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2024 Public Sector Conference

An Introduction to Public Employee Whistleblowers

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Speakers:

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Conference Reference Materials

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LABOR AND
EMPLOYMENT
LAW



INTRODUCTION TO PUBLIC EMPLOYEE WHISTLEBLOWERS

Moderator Yuri Kvichko

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AGENDA

- ❖ OVERVIEW OF KEY WHISTLEBLOWER STATUTES
- ❖ PRE-LITIGATION CONSIDERATIONS
 - ❖ ADMINISTRATIVE EXHAUSTION
 - ❖ GOVERNMENT CLAIM FILING REQUIREMENT
 - ❖ SPB RULES AND PROCEDURES
- ❖ PRIMA FACIE ELEMENTS AND BURDENS OF PROOF
- ❖ DEFENSES

FEDERAL CLAIMS

- ❖ FIRST AMENDMENT
 - ❖ NO EXHAUSTION
 - ❖ 2 YEAR SOL (CCP § 335.1)
- ❖ FEDERAL WHISTLEBLOWER PROTECTION ACT

AMENDMENT 1
all make no law respecting an
prohibiting the free exerci
freedom of speech, or of the
ple peaceably to assemble, an
for a redress of grievances.

CALIFORNIA GOVERNMENT CODE § 8547

“[S]tate employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution.”

CALIFORNIA GOVERNMENT CODE § 8547

❖ “‘Protected disclosure’ means any good faith communication that discloses or demonstrates an intention to disclose information that may evidence (1) an improper governmental activity or (2) any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition.”

❖ “(e) ‘Illegal order’ means any directive to violate or assist in violating a federal, state, or local law, rule, or regulation or any order to work or cause others to work in conditions outside of their line of duty that would unreasonably threaten the health or safety of employees or the public.”

❖ Individual liability available.

❖ Plaintiff – preponderance of the evidence shows retaliation was a contributing factor to alleged prohibited action against employee.

❖ Defendant – clear and contributing evidence that adverse act would have occurred for legitimate reasons.

❖ Cannot intimidate or threaten by benefit, reprisal, adverse act

CALIFORNIA LABOR CODE § 1102.5

(a) An employer, or any person acting on behalf of the employer **shall not make, adopt, or enforce any rule, regulation, or policy** preventing an employee from disclosing information to a government or law enforcement agency, to **a person with authority over the employee**, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has **reasonable cause to believe that the information discloses a violation** of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

CALIFORNIA LABOR CODE § 1102.5

(b) Employer shall not retaliate against an employee who has reasonable cause to believe disclosing unlawful activity or who employer believes engaged or may engage in such activity – and other protected activity under (a);

(c) Or against an employee who refuses to participate in an activity that would result in a violation of law, rules, or regulations,
Nejadian v. Cnty. of Los Angeles, 40 Cal. App. 5th 703 (2nd Dist. 2019), “[F]ire-rebuild guidelines were not statutes, rules, or regulation.”

Local rules include city, county, and UC rules.

(d) Or exercising rights under (a), (b), and (c) in previous employment;

(e) Report by government employee is report to government;

(f) \$10,000 civil penalty for each violation;

DEFINITION OF “EMPLOYEE”

Labor Code section 1106:

For purposes of Sections 1102.5, ..., “employee” includes, but is not limited to, any individual employed by the state or any subdivision thereof, any county, city, city and county, including any charter city or county, and any school district, community college district, municipal or public corporation, political subdivision, or the University of California.



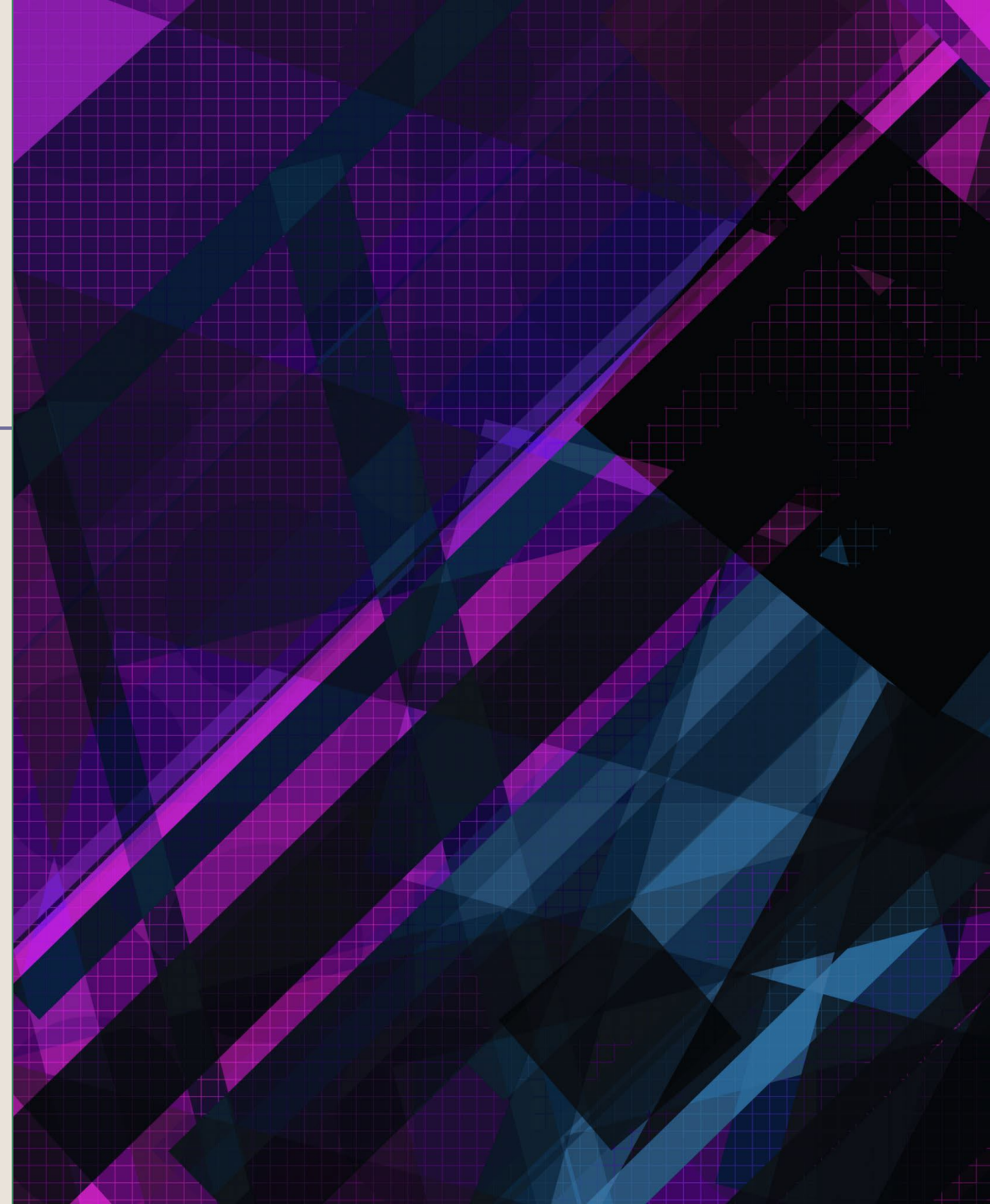
1102.5 – WHO CAN BE SUED?

- ❖ Amended in 2014 to read, “or any person acting on behalf of the employer.”
 - ❖ Appears there is no California decision addressing this issue after the 2014 amendment.
-
- ❖ Federal decisions have addressed it and found no individual liability. *United States ex rel. Lupo v. Quality Assurance Services, Inc.*, 242 F. Supp. 3d 1020, 1030 (S.D. Cal. 2017); *Tillery v. Lollis*, 2015 WL 487311 at *9 (E.D. Cal. Aug. 13, 2015); *Vera v. Con-way Freight, Inc.*, 2015 WL 1546178 at *1 (C.D. Cal. Apr. 6, 2015).
 - ❖ But see *Jackson v. Dollar Tree Distribution, Inc.* (C.D. Cal. 2018) WL 2355983, *6, finding “vague ambiguity”
 - ❖ *Bales v. Cnty. of EL Dorado*, No. 2018 WL 4558235, at *2 (E.D. Cal. 2018), distinguished *Jackson* because *Jackson* was under MTD standard where all ambiguities go to plaintiff.



1102.5 BURDENS AND SOL

- ❖ Plaintiff – preponderance of the evidence shows retaliation was a contributing factor to alleged prohibited action against employee.
- ❖ Defendant – clear and convincing evidence that adverse act would have occurred for legitimate reasons.
- ❖ 3 years to sue as per CCP § 338(a), governing suit for “liability created by statute.”



ADDITIONAL ELEMENTS OF 1102.5



(h) Employer shall not retaliate against family members of employees who engage in such activity or are believed to have done so;

(i) “Employer” or “person acting on behalf of employer” includes and not limited to “client employer” under CLC 2810.3(a), and “employers” under 6400(b).

(j) Reasonable attorney’s fees to successful plaintiff.

LOCAL GOVERNMENT – CAL. GOV. CODE § 53296

- ❖ Permits an applicant or employee the right to file a complaint with a local public agency.
- ❖ “Complaint” is defined as a written document containing a “disclosure of information.”
- ❖ “Disclosure of Information” is defined as the written provision of evidence regarding gross mismanagement or a significant waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.



SOL AND PREFILING CONSIDERATIONS

- ❖ Complaint must be filed within 60 days of act or event which is the subject matter of the complaint.
- ❖ Prior to filing a written complaint, the employee must first make a good faith effort to exhaust all available administrative remedies. The 60-day time limit specified in subdivision (a) shall be extended by the amount of time actually utilized by the employee in pursuing available administrative remedies.
- ❖ A complaint must be filed in accordance with the locally adopted administrative procedure. If there is no administrative procedure, the complaint must be filed with the governing body.
- ❖ Complaints brought by employees must be filed under penalty of perjury.

PROHIBITION AGAINST “REPRISAL ACTIONS”/EXCEPTIONS

- ❖ No local agency officer, manager, or supervisor shall take a reprisal action against any employee or applicant for employment who files a complaint.
- ❖ “Reprisal action” means any act of intimidation, restraint, coercion, discrimination, or disciplinary action against any employee, or applicant for employment, who files a complaint.

Prohibition against “reprisal actions” does not prevent a local public agency from taking personnel action against an employee in the following circumstances:

- ❖ Employee’s complaint contains false information.
- ❖ Employee’s complaint discloses information from records which are closed to public inspection as a matter of law.
- ❖ Employee’s complaint discloses other confidential information.
- ❖ Employee already was subject to disciplinary action or investigation.
- ❖ Employee has violated personnel rules or regulations.

WHISTLEBLOWER PROTECTION ACT: GOV C. § 9149.20, ET SEQ.

- ❖ Legislature intent that state employees and other persons should disclose, to the extent not expressly prohibited by law, improper governmental activities.
- ❖ Prohibits gubernatorial appointees and others holding office in state agencies from directly or indirectly using or attempting to use the official authority or influence of the employee for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person for the purpose of interfering with the right of that person to disclose to a legislative committee improper governmental activities.
- ❖ Subjects offending employee to unspecified civil damages.

LEGISLATIVE EMPLOYEE WHISTLEBLOWER PROTECTION ACT: GOV. CODE 9149.30 - 9149.36

- ❖ Legislative finding and declaration that in addition to Lab. C. § 1102.5 and FEHA protections, “it is necessary to establish a specific process for legislative employees who report legal and ethical violations, so that they may do so without fear of retribution.”
- ❖ Both Members of the Legislature, as well as “legislative employees” (defined as anyone who works for the Legislature. *other than elected officials*, including volunteers, interns, fellow, and applicants), are prohibited from directly or indirectly using or attempting to use that individual’s official authority or influence for the purpose of interfering with the right of a legislative employee to make a protected disclosure.
- ❖ A “protected disclosure” means (1) a report made in good faith that a Member of the Legislature, legislative employee, or third person whose behavior affects a Member or legislative employee, has engaged or will engage in activity that may constitute a violation of any law, including sexual harassment, or of a legislative code of conduct; or (2) a communication protected under the FEHA to the Senate or Assembly Rules Committee, the Joint Committee on Rules, or state or local law enforcement agencies, or authorized state agency.

BURDENS OF PROOF/PENALTIES/REMEDIES

Civil

- ❖ Once plaintiff demonstrates by a preponderance of the evidence that a protected activity was a contributing factor in the alleged retaliation against a legislative employee, the burden of proof is on the offending party to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the legislative employee had not made a protected disclosure.
- ❖ If liability is established, prevailing plaintiff is entitled to attorney's fees.
- ❖ Punitive damages for acts proven to be fraudulent, oppressive, or malicious.

Criminal

- ❖ Fine not to exceed \$10,000
- ❖ Imprisonment in county jail not to exceed one year.



REPORTING BY SCHOOL EMPLOYEES OF IMPROPER GOVERNMENTAL ACTIVITIES ACT: ED. CODE § 44110

- ❖ Covers any person employed by a public school employer.
- ❖ Prohibits any the direct or indirect use or attempt to use official authority or influence for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person for the purpose of interfering with the right of that person to engage in a protected disclosure.
- ❖ Protected disclosure means an improper governmental activity or any condition that may significantly threaten the health or safety of employees or the public if the disclosure was made for the purpose or remedying that condition.
- ❖ Violation of the act includes both the same types of burdens of proof and civil and criminal sanctions as in the Legislative Employee Whistleblower Protection Act.

LABOR CODE § 6310 and 6399.7

Unsafe working conditions. Four main forms of activity are protected:

- ❖ **complaining** about unsafe or unhealthy working conditions - must be complaint, not just report, and must be about workplace conditions.
 - ❖ instituting or testifying in safety proceedings;
 - ❖ participating in safety committees; and
 - ❖ reporting a work-related fatality, injury or illness.
-
- ❖ 6399.7: protects EE who complains or testifies about noncompliance with Hazardous Substances Information and Training Act



LABOR CODE § 6310 II

- ❖ Individual liability. Unpublished district court decisions declined to reach issue or found no liability. *Thompson v. Genon Energy Services, LLC* (ND CA 2013) 2013 WL 968224, *4 (declining to reach issue). *Hart v. Tuolumne Fire Dist.* (ED CA 2011) 2011 WL 3847088, *10 (no liability)
- ❖ Likely 3 years to sue. Cal. Prac. Guide Civ. Pro. Trial Claims and Def. Ch. 13(VII)-B, D. Statute of Limitations.
- ❖ Plaintiff's conduct was "substantial motivating factor" for adverse decision. CACI No. 4605.
- ❖ *McDonnell-Douglas* test. Employer burden of legitimate, nonretaliatory reason; plaintiff burden of pretext.



OTHER SIGNIFICANT STATUTORY ANTI- RETALIATION PROTECTIONS

- ❖ FEHA (Gov. C. § 12940(h)).
 - ❖ No individual liability. *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1178.
 - ❖ *McDonnell Douglas* burden shifting framework applies.
 - ❖ Prima facie elements: (1) plaintiff engaged in protected activity; (2) was subjected to adverse action; (3) causal link.
 - ❖ Protected activity: participate in any FEHA-established process; oppose any acts made unlawful by FEHA.
 - ❖ Adverse action must materially affect the terms, conditions, or privileges of employment. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1050-1052.)



retaliation

OTHER ANTI-RETALIATION STATUTES OF NOTE

- ❖ California's False Claim Act (Gov. C. § 12650, et seq.): establishes a cause of action for damages and penalties against persons who submit false claims for money, property, or services to the State of California or any political subdivision.
- ❖ H&S Code § 1278.5: establishes a cause of action for damages and penalties for retaliation against patients, nurses, members of the medical staff, and other health care workers who notify government entities of suspected unsafe patient care and conditions.



PRELITIGATION CONSIDERATIONS

Exhaustion of Administrative Remedies
Government Claim filing requirements
SPB Whistleblower rules and procedures



EXHAUSTION OF ADMINISTRATIVE REMEDIES

- ❖ In *Campbell v. Regents of the Univ. of Cal.* (2005) 35 Cal.4th 311, Court held that exhaustion of administrative remedies requirements applied to Lab. C. § 1102.5 claims.
- ❖ In 2013, Legislature adopts Lab. C. § 244(a), which provides that “[a]n individual is not required to exhaust administrative remedies or procedures in order to bring a civil action under any provision *of this code, ...*” (Emphasis added.) (See also, *Satyadi v. West Contra Costa Healthcare Dist.* (2014) 232 Cal.App.4th 1022.)
- ❖ In *Terris v. County of Santa Barbara* (2018) 20 Cal.App.5th 551, county civil service employee brought 1102.5 claim against County following the termination of her employment. County civil service rules contained an exhaustion requirement. *Terris* court held that section 244 applies only to claims before the Labor Commissioner and has no effect on the *Campbell* rule.
- ❖ *Terris* court discussed *Satyadi, supra*, and found that *Satyadi* held that “an employee does not have to file a Labor Commissioner claim before suing her employer. But it also instructs that an employee subject to county civil service ‘internal administrative remedies’ must exhaust them. (*Terris, supra*, at 556.)

GOVERNMENT CLAIM FILING REQUIREMENT

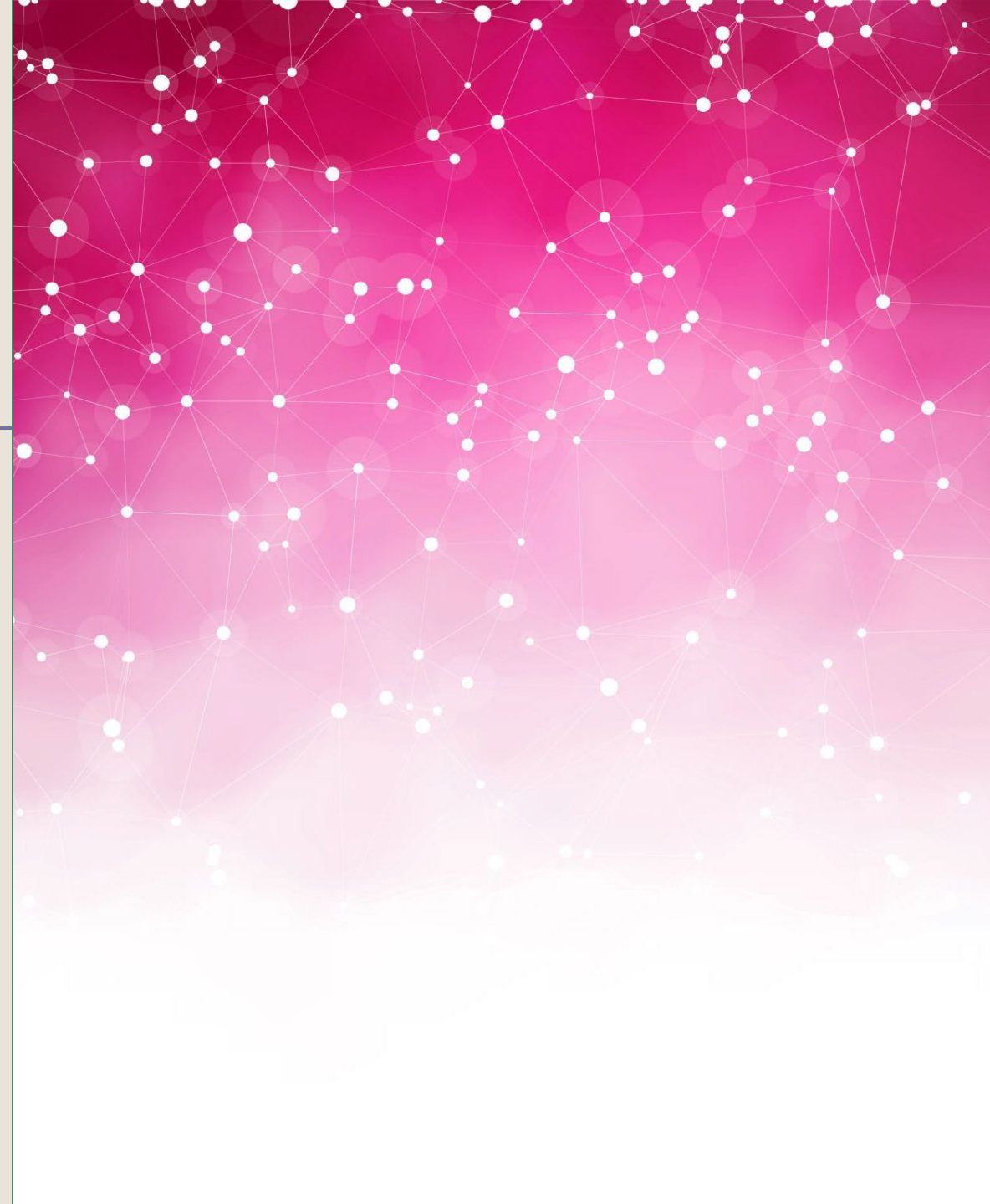
- ❖ Claims brought under California Whistleblower Protection Act (Gov. C. § 8547) not subject to government claim filing requirement. (See *Cornejo v. Lightbourne* (2013) 220 Cal.App.4th 932, 938, analogizing to cases such as *Garcia v. Los Angeles Unified Sch. Dist.* (1985) 173 Cal.App.3d 701, 711-712 and *Snipes v. City of Bakersfield* (1983) 145 Cal.App.3d 861, 865, holding that claims filing requirement is not applicable in FEHA actions because FEHA exhaustion promotes the same objective as the Claim act, namely, it gives notice of the charges to the public agency, early opportunity to investigate, and promotes early settlement short of court litigation in an administrative forum.)
- ❖ But see, *LeMere v. Los Angeles Unified Sch. Dist.* (2019) 35 Cal.App.5th 237, 245-46 holding that claims filing requirement does apply to § 1102.5 claims.

GOV. C. 8547 AND LAB. C. 1102.5, 6310 UNIVERSITY OF CALIFORNIA

❖ The only exhaustion required is a Sworn Statement filed with the UC within 12 months of the most recent adverse act. CGC 8547.10; <https://policy.ucop.edu/doc/1100563/WPP>

❖ “Nothing in this section is intended to prohibit the injured party from seeking a remedy if the university has not satisfactorily addressed the complaint within 18 months.” CGC 8547.10(c).

❖ No issue preclusion for 8547 and 1102.5. *Taswell v. Regents of Univ. of Calif.*, 23 CA5th 343, 346 (4th Dist. 2018), “[T]he administrative decision has no res judicata or collateral estoppel effect on this action,” applies to both statutes at 362. See also *Bahra v. County of San Bernardino*, 945 F3d 1231, 1235-1236, (9th Cir. 2019), applies to 1102.5.



STATE PERSONNEL BOARD

❖ An employee may bring an action for damages in superior court, but only after the employee files a complaint with the SPB and the board ‘has issued, or failed to issue, findings.’” See *State Bd. of Chiropractic Examiners v. Superior Court (Arbuckle)* (2009) 45 Cal.4th 963, 978, quoting CWPA at California Government Code § 8547.8(c).

❖ SPB findings are not binding and not preclusive. No writ required. *Arbuckle* at 975-76 (state employee) and *Wabakken v. California Dept. of Corrections & Rehabilitation* (9th Cir. 2015) 801 F3d 1143, 1149-1150 (state employee); *Runyon v. Bd. of Trustees of California State Univ.*, 48 Cal. 4th 760, 774, 229 P.3d 985, 994 (2010).

LITIGATION CONSIDERATIONS

Prima facie elements
Burdens of proof
Defenses
Attorneys' Fees



PRIMA FACIE ELEMENT: DISCLOSURE

- ❖ *People ex rel. Garcia-Brower v. Kolla's, Inc.* (2023) 14 Cal.5th 719 clarified key prima facie element of plaintiffs' claims:
- ❖ "Disclosure" means to "make something openly known" or "open something up to general knowledge." It does not require that the "something" be unknown to the recipient of the disclosure. For purposes of § 1102.5, "disclosure" may reasonably encompass an employee's report or complaint that calls attention to a legal violation or potential violation in the workplace.

PRIMA FACIE ELEMENT: “REASONABLE CAUSE TO BELIEVE”

- ❖ Does the statutory phrase mean an employee must have an “reasonable actual belief” or merely a “reasonable cause to believe”? See *Vatalaro v. County of Sacramento* (2022) 79 Cal.App.5th 367, 382-83:
 - ❖ Considering the generally acknowledged distinction between a person who has cause to believe something is true and a person who actually believes something is true, we harbor serious doubts about the parties’ understanding of section 1102.5. But we stop short of rejecting their reading altogether. In some circumstances, notably, courts have construed “reasonable cause to believe” to mean “reasonable cause to believe” and “actually believes.”

BURDENS OF PROOF

In *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, Court held that the *McDonnell Douglas* burden shifting framework is inapplicable to section 1102.5 cases. Rather, under section 1102.6, “once it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.”

DEFENSES

- ❖ Section 1102.5 does not apply to rules, regulations, or policies that implement, or to actions by employers against employees who violate, the confidentiality of the lawyer-client privilege, or the physician-patient privilege, or trade secret information.
- ❖ But see, *Erhart v. Bofl Holding, Inc.*, 2017 WL 588390 (unpublished), finding a public policy exception to the enforcement of an employee confidentiality agreement thus permitting employee to use documents appropriated from corporate employer to substantiate whistleblower retaliation claims.
- ❖ See also, *General Dynamics C4 Systems, Inc.* (9th Cir. 2011) 637 F.3d 1047, 1062, finding “some merit” in public policy exception to confidentiality agreement but declining to endorse employee’s “vast and indiscriminate appropriation” of employer’s files.

THANK YOU!

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