BOTH SIDES OF THE BAR

Plaintiff: The Late 2003 Amendments to Labor Code Sections 1102.5 to 1102.8 and 1106 are Salutary

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The late 2003 amendments to California Labor Code sections 1102.5-1102.8, and 1106 serve greater public purposes than merely making it easier for plaintiffs to win, or providing an additional monetary incentive for plaintiffs to bring a case against their employer after reporting their employer's statutory or regulatory violation to a branch of the government (or after refusing to participate in an activity that would result in a violation of a statute or regulation). These amendments should cause employers to rethink whether they should make legally questionable decisions, expect their employees to go along with them, and then drag on wrongful termination cases based upon the belief that they are either easy to defend, or are low exposure cases.

In enacting the amendments to sections 1102.5-1102.8, and 1106, the Legislature hoped that these amendments would lead to early detection of corporate wrongdoing.[1] Senator Escutia declared that early detection of unlawful activity would lessen or prevent damage to the corporation, its shareholders, and the general public. In an era in which some providers of energy and cable television have been ruined due to their executives' illegal behavior, Senator Escutia has a point. Had the employees of Enron or Adelphia known that they would receive protections tantamount to sections 1102.5-1102.8 and 1106, maybe they would have blown the whistle before their employers went into bankruptcy.

California Labor Code section 1102.8 now requires employers to display the employees' rights and responsibilities under section 1102.5, and to provide the telephone number of the new whistleblower hotline in the Attorney General's Office, which was created by California Labor Code section 1102.7. Many meritorious cases develop when employers are ignorant of the law. Hopefully, supervisors, managers, and employees performing human resource functions in companies not large enough to receive training on the law will read this poster and carefully scrutinize any terminations of employees who fall within the protection of section 1102.5. Better awareness of what creates wrongful termination may eliminate the personal devastation caused to an employee who is wrongfully terminated, as well as moral and monetary expense for the corporation. Besides being unaware of their rights, as previously mentioned, many employees are not aware of the availability of the remedy of wrongful termination. (A humorous aside - if employees actually read these postings, maybe the high volume of former employees calling plaintiffs' lawyers about wrongful termination will diminish.)

The new evidentiary advantages for employees utilizing California Labor Code section 1102.5, and the $10,000.00 civil penalty, should lead to better access to the court system. Because *Tameny* claims do not provide for attorney fees, as does other employment litigation, and often involve complex proof of an employer's violation of the law, a great number of meritorious wrongful termination cases are never brought. Hopefully the new penalty and evidentiary advantage provisions will permit a greater number of plaintiffs' lawyers to handle wrongful termination cases on a contingency basis.

Providing a nexus between the employees' protected activity and their adverse employment action is often extremely difficult; an employer can usually criticize some aspect of the employee's performance. However, due to section 1102.6's provisions, in attempting to defeat a wrongful termination claim, employers can no longer throw alleged legitimate reasons for termination at judges on summary adjudication (nor at fact finders), and expect to win. Under section 1102.6, employers must demonstrate, by clear and convincing evidence, that the alleged action would have occurred for legitimate, independent reasons had the employee not engaged in protected activity under section 1102.5. Essentially, the employer's alleged reasons for taking its actions must be stronger and more persuasive than the employee's.

This provision should cause employers to rethink the probability of a win on summary adjudication, or at trial. Anything that will cause employment litigation to settle faster and more frequently is of great public importance. Far too many hours are spent on employment litigation: plaintiff's attorneys trying to obtain documents the employer claims are

[1] Legislative Counsel's Digest on SB 777 (Escutia).

confidential; defense lawyers having to bate stamp and read all of these documents; attorneys sitting at 2+ day depositions of employees and countless "alleged" witness depositions by plaintiffs; and attorneys having to deal with summary adjudication motions that essentially ask the judge to decide, as a matter of law, factual issues about nexuses. In sum, this provision should discourage employers from low-balling claims and dragging them out to the detriment of their staffs and shareholders.

Again, although the $10,000 civil penalty under section 1102.5(e) isn't much, it will motivate plaintiffs' lawyers to take some otherwise low damage cases. It may also cause employers to rethink their strategies in dragging on cases because they view their exposure as minimal.

Last, but not least, section 1102.5(c) makes a whole new group of employees real whistleblowers under section 1102.5. The amendments to sub-division (c) clarify that section 1102.5 applies even if the employee never reports the conduct to the government, but merely refuses to participate in activity that would result in the violation of a statute or regulation. This codifies the common law rulings of *Green v. Ralee Engineering Co.*[2] (that the fundamental public policy supporting wrongful termination may be based upon a regulation); and *Gantt v. Sentry Insurance*[3] (that a *Tameny* claim may be based upon an employee's refusal to violate a statute), and expands that notion to include regulations.

The amendments to sections 1102.5-1102.8, and 1106 reflect public sentiment about corporate wrongdoing, and the termination of employees who complain. If nothing else, these amendments should serve as a wake up call to California businesses treading in gray areas of deontology.

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2 19 Cal. 4th 66, 79 (1998).

3 1 Cal. 4th 1083, 1090-1091 (1992).

Defense: The Whistleblower Amendments: Good Intentions Gone Awry?

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Reacting to the horrors inflicted on innocent employees, investors, and the public by corporate wrongdoers at Enron, WorldCom, and their ilk, the Legislature passed SB 777 to significantly expand the rights and protections afforded employee whistleblowers. Certainly, encouraging employees to disclose corporate abuses as early as possible to prevent and minimize the consequences of corporate fraud is a laudable goal. Unfortunately, however, for every deserving employee these amendments protect, dozens of other employees will misuse these provisions to insulate themselves from legitimate corrective action or to strong-arm employers into lucrative and undeserved settlements. Moreover, glaring loopholes and vague language in these amendments impose unfair and counterproductive burdens on beleaguered California employers.

The Amendments

Labor Code section 1102.5 already prohibited employers from preventing employees from disclosing information to government or law enforcement agencies where the employee had "reasonable cause to believe" the information disclosed "a violation of state or federal statute, or violation or noncompliance with a state or federal regulation."[1] Section 1102.5 also already prohibited employers from retaliating against employees who made such a disclosure.[2] Now, an employee whistleblower is also protected when reporting a violation of or noncompliance with a state or federal "rule" — whatever that might be. For the sake of brevity, the foregoing will be described collectively herein as "unlawful conduct."

SB 777 created two new statutory protections for employees and, therefore, two corresponding causes of action. First, employers are now prohibited, by statute, from retaliating against an employee who refuses to participate in an activity that would result in

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2 *See* Cal. Lab. Code § 1102.5(b).