

BILL ANALYSIS

C.S.H.B. 1031
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Judiciary & Civil Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

There is concern that a significant percentage of those who observe misconduct in the workplace do not come forward for a variety of reasons, including fear of retaliation, lack of confidentiality, and concern that nothing will be done, and there is an attendant concern that, for those who do come forward, the risk of retaliation is very real. Interested parties assert that anonymous and confidential channels for reporting are necessary to retain trust in the system so that employees are more likely to come forward when misconduct is observed. An ombudsman program is one way in which an employer may provide its employees with an anonymous and confidential channel for reporting and addressing misconduct, bad behavior, and conflict in the workplace. A potential weakness in the ombudsman role is the absence of a privilege protecting the ombudsman from being required to testify in the event of a subpoena in a related matter. Employee willingness to come forward may be negatively affected by the knowledge that an ombudsman may be required to testify in response to a subpoena.

C.S.H.B. 1031 seeks to address this weakness and provide for an anonymous channel in which workplace misconduct can be reported by authorizing an employer to establish an ombudsman program and establishing strict confidentiality provisions regarding information communicated through the program.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 1031 amends the Civil Practice and Remedies Code to authorize an employer to establish an ombudsman program to provide an alternative dispute resolution service in the form of information, facilitation, mediation, and conciliation guidance and assistance to help employees and others resolve workplace and organizational disputes and to permit employees and other persons to have confidential communications on issues of concern or conflict, including allegations of misconduct. The bill establishes requirements regarding the program's neutrality and direct employee access to senior management and establishes restrictions regarding the program's authority, business responsibility, and staffing. The bill requires the program and the employer establishing the program to adequately publicize the program's existence, purpose, and limitations and inform employees and others that communications with the program are confidential. The bill requires an employer that establishes an ombudsman program to ensure that the program has procedures and facilities adequate to permit confidential access to the program's office and to preserve confidential communications. The bill requires the program to adhere to generally accepted standards for organizational ombudsman programs to preserve confidentiality of communications.

C.S.H.B. 1031 establishes that, except as otherwise provided, oral and written communications between a program staff member and an employee or other person, or between program staff

members, for the purpose of assisting with the informal and expeditious resolution of a concern or complaint are confidential, privileged, and not subject to discovery and prohibits the use of such communications as evidence in any judicial or administrative proceeding. The bill establishes that the following oral or written communications are not privileged or protected from discovery in any judicial or administrative proceeding: communications between a person making a complaint, or any program staff member, and an officer, director, agent, or employee of the employer for the purpose of notifying the officer, director, agent, or employee of the existence of an unsafe practice or violation of a state or federal law; communications concerning conduct, including a pattern of conduct, that is reasonably likely to result in damages to any person; and communications concerning a threat of serious harm or injury to any person. The bill requires a program staff member to disclose confidential material that concerns conduct, including a pattern of conduct, that is reasonably likely to result in damages to any person or the disclosure of which is necessary to prevent serious harm or injury to any person. The bill provides that its provisions relating to confidentiality are in addition to any privilege or protection under statutory or common law, the attorney-client privilege, and the attorney work product privilege.

C.S.H.B. 1031 establishes that its provisions do not prevent the discovery or admissibility of information that is otherwise discoverable, the disclosure of information for research or educational purposes in connection with a training or educational component of an ombudsman program if the identity of the parties and the specific issues from the confidential communication are not identifiable, or the preparation and disclosure of statistical summary reports organized by category of the issues presented if the summary is based on a sufficiently large number of issues so that the identity of the parties and the specific issues from the confidential communication are not identifiable. The bill's provisions do not apply to an ombudsman program or other alternative dispute resolution service established by an employer unless the program or service provides expressly in writing that the bill's provisions apply to the program or service. The bill establishes that its provisions do not prevent an employer from establishing an ombudsman program or other alternative dispute resolution service that is not subject to such provisions.

EFFECTIVE DATE

September 1, 2013.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 1031 may differ from the original in minor or nonsubstantive ways, the following comparison is organized and highlighted in a manner that indicates the substantial differences between the introduced and committee substitute versions of the bill.

INTRODUCED

SECTION 1. Title 7, Civil Practice and Remedies Code, is amended by adding Chapter 160 to read as follows:

CHAPTER 160. OMBUDSMAN PROGRAM ESTABLISHED BY EMPLOYER

Sec. 160.001. DEFINITIONS.

Sec. 160.002. ESTABLISHMENT OF OMBUDSMAN PROGRAM.

Sec. 160.003. CONFIDENTIALITY PROVISIONS. (a) This section applies

HOUSE COMMITTEE SUBSTITUTE

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Sec. 160.001. DEFINITIONS.

Sec. 160.002. ESTABLISHMENT OF OMBUDSMAN PROGRAM.

Sec. 160.003. CONFIDENTIALITY PROVISIONS. (a) This section applies

only to an ombudsman program that meets the requirements of Section 160.002.

(b) The following oral and written communications are confidential, privileged, and not subject to discovery and may not be used as evidence in any judicial or administrative proceeding:

(1) communications between a staff member of the program and an employee or other person for the purpose of assisting with the informal and expeditious resolution of a concern or complaint; and

(2) communications between staff members of the program for the purpose of assisting with the informal and expeditious resolution of a concern or complaint.

(c) Notwithstanding Subsection (b), a staff member of an ombudsman program may voluntarily disclose confidential information if the staff member determines that disclosure is necessary to prevent an imminent threat of serious harm.

(d) Information discovered or disclosed in violation of this chapter is not admissible as evidence in any proceeding or for any other purpose.

Sec. 160.004. APPLICATION OF OTHER LAW.

Sec. 160.005. ADMISSIBILITY OF OTHER INFORMATION.

Sec. 160.006. APPLICABILITY OF

only to an ombudsman program that meets the requirements of Section 160.002.

(b) Except as provided by Subsections (c) and (d), the following oral and written communications are confidential, privileged, and not subject to discovery and may not be used as evidence in any judicial or administrative proceeding:

(1) communications between a staff member of the program and an employee or other person for the purpose of assisting with the informal and expeditious resolution of a concern or complaint; and

(2) communications between staff members of the program for the purpose of assisting with the informal and expeditious resolution of a concern or complaint.

(c) The following oral or written communications are not privileged or protected from discovery in any judicial or administrative proceeding:

(1) communications between a person making a complaint, or any staff member of an ombudsman program, and an officer, director, agent, or employee of the employer for the purpose of notifying the officer, director, agent, or employee of the existence of an unsafe practice or violation of a state or federal law; and

(2) communications concerning:

(A) conduct, including a pattern of conduct, that is reasonably likely to result in damages to any person; or

(B) a threat of serious harm or injury to any person.

(d) A staff member of an ombudsman program shall disclose confidential material:

(1) that concerns conduct, including a pattern of conduct, that is reasonably likely to result in damages to any person; or

(2) the disclosure of which is necessary to prevent serious harm or injury to any person.

Sec. 160.004. APPLICATION OF OTHER LAW.

Sec. 160.005. ADMISSIBILITY OF OTHER INFORMATION.

Sec. 160.006. APPLICABILITY OF

CHAPTER.

SECTION 2. The change in law made by this Act with regard to the confidentiality of communications applies only to a suit or administrative proceeding that commences on or after the effective date of this Act. A suit or administrative proceeding that commences before that date is governed by the law in effect on the date the suit or proceeding commenced, and the former law is continued in effect for that purpose.

SECTION 3. This Act takes effect September 1, 2013.

CHAPTER.

SECTION 2. Same as introduced version.

SECTION 3. Same as introduced version.