

Protecting UC Whistleblowers and Investigating Complaints of Whistleblower Retaliation

October 13, 2011

Panel Members

- **Speakers**

- **Wendi Delmendo** - *Chief Compliance Officer and Locally Designated Official (LDO), Davis Campus*
- **Joseph Epperson** – *Director of Employee Relations, Office of the President*
- **Jadie Lee** – *Director of Labor Relations, Riverside Campus*
- **Sandy McDonough** – *Partner, Paul, Plevin, Sullivan & Connaughton LLP*

- **Moderator**

- **Stephanie Leider** – *Senior Counsel, Litigation, Labor & Employment, Office of the General Counsel*

Overview

- Best Practices for Preventing Retaliation against UC Whistleblowers
- Essential Elements of a Whistleblower Retaliation Complaint
- Processing Whistleblower Retaliation Complaints
- Questions

Preventing Whistleblower Retaliation



Preventing WB Retaliation

- The Whistleblower Protection Policy (WPP) protects UC employees and applicants for employment from
 - Retaliation for making a protected disclosure under the UC Whistleblower Policy
 - Interference with an attempt to make a protected disclosure under the UC Whistleblower Policy
 - Retaliation for refusing an illegal order

Preventing WB Retaliation

- Proper Handling of the underlying whistleblower complaint
 - Expeditiously and fairly
 - Establish appropriate expectations
 - Regarding what is a whistleblower complaint
 - How the complaint will be processed
 - Good communication throughout the process
 - Importance of establishing single point of contact to manage communications

Preventing WB Retaliation

- Proper Handling of the underlying whistleblower complaint (cont'd)
 - Reporting outcomes, as appropriate
 - Whistleblowers have the right to be informed of the disposition of their disclosures absent overriding legal/public interest reasons.
 - Subjects of whistleblower allegations have the right to be informed of the outcome.
 - Who else should be advised?
 - Who has a “need to know”?
 - Limiting those who know of protected disclosure can help decrease exposure for retaliation complaints

During (and After) the Processing of the Whistleblower Complaint

- Role of HR/LR
 - Where the underlying whistleblower complaint involves personnel issues
 - Where the underlying whistleblower complaint is unrelated to personnel issues

During (and After) the Processing of the Whistleblower Complaint

- Possible measures:
 - Counsel supervisor to ensure he/she understands what retaliation is and that it must be prevented
 - Encourage supervisor to involve HR/LR early and actively in any contemplated changes or adverse actions that could impact the whistleblower
 - Is it possible to maintain the status quo during the investigation?
 - Consider training regarding change management

During (and After) the Processing of the Whistleblower Complaint

- Possible measures (cont'd):
 - Active HR/LR monitoring to ensure any actions involving whistleblower are justified and properly documented before any action is taken and before any Notice of Intent is issued.
 - Ensure documentation is retained.
 - Provide training and education
 - Example: If accounting improprieties were alleged, train regarding proper accounting practices
 - In certain situations, may need to consider changing the reporting relationship.

During (and After) the Processing of the Whistleblower Complaint

- Additional measures to consider where the subject of the whistleblower complaint was a coworker rather than supervisor/management:
 - Ensure supervisor understands risk of retaliation
 - Work with supervisor to prevent retaliation by
 - Counseling subjects regarding refraining from retaliation
 - Remaining aware of interactions between whistleblower and subjects, as well as other coworkers
 - Assessing whether anything else needs to be done to protect the whistleblower
 - Periodically touching base with whistleblower

Hypothetical: Nurse Nancy

Nancy, a nurse at one of the medical centers, anonymously files a written complaint with the LDO alleging that management has not been maintaining staffing levels in her unit at the level required by law, thereby creating a risk to patient safety. In her complaint, Nancy expressed fear of retaliation from her supervisor, Sally, stating that Sally will be able to figure out her identity if an investigation is conducted.

Hypothetical: Nurse Nancy (cont'd)

In the last 6 months, Nancy has received several warnings and a suspension due to recurring tardiness. Nancy has been late 2 times this week, and Sally is in the process of preparing a Notice of Intent to terminate her for violating the attendance policy.

Hypothetical: Nurse Nancy (cont'd)

Nancy had previously complained to Sally and also Sally's immediate supervisor that she believed staffing levels in their unit did not meet the legal standards.

Nancy has challenged the discipline she has received for attendance infractions, claiming that she has been held to a different standard. She claims she is written up when she is 5-10 minutes late when other nurses, who are routinely late by 15 minutes or more, are not written up.

Hypothetical:

Aaron and His Coworkers

Aaron reports to management that he is concerned that coworkers (who he does not identify) are skipping certain time-consuming safety protocols, which is putting the whole team at risk. In response, management closely monitors operations for a week, identifies 6 employees who routinely violate the safety protocols, and disciplines them. Word leaks that Aaron's report is what prompted the increased scrutiny, and Aaron's coworkers shun him as a result. Aaron always valued how collegial the unit was and is devastated by this treatment. He confides to Andrea, a friendly coworker, that he's been losing sleep, dreads coming to work, and has started to look for another job. Later that week, Aaron begins a 4-week Family and Medical Leave to address a stress-related condition. While Aaron is out, Andrea reports to Labor Relations what Aaron shared with her.

What could have been done to prevent this outcome?

Essential Elements of a Whistleblower Retaliation Complaint



Essential Elements of a Whistleblower Retaliation Complaint

- To be accepted for review, a complaint must set forth necessary facts (including dates and names of relevant persons) about:
 - Complainant's protected conduct
 - Retaliatory act(s) and the effects of those acts on the complainant

Protected Conduct

- The Whistleblower Protection Policy (WPP) protects UC employees and applicants for employment from
 - Retaliation for making a protected disclosure under the UC Whistleblower Policy
 - Interference with an attempt to make a protected disclosure under the UC Whistleblower Policy
 - Retaliation for refusing an illegal order

Protected Disclosure

“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 and safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition.”

Definition is based on California Government Code section 8547.2

Protected Disclosure

- What does the “good faith” requirement mean?
 - “The motivation of a whistleblower is irrelevant to the consideration of the validity of the allegations.”
 - “However, the intentional filing of a false report...is itself considered an improper governmental activity which the University has the right to act upon.”

Protected Disclosure

- To whom must the protected disclosure have been made?
 - Someone with responsibility to act or authority to review the alleged IGA.
 - Typically the LDO or someone at the management level.

Improper Governmental Activity (IGA)

“Any activity by a state agency or by an employee that is undertaken in the performance of the employee’s official duties, whether or not that action is within the scope of his or her employment, and that (1) is in violation of any state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, or (2) is economically wasteful, or involves gross misconduct, incompetency, or inefficiency.”

Definition is based on California Government Code section 8547.2

Other Key Definitions

- **Illegal Order:**

“Any directive to violate or assist in violating an applicable 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.”

- **Interference:**

“Direct or indirect use of authority to obstruct an individual’s right to make a protected disclosure.”

Retaliatory Acts

- What constitutes a retaliatory act?
 - Typically a dismissal, layoff, suspension, or other serious discipline.
 - But it can be any employment action that
 - materially affects the complainant's terms, conditions, or privileges of employment
 - is reasonably likely to impair the complainant's job performance or prospects for advancement or promotion.

Hypothetical: Nurse Nancy Revisited

Assume that Nancy, the nurse from our earlier hypothetical, misunderstood the legal requirements for staffing levels that applied to her unit. For all the shifts she had identified in her complaint, the unit's staffing levels had been in full compliance.

Was her complaint about the inadequacy of staffing levels a “protected disclosure” under the WPP?

Hypothetical: Nurse Nancy Revisited (cont'd)

What if Sally, the supervisor, had provided Nancy with the legal requirements for staffing that applied to their unit in response to the concerns Nancy had reported to her and had informed Nancy that she was available to discuss the requirements if Nancy had any questions?

Hypothetical:

Gretchen and the Research Grant

Gretchen is a research tech on a research project sponsored by a federal grant. Paul, the PI, emails Gretchen, telling her to bill expenses to the grant that Gretchen knows are for a completely separate project. Because she thinks this would be a violation of the grant, Gretchen ignores Paul's request and never responds to his email. Paul never mentions the request again. When Paul's grant project ends 9 months later, Gretchen is assigned to a different project under a different PI. She files a whistleblower retaliation complaint, alleging that Paul changed her assignment in retaliation for her refusal to obey his "illegal order."

Did Gretchen engage in "protected conduct"?

Has she alleged a "retaliatory act"?

Processing Whistleblower Retaliation Complaints



Filing Complaints

- Various avenues exist for formally filing complaints of whistleblower retaliation:
 - **All employees:** With the LDO under the WPP alternatively/in addition:
 - **Academic personnel (unrepresented):** Senate Bylaw 335 or APM 140, as applicable
 - **Staff personnel:** PPSM Complaint Resolution Procedure (PPSM 70, 71, or II-70, as applicable)
 - **Exclusively represented employees:** Grievance process under the collective bargaining agreement

Informal Complaints

- Anyone receiving informal reports of whistleblower retaliation should:
 - Make sure the whistleblower is aware of the available avenues for filing a complaint of whistleblower retaliation
 - Advise the LDO to ensure complaints don't fall through the cracks

Ensuring Complainant Knows of Option to Also File under WPP

- If employee files a complaint under one of the complaint/grievance processes other than the WPP process administered by the LDO:
 - LDO should be informed when employee files under the alternative process
 - LDO then advises complainant of the option to also file under the WPP
 - Filing under the WPP requires a sworn statement, made under penalty of perjury, that contents of complaint are true or believed by complainant to be true
 - Filing under the WPP is a prerequisite to any lawsuit under California's Whistleblower Protection Act

Processing Whistleblower Retaliation Complaints under WPP

- Vetting Process
 - Is complaint timely under WPP?
 - Must be filed within 12 months of the act of retaliation or threat of retaliation/interference
 - Is there sufficient detail to determine whether complaint is eligible for processing?
 - If not, obtain clarification and/or additional information
 - Where employee's underlying whistleblower complaint did not report conduct that, if true, would have constituted an IGA, determine whether "good faith" requirement was nevertheless satisfied

Relationship between WPP and Other Complaint/Grievance Processes

- When employee files under WPP and another complaint/grievance process, WPP complaint is initially held in abeyance
 - Employee may withdraw other complaint if wishes to proceed immediately under WPP
- Who investigates and who decides whether whistleblower retaliation occurred depends on the process(es) involved and whether the non-WPP process provides for fact-finding or hearing

Relevant Time Frames

- For complaints processed under other complaint/ grievance processes: Consult the applicable process and any local procedures.
- Under the WPP, the Retaliation Complaint Officer (RCO) “shall present findings of fact based on the evidence and factual conclusions” to the Chancellor within 120 days from the date on which the complaint was assigned to the RCO unless an extension is granted by the LDO.”
 - What starts the 120-day clock?
 - Importance of documenting extensions
 - When does the clock stop?

Appeals

- Is there a right of appeal under the WPP?
 - Only with regard to decisions relating to the scope and timeliness of a whistleblower retaliation complaint
 - No right of appeal for a decision on the merits of a whistleblower retaliation complaint

Complaints filed in Court

- A UC employee (or applicant for employment) may file a complaint for damages under the California Whistleblower Protection Act, Cal. Gov. Code section 8547, et seq.:
 - If the complainant filed a timely internal complaint under the WPP
 - That internal complaint was not satisfactorily addressed within 18 months
- Such a complaint may be brought against the University and/or any UC employee alleged to have violated the Act.

Hypothetical: Angie the Auditor

- Angie is known for being a meticulous auditor. Findings in her audits reports have served as the basis for the discipline and even termination of several employees.
- Due to financial problems, Angie's department implements a layoff. She is informed that she is one of 3 employees in the department who are being laid off.
- Angie files a whistleblower retaliation complaint with the LDO, alleging that she was selected for layoff in retaliation for having identified violations of University policy in a dozen or more audit reports she has written over the last 4 years.
- Did Angie engage in "protected conduct"?
- Has there been a "retaliatory act"?

Questions?

