

STATE OF CALIFORNIA

Public Utilities Commission
San Francisco

M e m o r a n d u m

Date: December 8, 2011

To: The Commission
(Meeting of December 15, 2011)

From: Office of Governmental Affairs (OGA) — Sacramento

Subject: **AB 1160 (Hill) – Public utility employees: whistleblowers**
As amended: September 7, 2011

LEGISLATIVE SUBCOMMITTEE RECOMMENDATION: SUPPORT IF AMENDED

SUMMARY OF BILL:

AB 1160 would require that the CPUC establish a comprehensive whistleblower protection program to protect public utilities' employees from retaliation from utility management for bringing information to the CPUC or other public entities regarding unreported safety issues. To ensure that employees do not receive retaliation, the bill requires utilities to file completed reports within 30 days after any final judgment, arbitration award, or settlement in excess of \$50,000 in any civil action brought by an employee or former employee of the utilities. The bill would further require the CPUC to adopt and enforce rules, which would subject the public utilities to a civil penalty of not more than \$1 million for willful failure to comply with this requirement or \$500,000 for negligent failure to comply with this requirement.

SUMMARY OF SUPPORTING ARGUMENTS FOR RECOMMENDATION:

AB 1160 should be supported if amended for the following reasons:

(1) The bill addresses a very serious problem that has been the subject of discovery by the Consumer Protection and Safety Division and Legal Division, as well as the subject of a motion by the Utilities Workers Union of America (UWUA).

However, unless amended, the bill would not resolve the problem, because the utility can too easily circumvent the reporting requirements.

(2) The bill has benchmarks for utilities' reports of retaliation, which could be easily circumvented by the utilities. By drawing a line at \$50,000 or more for final judgments against the utilities for the utilities to report civil actions brought by employees for retaliation (\$50,000 benchmark), such a benchmark could provide a perverse incentive which could allow the utilities to circumvent the legislation and to

retaliate against employees and not report such retaliation by settling for less than \$50,000, by litigating the case all of the way up to U.S. Supreme Court (with ratepayer dollars) so that the employees would not receive any judgment, at least for a long period of time, or by retaliating against employees in other ways, which are not actionable (such as not terminating the employees, but transferring the employees to lower paying and less satisfying jobs). By the same token, this bill would only apply to employees, who are whistleblowers, but would not apply to contractors, subcontractors or other third party whistleblowers.

SUMMARY OF SUGGESTED AMENDMENTS:

Any limitation, such as the application only to employees or former employees, should be removed from the bill so that contractors, subcontractors or other third parties can be included.

Additionally, the \$50,000 benchmark should be eliminated from the bill and replaced by a requirement that a public utility be required to file a report with the CPUC whenever any civil action is brought against it. In addition to the report, the public utility should further be required to provide the CPUC with a copy of the legal documents relevant to the civil action brought against it. A second notification should be required to be filed with the CPUC following any final judgment, arbitration award, compromise or settlement.

DIVISION ANALYSIS (Legal Division):

The bill would impact CPUC programs, practice and policy in the following ways:

- In its Order Instituting Rulemaking (OIR) R.11-02-019, the CPUC is already considering whistleblower protections with regards to retaliation against natural gas employees in the aftermath of the San Bruno tragedy. This is already listed as an issue in the OIR, but the CPUC has not yet taken any formal action. Moreover, CPSD and Legal Division staff have been conducting discovery on this subject to become better informed of the nature of the problems and the solutions, before proposing any regulation in this subject area.
- The bill refers to a whistleblower hotline maintained by the Attorney General pursuant to section 1102.7 of the California Labor Code, as an example of a public entity to which utility employees may report unsafe conditions. The federal Pipeline Safety Act, 49 U.S.C. § 60129, similarly has whistleblower protections, which allow employees to bring actions before the U.S. Department of Labor if they are retaliated against by management, but neither of these acts draw limits for settlements or judgments above the \$50,000. However, simply having the California Labor Commissioner or U.S. Department of Labor as an entity to review matters involving retaliation does not mean that the whistleblowers would ultimately prevail unless they have excellent attorneys representing them in the administrative hearings and

in court if these agencies (with their limited resources) are not able to rule on the issues.

- If the existing bill were enacted, it could limit the situations in which the CPUC could learn about safety matters that are unreported, rather than wait to see the program which the Commission finally adopts in the OIR.
- In its current form, the utilities could attempt to utilize this bill as a restriction on the CPUC's authority by claiming that the Legislature has acted on this matter. Therefore, the utilities could argue that this bill limits any action by the CPUC to address utility management retaliation of employees for reporting safety violations, which did not result in a final judgment or settlement in excess of \$50,000.

PROGRAM BACKGROUND:

- Effective October 1, 2011, CPSD established a more accessible way by which whistleblowers can report a complaint with the CPUC. In addition to establishing a Frequently Asked Question (FAQ) page on the CPUC website to answer questions of interest to potential whistleblowers, whistleblowers are now provided two means by which to report a matter to the CPUC: (1) by calling the Commission Fraud Hotline at 1-800-649-7570 or by sending an email to fraudhotline@cpuc.ca.gov. Whistleblower calls are directly transferred to a CPSD enforcement staff and all emails sent to the fraud hotline mailbox are also handled by CPSD enforcement staff. The anonymity provided by this process alone is probably an insufficient incentive for employees to come forward with claims of unsafe conditions. For this reason, it is imperative that the CPUC address the whistleblower protection issue more comprehensively in the OIR and announce its policies against management retaliation.
- CPSD has received only 2 whistleblower contacts since the inception of the enhanced whistleblower intake process on October 1, 2011. However, if and when the CPUC adopts whistleblower protections in the current OIR, which provides meaningful protection for employees who report unsafe conditions, there should be a significant increase in the number of reports of unsafe conditions, which will impact the resources of this agency by requiring follow-up investigations, but in a very focused and effective manner. It will also impact the CPUC, by requiring some screening to be done so as to protect the CPUC from employees, who have no useful information to provide but try to exploit the program, in order to protect themselves from warranted terminations from the utilities.
- The bill, unless amended, would either significantly increase the reports to the CPUC or, in all likelihood, increase the length of litigation by utilities to preclude reports to the CPUC, or cause the utilities to conduct their retaliatory practices in other ways that preclude the reports.

LEGISLATIVE HISTORY:

None.

FISCAL IMPACT:

As a result of this bill, the fiscal impacts on the CPUC could be very significant. By requiring the CPUC to adopt a comprehensive whistleblower protection program regarding unreported safety issues, the Commission needs additional resources not only to protect the employees (with useful information) from various forms of retaliation from management, but also to prevent other employees (without useful information) from exploiting the program. Moreover, in order for the Commission's program to be effective, the Commission would have to enforce the penalties or other measures to protect employees (with useful information) from retaliation. Simply put, if the Commission regulation or program is adopted, but it is not enforced, the utility may not change its behavior, but could eventually succeed in making an example of the whistleblower to deter others from becoming whistleblowers.

Therefore, if the legislation were to pass, there could be significant fiscal impacts, requiring at least .5 PY for ALJ II (one-time cost), 3 PYs for PU Counsel III and 3 PYs for CPSD (most likely 2 PURA IVs and 1 Senior Utility Engineer). The .5 ALJ II position would be responsible for overseeing the required proceeding; the 3 PU Counsel III positions are necessary for developing the comprehensive program, protecting the employees from retaliation and enforcing the law by proving that the utilities are retaliating against the employees, which requires extensive discovery due to the obstacles that the utilities use in covering up their retaliation; the 2 PURA IVs and 1 Senior Utility Engineer would be needed to review the reports/filings that come in on an ongoing basis. CPSD will also need staff for investigation and enforcement.

STATUS:

AB 1160 is awaiting consideration in the Assembly Business, Professions and Consumer Protection Committee.

SUPPORT/OPPOSITION:

None on file.

STAFF CONTACTS:

Nick Zanjani, Legislative Liaison-OGA (916) 327-1418

nkz@cpuc.ca.gov

BILL LANGUAGE:

BILL NUMBER: AB 1160 AMENDED
BILL TEXT

AMENDED IN ASSEMBLY SEPTEMBER 7, 2011
AMENDED IN ASSEMBLY APRIL 4, 2011

INTRODUCED BY Assembly Member Hill

FEBRUARY 18, 2011

~~An act to amend Section 1798.90.1 of the Civil Code, relating to personal information.~~ An act to add Article 6 (commencing with Section 8290) to Chapter 7 of Division 4 of the Public Utilities Code, relating to public utility employees.

LEGISLATIVE COUNSEL'S DIGEST

AB 1160, as amended, Hill. ~~Personal information.~~
Public utility employees: whistleblowers.

~~(1) Existing law permits a business to swipe a driver's license or identification card issued by the Department of Motor Vehicles in any electronic device for specified purposes, including to verify age. Existing law prohibits a business from retaining or using any of the information obtained by that electronic means for any purpose other than those that are permitted. Existing law makes a violation of these provisions a misdemeanor.~~

~~This bill would prohibit a purchaser of alcoholic beverages from being required to produce his or her driver's license or identification card for the purpose of verifying age if the purchaser reasonably appears to be 40 years of age or older. By expanding the definition of a crime, this bill would impose a state mandated local program.~~

(1) Under existing law, the Public Utilities Commission has regulatory authority over public utilities. The California Constitution authorizes the commission to establish rules for all public utilities, subject to control by the Legislature.

This bill would require the commission to establish a comprehensive whistleblower protection program to protect public utility employees from management retaliation for bringing information to the commission or other public entities regarding unreported safety issues. The bill would require a public utility to file a completed report with the commission within 30 days as to any final judgment, arbitration award, compromise, or settlement in excess of \$50,000 in any civil action brought by an employee or former employee of the utility against the utility. The bill would authorize the commission to limit this reporting requirement to those particular types of claims that the commission determines are likely to involve claims of retaliation, or to exclude from the duty to

report particular claims that the commission determines are highly unlikely to involve claims of retaliation. The bill would require the commission to develop and adopt a report form to be used by a public utility to comply with the reporting requirements. The bill would require civil penalties to be imposed for violation of the reporting requirements.

Under existing law, a violation of any order, decision, rule, direction, demand, or requirement of the commission is a crime.

Because the bill would require the commission to adopt rules for the protection of whistleblowers and a violation of these rules would be a crime, the bill would impose a state-mandated local program by creating a new crime.

(2) 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.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

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

SECTION 1. Article 6 (commencing with Section 8290) is added to Chapter 7 of Division 4 of the Public Utilities Code , to read:

Article 6. Whistleblower Protection

8290. The commission shall establish a comprehensive whistleblower protection program to protect public utility employees from management retaliation for bringing information to the commission or other public entities regarding unreported safety issues. For these purposes, "other public entities" includes the whistleblower hotline maintained by the Attorney General pursuant to Section 1102.7 of the Labor Code.

8291. (a) (1) Every public utility shall file a completed report with the commission within 30 days as to any final judgment, arbitration award, compromise, or settlement in excess of fifty thousand dollars (\$50,000) in any civil action brought by an employee or former employee of the utility against the utility.

(2) It is the intent of the Legislature that the commission be informed of any significant payment made by a public utility to an employee or former employee where there may be any claim of management retaliation for bringing information to the commission or other public entities regarding unreported safety issues, and the commission may limit the duty to report pursuant to paragraph (1) to those particular types of claims that the commission determines are likely to involve claims of retaliation, or to exclude from the duty to report particular claims that the commission determines are highly unlikely to involve claims of retaliation.

(3) The commission shall develop and adopt a report form to be used by a public utility to comply with the requirements of paragraph

(1). Until the commission adopts a report form, the report shall include a copy of the complaint or claim made by the employee or former employee and any written judgment, arbitration award, or agreement for the compromise or settlement of an action or claim.

(b) (1) The commission shall assess a penalty of not more than one million dollars (\$1,000,000) against a public utility for a willful failure to comply with the requirements of subdivision (a).

(2) The commission shall assess a penalty of not more than five hundred thousand dollars (\$500,000) for a negligent failure to comply with the requirements of subdivision (a).

(3) The commission may enforce and collect a penalty pursuant to Chapter 11 (commencing with Section 2100) of Part 1 of Division 1.

SEC. 2. 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.

~~SECTION 1. Section 1798.90.1 of the Civil Code is amended to read:~~

~~1798.90.1. (a) (1) Any business may swipe a driver's license or identification card issued by the Department of Motor Vehicles in any electronic device for the following purposes:~~

~~(A) To verify age or the authenticity of the driver's license or identification card. A purchaser of alcoholic beverages shall not be required to produce his or her driver's license or identification card for the purpose of verifying age if the purchaser reasonably appears to be 40 years of age or older.~~

~~(B) To comply with a legal requirement to record, retain, or transmit that information.~~

~~(C) To transmit information to a check service company for the purpose of approving negotiable instruments, electronic funds transfers, or similar methods of payments, provided that only the name and identification number from the license or the card may be used or retained by the check service company.~~

~~(D) To collect or disclose personal information that is required for reporting, investigating, or preventing fraud, abuse, or material misrepresentation.~~

~~(2) A business may not retain or use any of the information obtained by that electronic means for any purpose other than as provided herein.~~

~~(b) As used in this section, "business" means a proprietorship, partnership, corporation, or any other form of commercial enterprise.~~

~~(c) A violation of this section constitutes a misdemeanor punishable by imprisonment in a county jail for no more than one year, or by a fine of no more than ten thousand dollars (\$10,000), or by both.~~

~~SEC. 2. 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.~~