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Protecting whistleblowers

LITIGATING CLAIMS UNDER LABOR CODE SECTION 1102.5

It is not uncommon for employees to learn about potentially illegal practices happening at work. Allowing employees to freely report and disclose those practices is an important tool in protecting other workers, shareholders, investors, and the general public from fraud, unsafe conditions, compliance issues, and other unlawful activity that may otherwise go undetected.

While there are whistleblower protections for some specific statutes and industries under state and federal laws, the California Labor Code has a general whistleblower-protection law that can provide strong protections for employees who disclose or refuse to participate in unlawful activity at work. This statute, Labor Code section 1102.5, reflects our Legislature's intent to protect whistleblowers, and reflects the importance of encouraging employees to report or resist unlawful activity without fear of retaliation.

Categories of protection

There are three main categories of protection under Labor Code section 1102.5. Labor Code section 1102.5, subdivision (a) prohibits an employer from making or enforcing any rule, regulation, or policy that prevents an employee from disclosing information about legal violations or non-compliance: (1) to a government or law enforcement agency, (2) to a person with authority over the employee, or (3) to another employee who has authority to investigate, discover, or correct the violation. This protection applies if the employee has *reasonable cause* to believe that the information discloses a violation of federal, state, or local laws. The protection also applies even if disclosing such information or reporting such violations are part of the employee's job duties.

Section 1102.5, subdivision (b) prohibits an employer from retaliating against an employee for disclosing information about legal violations or non-compliance: (1) to a government or law enforcement agency, (2) to a person with authority over the employee, or (3) to another employee who has authority to investigate, discover, or correct the violation. Again, this protection applies if the employee has *reasonable cause* to believe that the information discloses a violation of federal, state, or local laws, and also applies regardless of whether disclosing such information is part of the employee's job duties. Section 1102.5, subdivision (b) also prohibits an employer from retaliating if it *believes* that the employee has disclosed or may disclose information about legal violations, even if such disclosure has not actually happened. This section not only protects employee reports of unlawful activity by an actual employer, but also unlawful activity by third parties such as contractors and other employees. (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 471).

Finally, section 1102.5, subdivision (c) prohibits an employer from retaliating against an employee for refusing to participate in an activity that would result in legal violations or non-compliance. Thus, there is a distinction between complaining about or reporting legal violations, which fall under section 1102.5, subdivision (a) and subdivision (b), and actually *refusing to participate* in activities that could result in legal violations, which is covered under section 1102.5, subdivision (c). (*Robles v. Agreserves, Inc.* (E.D. Cal. 2016) 158 F. Supp.3d 952, 1008.) Both reporting unlawful activities and refusing to participate in unlawful activities are protected under the statute, but which one applies to your specific case depends on the employee's conduct.

The statute also prohibits an employer from retaliating against an employee because the employee is a *family member* of a person who has, or is perceived to have, engaged in whistleblowing activities under the statute. (Lab. Code, § 1102.5, subd. (h).)

Reasonable belief of legal violation

As noted in the language of Labor Code section 1102.5, the statute uses a "reasonable cause" standard. That generally means there must be some legal foundation for the employee's belief in the unlawful activity, and the employee must actually believe that the employer's actions were unlawful. The employee does *not* have to be correct in their belief about legal violations occurring, but they must have reasonable cause to believe that such violations occurred. (*Devlyn v. Lassen Mun. Utility Dist.* (E.D. Cal. 2010) 737 F. Supp.2d 1116, 1124.)

Thus, one initial question in assessing these claims is whether the employee had the required reasonable-cause belief in illegal activity occurring at the workplace. For example, in *Patten v. Grant Joint Union High School District* (2005) 134 Cal.App.4th 1378, 1384-1385, the court held that disclosures regarding "internal personnel matters" involving teachers and regarding the need for more staff for safety purposes, as opposed to legal violations, did not amount to whistleblowing as a matter of law for a claim under section 1102.5, subdivision (b).

Similarly, courts have rejected section 1102.5 claims where the disclosures involved alleged safety or health concerns that were not rooted in established statutes, rules, or regulations. (See, e.g., *Love v. Motion Industries, Inc.* (N.D. Cal. 2004) 309 F.Supp.2d 1128, 1134-1135 [plaintiff failed to establish that safety concerns about specifications of ball bearings for towers project were grounded in any state statute, rule, or regulation]; *Carter v. Escondido Union High School Dist.* (2007) 148 Cal.App.4th 922, 933-934 [disclosure about coach's advice to student athlete to drink protein shake not protected by section 1102.5, as protein shakes are not unlawful and there was no record to support that employee's belief of illegality was "reasonable."].)

This "reasonable cause" standard means that you should seek to preclude "expert" testimony at trial about whether the employee's conclusions about legal violations or non-compliance were

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appropriate or correct. (*Erhart v. BofI Holding, Inc.* (S.D. Cal. 2020) 445 F. Supp.3d 831, 848-849.) All that is required is that the employee actually had a reasonable belief that a legal violation was occurring. Purported expert testimony about the propriety of the plaintiff's legal conclusions would thus likely be irrelevant and confusing for a jury.

No exhaustion requirement with Labor Commissioner

There is no requirement of administrative exhaustion of remedies with the California Labor Commissioner for section 1102.5 claims. In other words, employees do not have to file anything first with the Labor Commissioner, and they can instead directly file a civil lawsuit in court if they wish. (*Satyadi v. West Contra Costa Healthcare Dist.* (2014) 232 Cal.App.4th 1022, 1032.) However, depending on the specific employer, there may be other internal administrative exhaustion or grievance requirements that need to be satisfied before filing a lawsuit, such as for unionized employees or for employees of public entities or agencies, so it is important to explore those issues when assessing the case.

Strategies for litigating section 1102.5 cases

While every case is different, there are certain strategies for setting the foundation to litigate a Labor Code section 1102.5 case. First, you need to *establish the plaintiff's protected whistleblowing activity.* This means that throughout your case theory, pleadings, and discovery, you should be clear about the legal violation that the plaintiff disclosed, reported, or refused to participate in at work. The straightforward way to do this is to cite to the statute, rule, or regulation at issue and explain the potential legal violation. Again, while the plaintiff does not have to be correct in their belief about legal violations occurring, they need to be able to establish their reasonable belief in the violation. They also need to establish that their reasonable belief in unlawful conduct was the basis for their protected activity. The plaintiff needs to be prepared to articulate their reasonable belief about a legal violation from the outset of the case, going into deposition, the summary judgment stage, and at trial.

You also need to show which category of section 1102.5 protected activity the employee engaged in. If they disclosed, reported, or complained about legal violations or non-compliance, that activity is protected under section 1102.5, subdivision (b). You would need to establish to whom the employee disclosed information, i.e., to a government or law enforcement agency, to a person with authority over the employee, and/or to another employee with authority to investigate, discover, or correct the legal violation. If the employee refused to participate in an activity that would result in legal violations or non-compliance, that activity is protected under section 1102.5, subdivision (c). You would need to establish who directed the employee to engage in the unlawful activity and who knew about the employee's refusal to participate in the activity. These elements can help to confirm the employer's *knowledge* of the plaintiff's protected activity, which establishes the employer's retaliatory motive.

Next, you need to *establish the adverse employment action*, such as a suspension, demotion, or termination, that happened to the plaintiff after they engaged in the whistleblowing activity. Sometimes there may be a series of smaller events that build or lead up to the "ultimate" adverse action, like termination of employment. In situations where an employer engages in a series of retaliatory acts, they could all be considered together in determining whether they affected the plaintiff's job performance or opportunity for advancement in their career. (*Canupp v. Children's Receiving Home of Sacramento* (E.D. Cal. 2016) 181 F.Supp.3d 767, 790.) Even if those smaller events are not considered adverse employment actions as a matter of law, they could be useful in showing the employer's retaliatory motive and pattern of conduct to a judge or jury.

Rebutting employer's non-retaliatory defense

You also need to be ready to *rebut* the employer's alleged non-retaliatory reason for the adverse employment action and be prepared with arguments about why retaliation is the more credible and likely explanation for the adverse action. Some factors to consider include:

- Whether there is close proximity in timing between the whistleblowing activity and the adverse employment action
- Whether the employer's alleged reasons for the adverse action are false or unworthy of credence
- Whether there are sudden shifts in the employer's behavior or attitude toward the plaintiff after the whistleblowing activity
- Whether the employer has negative or dismissive reactions to the plaintiff's reports of unlawful conduct
- Whether other similarly situated whistleblowers have also suffered adverse actions from the employer

Establishing the foundation of your case as described above will help you have a clear roadmap for litigating your case. It will also help you establish issues of material fact at the summary judgment stage with respect to critical elements such as the plaintiff's reasonable belief in legal violations, the employer's knowledge of protected activity, causation for the adverse employment action, and the employer's pretextual reasons for the adverse action.

Pending appellate questions on evidentiary standard

The California Supreme Court recently agreed to answer a question certified by the Ninth Circuit regarding the proper evidentiary standard for retaliation claims under Labor Code section 1102.5. Previously, many courts applied the *McDonnell Douglas* burden-shifting framework in section 1102.5 cases. Under that test, the plaintiff has to

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first establish, by a preponderance of the evidence, a prima facie case of retaliation. If the plaintiff does so, the defendant then has the burden of production to articulate a legitimate, non-retaliatory reason for the adverse employment action. If the defendant carries its burden of production, the burden shifts back to the plaintiff to show that the employer's articulated reason was pretextual for retaliation. The burden of establishing intentional retaliation always remains with the plaintiff. The *McDonnell Douglas* test originated in the Title VII context but was subsequently adopted and applied by California state courts in discrimination and retaliation cases.

The issue of the evidentiary standard, however, is complicated by Labor Code section 1102.6, which states that in a civil action or administrative proceeding brought under section 1102.5, the plaintiff first has to demonstrate by a *preponderance of the evidence* that their protected whistleblowing activity was a contributing factor in the adverse employment action. Once the plaintiff establishes that, the employer shall then have the burden of proof to demonstrate by *clear and convincing evidence* that the adverse action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected activity.

As noted by the Ninth Circuit, there are material differences between the *McDonnell Douglas* and section 1102.6 evidentiary standards. Under the *McDonnell Douglas* test, the ultimate burden of persuasion always remains with the plaintiff. The defendant's only burden is to merely *produce* evidence of legitimate, non-retaliatory reasons for the adverse action, but it does not need to *persuade* the trier of fact that it was actually motivated by those reasons. (*Lawson v. PPG Architectural Finishes, Inc.* (9th Cir. 2020) 982 F.3d 752, 759.)

But under the statutory language of section 1102.6, the burden of persuasion shifts to the defendant to demonstrate by "clear and convincing evidence" that it had legitimate, independent reasons for the adverse action even if the plaintiff had not engaged in whistleblowing. Thus, the defendant must introduce evidence sufficient to *persuade* the trier of fact that the adverse action was indeed lawful, and the "clear and convincing" standard is much heavier for the defendant. Also, unlike *McDonnell Douglas*, the plaintiff does not have the burden of showing pretext under section 1102.6. In analyzing these different frameworks, the Ninth Circuit also opined that "subjecting defendants in cases involving section 1102.5 retaliation claims to the lower *McDonnell Douglas* standard does some damage to workers' rights." (*Id.* at 760.)

Given the conflict between the *McDonnell Douglas* test applied by California courts and the statutory section 1102.6 test adopted by the California Legislature, the Ninth Circuit requested the California Supreme Court to answer the following question: "Does the evidentiary standard set forth in section 1102.6 of the California Labor Code replace the *McDonnell Douglas* test as the relevant evidentiary standard for retaliation claims brought pursuant to section 1102.5 of California's Labor Code?" (*Id.* at 753.) The California Supreme Court has certified this question, and it remains to be seen how this will affect section 1102.5 claims, especially in the context for summary judgment and for trial.

Remedies under section 1102.5

An employee who prevails on a section 1102.5 claim may get remedies including possible reinstatement at work, compensatory damages, economic damages, emotional distress damages, and a civil penalty of up to $10,000.

Previously, section 1102.5 did not have a provision for attorneys' fees for prevailing plaintiffs. Thus, employees with a successful claim had to try seeking attorneys' fees under other legal provisions. For example, under California Code of Civil Procedure section 1021.5, a court may award attorneys' fees to a successful party in a legal action which results in the enforcement of an important right affecting the public interest if certain requirements are met. However, seeking fees under section 1021.5 could be challenging due to the requirement of showing that the legal action conferred a "significant benefit" on the general public or on a large class of persons, and that the necessity and financial burden of private enforcement makes a fees award appropriate.

Effective January 1, 2021, section 1102.5 now has an attorneys' fees provision. Under the new section 1102.5, subdivision (j), a court is authorized to award reasonable attorneys' fees to a *plaintiff* who brings a successful action for a violation of the statute. Note that this fees award is only for a successful plaintiff. Prevailing defendants cannot be awarded attorneys' fees under this section. This new amendment increases the enforcement power of section 1102.5 and the leverage that employees must pursue whistleblower claims.

Conclusion

Labor Code section 1102.5 can be a strong tool for litigating whistleblower retaliation claims. Plaintiffs' employment lawyers should keep this statute in mind when exploring possible claims and protections for workers who disclose or refuse to participate in unlawful activity at work.

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