

# Whistleblower Retaliation Claims Under Labor Code Section 1102.5: Pitfalls and Pointers for Practitioners

By Kelly Armstrong and Jacqueline Ravenscroft

Often the best source of information about waste, fraud, and abuse is an existing ... employee committed to public integrity and willing to speak out. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled.<sup>1</sup>

California is one of the nation's leaders in protecting whistleblower employees from retaliation. California Labor Code section 1102.5 reflects the State's broad public policy interest in encouraging employees to report unlawful acts without fearing retaliation. (See *Green v. Ralee Eng. Co.* (1998) 19 Cal.4th 66, 77.) Section 1102.5 protects both public and private sector employees from retaliation who do either of the following: (1) report to a government or law enforcement agency that they reasonably believe their employer is

violating the law (§ 1102.5(b)); or (2) refuse to participate in, accede to, or mask an employer's illegal activity. (§ 1102.5(c).) Because lawsuits brought under Labor Code section 1102.5 subdivision (b) present different hurdles than claims brought under subdivision (c), it is important to evaluate a potential client's claims under both provisions.

Employers are required to prominently display information in the workplace regarding employees' rights under the whistleblower laws, including the telephone number of the state-sponsored whistleblower hotline. (Cal. Lab. C. § 1102.8.) Surprisingly, employees are often unaware of what constitutes protected whistleblowing and what is required to assert a valid claim under state law. This confusion may be due in part to the common perception that "whistleblowers" are only employees who report illegal activity out of concern for public-welfare. An employee's motivation for reporting suspected illegal activity is irrelevant as to whether the disclosure is a protected activity. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 134 Cal.App.4th 832, 850-52.) However, whether the conduct complained of is required to be unlawful depends on whether a whistleblower complains to an outside government or law enforcement agency versus their own employer pursuant to Labor Code section 1102.5 subdivisions (b) and (c). Inconsistent federal and state precedent in this area of law further emphasizes the need to take precautions regarding exhaustion of administrative remedies and the timely filing of whistleblower claims.

## Qualifying as a Whistleblower Under § 1102.5, Subd. (b): Reporting Suspected Illegal Activity to a Government or Law Enforcement Agency

Employees are protected from retaliation as whistleblowers if they reasonably believe their employer is engaged in illegal activity, and the employee discloses information regarding the suspected illegal activity to a government or law enforcement agency. (Cal. Lab. C. § 1102.5(b).) Employees are also protected from retaliation if they report suspected unlawful activity of a co-worker or contractor of the employer. (See *McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 471.) Employees who report illegal activity that is publically known, however, are not protected by Section 1102.5(b). (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 859.)

An employee is only afforded protection as a whistleblower under Section 1102.5(b) if the employee's disclosure revealed suspected violations under "state or federal statute, ... rule or regulation." (Cal. Lab. C. § 1102.5(b), emphasis added.) Reporting suspected violations of a local or municipal statute or city charter does not afford an employee whistleblower protection under subdivision (b). (*Edgerly v. City of Oakland* (2012) 211 Cal.App.4th 1191, 1201 [municipal statutes do not qualify as state statutes within the scope of section 1102.5 "unless there is some enabling provision, for example, a municipal statute or rule stating that the intent of the city is to have its local laws treated as statewide statutes for purposes of this section."].)



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Further, merely reporting improper conduct not reasonably believed to be illegal is insufficient. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384-1385 [school principal's report to district regarding safety concerns and inappropriate, but not unlawful, conduct by two teachers was not protected activity].)

Labor Code section 1102.5(b) generally does not protect employees who report their suspicions only to their employers, unless the employer is a public entity. (See *Green v. Ralee Eng. Co.* (1998) 19 Cal.App.4th 66, 77.) Government employees who report illegal activity to their employer, rather than to a separate public entity, qualify as whistleblowers so long as the person to whom they are reporting the unlawful conduct is not the suspected wrongdoer. (Lab. C. § 11025(b),(e); *Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 856-857; see also *Colores v. Board of Trustees of Calif. State Univ.* (2003) 105 Cal. App.4th 1293, 1312-1313.)

It should be noted that there is no whistleblower protection for employees who violate confidentiality of attorney-client privilege, physician-patient privilege or trade secret information. (Cal. Lab. C. § 1102.5(g).)

### **Qualifying as a Whistleblower Under § 1102.5, Subd. (c): Refusing to Participate in Actual Illegal Conduct**

Now consider a client comes to you who never reported any suspected illegal activity to a government or law enforcement agency, but adamantly

refused to participate in, or mask the employer's illegal activity. While a non-reporting employee cannot assert a cause of action under subdivision (b), the employee may still be protected as a whistleblower under subdivision (c).

To qualify as a whistleblower under 1102.5(c), the employee must show a refusal to participate in an illegal activity or taking a position adverse to the employer regarding the illegal activity. (See Lab. C. § 1102.5(c).) In enacting Section 1102.5(c), "the California Legislature intended 'to protect employees who refuse to act at the direction of their employer or refuse to participate in activities of an employer that would result in a violation of law.'" (*Ferretti v. Pfizer Inc.* (2012) 855 F.Supp.2d 1017, 1025.)

The distinguishing differences between subdivision (b) and (c) should be not be overlooked as they present significantly different challenges for an employee-whistleblower to overcome in bringing a successful claim under Section 1102.5. Whistleblowers bringing claims under subdivision (c) have a higher burden of proof than those under subdivision (b) insofar as they must show that the employer's conduct was *actually* illegal, not merely that they had a *reasonable belief* of illegality. Employees bringing claims under subdivision (c) must also show that they opposed the employer's illegal activity, refused to participate in it, or took some adverse action beyond merely complaining about it or flagging the issue for the employer.

### **Overcoming the "Job Duty" Defense to Claims Under Labor Code § 1102.5**

Defendant-employers often move to dismiss whistleblower retaliation claims by asserting that Labor Code section 1102.5 does not provide protection to employees whose regular job duties include "blowing the whistle." (See *McKenzie v. Renberg's Inc.* 94 F.3d 1478 (10th Cir. 1996); see also *Edgerly v. City of Oakland*, *supra*, 211 Cal.App.4th at p. 1206.) Plaintiff-employees may avoid a dismissal of their whistleblower claim if they assert their "refusal to accede" to an illegal activity.

To qualify as a whistleblower under 1102.5(c), the employee must show a refusal to participate in an illegal activity or taking a position adverse to the employer regarding the illegal activity.

Consider this hypothetical case: A government employee is tasked with ensuring the agency's compliance with the law. She reasonably believes that her government employer is engaging in illegal activity. As part of her job duties, she reports her suspicion of illegal activity to a person not involved in the suspected illegality, but who is within her same government agency. She is subsequently retaliated against and brings a claim under Labor Code section 1102.5(b). She qualifies as a whistleblower because she reasonably believed the employer was



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engaged in illegal activity, and she reported said activity to a government agency. (See *Colores v. Board of Trustees* (2003) 105 Cal. App.4th 1293, 1312-1313; see also *Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 857.)

Defense counsel will argue that because plaintiff's job was to ensure compliance with the law, and report any suspected areas of non-compliance, she did not engage in protected activity warranting a claim under Section 1102.5(b). To overcome this assertion, a plaintiff must demonstrate that she "stepped outside" her job duties in reporting the suspected illegal activity and took action adverse to her employer. (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 467 [using terms like "embezzlement," taking concerns to the employer's board of directors, and securing an offer from police to investigate employer's alleged fraud raises at least a triable issue whether plaintiff was "merely doing his job and not warning of possible litigation"]; see also *Muniz v. United Parcel Services, Inc.* (2010) 731 F.Supp.2d 961, 969-970 ["Plaintiff testified that reporting such violations were part of her job duties [therefore] she cannot sustain her claim ... [b]ut Plaintiff's alternative theory is that she refused to accede to an alleged practice of masking wage-and-hour violations, which a jury could construe as adverse to [her employer]."]) Most useful to whistleblowers, although not often given much credence by defense counsel, is the court's recognition in *McVeigh* that an "employee's report of illegal activity can, in any event, constitute protected conduct under Labor Code section 1102.5, subdivision (b) even if she 'was simply doing her job' in making the report." (*McVeigh*, *supra* 213 Cal.App.4th at 469.)

Alternatively, the employee may allege a cause of action under Section 1102.5(c) if the employee "refused to participate" in the suspected illegal activity. (See *Ferretti v. Pfizer* (2012) 855 F.Supp.2d 1017, 1027-28 [Plaintiff's request to be transferred out of a research program violating federal regulations could be construed as refusal to participate in an illegal practice and refusal to accede to masking employer's violations of federal regulations]; see also *Edgerly v. City of Oakland*, *supra*, 211 Cal. App.4th at p. 1206 [City administrator did not engage in protected activity when she questioned several of the Mayor's expense

reimbursement requests and sought advice from the City Attorney because it was part of plaintiff's "general job description to take the actions that she alleged she took" to enforce the law and because "none of these actions constituted a refusal to participate in any alleged violations."]) The employee will also have to demonstrate that the employer's activity in fact violated state or federal law, not that the employee just had a reasonable belief that the employer's conduct was illegal, in contrast to Labor

Code section 1102.5, subdivision (b). (See Cal. Lab. C. § 1102.5(c).)

### Exhausting Administrative Remedies: Conflicting State vs. Federal Authority

There is a split of authority regarding whether or not a whistleblower must exhaust administrative remedies before bringing a Labor Code section 1102.5 claim in court. The Division of Labor

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Standards Enforcement (DLSE)<sup>2</sup> provides that a person alleging violation of the law may file a complaint within six months of the violation. (Cal. Lab. C. § 98.7(a).) California appellate courts have held that administrative exhaustion through the DLSE is permissive: “Labor Code section 98.7 merely provides the employee with an additional remedy which the employee may choose to pursue .... [T]here is no requirement that a plaintiff proceed through the Labor Code administrative procedure in order to pursue a statutory cause of action.” (*Lloyd v. County of Los Angeles* (2009) 172 Cal.App.4th 320, 331-332.) The DLSE itself takes the position that exhaustion of these permissive administrative remedies is not required. (See *Creighton v. City of Livingston* 2009 WL 3246825 at 5 (C.D.Cal. Oct. 5, 2012).)

However, because significant tension exists between state and federal courts regarding administrative exhaustion, litigants should always timely file a complaint with the DLSE prior to filing suit. Multiple federal courts have incorrectly disagreed with the California precedent in *Lloyd*, and held that administrative exhaustion with the DLSE is a necessary pre-requisite to filing a private civil action under Labor Code section 1102.5. (See *Ferretti v. Pfizer* (2012) 855 F.Supp.2d 1017, 1024 [“courts in this district have uniformly held that claims under section 1102.5 must first be presented to the Labor Commissioner before a court can consider them.” (internal quotes and citations omitted)].) In large part, federal courts base their determination that Section 1102.5 requires exhaustion with the DLSE on the California Supreme Court’s decision in *Campbell v. Regents of Univ. of California* (2005) 35 Cal.4th 311, 333. *Campbell*, however, did not explicitly rule that exhaustion with the DLSE is a prerequisite to suit under Section 1102.5. Rather, *Campbell* held that a former employee of a public university was required to exhaust the school’s own internal administrative remedies before filing a civil action under Section 1102.5. Federal courts, for the most part, have avoided addressing this tension. (See *Dowell v. Contra Costa County* 2013 WL 785533 (N.D. Cal. March 1, 2013).)

Although employees technically have three years to sue for violations under Labor Code section 1102.5,<sup>3</sup> or one year if the suit seeks the civil penalty provided

in section 1102.5(f),<sup>4</sup> conflict between California and federal precedent regarding exhaustion of administrative remedies effectively shortens the timeline to seek redress to six months. (See Cal. Lab. C. § 98.7(a).) Counsel should first determine whether a timely DLSE administrative complaint was filed for a potential whistleblower retaliation plaintiff. Although a procedure exists to seek leave to file a DLSE complaint past the six-month deadline, the standards to show “good cause” are high and the DLSE rarely grants these. (See Cal. Lab. C. § 98.7(a).)

### Attorneys’ fees are recoverable under the California Private Attorneys General Act after exhaustion with the LDWA is completed.

The timing for filing a suit for whistleblower retaliation under Labor Code section 1102.5 is a minefield for malpractice considering the ambiguous status of whether administrative exhaustion is required. It should be noted that a bill introduced by Senate President Pro Tem Darrell Steinberg addresses the DLSE exhaustion conflict. Senate Bill 666 clarifies that it is not necessary to exhaust administrative remedies or procedures in order to bring a civil action under Labor Code section 1102.5. (See S.B. 666 (2013-2014), available at <http://openstates.org/ca/bills/20132014/SB666/>. Senate Bill 666 garnered bipartisan support and was signed by Governor Edmund G. Brown, Jr. on October 5, 2013. It will go into effect January 1, 2014.

### Private Attorney General Act (PAGA) Exhaustion Is Required to Obtain Attorneys’ Fees

Employees who successfully bring suit to collect penalties on behalf of the state’s Labor and Workforce Development Agency (LWDA) can recover attorneys’ fees under California’s Private Attorney General Act (PAGA). (Cal. Lab. C. § 2699(g).) The statute of limitations to bring a claim under PAGA is one year. (Cal. C. Civ. Proc. § 340(a).) Before bringing a PAGA claim, an employee must give written notice, by certified mail, to both the LWDA and the employer describing the “specific provisions ... alleged to have been violated,

including the facts and theories to support the alleged violation.” (Cal. Lab. C. § 2699.3(a)(1).) If the LWDA either declines to investigate or neglects to respond to the employee’s written notice within 33 days, the whistleblower may bring a PAGA claim based on a violation of Labor Code section 1102.5. (Cal. Lab. C. §§ 2699.3(a)(2)(A), 2699.5.)

### Remedies for Violations of Labor Code § 1102.5

Defendant-employers who retaliate against a whistleblower may be ordered to reinstate the employee with back pay and benefits,<sup>5</sup> pay the employee’s compensatory damages, including lost wages, lost benefits, front pay, and emotional distress,<sup>6</sup> and pay a civil penalty of \$10,000 for each violation if the employer is a corporation or limited liability company.<sup>7</sup> Although Section 1102.5 does not have its own attorneys’ fees provision, a litigant may be able to recover fees pursuant to California Code of Civil Procedure section 1021.5.<sup>8</sup> More commonly, attorneys’ fees are recoverable under the California Private Attorneys General Act after exhaustion with the LDWA is completed. ■

<sup>1</sup> See The Office of the President-Elect, [http://change.gov/agenda/ethics\\_agenda/](http://change.gov/agenda/ethics_agenda/) (last visited July 10, 2013).

<sup>2</sup> The Labor Commissioner’s Office is also known as the Division of Labor Standards Enforcement (DLSE), a division of the State of California Department of Industrial Relations. The DLSE was established to adjudicate wage claims, investigate discrimination and public work complaints, and enforce Labor Code statutes and Industrial Welfare Commission orders.

<sup>3</sup> See Cal. Code Civ. Proc. § 338(a), governing suit for “liability created by statute.”

<sup>4</sup> See Cal. Code Civ. Proc. § 340(a), governing suit for “penalty or forfeiture.”

<sup>5</sup> Cal. Lab. C. § 98.6(b).

<sup>6</sup> See Cal. Lab. C. § 1105.

<sup>7</sup> Cal. Lab. C. § 1102.5(f). Note that the shorter one-year statute of limitations applies to a suit seeking these civil penalties.

<sup>8</sup> Cal. Code Civ. Proc. § 1021.5 provides that a court may award attorneys’ fees to a successful party if the action resulted in the enforcement of an important right affecting the public interest, conferred a significant benefit on the general public or a large class of individuals, and the necessity and financial burden of private enforcement renders the award appropriate.