California Supreme Court Clarifies What Constitutes a "Protected Disclosure" for Whistleblower Claims Under Labor Code Section 1102.5

June 29, 2023
Number 23

Written by:
Fabiola M. Rivera
Partner
Los Angeles Office
frivera@lozanosmith.com

Matthew M. Lear
Associate
Fresno Office
mlear@lozanosmith.com

On May 22, 2023, the California Supreme Court issued an opinion further delineating the analysis for retaliation claims under Labor Code section 1102.5. In *People ex rel. Garcia Brower v. Kolla's, Inc.* (2023) 529 P.3d 49) *(Kolla's*), the California Supreme Court held that "a protected disclosure under [Labor Code] section 1102.5(b) encompasses reports or complaints of a violation made to an employer or agency even if the recipient already knows of the violation." In so doing, the California Supreme Court expressly disapproved of *Mize-Kurzman v. Marin Community College District* (*Mize-Kurzman*) which conversely held that, "the report of information that was already known [does] not constitute a protected disclosure."

Background

Labor Code section 1102.5 prohibits employers from retaliating against employees for disclosing information about a violation of state or federal law or regulation to a government agency, law enforcement agency, a person with authority over the employee, or a person with authority to "investigate, discover, or correct the violation or noncompliance."

In *Mize-Kurzman*, a community college district employee alleged her employer had retaliated against her following disclosures of what she believed to be the district's violations of State law. Guided by federal case law, the Court of Appeal held that an employee reporting publicly known information did not constitute a "protected disclosure" within Labor Code section 1102.5(b). The opinion was based on the Court of Appeal's interpretation of the term "disclosure" to mean revealing something that was previously hidden or unknown. Specifically, the Court of Appeal found that "the employee's report to the employee's supervisor about the supervisor's own wrongdoing is not a 'disclosure' and is not protected whistleblowing activity, because the employer already knows about his or her wrongdoing."

People ex rel. Garcia-Brower v. Kollas's, Inc.

Kolla's arose out of an employee dispute concerning a bartender's complaint to her employer, Kolla's Nightclub, that she had not been paid for her previous three shifts. In response, the employer threatened to report the employee to immigration authorities and terminated her employment. The employee filed a claim with the Division of Labor Standards Enforcement (DLSE), which then conducted an investigation. At the

conclusion of its investigation, DLSE determined that the employer's immigration-based threats and termination violated State law. The employer rejected the remedies proposed by DLSE, and as a result, DLSE filed suit against the employer for violation of Labor Code section 1102.5(b). The trial court denied part of DLSE's application for default judgment, finding that DLSE failed to state a valid cause of action since the employee reported her complaints to her employer rather than to a government agency. DLSE appealed. On appeal, although finding that the trial court relied on an outdated version of section 1102.5, the Court of Appeal nevertheless affirmed the trial court's order concluding, "a private employee's report of unlawful activity directly to his or her wrongdoing employer is not a protected disclosure under section 1102.5(b)." DLSE then petitioned for review to the California Supreme Court.

In its opinion, the California Supreme Court analyzed the legislative history of Labor Code section 1102.5, giving particular attention to the 2013 amendment that added provisions allowing employees to report violations to their employer, and not just to a governmental entity. The Court then considered the meaning of "disclosure" under the statute, finding that the term is not limited to only the revelation of previously unknown information, but rather, includes "reports or complaints of violations to an employer or agency even if the recipient already knows of the violation."

The Court rejected the *Mize-Kurzman* court's narrow interpretation of Labor Code section 1102.5(b) stating, "[t]he Legislature reasonably could have believed that wrongdoers themselves may often be well positioned to correct their own violations and that being confronted by an employee about violations could motivate an employer to correct those violations. . . Estrada, as the owner of Kolla's, was a 'person with authority' over [the] employee. . . and he appeared well situated to 'correct the violation' disclosed by [the employee]. . . Construing section 1102.5(b) to cover [the employee's] complaint here is fully consistent with the statute's text and with the Legislature's purpose in adding the internal disclosure protections to the statute in 2013." Accordingly, the Court concluded that the employee's disclosure was protected under Labor Code section 1102.5(b), and disapproved of *Mize-Kurzman* to the extent it was inconsistent with the Court's opinion.

Takeaways

The holding in *Kolla's* is significant because it expands the definition of a "protected disclosure" under Labor Code section 1102.5(b) to include a report of unlawful activities to an employer or agency that already knows about the violation. Therefore, employers need to be mindful of how they respond to such disclosures.

Importantly, the California Supreme Court also noted that the protections under Labor Code section 1102.5(b) only apply where the employee has reasonable cause to believe that the information discloses a legal violation. Therefore, this case does not convert "run of the mill" employee disputes into whistleblower actions. Indeed, the opinion notes that the statute "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." Further, employers still retain the ability to rebut such an allegation by demonstrating through "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."

If you have any questions about this case and its effect on employee reports of unlawful conduct to an employer, please contact the authors of this Client News Brief or an attorney at one of our eight offices

Lozano Smith
ATTORNEYS AT LAW

located statewide. You can also subscribe to our podcast, follow us on Facebook, Twitter and LinkedIn or download our mobile app.

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

Lozano Smith
ATTORNEYS AT LAW