment in a county jail for a period not to
9 exceed one year.

10 ~~9149.36.~~

11 ~~9149.35. (a) In addition to all other penalties~~ *penalties, rights,*
12 *and remedies* provided by law, ~~a person who~~ *an individual or entity*
13 *that* intentionally retaliates against a legislative employee for
14 having made a protected disclosure is liable in a civil action for
15 damages brought by a legislative employee.

16 (b) (1) In any civil action, once it has been demonstrated by a
17 preponderance of the evidence that an activity protected by this
18 article was a contributing factor in the alleged retaliation against
19 a legislative employee, the burden of proof is on the offending
20 party to demonstrate by clear and convincing evidence that the
21 alleged action would have occurred for legitimate, independent
22 reasons even if the legislative employee had not made a protected
23 disclosure.

24 (2) If liability is established under ~~subdivision (b), paragraph~~
25 ~~(1), the aggrieved party prevailing plaintiff~~ is entitled to recover
26 reasonable attorney's fees. ~~fees and costs.~~

27 (3) Punitive damages may be awarded by the court if the acts
28 of the offending party are proven to be fraudulent, oppressive, or
29 malicious.

30 ~~9149.37.~~

31 ~~9149.36. (a) This article does not diminish the rights,~~
32 ~~privileges, or remedies of a legislative employee under any other~~
33 ~~federal or state law. limit the application of any other rights or~~
34 ~~remedies under federal or state law, and any penalties imposed~~
35 ~~or damages awarded under this article are in addition to those~~
36 ~~provided under any other federal or state law, including, but not~~
37 ~~limited to, Section 1102.5 of the Labor Code and the California~~
38 ~~Fair Employment and Housing Act (Part 2.8 (commencing with~~
39 ~~Section 12900) of Division 3 of Title 2 of the Government Code).~~

1 (b) This article does not limit the authority conferred upon the
2 Attorney General, any state or federal law enforcement agency,
3 or any other commission, department, or agency authorized to
4 investigate the Legislature.

5 SEC. 2. No reimbursement is required by this act pursuant to
6 Section 6 of Article XIII B of the California Constitution because
7 the only costs that may be incurred by a local agency or school
8 district will be incurred because this act creates a new crime or
9 infraction, eliminates a crime or infraction, or changes the penalty
10 for a crime or infraction, within the meaning of Section 17556 of
11 the Government Code, or changes the definition of a crime within
12 the meaning of Section 6 of Article XIII B of the California
13 Constitution.

14 SEC. 3. This act is an urgency statute necessary for the
15 immediate preservation of the public peace, health, or safety within
16 the meaning of Article IV of the California Constitution and shall
17 go into immediate effect. The facts constituting the necessity are:

18 In order to protect victims of sexual harassment and prevent
19 further misconduct, it is necessary for this act to take effect
20 immediately.