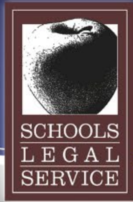


LAW UPDATE
LABOR AND EMPLOYMENT



PHONE: (661) 636-4830 • FAX: (661) 636-4843
E-mail: sls@kern.org • www.schoolslegalservice.org


July 2023

# WHAT IS A "PROTECTED DISCLOSURE" FOR WHISTLEBLOWER PROTECTION UNDER LABOR CODE SECTION 1102.5?

California Labor Code section 1102.5 prohibits employers (including school districts), and persons acting on behalf of the employer, from retaliating against an employee for *disclosing* what the employee reasonably believes to be a violation of or noncompliance with local, state, or federal law or regulation "to a government or law enforcement agency, to a person with authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing or inquiry." Violators of section 1102.5 can be subject to various sanctions, including civil penalties and attorney's fees.

Courts have been split on what it means for an employee to "disclose" a violation or noncompliance as used in section 1102.5(b). In *Mize-Kurzman v. Marin Community College,* the dean of enrollment services complained to the superintendent and president of the district of alleged tampering with the hiring process, discrimination in the application of grant funds, permitting students to register without paying fees, and illegal student citizenship and residency inquiries by the district.[1] The *Mize-Kurzman* court held that the dean's report to her supervisor about the supervisor's own wrongdoing is not a "disclosure," under the ordinary meaning of that term (i.e., to "disclose" means "to reveal something hidden and not known"), and is not a protected whistleblowing activity, because the employer, or person acting on behalf of the employer, already knows about the wrongdoing.

Subsequent to *Mize-Kurzman*, the court in *Hager v. County of Los Angeles,* while accepting the same dictionary meaning of the term "disclosure" as the court in *Mize-Kurzman* had used, concluded the *Mize-Kurzman* court did not construe section 1102.5 in the context of the whole statute and legislative purpose of providing broad protection for workplace whistleblowers.[2] The *Hager* court went on to find that section 1102.5 protected a sheriff's deputy from retaliation even if he was not the first employee to disclose the alleged unlawful conduct (murder, coverup and illicit methamphetamine trade) of another deputy. "Protection only to the first employee to disclose unlawful acts would defeat the legislative purpose of protecting workplace whistleblowers, as employees would not come forward to report unlawful conduct for fear that someone else already had done so."[3]

---

[1] *Mize-Kurzman v. Marin Community College* (2012) 202 Cal.App.4th 832, overruled in part by *People ex rel. Garcia-Brower v. Kolla's, Inc.* (2023) 14 Cal.5th 719.
[2] *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538.
[3] *Id.* at 1550.

On May 22, 2023, the California Supreme Court clarified what it means to "disclose" information under section 1102.5 in *People ex rel. Garcia-Brower v. Kolla's, Inc.*[4] The case involved a bartender's complaint to the owner of the nightclub where she worked regarding nonpayment of wages. After she complained, the nightclub owner fired her, threatened to report her to immigration authorities, and told her never to return to the nightclub. The bartender filed a claim with the Division of Labor Standards Enforcement (DLSE), which enforces section 1102.5, and DLSE sued the nightclub. Relying on *Mize-Kurzman*, the lower courts dismissed the retaliation claim, concluding that an employee's report of unlawful activity directly to her wrongdoing employer is not a protected disclosure under section 1102.5. On review, the Supreme Court disagreed.

The Court found that the broader definition of "disclose," as used by the court in *Hager*, was consistent with the legislative history of section 1102.5 and the larger statutory scheme designed to protect California's workers. The narrower definition used by the court in *Mize-Kurzman* was rejected as it would undermine the purpose of section 1102.5 and "limit the ability of employees to report violations, corroborate a coworker's disclosure, or encourage their employers to remedy violations of the law."[5]

In response to the argument that the Court's broad reading of "disclose" would "convert everyday workplace disputes into whistleblower cases," the Court noted that the protections afforded by section 1102.5 only apply where the employee reasonably discloses a legal violation. Section 1102.5 "imposes a requirement of objective reasonableness and excludes from whistleblower protection disclosures that involve only disagreements over discretionary decisions, policy choices, interpersonal dynamics, or other nonactionable issues. Moreover, an employer accused of retaliation in violation of section 1102.5(b) can rebut the charge by demonstrating by clear and convincing evidence that the alleged retaliatory action would have occurred for legitimate, independent reasons even if the employee had not engaged in the activities protected by section 1102.5."[6]

In sum, it is clear a protected disclosure under section 1102.5 includes reports or complaints of a violation of law made to an employer or agency even if the recipient already knows of the violation.

Should you have any questions regarding employee whistleblowing claims, or any other employment-related question, please contact any of the attorneys in our Labor and Employment Law Practice Group.

*-Kelly A. Lazerson*

*Education Law Updates are intended to alert Schools Legal Service clients to developments in legislation, opinions of courts and administrative bodies and related matters. They are not intended as legal advice in any specific situation. Consult legal counsel as to how the issue presented may affect your particular circumstances.*

[4] *People ex rel. Garcia-Brower v. Kolla's, Inc., supra,* 14 Cal.5th 719.
[5] *Id.* at 730.
[6] *Id.* at 734, internal quotes and brackets omitted.