# Calif. Whistleblower Decision Signals Change For Employers

By **Alison Tsao and Sophia Jimenez** (July 3, 2023)

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California Labor Code, Section 1102.5(b) prohibits employers from retaliating against "whistleblowing" employees for disclosing information about suspected violations of law to (1) a person with authority over the employee, (2) another employee who has the authority to investigate, discover or correct the violation, or (3) a government or law enforcement agency.[1]

Previously, California courts interpreted the term "disclosure" to require the revelation of something new, which effectively removed whistleblower protection for an employee who reported a violation that was already known to the employer.

However, a recent decision by the California Supreme Court expands whistleblower protections to include an employee's report of a violation or suspected violation of the law regardless of whether the employer already knew of the violation.

The ruling significantly broadens whistleblower protections for California employees, and as a result, employers should strengthen reporting procedures and clearly document any incident that may lead to disciplinary action of a protected employee.

**The Case**

In The People ex rel. Garcia-Brower v. Kolla's Inc., a bartender at a nightclub in Orange County complained to the club's owner about unpaid wages for her previous three shifts.[2]

The club's owner responded by terminating the bartender's employment and threatening to report her to immigration authorities. The bartender filed a complaint against the nightclub and its owner with the Division of Labor Standards Enforcement.

After the nightclub refused to accept the division's proposed remedies, the labor commissioner sued the club for various violations of the Labor Code, including retaliation in violation of Section 1102.5(b).

The trial court and appellate court ruled against the labor commissioner on the Section 1102.5(b) claim.

The Court of Appeal reasoned that a "disclosure" under Section 1102.5(b) only affords protection when an employee reveals something new to the recipient of the information. In this case, the Court of Appeal reasoned that the nightclub owner was clearly aware of — if not responsible for — the unpaid wages violation, and thus there was no protected disclosure.

The California Supreme Court reversed the lower court's decision, finding that a disclosure under Section 1102.5(b) includes making something "openly known" and encompasses an employee's complaint of a potential violation of law "without regard to whether the recipient already knew of the violation."

This definition aligns with the federal Whistleblower Protection Enhancement Act, which provides that an employee's disclosure is protected even if the recipient already knew of the violation.

**California Supreme Court's Reasoning**

In reaching its decision, the court primarily focused on the California Legislature's purpose in enacting Section 1102.5(b): "to protect workers, to encourage disclosure, and to promote compliance with employment-related laws and regulations."

The court found that the statute's purpose would be furthered by protecting disclosures of known information because employees "may fear that reporting wrongdoing to their employers, who may know of the alleged violations, would leave them unprotected under Section 1102.5(b)."

Notably, protecting multiple disclosures of the same violation was also found to be in-step with Section 1102.5(b)'s purpose.

The court reasoned that employees will be more likely to report violations if they know their coworkers have already reported the same violation.

The court rejected the appellate court's reasoning that disclosures made directly to the wrongdoer would not further Section 1102.5(b)'s purpose, on the premise that the wrongdoer is likely the last person to do anything about the violation. The court instead took the view that the wrongdoer could be motivated to correct the violation if confronted by a disclosing employee.

The court's new view effectively overrules the California Court of Appeal, First Appellate District's 2012 ruling in Mize-Kurzman v. Marin Community College District — the former leading authority on California whistleblower protection law, which held that reporting a violation directly to the wrongdoer is not a protected disclosure because the recipient of the information is already aware of his or her wrongdoing.[3]

The Kolla's court criticized this rationale on the grounds that it was an overly narrow interpretation of Section 1102.5(b)'s protection.

The 2013 amendments to Labor Code, Section 1102.5 expanded the scope of the statute such that disclosures could be made internally within a company "to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation."

Thus, the disclosure included the making of complaints to persons who not only discover the violation, but also those in a position to investigate or correct the violation.

This view is consistent with the U.S. Court of Appeals for the Ninth Circuit's 2022 decision in Killgore v. SpecPro Professional Services LLC, which similarly held that a federal district court misapplied California law when it rejected evidence of an employee's disclosure because the person to whom the disclosure was made was involved in the alleged violation.[4]

The court also highlighted the fact that other California laws involving a disclosure — such as judicial ethics codes requiring disclosure of campaign contributions or health and safety

codes mandating certain disclosures to residential tenants — do not require that the information be previously unknown. Rather, the import of the disclosure is that they involve information to which the discloser has special access.

Similarly, the court reasoned, employees have special access to workplace wrongdoing and should receive protection for disclosing violations of law, without regard to the recipient's prior knowledge.

**Significance and Practical Application**

The Kolla's decision is significant for California employers because an employee, or groups of employees, may now receive protection for reporting a widely known violation or potential violation of law.

Also, multiple employees can repeat the same violation to a manager or supervisor and receive heightened protection under Section 1102.5(b). This is a significant expansion because California's labor laws encompass a wide variety of potential violations, from unpaid wages to a wage statement that is not properly itemized.

It is important to note, however, that Section 1102.5(b)'s protection extends to disclosures involving legal violations based on "objective reasonableness," and does not extend to an employee's report of an issue related to internal business operations, interpersonal dynamics, disputes over discretionary company policies or commonplace workplace disagreements.

Based on this ruling, employers should ensure that internal reporting procedures clearly communicate the appropriate methods of reporting — and elevating — suspected violations of law.

Specifically, company guidelines should ensure that managers and supervisors work in conjunction with human resources when a report of a violation or potential violation of law is received in order to properly navigate communications and actions with the reporting employee.

Section 1102.5(b)'s protection may be implicated whenever there is an adverse employment action against the reporting employee, such that the action materially affects the terms and conditions of employment. This not only includes termination from employment, but the "entire spectrum" of employment actions that may materially affect an employee's job performance or opportunity for advancement.

Therefore, Section 1102.5(b) becomes the most significant when the disclosing employee may be on the verge of disciplinary action or possible termination from employment.

In these instances, it is crucial for employers to have well-documented policies and procedures that establish a clear record of business-related reasons for any disciplinary action to avoid potential liability under Section 1102.5(b).

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[1] Cal. Labor Code § 1102.5(b).

[2] People ex rel. Garcia-Brower v. Kolla's Inc., 308 Cal. Rptr. 3d 388 (Cal. 2023).

[3] Mize-Kurzman v. Marin Cmty. Coll. Dist., 202 Cal. App. 4th 832 (2012).

[4] Killgore v. SpecPro Pro. Servs. LLC, 51 F.4th 973 (9th Cir. 2022).