

**RESOLUTION 04-04-2018**

**DIGEST**

Whistleblower Protection: Preventing Overbroad Non-Disclosure Agreements

Amends Labor Code section 1102.5 to strengthen the Whistleblower Protection Act by precluding use of contractual provisions mandating non-disclosure and assuring confidentiality of disclosures made by an employee to government or law enforcement.

**STATEMENT OF REASONS**

The Problem: Overbroad nondisclosure agreements (NDAs) have recently come under scrutiny for contributing to a culture of sexual harassment in the workplace: “*The New York Times* journalists who broke the Weinstein story said former employees felt constrained from reporting abuse because of the NDAs they signed when they were hired. Former Uber engineer Susan Fowler said nondisclosure and nondisparagement agreements had silenced complaints about sexual harassment at Uber.” (Tiku, *How to Pierce the Secrecy Around Sexual Harassment Cases* (Dec. 4, 2017), WIRED <https://www.wired.com/story/how-to-pierce-the-secrecy-around-sexual-harassment-cases>.) Similarly, overbroad NDAs have been used in the financial industry to discourage employees from blowing the whistle on fraud and insider trading. (See Gandel, *In the wake of financial crimes, are more Wall Street firms 'gagging' their employees?* (May, 20, 2015), Fortune <http://fortune.com/2015/05/20/wall-street-whistleblowers-silenced>.)

California’s Whistleblower Protection Act forbids employers from “making, adopting, or enforcing any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency” concerning an unlawful act. (Lab. Code, § 1102.5(a).) But this protection does not extend to contracts with NDAs. Additionally, employers can deter whistleblowing by instituting policies that undermine the confidentiality of any report and could lead to interference with an ongoing investigation. For example, an employer can require employees to disclose any report made to a government or law enforcement agency and waive any right to confidentiality.

The Solution: This resolution would strengthen California’s Whistleblower Protection Act by including contractual provisions within its ambit and specifically protecting an employee’s right to report regulatory and criminal violations to a government or law enforcement agency in a confidential manner.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Labor Code section 1102.5 to read as follows:

- 1 § 1102.5
- 2 (a) An employer, or any person acting on behalf of the employer, shall not make, adopt,
- 3 or enforce any rule, regulation, ~~or~~ policy, or contractual provision preventing an employee from
- 4 disclosing information to a government or law enforcement agency, to a person with authority
- 5 over the employee, or to another employee who has authority to investigate, discover, or correct
- 6 the violation or noncompliance, or from providing information to, or testifying before, any public

7 body conducting an investigation, hearing, or inquiry, or impairing the confidentiality of a  
8 disclosure made to a government or law enforcement agency, if the employee has reasonable  
9 cause to believe that the information discloses a violation of state or federal statute, or a violation  
10 of or noncompliance with a local, state, or federal rule or regulation, regardless of whether  
11 disclosing the information is part of the employee’s job duties.

12 (b) An employer, or any person acting on behalf of the employer, shall not retaliate  
13 against an employee for disclosing information, or because the employer believes that the  
14 employee disclosed or may disclose information, to a government or law enforcement agency, to  
15 a person with authority over the employee or another employee who has the authority to  
16 investigate, discover, or correct the violation or noncompliance, or for providing information to,  
17 or testifying before, any public body conducting an investigation, hearing, or inquiry, if the  
18 employee has reasonable cause to believe that the information discloses a violation of state or  
19 federal statute, or a violation of or noncompliance with a local, state, or federal rule or  
20 regulation, regardless of whether disclosing the information is part of the employee’s job duties.

21 (c) An employer, or any person acting on behalf of the employer, shall not retaliate  
22 against an employee for refusing to participate in an activity that would result in a violation of  
23 state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or  
24 regulation.

25 (d) An employer, or any person acting on behalf of the employer, shall not retaliate  
26 against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any  
27 former employment.

28 (e) A report made by an employee of a government agency to his or her employer is a  
29 disclosure of information to a government or law enforcement agency pursuant to subdivisions  
30 (a) and (b).

31 (f) In addition to other penalties, an employer that is a corporation or limited liability  
32 company is liable for a civil penalty not exceeding ten thousand dollars (\$10,000) for each  
33 violation of this section.

34 (g) This section does not apply to rules, regulations, or policies that implement, or to  
35 actions by employers against employees who violate, the confidentiality of the lawyer-client  
36 privilege of Article 3 (commencing with Section 950) of, or the physician-patient privilege of  
37 Article 6 (commencing with Section 990) of, Chapter 4 of Division 8 of the Evidence Code, or  
38 trade secret information.

39 (h) An employer, or a person acting on behalf of the employer, shall not retaliate against  
40 an employee because the employee is a family member of a person who has, or is perceived to  
41 have, engaged in any acts protected by this section.

42 (i) For purposes of this section, “employer” or “a person acting on behalf of the  
43 employer” includes, but is not limited to, a client employer as defined in paragraph (1) of  
44 subdivision (a) of Section 2810.3 and an employer listed in subdivision (b) of Section 6400.

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** Michael Fern, Shaun Dabby Jacobs, Ujvala Singh, Nick Stewart-Oaten, Lisa Miller, Darin Wessel, Jack Osborn, Duncan Crabtree-Ireland, Alicia Gámez, Kim Tran

### **IMPACT STATEMENT**

The resolution does not affect laws, statute or rule other than those expressly identified.

**CURRENT OR PRIOR RELATED LEGISLATION**

None known.

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**RESPONSIBLE FLOOR DELEGATE:** Michael Fern

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**RESOLUTIONS COMMITTEE RECOMMENDATION:  
APPROVE IN PRINCIPLE**

History:  
Similar to Resolution 02-02-2016, which was withdrawn.

Reasons:  
This resolution amends Labor Code section 1102.5 to strengthen the Whistleblower Protection Act by precluding use of contractual provisions mandating non-disclosure, and assuring confidentiality of disclosures made by an employee to government or law enforcement. This resolution should be approved in principle because it properly precludes an employer from concealing illegal conduct and foster confidentiality of an employee’s disclosure to government or law enforcement regarding apparent violations of law.

California’s Whistleblower Protection Act forbids employers from “making, adopting, or enforcing any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency” concerning an unlawful act. (Lab. Code, § 1102.5, subd. (a).) Currently this prohibition does not extend to employer-imposed contracts that would require a would-be whistleblower to reveal communications made to law enforcement or governmental agencies. Nor does the current enactment prevent an employer from exacting a nondisclosure agreement from the employee, with the effect of covering-up illegal conduct and keeping the identity of perpetrators a secret. Use of these loopholes undermines meaningful scrutiny, law enforcement, and effectively stemming illegal conduct.

The resolution strengthens California’s Whistleblower Protection Act and public policy by prohibiting the commonplace use of contractual provisions, calculated at deterring reports to government or law enforcement of illegal activity by the employer through threat of a retaliatory lawsuit seeking monetary damages. The resolution removes the lingering barriers to an employee coming forward in order to meaningfully end through government intervention or public scrutiny, past, pervasive or ongoing illegal practices by industry or certain actors. It does so by enhancing employee protection and forbids adhesive contractual terms, inimical to public policy, preventing an employer from reporting wrongdoing, and requiring the employee to disclose confidential information made to government or law enforcement.