

WHISTLEBLOWING AND CONDUCTING INVESTIGATIONS

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Topics

- I. New Laws Protecting Whistleblowers.
- II. Other Anti-Retaliation and Whistleblower Protections.
- III. Discipline and/or Termination and the Whistleblower.
- IV. Workplace Investigations.

New California Whistleblower Protections

- Effective January 1, 2004.
- Purpose of New Statute is encourage early detection of corporate wrongdoing.
- Employees are in best position to learn of such wrongdoing.

New California Whistleblower Protections (Same as Former Statute)

- Employers are prohibited from making or enforcing any rule or policy preventing an employee from disclosing information to a government or law enforcement agency where the employee has reasonable cause to believe the information discloses a violation of state or federal statute or a violation or noncompliance with a state or federal rule or regulation.

New California Whistleblower Protections (Same as Former Statute)

- Employers are prohibited from retaliating against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of a state or federal statute or a violation or noncompliance with a state or federal rule or regulation.

New California Whistleblower Protections

(Consistent with former California Decisions)

- Employees are protected even if they disclose such information internally to their supervisor or to management.
- Potential claim for wrongful termination in violation of public policy (not part of former or new statute).

New California Whistleblower Protections (New)

- Employers are prohibited from retaliating against an employee
 - for refusing to participate in an activity that would result in a violation of state or federal statute or violation or noncompliance with a state or federal rule or regulation
 - for exercising his/her right to disclose such information to the authorities and/or refusing to participate in such unlawful activities.

New California Whistleblower Protections (New)

- Applies to public sector employees.
- Applies to internal complaints made by public sector employees.

New California Whistleblower Protections (New)

- Employers (corporations or limited liability companies) can be held liable for a civil penalty of up to \$10,000 for each violation.
- Other damages include lost wages, other compensatory damages, interest, costs and attorneys' fees.

New California Whistleblower Protections (New)

- Attorney General's Office shall maintain a whistleblower hotline to receive calls from persons who have information about possible violations of state or federal statutes, rules, regulations or violations of fiduciary duty by corporation or limited liability company to its shareholders, investors or employees.

New California Whistleblower Protections (New)

- Attorney General's Office will refer the complaint to the appropriate governmental authority for review and possible investigation.
- Attorney General's Office must keep the information, including the name of the reporting person and the employer, confidential during the initial review of any call received.

New California Whistleblower Protections (New)

- Employers are required to display a poster of the employee's rights under the whistleblower protection laws, including information pertaining to the whistleblower hotline.

New California Whistleblower Protections (New)

- In a civil action or an administrative proceeding, if the employee demonstrates that his/her complaint was a contributing factor in an adverse employment decision, the employer must show by clear and convincing evidence that the employer had legitimate business reasons for the action.

Corporate and Criminal Fraud Accountability Act of 2002 (Sarbanes-Oxley Act of 2002)

- Employers, that are publicly traded companies, are prohibited from retaliating against employees who provide evidence of fraud.
- Such employers are prohibited from retaliating against an employee who gives information or helps with a fraud investigation about conduct the employee reasonably believes violates federal statutes pertaining to fraud, an SEC rule or regulation and/or federal law regarding fraud against shareholders.

Corporate and Criminal Fraud Accountability Act of 2002 (Sarbanes-Oxley Act of 2002)

- Employee is protected regardless of whether the complaint is made to a federal regulatory or law enforcement agency, a member of Congress, or a supervisor.

Corporate and Criminal Fraud Accountability Act of 2002 (Sarbanes-Oxley Act of 2002)

- To enforce statute, employee may file a claim with the Department of Labor (“DOL”) within 90 days of the violation.
- If the DOL has failed to issue a final decision within 180 days of the employee’s filing of a complaint, the employee may file a court action.

Corporate and Criminal Fraud Accountability Act of 2002 (Sarbanes-Oxley Act of 2002)

- Employee may recover compensatory damages including reinstatement with same seniority status, back pay with interest, and costs, expert witness fees and reasonable attorneys' fees.

Other Whistleblower Protections and Anti-Retaliation Laws

- Other statutory laws and claims for wrongful termination in violation of public policy protect employees who complain about and/or participate in investigations of unlawful conduct.
- These laws do not always require the employee's "reasonable" belief that the conduct complained of is unlawful.

Other Whistleblower Protections and Anti-Retaliatory Laws

- Discriminatory Conduct - no retaliation for internal complaints of and/or participation in investigations pertaining to unlawful discrimination and/or harassment (internal or external complaints).
- California Occupational Safety and Health Act of 1973 - reporting and/or participating in investigations regarding workplace safety (internal or external complaints).
- Refusal to Commit an Illegal Act - employer cannot direct an employee to perform an illegal act.

Other Whistleblower Protections and Anti-Retaliation Statutes

- Wage Claimants - Employers cannot discharge or discipline an employee for participating in a California Department of Labor proceeding.
- False Claim Action - Employers cannot discharge or otherwise discriminate against an employee who supports, aids, or participates in a false claim act (a false claim to the state or a political subdivision of the state).
- Industrial Injuries - Cannot discharge or otherwise discipline employees for filing a work-related injury claim, receiving a rating, award, or settlement, or participating in a workers' compensation proceeding.
- Lawful Off-Duty Conduct - Away from premises.

Other Whistleblower Protections and Anti-Retaliation Statutes

- Federal Anti-Retaliation Laws.
 - Protection from Retaliation for Participation.
 - Protection from Retaliation for Complaints.

Other Whistleblower Protections and Anti-Retaliation Statutes

- Environmental Statutes
 - Clean Air Act.
 - Energy Reorganization Act.
 - CERCLA.
 - Safe Drinking Water.
 - Solid Waste Disposal Act.
 - Toxic Substances.
- Safety Statutes.
 - OSHA.
 - Mine Safety and Health.

Other Whistleblower Protections and Anti-Retaliation Statutes

- Federal Deposit Insurance Act - Protects bank employees who provide information to any federal banking agency or the Attorney General regarding possible violation of any laws or regulation or gross mismanagement of funds.
- False Claims Act.
- NLRA - Union or concerted activity.

Other Whistleblower Protections and Anti-Retaliatory Statutes

- Claims for Wrongful Termination in Violation of Public Policy.
 - Exercising a legal right.
 - Carrying out a legal obligation.

Discipline and/or Termination and the Whistleblower

- Difficulties may arise where:
 - Whistleblower is factually mistaken or legally misinformed.
 - Disgruntled.
 - Poor performers already subjected to discipline and/or in need of further discipline or discharge due to performance issues.

Discipline and/or Termination and the Whistleblower

- Always treat the complaint seriously.
- Advise the whistleblower that the complaint will be investigated.
- Thank the whistleblower.
- Conduct an investigation into the matter and document the specific complaint and action taken.
- Follow-up with the whistleblower.

Discipline and/or Termination and the Whistleblower

- Employers might, if appropriate:
 - Coach wrongly accused managers to be careful about what they say and write.
 - Consider reporting the alleged wrongdoing to the appropriate governmental authority.
 - Encourage the whistleblower to report the matter to the appropriate governmental agency.

Discipline and/or Termination and the Whistleblower

- Employers might, if appropriate:
 - Establish a policy or practice of an internal complaint procedure.
 - Communicate with the whistleblower in writing.
 - Have a third party conduct the investigation.

Discipline and/or Termination and the Whistleblower

- Change the employee's job (a transfer with no change in compensation and/or benefits).
- Change the employee's supervisor, if his/her current supervisor is accused of wrongdoing.
- Continue to give the employee credit for good work performance and work-related accomplishments.

Discipline and/or Termination and the Whistleblower

- Wait before implementing adverse employment action.
- Have an impartial review of any proposed adverse employment action.
- Involve a supervisor or manager that the employee feels comfortable with, likes or respects.
- If the employee quits, consider asking the employee to reconsider.
- Severance package with release.

Workplace Investigations

- Decide who will conduct the investigations.
- Privileged versus non-privileged.
- Outside versus inside investigator.
- Select a neutral party unrelated to the accused wrongdoer.

Workplace Investigations

- Review relevant documents.
- Interview all witnesses and any person with knowledge relevant to the issue.
- Select the order of the witnesses.
- Have a witness present for the interviews.
- Interview the accused.

Workplace Investigations

- Thoroughly interview the person making the complaint.
- Document the complaint.
- Ask the complainant how he/she learned of the wrongdoing.
- Ask if there are any witnesses and/or relevant documents to the complained of wrongdoing.
- Explore the complainant's relationship to the accused wrongdoer.

Workplace Investigations

- Document the findings.
- Discuss with a neutral party in management the action to be taken.
- Document the actions taken.
- Take appropriate corrective action.
- Follow-up with the complainant.