

# Who is a Workplace Whistleblower?

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# CA Labor Code Section 1102.5

*Department of Industrial Relations Definition codified*

A “whistleblower” is an employee who discloses information to a government or law enforcement agency, person with authority over the employee, or to another employee with authority to investigate, discover, or correct the violation or noncompliance, or who provides information to or testifies before a public body conducting an investigation, hearing or inquiry, where the employee has reasonable cause to believe that the information discloses:

1. A violation of a state or federal statute,
2. A violation or noncompliance with a local, state or federal rule or regulation, or
3. With reference to employee safety or health, unsafe working conditions or work practices in the employee’s employment or place of employment.

A whistleblower can also be an employee who refuses to participate in an activity that would result in a violation of a state or federal statute, or a violation of or noncompliance with a local, state or federal rule or regulation.

# Modern Legislation: CA's Whistleblower Statute

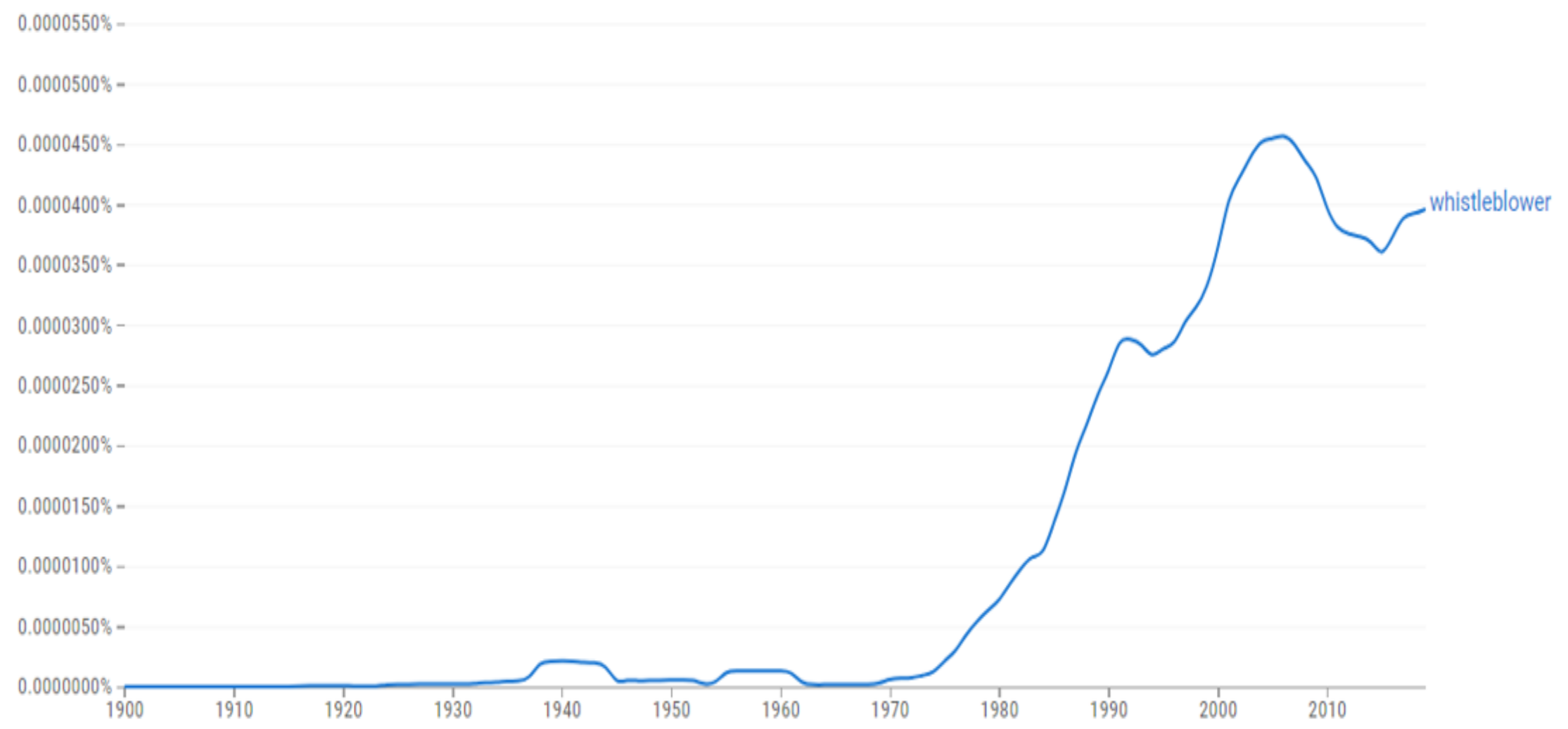
- Enacted in 1984
- Product of Watergate era, concerns about air & water pollution
- Encourage workplace whistleblowers to report unlawful acts without fearing retaliation.



# Legislative History of Broadening Whistleblower Protection

- 1984** Initially applied only to employees who disclose suspected unlawful activity to a government or law enforcement agency.
- 2003** Wake of a false business reports and other illegal activity by Enron, amended to provide new antiretaliation protections to workers who refuse to participate in activities that violate the law or who had engaged in protected whistleblowing activity in past employment.
- 2013** Expand protections to include an employee's disclosure made "to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance"







# *First, a Quick Primer on Retaliation*

- Adverse Action by Employer

“I didn’t get approval to take training.” “They were all mean to me.” “The mood changed – like I was toxic or something.” “They called me a snitch.”

- Proximity in time to the disclosure
- Causal link between whistleblower’s disclosure and retaliatory act
- Employer had to know about whistleblower’s disclosure!
- What if adverse decision was made *before* the disclosure?
- Adverse action is specific to whistleblower. Shutting factory? Laying off half the work force?



# Breaking it Down

## Who is a Whistleblower?

- **Employer-employee relationship**

*To avail oneself of Labor Code section 1102.5, subdivision (b), an employee must be able to articulate both a “protected activity” and a resulting “adverse employment action.”*

- Independent Contractors?
- Part-time, temporary, seasonal employees?
- Job Applicants?
- Retired Employees?
- Elected Official? [Brown v. City of Inglewood](#) (6/30/23) Treasurer v. City for reporting City council financial inproprieties

- **Subdivision (h) protects employees who are family members of a person who has, or is perceived to have, engaged in protected activity**



# *Breaking it Down*

## When to Blow the Whistle?

- Violation of local, state or government statute, rule, regulation
- “Reasonably based suspicion of illegal activity”
- Whistleblower’s refusal to participate in illegal activity
- What if employee is wrong – no violation of law?
- What if an internal policy violated?





# What is Considered an “Adverse Action”?

- An action or course or pattern of conduct that, taken as a whole, materially and adversely affected the terms, conditions, or privileges of employment.

*(Yanowitz v. L’Oreal USA, Inc. (2005) 36 Cal.4th 1028)*

- An Employer’s retaliatory action may be one swift blow or a series of acts
- Courts consider the ***totality of the circumstances*** of the affected employee as well as the workplace context of the claims
  - Series of subtle actions, such as workplace harassment
  - Reduction in support staff
  - Undesirable reassignment
  - Negative performance reviews



# 1102.5 Prima Facie Case

*How Does an Employee Succeed? Or an Employer Defend?*

**2003: California Legislature enacts 1102.6, establishing burden of proof:**

*Employee demonstrates by a preponderance of the evidence that an activity proscribed by 1102.5 was a **contributing factor** in the alleged adverse action → BURDEN SHIFTS*

*Employer demonstrates 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 1102.5.*

**Despite 1102.6, Courts disagree. . .**

There is a great deal of confusion on burden of proof to establish causation under 1102.5, many conflating retaliation prohibited by the Fair Employment Housing Act → applying the traditional McDonnell Douglas Burden Shifting analysis . . .

**California Supreme Court, *Lawson v. PPG Architectural Finishes***

**(2022) 12 Cal.5th 703**

# 1102.5 Prima Facie Case

## *How Does an Employee Succeed? Or an Employer Defend?*

***Lawson v. PPG Architectural Finishes*** (2022) 12 Cal.5th 703

**HOLDING:** 1102.6 = “complete set of instructions for the presentation and evaluation of evidence in section 1102.5 cases; it is not merely codification of an affirmative defense.”

1. Plaintiff must prove by a preponderance of the evidence that her protected activity was a “contributing factor” in defendant taking an adverse employment action.
  - Contributing factor = “any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision.”
2. Once plaintiff satisfies their burden, to avoid liability, the Defendant must prove 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.



# Lawson Conclusions and Implications

Defense Counsel Perspective

## ***Windfall for Plaintiff Employees?***

- Section 1102.5 has evolved from a relatively limited and misunderstood mechanism into one of the most robust statutory schemes that employee rights attorneys have at their disposal. Section 1102.5(b) is now and a “must have” cause of action in any case of unlawful retaliation in the workplace.

## ***The Court’s Clarification of “Contributing Factor”***

- Plaintiff’s attorneys capitalizing on this ruling, as the “contributing-factor” standard enables a whistleblower to meet their burden by showing their whistleblowing activity was just one factor that contributed to the adverse action, even when there are other, legitimate factors for the employer’s decision.



# What Does it Mean to “Disclose”?

*To be protected under section 1102.5, an employee must **reasonably believe** that the information he or she is disclosing violates a local, state, or federal law, rule or regulation*

- Disclosure to Government Agency
- Disclosure to Law Enforcement
- Disclosure to “person with authority” over whistleblower
- Disclosure to “an employee with authority to investigate, discover, or correct legal violations/noncompliance...”

\*CACI No. 4603, “Whistleblower Protection -  
- Essential Factual Elements (Lab. Code Section 1102.5)



# California Supreme Court Interprets “Disclosure”



*People ex rel. Lilia Garcia-Brower, v. Kolla’s, Inc.* May 22, 2023

- Legislative history intended: An employee’s disclosure made “to a person with authority over the employee **or** another employee who has the authority to investigate, discover, or correct the violation or noncompliance.”
  - Disclose = “Report,” “Inform,” or “Complain.”
- Plain Meaning: “Disclosure” may “reasonably encompass an employee’s report or complaint that calls attention to a legal violation or potential violation in the workplace.”
  - “Disclose” need not mean only the revelation of information previously unknown to the recipient.
- ***Threatens to include everyday workplace dispute as whistleblowing?***
  - Employers are protected from disagreements over discretionary decisions, policy choices, and interpersonal issues by virtue of the statute’s requirement for “objective reasonableness.”
  - Employers are further protected against meritless whistleblower cases by their ability to rebut allegations of retaliation using clear and convincing evidence of legitimate, nonretaliatory reasons for any adverse employment actions they take.



# Back to the Supreme Court's *Lawson* Decision

## “Disclosure”

- Avenues of reporting are **independent** of one another
  - Purposely emphasized the distinction between disclosures to government agencies, persons with authority over the whistleblower, or other employees with authority to investigate or correct the violation

A black and white illustration featuring two men and a large megaphone. On the left, a man in a suit is shown from the side, holding the handle of a large, stylized megaphone. On the right, another man in a suit stands facing the megaphone. The megaphone is the central focus, with its bell pointing towards the right. The background is a simple gradient.

# “Disclosure,” Just How Broad?

- Testimony before a public body (e.g. legislative hearing)?
- Talking to the media ?





# The “Parking Ticket” Case

*Hawkins v. City of Los Angeles* (2019) 40 Cal.App.5<sup>th</sup> 384

Two part-time hearing officers DID have standing as whistleblowers

They reported undue pressure to change their decisions re: alleged parking violations under the Vehicle Code.

They were terminated after reporting violations up the chain of command.



# The “Hologram-in-a-Church” Case

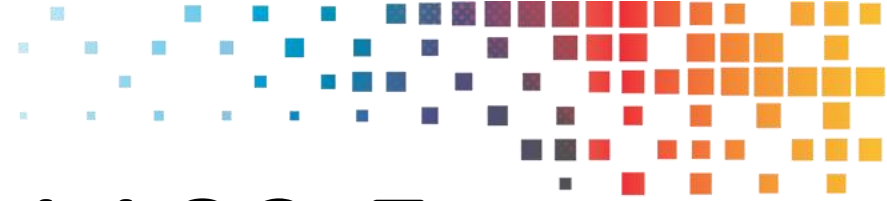
*Zirpel v. Alki David Prods.* (June 20, 2023) No. B317334  
California Court of Appeals, Second District

Plaintiff refused to work on equipment installation at a theater because the work would violate the law and endanger customers and employees.

City inspectors withheld approval of construction at the theater due to defects

Plaintiff is cursed at by boss, harassed, terminated

Jury verdict: \$7 MILLION in total damages, with \$6 million in punitive damages. Appellate court sustains the verdict!



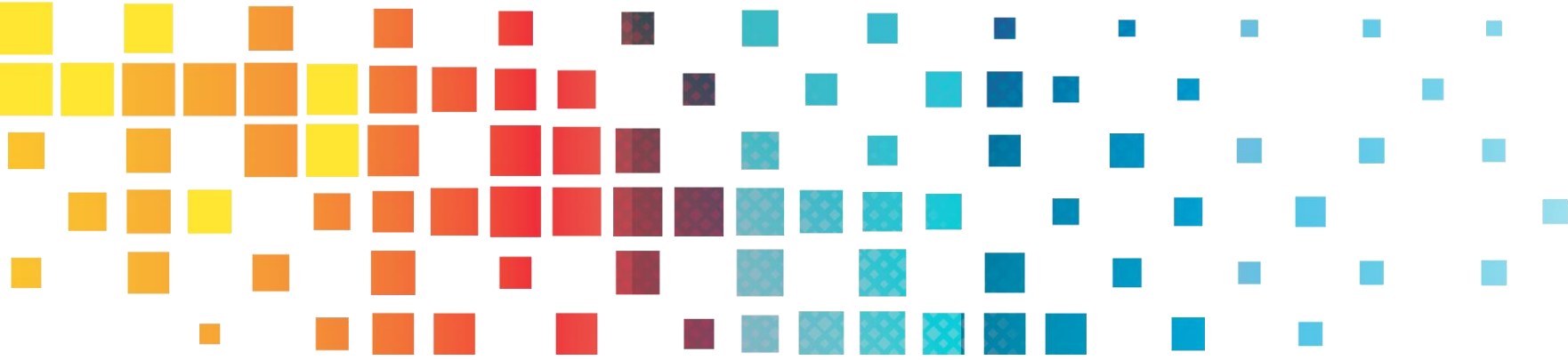
# Continued Evolution of 1102.5

*Clear trend in broadening the scope of retaliation claims under 1102.5*

## **Pending SB 497 . . .**

Broadens and clarifies the discretion of the Labor Commissioner in assessing penalties (up to \$10,000 for each violation):

*In assessing this penalty, the Labor Commissioner shall consider the nature and seriousness of the violation based on the evidence obtained during the course of the investigation. The Labor Commissioner's consideration of the nature and seriousness of the violation shall include, but is not limited to, the type of violation, the economic or mental harm suffered, and the chilling effect on the exercise of employment rights in the workplace, and shall be considered to the extent evidence obtained during the investigation concerned any of these or other relevant factors.*



# Further Comments or Questions?

## Thank You!

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