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PERSPECTIVE

Offsetting the delays faced by victims of workplace retaliation

By Aaron L. Osten

A major deficiency under the current whistleblower protections is the time-consuming litigation process subjecting aggrieved employees to years of litigation before potential redress. Throughout the litigation, the employee is left bearing the consequences of the retaliation: job loss, demotion and/or working under hostile conditions. By the time of trial, they have already endured the ramifications, often being forced to find employment elsewhere. Unfortunately, with the current state of the courts due to the COVID-19 pandemic, the impact upon the already existing delays has never been greater, leaving many victims of retaliation in limbo.

Recognizing the chilling effects prolonged litigation has on potential whistleblowers, the Legislature enacted Senate Bill 306, effective Jan. 1, 2018, which provides an opportunity for injunctive relief for such aggravated employees. Pursuant to California Labor Code Sections 1102.61 and 1102.62, a plaintiff “in any civil action or administrative proceeding” may petition the court for injunctive relief. Upon a showing of “reasonable cause” that retaliation has occurred, the court “shall” issue injunctive relief as it “deems just and proper.” This broad scope allows the opportunity to seek maximum relief, such as job reinstatement, lost wages and even “tax neutralization,” which is a doctrine “to offset the increased tax burden on plaintiff resulting from a lump sum award of damages as compared to what Plaintiff would have owed in taxes if the earnings had been received sequentially each year.” *Kenneth Economy v. Sutter East Bay Hospitals*, 31 Cal. App. 5th 1147, 1149 (2019). As a result, a whistleblower can return to work

and receive a paycheck and compensation while waiting for their day in court.

An order issuing injunctive relief pursuant to Section 1102.61 cannot be stayed pending any appeal (Section 1102.62(e)), offsetting the additional hardship and delays often suffered by a prevailing plaintiff who faces a lengthy appeal process after verdict. Accordingly, Sections 1102.61 and 62 combat the inevitable, and often unjust, landscape of length litigation by providing whistleblowers pursuing claims under Section 1102.5 the right to seek expedited injunctive relief in advance of trial.

Many employees know that raising a complaint in the workplace can trigger retaliation, including discharge, followed by years of sluggish litigation. Employees often are discouraged from speaking out, finding it easier to keep their head down. Section 1102.62 requires a court determining whether to issue injunctive relief to “consider the chilling effect on other employees asserting their rights.” Cal. Labor Code Section 1102.62(b). As most whistleblower complaints are tied to a larger public issue, there often exists more employees who have encountered the wrongdoing with a desire to speak up.

Despite its enactment in 2018, the injunctive relief available under Sections 1102.61 and 1102.62 appears to have been heavily unused by plaintiffs. There is a significant absence of case law on point. The “reasonable cause” standard is not defined. Arguably, “reasonable” would suggest that a simple “more likely than not” standard should apply, or that the employee must have a reasonable belief they have been subjected to retaliation, as used under Labor Code Section 1102.5(b). This point will surely be met with

opposition, since injunctive relief ordinarily requires making a series of showings to a court, including the lack of an adequate remedy at law and irreparable harm absent injunctive relief. Cal. Code of Civil Proc. Section 526(a). Yet, one could argue the presence and recent addition of Sections 1102.61 and 62 is evidence of the precise irreparable harm which arises absent injunctive relief. *See It Corp. v. County of Imperial*, 35 C. 3d 63, 72 (1983) (the very existence of the statute creates a rebuttable presumption that irreparable harm will take place, since the Legislature has already decided that the activity prohibited by the statute is contrary to the public interest).

The Senate Judiciary Committee Session regarding SB 306 explored the legislative intent behind Sections 1102.61 and 62, stating that the existing whistleblower protections “are only as good as their timely enforcement” and that due to delays in litigation, “unless the aggrieved employee is returned to work or made whole immediately, co-workers will stop reporting crime and the harm caused often cannot be undone.” “Even if the worker is fully compensated in the end, the prospect of enduring these consequences in the meantime can act as a deterrent, discouraging workers from asserting their lawful rights in the workplace.” Senate Judiciary Committee, April 4, 2017- pages 1, 4-5.

Indeed, timing is critical. While the petition can be brought at any time, diligent discovery must be done to uncover and assemble the evidence necessary for the petition. Similarly, filing well in advance of trial, should injunctive relief be granted, maximizes the benefits to your client. Striking a balance between prudent discovery and timely filing is key. The petition will also force defendants to show their hand in opposing

the merits, potentially exposing trial strategies or theories which would otherwise be kept under wraps.

The ripple effect of this statute could drastically increase leverage by a whistleblower during litigation, while simultaneously curtailing meritless motion practice simply designed to delay. The threat of being ordered to reinstate and/or pay a whistleblower well before trial could effectively drive settlement talk. It will likely make defendant employers and attorneys think twice before retaliating, terminating or dragging out litigation against a whistleblower with valid claims.

The downside of pursuing a petition under Sections 1102.61 and 62 appears minimal, while the potential benefits to a successful petition appear significant. It could prove to be a heavy and effective tool for whistleblowers treading through stagnant litigation, particularly in the current pandemic paralyzing the courts and delaying trials for the indefinite future. ■

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