

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
OFFICE OF ETHICS, COMPLIANCE AND AUDIT SERVICES



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December 22, 2014

Colleagues:

The University of California is proposing extensive revisions to the *University of California Policy for Protection of Whistleblowers from Retaliation and Guidelines for Reviewing Retaliation Complaints* (Whistleblower Protection Policy), which applies to all University employees and all applicants for University employment.

The revisions are intended to improve the administration of the policy and ensure that complaints alleging whistleblower retaliation are processed more expeditiously. The revisions are also designed to make it easier for complainants to understand the process; they clearly outline what complainants need to include when filing a complaint under the policy and describe what happens at each step of the process.

The proposed policy is attached. The current policy is posted online at:
<http://policy.ucop.edu/doc/1100563/WhistleblowerProtection>.

Employees are invited to provide comments regarding the proposed policy by January 30, 2015 in accordance with the instructions provided at their location.

Sincerely,

A handwritten signature in black ink that reads "Sheryl Vacca".

Sheryl Vacca
Senior Vice President
Chief Compliance and Audit Officer



Protection of Whistleblowers from Retaliation and Procedures for Reviewing Retaliation Complaints (Whistleblower Protection Policy)

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| Responsible Officer: | SVP - Chief Compliance & Audit Officer |
| Responsible Office: | EC - Ethics, Compliance & Audit Services |
| Issuance Date: | [Issuance Date] |
| Effective Date: | [Effective Date] |
| Last Review Date: | |
| Scope: | This policy applies to all University employees, as well as applicants for University employment. |

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|-----------------|---------------------|
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I. POLICY SUMMARY

This policy describes the complaint resolution process that is available to employees and applicants for employment who believe they have been subjected to retaliation as a result of having made a Protected Disclosure or refused to obey an Illegal Order. Absent extenuating circumstances, a decision on all Retaliation Complaints that are not dismissed or withdrawn will be issued within 18 months of the filing of the Retaliation Complaint with the Locally Designated Official (LDO) or the Complainant’s supervisor.

II. DEFINITIONS

The following definitions apply to this policy and procedures, as well as any local implementing procedures.

Adverse Personnel Action: A management action that affects the Complainant’s existing terms and conditions of employment in a material and negative way, including,

but not limited to, failure to hire, corrective action (including written warning, corrective salary decrease, demotion, suspension), and termination.

Clear and Convincing Evidence: An evidentiary standard that is higher than the Preponderance of the Evidence standard. It is satisfied when the evidence demonstrates that it is highly probable that the allegations in question are true.

Complainant: An employee or applicant for employment who submits a complaint under this policy. For purposes of this policy, “employee” includes a current University employee or a former University employee who was employed at the time the relevant events occurred and includes academic appointees.

Illegal Order: A directive to violate or assist in violating a federal, state, or local law, rule, or regulation or an order to work or cause others to work in conditions outside of their line of duty that would unreasonably threaten the health or safety of employees or the public.

Improper Governmental Activity: Any activity undertaken by the University or by a University employee that is undertaken in the performance of the employee’s duties, whether or not that activity is within the scope of his or her employment, and that (1) is in violation of any state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property (including University property), fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property (including University property and facilities), or willful omission to perform duty, or (2) is economically wasteful or involves gross misconduct, gross incompetence, or gross inefficiency.

Interference: Direct or indirect use or attempted Use of Official Authority or influence for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command an individual for the purpose of obstructing an individual’s right to make a Protected Disclosure.

Preponderance of the Evidence: An evidentiary standard that is satisfied when the evidence demonstrates that the allegations in question are more likely true than not true.

Protected Disclosure: A good faith communication, including a communication based on, or when carrying out, job duties, that discloses or demonstrates an intention to disclose information that may evidence either (1) an Improper Governmental Activity or (2) a condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition. A Protected Disclosure may be made internally to the Complainant’s supervisor, to the LDO, or to any University official identified in the University’s Whistleblower Policy for that purpose. A Protected Disclosure also includes a good faith communication to the California State Auditor’s Office or the Office of the Attorney

General alleging an Improper Governmental Activity and any evidence delivered to the either of those offices in support of such allegation.

Retaliation Complaint: A written complaint filed under this policy that includes a Sworn Statement and alleges that a University employee retaliated by taking an Adverse Personnel Action against the Complainant because the Complainant (1) made a Protected Disclosure or (2) refused to obey an Illegal Order.

Sworn Statement: A statement made under penalty of perjury that the contents of the complaint are true or are believed by the Complainant to be true. A complaint submitted without a Sworn Statement will not be processed under this policy.

Use of Official Authority or Influence: Promising to confer, or conferring, any benefit; effecting, or threatening to effect, any reprisal; taking, or directing others to take, or recommending, processing, or approving, any personnel action, including, but not limited to, appointment, promotion, transfer, assignment, performance evaluation, termination, suspension, or other disciplinary action.

III. POLICY TEXT

A. Purpose of Policy

The University of California is committed to providing a work environment where employees are free to report suspected Improper Governmental Activity or conditions that significantly threaten the health or safety of employees or the public without fear of retribution and where employees can be candid and honest without reservation in conducting the University's business. This policy is a companion to the University of California Policy on Reporting and Investigating Allegations of Suspected Improper Governmental Activities (the University's Whistleblower Policy). Consistent with the California Whistleblower Protection Act (Government Code Sections 8547-8547.15), a University employee may not: (1) retaliate against an employee or applicant for employment who has made a Protected Disclosure, (2) retaliate against an employee who has refused to obey an Illegal Order, or (3) directly or indirectly make Use of Official Authority or Influence for the purpose of interfering with an employee's or applicant's right to make a Protected Disclosure. The University will investigate thoroughly any Retaliation Complaints filed, provide appropriate relief to any employee or applicant harmed by violation of this policy, and take appropriate action against employees who violate this policy.

Complaints alleging the following will be considered as reports of suspected Improper Governmental Activity that may warrant further inquiry under the Whistleblower Policy rather than this policy: (1) Interference with the Complainant's right to make a Protected Disclosure or (2) an Adverse Personnel Action was threatened or attempted against the Complainant in retaliation for having made a Protected Disclosure. However, if such

complaints also allege that an Adverse Personnel Action was taken against the Complainant in retaliation for having made a Protected Disclosure, the entire complaint may be processed under this policy.

B. Authority and Responsibilities

1. Locally Designated Official (LDO)

The Chancellor will appoint a Locally Designated Official (LDO) to receive Retaliation Complaints and to administer local implementing procedures. The LDO may be the same official designated to administer local procedures for investigating whistleblower complaints under the University's Whistleblower Policy. The LDO will determine whether a complaint is eligible for processing under this policy. The LDO is also responsible for ensuring that complaints are processed in a timely manner. The LDO may delegate his/her duties under this policy, as appropriate.

2. Systemwide LDO

The President will appoint a Systemwide LDO. The Systemwide LDO will receive Retaliation Complaints referred to the Office of the President under Section H. and determine whether they will be processed at the Office of the President. The Systemwide LDO will resolve appeals filed under Section I. below and serve as the LDO for the Office of the President. However, whenever the Complainant is a current or former academic employee or an applicant for an academic position or where an accused employee is an academic employee, the Provost and Executive Vice President—Academic Affairs will assume the duties of the Systemwide LDO, with the exception of the Systemwide LDO's responsibilities for Appeals under Section I. below. The Systemwide LDO and the Provost and Executive Vice President—Academic Affairs may delegate any of their duties under this policy.

3. Retaliation Complaint Officer (RCO)

The LDO may appoint one or more individuals to serve as Retaliation Complaint Officer(s) to oversee the investigation of complaints under this policy. The LDO may decide to serve as the RCO. The RCO may personally conduct the investigation or may delegate the factfinding, in whole or in part, to another investigator.

4. Chancellor

The Chancellor will establish local implementing procedures in accordance with this policy. The Chancellor renders a decision after reviewing the investigation report. When there is a finding of retaliation, the Chancellor determines the

appropriate action(s) to be taken against the employee who violated this policy, as set forth in Section G. below. The Chancellor may delegate any of his/her duties under this policy, including decision-making authority.

For purposes of this policy, authorities and responsibilities delegated to the Chancellor are assumed by the Laboratory Director for employees at Lawrence Berkeley National Laboratory, by the Systemwide LDO for employees at the Office of the President, and by the Vice President—Agriculture and Natural Resources for employees within the Division of Agriculture and Natural Resources.

C. Filing a Retaliation Complaint (Where, When and How to File)

A Retaliation Complaint must include a Sworn Statement and be filed with the LDO or with the Complainant's supervisor within 12 months of the Adverse Personnel Action that the Complainant believes was taken to retaliate against the Complainant for having made a Protected Disclosure or refusing to obey an Illegal Order. If the Retaliation Complaint alleges a pattern of retaliation, it must be filed within 12 months of the most recent Adverse Personnel Action that the Complainant believes constituted an act of retaliation. A Retaliation Complaint is considered filed on the date it is postmarked, personally delivered, faxed, or emailed. If the Complainant files a Retaliation Complaint with his/her supervisor, the supervisor will promptly forward it to the LDO.

1. Required Allegations for a Retaliation Complaint

A Retaliation Complaint must include the allegations set forth below for the type of complaint being filed with as much specificity as possible.

a. Required Allegations for a Retaliation Complaint alleging retaliation for having made a Protected Disclosure:

- i. Complainant made a Protected Disclosure. The Complainant must: (a) describe what was disclosed, (b) identify the person(s) to whom each Protected Disclosure was made, (c) specify the date or approximate date of each Protected Disclosure, and (d) specify how each Protected Disclosure was communicated.
- ii. One or more Adverse Personnel Actions were taken against the Complainant. The Complainant must: (a) describe the Adverse Personnel Action(s), (b) identify the University employee(s) responsible for each Adverse Personnel Action, and (c) specify the date or approximate date on which each Adverse Personnel Action occurred.
- iii. The basis for Complainant's belief that the Protected Disclosure was a contributing factor in the Adverse Personnel Action(s).

b. Required Allegations for a Retaliation Complaint alleging retaliation for having refused to obey an Illegal Order:

- i. Complainant refused to obey an Illegal Order. The Complainant must: (a) describe the Illegal Order, (b) identify the University employee(s) who gave the Illegal Order, (c) specify the date or approximate date on which the Illegal Order was given, (d) describe what the Complainant did in response to the Illegal Order that constituted a refusal to obey, and (e) specify the date or approximate date when the refusal occurred.
- ii. One or more Adverse Personnel Actions were taken against the Complainant. The Complainant must: (a) describe the Adverse Personnel Action(s), (b) identify the University employee(s) responsible for each Adverse Personnel Action, and (c) specify the date or approximate date on which each Adverse Personnel Action occurred.
- iii. The basis for Complainant's belief that refusing to obey the Illegal Order was a contributing factor in the Adverse Personnel Action(s).

D. Processing a Complaint

1. Preliminary Review by the LDO

After a complaint has been submitted with or referred to the LDO, the LDO will promptly send the Complainant written acknowledgment of the complaint's receipt and determine whether the complaint is eligible for processing as a Retaliation Complaint.

a. Sworn Statement

When a complaint is submitted without a Sworn Statement, the LDO will request that the Complainant correct this deficiency. If the Complainant fails to correct this deficiency within 15 calendar days, the LDO will (1) dismiss the complaint, (2) notify the Complainant in writing of that decision, and (3) review the retaliation allegations to determine whether the facts alleged should be considered as a report of suspected Improper Governmental Activity that may warrant further inquiry under the University's Whistleblower Policy.

b. Timeliness

The LDO will determine whether the complaint is timely under Section C. above. If it is not timely, the LDO will (1) dismiss the complaint, (2) notify the Complainant in writing of that decision, and (3) review the allegations to determine whether the facts alleged should be considered as a report of

suspected Improper Governmental Activity that may warrant further inquiry under the University's Whistleblower Policy.

c. Required Allegations

The LDO will determine whether the complaint contains the required allegations, as set forth in Section C.1. above. When determining whether a complaint contains the required allegations, the LDO may consult with the location's Investigations Workgroup, as defined under the University's Whistleblower Policy, or an ad hoc workgroup, as needed. If the complaint is not specific or fails to provide sufficient information, the LDO may request that the Complainant amend the complaint to address the deficiencies. If the Complainant does not amend the complaint or otherwise correct the deficiencies within 15 calendar days of the date of the LDO's notice, the LDO may dismiss all or part of the complaint and notify the Complainant in writing of that decision.

d. Accepting the Retaliation Complaint

The LDO will notify the Complainant in writing when the complaint is accepted for processing as a Retaliation Complaint and is assigned for investigation. If only parts of the complaint have been accepted, the LDO's notice will indicate which parts have been accepted, which parts have been dismissed, and the reason for the dismissal(s). A Complainant may appeal a decision dismissing a complaint, in whole or in part, on the grounds that it is untimely or lacked required allegations under Section I. below.

2. Notification of the Accused Employee(s)

When the LDO accepts a Retaliation Complaint for processing, the LDO will provide the employee accused of retaliation with a copy of the Retaliation Complaint or a summary of the allegations related to the accused employee and advise that (1) an investigation is being initiated, (2) he or she may submit a written response to the allegations as indicated in Section D.4.b., and (3) an interview of the accused employee will be scheduled and is an essential part of the investigatory process. If the Retaliation Complaint contains allegations against more than one employee, the LDO will provide each of them with those allegations related to him or her.

3. Referral to the RCO for Investigation

After the LDO accepts a Retaliation Complaint, the LDO will refer the Retaliation Complaint to the RCO for investigation unless the LDO will be serving as the RCO. If the RCO delegates any part of the investigation, the RCO retains

responsibility for ensuring that the investigation is conducted in accordance with this policy.

4. Investigation

a. Investigation Process

The investigator will review the Retaliation Complaint and other relevant materials submitted by the Complainant. In addition, the investigator may request and review other documents and materials relevant to the allegations. The investigator will, whenever possible, interview the Complainant and the accused employee(s). In addition, the investigator will interview any other witnesses who the investigator believes are necessary in order to conduct a thorough investigation. If a Complainant, accused employee, or witness fails or refuses to be interviewed, the investigator will complete the investigation based upon the information available.

b. The Accused Employee's Opportunity to Comment

The accused employee may submit a response to the allegations during the investigation, provided it is submitted no later than 30 calendar days after the investigator's interview of the accused employee or an extension of that deadline is granted in writing by the investigator. If the investigator interviews the accused employee more than once, the submission deadline runs from the date of the first interview. If the accused employee chooses to submit a response to the allegations, the investigator will include that response in the investigation report.

During the course of the investigation, the investigator will also provide the accused employee with an opportunity to comment on the documents on which the investigator plans to rely in making findings. Ordinarily, the investigator will do this in the course of interviewing the accused employee.

c. Witnesses

- i. The Complainant, the accused employee(s), and other witnesses will be allowed a reasonable amount of paid time off from their University duties to participate in interviews conducted by the investigator.
- ii. The Complainant, the accused employee(s), and the other witnesses have a duty to cooperate with the investigator. This includes a duty to participate in interviews requested by the investigator, to answer the investigator's questions honestly, and to provide documents and other materials requested by the investigator.

- iii. The Complainant, the accused employee(s), and other witnesses have a responsibility not to interfere with the investigation and to adhere to admonitions from the investigator in this regard. Evidence shall not be withheld, destroyed or tampered with, and witnesses shall not be influenced, coached, or intimidated.
- iv. A witness shall not be subjected to an Adverse Personnel Action as a result of participating in good faith in an investigation under this policy. A violation of this provision would constitute an Improper Governmental Activity under the Whistleblower Policy.

d. Investigation Report

The investigator will prepare a written report containing findings of fact based on the evidence and the investigator's conclusion as to whether retaliation in violation of the policy occurred, using the applicable evidentiary standards set forth in Section E. below. The investigation report will provide sufficient detail to enable the Chancellor to make an independent determination as to whether a policy violation occurred. The investigation report will include the Retaliation Complaint, a list of witnesses interviewed, any accused employee's response to the allegations (if submitted), and any other documents on which the investigator has relied in making findings.

If the RCO did not personally conduct the investigation, the RCO should review the investigation report to determine whether it is complete or is to be returned to the investigator to address the deficiencies. When the investigation report is completed, the RCO will deliver it to the LDO.

e. Time Frame for Investigation

The RCO is responsible for delivering the investigation report to the LDO within 6 months from the date on which the LDO notifies the Complainant that the Retaliation Complaint has been accepted for processing.

The LDO may extend the 6-month deadline upon receipt of a written request from the RCO that explains why the extension is needed. Additional extensions may be sought when appropriate. The LDO will respond in writing to such requests and will also notify the Complainant in writing of any extensions that are granted. The LDO generally will not provide an extension or extensions that increase the 6-month time frame beyond 12 months total.

E. Evidentiary Standards

1. Evidentiary Standards for Retaliation Complaints

Consistent with California Government Code Section 8547.10(e), a Complainant who brings a Retaliation Complaint must demonstrate by a Preponderance of the Evidence that he or she either made a Protected Disclosure or refused to obey an Illegal Order and that such activity was a contributing factor in the alleged Adverse Personnel Action. If the Complainant has met that standard, the burden of proof shifts to the supervisor, manager, or University to demonstrate by Clear and Convincing Evidence that the alleged Adverse Personnel Action would have occurred for legitimate, independent reasons even if the Complainant had not made a Protected Disclosure or refused to obey an Illegal Order. If that burden is not met, the employee shall have a complete affirmative defense to the Adverse Personnel Action that was the subject of the complaint.

Consistent with California Government Code Section 8547.10(d), nothing in this policy is intended to prevent a manager or supervisor from taking, directing others to take, recommending, or approving any personnel action or from taking or failing to take an Adverse Personnel Action with respect to any employee or applicant for employment if the manager or supervisor reasonably believes any action or inaction is justified on the basis of evidence separate and apart from the fact that the person has made a Protected Disclosure or refused to obey an Illegal Order.

2. Special Evidentiary Standard for Employees in the University's Health Facilities

When the Complainant is an employee of one of the University's inpatient health facilities (i.e., facilities to which persons are admitted for a 24-hour stay or longer) and brings a Retaliation Complaint, the LDO will determine whether the special evidentiary standard set forth in Section 1278.5 of the California Health and Safety Code applies.

F. Decision by the Chancellor

1. The LDO will present the investigation report to the Chancellor, who will render a decision applying the evidentiary standards set forth in Section E. above. The Chancellor may request that the investigator conduct further investigation or clarify information in the investigation report before the Chancellor renders a decision. The Chancellor will issue a written decision and send it to the Complainant and to the accused employee(s).
2. If the Chancellor determines that retaliation in violation of this policy occurred and that the Complainant was harmed as a result, the Chancellor will award any

appropriate relief, which will be identified in the Chancellor's written decision provided to the Complainant. However, the written decision will not describe any action that may be taken against an employee found to have violated this policy.

3. Absent extenuating circumstances, the Chancellor's written decision will be issued and sent to the Complainant no later than 18 months after the Retaliation Complaint was initially filed.

G. Consequences for a University Employee Who Violated the Policy

In those cases where the Chancellor has decided that an employee has violated this policy, the Chancellor, through the appropriate channels, will determine the appropriate action(s) to be initiated, which may include disciplinary action against that employee. If the employee is not a member of the Academic Senate, any disciplinary action will be in accordance with the applicable personnel policy or collective bargaining agreement. If the employee is a member of the Academic Senate, any disciplinary proceedings will be undertaken in accordance with the academic personnel policies and the procedures established by the Academic Senate.

H. Referral of Complaints to the Office of the President

1. When a complaint filed under this policy alleges that the Chancellor, the LDO, the LDO's supervisor, or the location's Audit Director, Chief Compliance Officer or Chief Campus Counsel engaged in retaliation, the LDO will request that the Systemwide LDO accept the complaint for processing by the Office of the President.
2. In other special circumstances, the LDO may request that the Systemwide LDO accept a complaint for processing at the Office of the President and explain why it would be more appropriate to have the complaint processed at the Office of the President than at the location.
3. If the Systemwide LDO accepts a complaint for processing at the Office of the President, the Systemwide LDO will conduct the preliminary review in accordance with Section D.1., notify the accused employee(s) in accordance with Section D.2., and will refer complaints accepted for processing to an RCO for investigation in accordance with Sections D.3. and D.4. above. The RCO will present the investigation report to the Systemwide LDO for a decision in accordance with Section F. above. If the Systemwide LDO concludes that an employee has violated this policy, the Systemwide LDO will refer the matter to the appropriate official at the employee's location to initiate appropriate action in accordance with Section G. above, except in cases where an adverse finding involves the Chancellor, in which case the Systemwide LDO will refer the matter to the President.

I. Appeals

The Complainant has no right to appeal a decision on the merits of a complaint or any remedy that may be awarded. However, the Complainant may appeal the dismissal of a complaint in whole or in part because it was untimely or lacked required allegations. Such appeals must be made in writing and filed with the Systemwide LDO within 30 calendar days of the date of the LDO's notice of dismissal. If the dismissal decision was made by the Systemwide LDO, the President will designate an alternative official at the Office of the President to resolve the appeal. The appeal must state why the dismissal should be overturned and must include copies of the complaint, the notice of dismissal, and the documents and other evidence that support the appeal. An appeal is considered "filed" on the date it is postmarked, personally delivered, faxed, or emailed.

J. Reporting Requirements

Each location will submit a copy of the local procedures implementing this policy to the Senior Vice President – Chief Compliance and Audit Officer. Additionally, each location will provide information regarding complaints filed under this policy and their status to the Senior Vice President – Chief Compliance and Audit Officer using the method established by him or her for this purpose.

IV. COMPLIANCE / RESPONSIBILITIES

See Section III.J.

V. PROCEDURES

Applicable procedures are outlined throughout the policy text in Section III.

VI. RELATED INFORMATION

- [University of California Policy on Reporting and Investigating Allegations of Suspected Improper Governmental Activities \(Whistleblower Policy\)](#) (referenced in Sections II., III.A., III.B.1., III.D.1.a., III.D.1.b., III.D.4.c.iv., and III.D.1.c.)

VII. FREQUENTLY ASKED QUESTIONS

Not applicable.

VIII. REVISION HISTORY

This policy was last revised on October 4, 2002.

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