

Whistleblowers:

An overview of federal and state whistleblower retaliation protections for California clients

By Kelly Armstrong and Michael A. Levy

Well, there's a question as to what sort of information is important in the world, what sort of information can achieve reform. And there's a lot of information. So information that organizations are spending economic effort into concealing, that's a really good signal that when the information gets out, there's a hope of it doing some good.

— Julian Assange¹

Unlawful conduct in the interest of increased profit is widespread throughout the United States, making the representation of whistleblowers one which contributes toward increased corporate accountability and benefits public health, safety and welfare. Whistleblower settlements and verdicts can also be significant. Whistleblowers are people who disclose suspected

illegal activity within their own organization to law enforcement, to other government agencies, to the media, or otherwise, or who resist illegal activity by other means. Retaliation is when an employer punishes an employee for actual or suspected whistleblowing.

To establish any retaliation cause of action, the employee must show: (1) some protected activity or the employer's suspicion that protected activity occurred; that a (2) covered employer took (3) some adverse action; (4) that the adverse action was motivated to some degree by the suspected protected activity. Additionally, (5) the suit must be filed within the statute of limitations period, and (6) some laws require administrative exhaustion. If the plaintiff prevails, each law authorizes (7) certain remedies. Whistleblower laws vary on the specifics of all seven factors. For actions under the Sarbanes-Oxley and Dodd-Frank statutes in particular, the specific boundaries of those factors are evolving. This article provides a brief overview of the most prominent whistleblower protections for California private sector employees.²

Sarbanes-Oxley

Enron collapsed into bankruptcy almost overnight in late 2001, costing investors tens of billions of dollars and wiping out Enron employee pensions.³ Enron, with its auditor, Arthur Anderson, inflated its stock price through unethical accounting practices designed to mislead investors as to

its financial health. The next year, another publicly-traded corporation, Worldcom, collapsed for the same reasons: rampant fraud intended to inflate its stock price, obscured by unethical accounting practices.⁴

If more employees felt compelled, and empowered, to use proper accounting practices and to blow the whistle on illegal activity, perhaps these disasters could have been averted. The Sarbanes-Oxley Act of 2002 ("SOX"), for publicly-traded corporations only, compels the use of proper accounting practices and empowers employees to stand up to corruption by creating a cause of action for employees who are retaliated against.⁵

Protected activity for SOX is as follows: an employee of a publicly-traded corporation (or the subsidiary/affiliate company of a publicly-traded corporation) reporting any information regarding conduct that the employee reasonably suspects to constitute a violation of certain statutes (including the extremely broad mail fraud statute) or any SEC rule or regulation to a supervisor, federal regulatory or law enforcement agency, or to Congress.⁶

Dodd-Frank

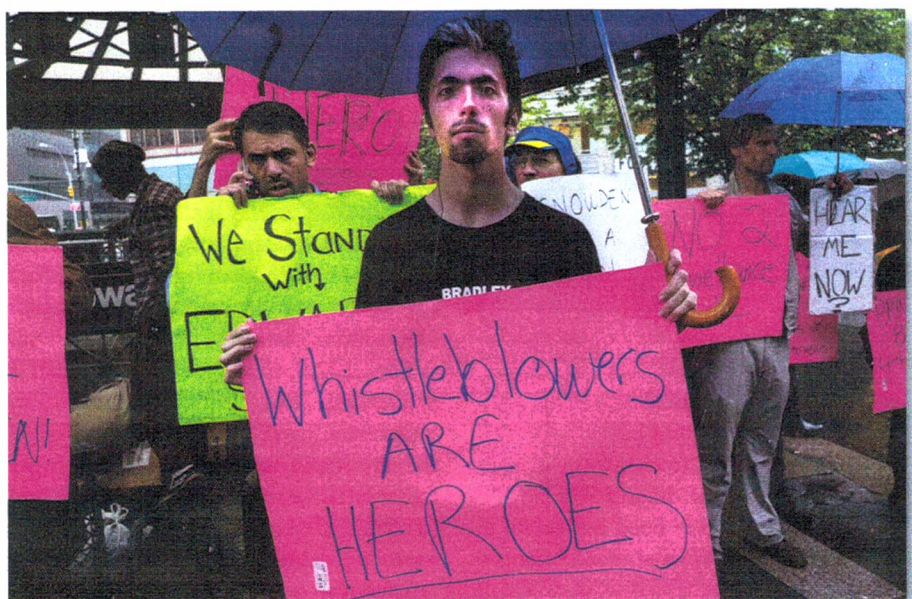
In 2010, in response to the financial collapse of 2007, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Dodd-Frank creates a cause of action for "whistleblowers" who are retaliated against for any of three types of protected activity: (1) reporting information



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relating to the violation of securities laws to the Securities and Exchange Commission (SEC); (2) participating in any investigation, judicial proceeding, or administrative proceeding of the SEC relating to a violation of securities laws; or (3) all activities protected by SOX.⁷

The first two categories are narrow (they only relate to violations of securities laws, and they only relate to complaints to the SEC or activity by the SEC). The third category of protected activity is much broader, because protected activity under SOX includes complaining internally about almost any illegal activity connected to a publicly-traded company (for example, mail fraud that is unrelated to the violation of securities laws). Far more employees complain internally than complain to the SEC.

A key unsettled question is whether an employee who never made a report to the SEC, and is retaliated against for activity protected under SOX, can maintain a cause of action for Dodd-Frank retaliation.

Dodd-Frank defines “whistleblowers” as persons who report information to the SEC regarding the violation of securities laws, which suggests that only a person who reported information to the SEC could bring a cause of action for retaliation under Dodd-Frank.⁸ Indeed, the only appellate court to decide this issue held in *Asadi* that the Dodd-Frank anti-retaliation cause of action is only available to employees who actually complained to the SEC.⁹

But SEC regulations state that the Dodd-Frank retaliation cause of action

is available to all employees retaliated against in violation of SOX, even if they never attempted to report to the SEC and even if the information they were reporting did not relate to a securities law violation.¹⁰ SEC regulations interpret the word “whistleblower” in 15 USC 78u-6(h) to have its ordinary meaning, as opposed to the definition set out at 15 USC 78u-6(a)(6).

The *Asadi* decision recognized the contrary SEC regulations and a number of contrary district court decisions.¹¹ District courts outside of the Fifth Circuit continue more often than not to reach the opposite conclusion, for compelling reasons: Courts should give deference to SEC regulations where a statute is ambiguous,¹² following *Asadi* would contradict and undermine Dodd-Frank’s purpose and render part of the statute superfluous,¹³ and it would encourage employers to terminate internal whistleblowers before their information was reported to the SEC.¹⁴

Labor Code section 1102.5

Labor Code section 1102.5 is the main whistleblower protection statute in California, because of its expansive scope: it protects disclosure of, and refusal to participate in, violations of *any* federal, state, or local statute, rule, or regulation.¹⁵

Section 1102.5(a) prohibits any rule barring the employee from disclosing information about activity that is, or is suspected to be, unlawful. Section 1102.5(b) protects the disclosure of information about any actual or suspected violation of

any law to any government agency, or to the employee’s supervisor or to personnel charged by the employer with ensuring compliance. Additionally, 1102.5(b) protects employees who are mistakenly suspected of whistleblowing.¹⁶ Section 1102.5(c) also protects the “refusal to participate” in an actual violation of any law, but does not protect refusals to participate in activity that is incorrectly suspected to be unlawful, no matter how reasonable or well-founded the suspicion is.¹⁷

The burden is on the employee to identify the statute, rule, or regulation that was, or was suspected to be, violated.¹⁸ The underlying illegal activity, and the underlying protected actions, do not need to be predicated on the illegal activity on the part of the employer.¹⁹ Nothing in the text of the statute suggests that the illegal activity, or the protected activity, needs to be related to any person’s employment. The whistleblower also does not have to be the first person to disclose the illegal activity for the disclosure to be protected activity.²⁰

Section 1102.5 was recently amended, effective January 1, 2014, to make it considerably stronger for plaintiffs.²¹ The main changes regarding the scope of protected activity are: (1) the scope was expanded to include local rules and regulations; (2) more internal reports to employers about

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illegal activity are protected; and (3) the Legislature clarified that it is irrelevant whether the employee’s job duties required the employee to report violations of the law to the employer.²²

Any retaliatory acts occurring before January 1, 2014 must be judged based on the prior version of the law, but any retaliatory acts occurring after January 1, 2014 are judged based on the current version of the law, regardless of when the protected activity took place. Many cases are pending, or have yet to be filed, based on retaliation that occurred prior to 2014.

Before the 2014 amendments went into effect, disclosures to the government about

the suspected violation of local ordinances or municipal codes, and refusal to violate local ordinances or municipal codes, were not protected.²³ Internal disclosures to an employer were also not protected unless the employer was itself a government agency.²⁴ Finally, one workaround plaintiffs used was to characterize internal disclosures about illegal activity as refusals

Whistleblowers are not required to show direct evidence of a causal link, but can use circumstantial evidence.

to participate, invoking 1102.5(c) as the basis for claiming the disclosures were protected activity. For example, disclosing information internally about the illegal activity can be characterized as a refusal to accede to the illegal practice, because it is a refusal to participate in “masking” the illegal activity.²⁵

One of the arguments raised by defendants, before the 2014 amendments, is that employees needed to “step outside” of their regular job duties in order to be a whistleblower. In other words, if it is an employee’s job to ensure the employer’s compliance, the employee’s efforts to ensure compliance were not protected activity.²⁶ The fear is apparently that if employees’ daily actions can be protected activity, then employers run the risk of whistleblower lawsuits any time an employee is terminated.²⁷ This dubious rule is now dead, because the amendments to 1102.5(b) clarify that disclosures of illegal activity are protected “regardless of whether disclosing the information is part of the employee’s job duties.”²⁸

ELEMENTS OF A WHISTLEBLOWER CLAIM

Adverse action

Retaliatory acts short of termination will only support a cause of action if they are sufficiently serious.

Section 1102.5 and FEHA require an “adverse employment action,” meaning that it must “materially affect the terms and conditions of employment.”²⁹ Only actions that are “reasonably likely to impair a

reasonable employee’s job performance or prospects for advancement or promotion” can be adverse employment actions.³⁰ Harassment or abusive behavior must rise to a level of interfering with job performance to be actionable, but this requirement should be interpreted “liberally and with a reasonable appreciation of the realities of the workplace.”³¹ Serious harassment (inside or outside of the workplace) often has psychological and emotional consequences, which can affect job performance.

For Title VII, an action is sufficiently serious if it “well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”³² The retaliatory action need not relate to the terms or conditions of employment.³³ Courts applying SOX have either applied the same standard as for Title VII³⁴ or have applied a standard more favorable to the employee (any retaliation that is more than “trivial” is actionable, regardless of whether objectively it might dissuade a reasonable employee from protected conduct).³⁵

Whichever standard the courts settle on for SOX, we expect that Dodd-Frank will be interpreted to use the same standard, because the relevant language of Dodd-Frank is so similar to the language of SOX. Specifically, both statutes prohibit the following as retaliation: to “discharge, demote, suspend, threaten, harass [] or in any other manner discriminate against” the plaintiff.³⁶

Title VII expressly permits suits based on protected activity outside of the United States.³⁷ SOX and Dodd-Frank do not. Therefore, SOX and Dodd-Frank have been held not to apply to retaliation occurring outside of the United States.³⁸

Evidence of improper motivation (causal link)

All whistleblower statutes require the plaintiff to prove the defendant was motivated by protected activity (some statutes also protect anticipated or suspected protected activity), but different standards of proof are required. Labor Code § 1102.5 and SOX both provide that the employer has no liability if it would have made the same decision absent a retaliatory motive, but they differ as to the showings the parties need to make. Section 1102.5 and SOX only require a showing that

the protected activity was a “contributing factor” in the decision; the burden then shifts to the defense to show “clear and convincing evidence” that it would have made the same decision absent the protected activity.³⁹

Dodd-Frank is silent on this issue.⁴⁰ Because of the similarity of the relevant text of Dodd-Frank and SOX, we expect that courts will use the SOX standard for Dodd-Frank claims.⁴¹

For 1102.5, the plaintiff establishes a *prima facie* case, shifting the burden, by demonstrating (1) protected activity; (2) that the employer subjected the employee to an adverse employment action; and (3) that there is a causal link between the two.⁴² Whistleblowers are not required to show direct evidence of a causal link, but can use circumstantial evidence. Evidence of proximity in time between the employer’s learning of protected activity, and the adverse action, can be sufficient to establish a triable issue of material fact on the question of a causal link.⁴³ But long delays between the protected activity and the adverse action are not circumstantial evidence of a causal link.⁴⁴

Administrative exhaustion requirements and statutes of limitation

SOX requires the employee to exhaust administrative remedies within 180 days of the retaliation or when the employee learned of the retaliation.⁴⁵ Exhaustion is accomplished through the federal Occupational Safety and Health Administration (“OSHA”).⁴⁶ On March 6, 2015, OSHA announced that administrative exhaustion can be accomplished in writing or by telephone, to “any OSHA officer or employee.”⁴⁷ After filing the charge with OSHA, before filing suit the employee must wait until the Secretary of Labor issues a final decision on the charge, or 180 days, whichever is earlier.⁴⁸ SOX also has a statute of limitations, which one court held to be four years (rejecting arguments that it should be a two-year statute).⁴⁹ However, SOX is a relatively new area of law so it would be safest to file suit within two years of the retaliation.

Dodd-Frank has no administrative exhaustion requirement. The statute of limitations for Dodd-Frank is six years from the retaliation, or three years from delayed

discovery of the retaliation, but “may not in any circumstance be brought more than 10 years after the date on which the violation occurs.”⁵⁰

For 1102.5, in the past, some courts, especially federal courts, held that it was necessary for a plaintiff to exhaust administrative remedies with California’s Labor and Workforce Development Agency (“LWDA”) within six months of the retaliation, before filing a lawsuit.⁵¹ With Labor Code section 244, also effective January 1, 2014, the Legislature clarified that administrative exhaustion is not required for 1102.5, or any other Labor Code section, except where the statute expressly requires administrative exhaustion.⁵² Because the Legislature was clarifying existing law, administrative exhaustion is not required for 1102.5 claims based on retaliation occurring before 2014 (or after).⁵³ The SOL for 1102.5 ought to be three years, for liability based on a statute.⁵⁴

If a plaintiff fails to timely exhaust administrative remedies, alternative causes of action may be available. The common law recognizes a cause of action for wrongful termination in violation of public policy (sometimes abbreviated as “WTVPP”) and also known as a “*Tameny*” claim.⁵⁵ For example, if an employee is wrongfully terminated in violation of SOX, but fails to exhaust administrative remedies with OSHA, a suit based on *Tameny* can still be brought. An employee terminated in violation of SOX, who fails to exhaust administrative remedies for SOX, is not precluded from bringing suit based on *Tameny* or Dodd-Frank.⁵⁶

Remedies

The whistleblower protection laws authorize different remedies.

A key consideration before bringing suit, and a major driver for the defense to settle, can be whether the plaintiff is likely to recover attorney fees. SOX, and Dodd-Frank provide for recovery of attorney fees to a prevailing plaintiff.⁵⁷ *Tameny* and 1102.5 do not, by themselves, provide for recovery of attorney fees.

However, the Private Attorneys General Act of 2004 (“PAGA”) allows an employee, or former employee, to file suit on their own behalf or on behalf of any other current or former employee, standing




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in the shoes of the Labor and Workforce Development Agency (“LWDA”), to recover penalties for violations of the Labor Code, and if successful, to potentially recover attorney fees and costs.⁵⁸ PAGA claims have their own statutes of limitation (one year) and administrative exhaustion requirements.⁵⁹

It is encouraging that courts recently awarded attorney fees for 11102.5 cases based on California Code of Civil Procedure § 1021.5. Under § 1021.5, there are three elements to a fee award: “(1) the enforcement of an important right affecting the public interest; (2) the conferring of a significant benefit on the general public or a large class of individuals; and (3) the necessity and financial burden of private enforcement renders the award appropriate.”⁶⁰

SOX provides for compensatory damages, reinstatement with seniority, back pay, and attorney fees.⁶¹ It should be noted that Dodd-Frank prohibits SOX claims from being forced into arbitration.⁶² Dodd-Frank provides for reinstatement with seniority, double back pay, and attorney fees, but does not otherwise authorize the recovery of compensatory damages.⁶³

Based on the foregoing, there are many whistleblower options available to California employees who are terminated after engaging in protected activity. ■

¹ www.knowledgeoftoday.org/2012/09/julian-assange-exclusive-interview-ecuadorian-embassy-london-uk.html

² For a list of other federal whistleblower statutes, see Congressional Research Service report no. R43045.

³ http://en.wikipedia.org/wiki/Enron_scandal

⁴ http://en.wikipedia.org/wiki/MCI_Inc.#Accounting_scandals

⁵ 18 USC 1514A

⁶ 18 USC 1514A(a); *Tides v. Boeing Co.* (9th Cir. 2011) 644 F.3d 809, 810-811 (disclosures to the media are not protected under SOX)

⁷ 15 USC 78u-6(h); *Zillges v. Kenney Bank & Trust* (E.D. Wash. 2014) 24 F.Supp.3d 795, 801 (“Zillges has not alleged or shown that his disclosure relates to a violation of federal securities laws, and so he has not stated a claim under Dodd-Frank’s whistleblower-protection provision”).

⁸ 15 USC 78u-6(a)(6); see 15 USC 78u-6(h)(1)(A) (using the word “whistleblower” rather than “employee”).

⁹ *Asadi v. GE Energy (USA), LLC* (5th Cir. 2013) 720 F.3d 620, 625-628.

¹⁰ 17 CFR 240.21F-2(b)(ii).

¹¹ *Asadi v. GE Energy (USA), LLC* (5th Cir. 2013) 720 F.3d 620, fn. 6.

¹² *Somers v. Digital Realty Trust Inc.*, N.D. Cal. Case no. 3:14-CV-05180 EMC, May 15, 2015.

¹³ *Bussing v. COR Clearing, LLC* (D. Neb. 2014) 20 F.Supp.3d 719, 729.

¹⁴ *Ellington v. Giacomakis* (D. Mass 2013) 977 F.Supp.2d 42, 45 (employees “have a private right of action under Dodd-Frank whether or not the employer wins the race to the SEC’s door with a termination notice”).

¹⁵ Labor Code § 1102.5(a)-(c).

¹⁶ *Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 923-924.

¹⁷ *Edgerly v. City of Oakland* (2012) 211 Cal. App.4th 1191, 1209.

¹⁸ *Love v. Motion Indus., Inc.* (N.D. Cal. 2004) 309 F.Supp.2d 1128, 1135.

¹⁹ *McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 471.

²⁰ *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1550-1552.

²¹ Stats. 2013, c. 781 (S.B.496), § 4.1.

²² Stats. 2013, c. 781 (S.B.496), § 4.1.

²³ *Edgerly v. City of Oakland* (2012) 211 Cal. App.4th 1191, 1200-1201.

²⁴ *Mize-Kurzman v. Marin Comm. College Dist.* (2012) 202 Cal.App.4th 832, 858.

²⁵ *Muniz v. United Parcel Service* (N.D. Cal. 2010) 731 F.Supp.2d 961, 970.

²⁶ *Edgerly v. City of Oakland* (2012) 211 Cal. App.4th 1191, 1207; *Muniz v. United Parcel Service* (N.D. Cal. 2010) 731 F.Supp.2d 961, 970.

²⁷ *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1385.

²⁸ Stats. 2013, c. 781 (S.B.496), § 4.1.

²⁹ *Yanowitz v. L’Oreal, USA Inc.* (2005) 36 Cal.4th 1028, 1050-1051; *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1388

³⁰ *Yanowitz v. L’Oreal, USA Inc.* (2005) 36 Cal.4th 1028, 1054-1055.

³¹ *Yanowitz v. L’Oreal, USA Inc.* (2005) 36 Cal.4th 1028, 1054. See, e.g., *Kelley v. Conco Cos.* (2011) 196 Cal.App.4th 191, 212.

³² *Burlington Northern and Santa Fe Ry. Co. v. White* (2006) 548 U.S. 53, 68.

³³ *Burlington Northern and Santa Fe Ry. Co. v. White* (2006) 548 U.S. 53, 63-64 (“A provision limited to employment-related actions would not deter the many forms that effective retaliation can take”).

³⁴ *Allen v. Admin. Review Bd.* (5th Cir. 2008) 514 F.3d 468, 476.

³⁵ *Guitron v. Wells Fargo Bank, N.A.* (N.D. Cal. 2012) 2012 WL 2708517, *16.

³⁶ Compare 18 USC 1514A(a) to 15 USC 78u-6(h)(1)(A).

³⁷ 42 USC 2000e(f).

³⁸ *Meng-Lin Liu v. Siemens AG* (S.D. N.Y. 2013) 978 F.Supp.2d 325, 328-329 and 330.

³⁹ Labor Code § 1102.6; 18 USC 1514A(b)(2)(C) (incorporating by reference 49 USC 42121(b)).

⁴⁰ See 15 USC 78u-6(h).

⁴¹ Compare 18 USC 1514A(a) to 15 USC 78u-6(h)(1)(A).

⁴² *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476.

⁴³ *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 530.

⁴⁴ *Wynes v. Kaiser Permanente Hospitals* (E.D. Cal. 2013) 936 F.Supp.2d 1171, 1190 (eight-year delay between protected activity and termination).

⁴⁵ 18 USC 1514A(b)(2)(D).

⁴⁶ 29 CFR 1980.103.

⁴⁷ 29 CFR 1980.103.

⁴⁸ 18 USC 1514A(b)(1)(B).

⁴⁹ *Jones v. SouthPeak Interactive Corp. of Del.* (4th Cir. 2015) 777 F.3d 658, 666-668.

⁵⁰ 15 USC 78u-6(h)(1)(B)(iii).

⁵¹ E.g., *Oyarzo v. Tuolumne Fire Dist.* (2013) 955 F.Supp.2d 1038, 1100 (“the majority of federal district court cases have found exhaustion necessary”); *MacDonald v. State* (depublished – was at 219 Cal.App.4th 67)

⁵² Labor Code § 244(a).

⁵³ *Satyadi v. West Contra Costa Healthcare Dist.* (2015) 232 Cal.App.4th 1022, 1032. (Note that *Gallup v. Sup. Ct.*, a case with the opposite holding, was depublished.)

⁵⁴ Code of Civ. Proc. § 338(a).

⁵⁵ *Tameny v. Atlantic Richfield Co.* (1988) 27 Cal.3d 167.

⁵⁶ *Banko v. Apple Inc.* (N.D. Cal. 2013) 20 F.Supp.3d 749 (missing the statute of limitations for SOX did not preclude a Dodd-Frank claim; however, the Dodd-Frank claim was precluded because this court followed *Asadi*).

⁵⁷ 42 USC 2000e-5(k); Gov’t Code § 12965(b); 18 USC 1514A(c)(2)(C); 15 USC 78u-6(h)(1)(C)(iii).

⁵⁸ Labor Code § 2698, et seq.

⁵⁹ See Labor Code § 2699.3.

⁶⁰ *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811, 829 (internal quotations omitted).

⁶¹ 18 USC 1514A(c).

⁶² 18 USC 1514A(e).

⁶³ 15 USC 78u-6(h)(1)(C).