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February 19, 2014

Susan Carlson
Vice Provost
Department of Academic Personnel
Office of the President
University of California
1111 Franklin, 11th Floor
Oakland, CA 94607

Re: Proposed Revisions to the Whistleblower Protection Policy

Dear Susan:

Enclosed is a draft of the University of California Policy for Protection of Whistleblowers from Retaliation and Guidelines for Reviewing Retaliation Complaints (Whistleblower Protection Policy or WPP) that reflects the proposed revisions to this policy.

The Office of the General Counsel drafted the proposed revisions, working in consultation with the Senior Vice President and Chief Compliance and Audit Officer, the Systemwide Locally Designated Official, and the Director of Investigations. An earlier draft was circulated to the Locally Designated Officials (LDOs) at the campuses and medical centers and was the centerpiece of a day-long meeting with the LDOs at the Office of the President in March 2012. Input regarding the proposed revisions was also solicited from the University attorneys who are based at the campuses and medical centers.

Overview of the Changes

Revision of the Whistleblower Protection Policy (WPP) was undertaken with two primary objectives in mind:

- Ensure that complaints filed under the WPP will be processed within 18 months, given an amendment to the California Whistleblower Protection Act (the "Act") that became

effective January 1, 2011. The Act requires that, before a plaintiff who is a University employee or applicant for University employment may file a lawsuit for damages as a result of whistleblower retaliation, he or she must first file an administrative complaint internally at the University. The Act already permitted the plaintiff to proceed with a lawsuit for damages if the University failed to reach a decision on the administrative complaint within the time frame established for that purpose by the Regents. With the amendment to the Act, a plaintiff now may also proceed with a lawsuit for damages if the University has not “satisfactorily addressed” the administrative complaint within 18 months. Accordingly, the proposed revisions to the WPP are intended to ensure that complaints filed under the WPP are addressed within 18 months.

- Address difficulties in the administration of the WPP and better explain how the process operates, thereby making it easier to administer and improving the experience for complainants.

The primary source of delay and administrative difficulties has been the current WPP’s abeyance/joinder process. Specifically, if a complainant wishes to file a whistleblower retaliation complaint under the WPP and also under another University grievance process,¹ the current policy requires that the complaint filed under the WPP be placed in abeyance until the other process reaches the fact-finding or hearing stage, at which time the two processes are joined. While the abeyance/joinder process was implemented to avoid having separate University processes duplicate effort, the experience of the last decade indicates that whatever benefits have been achieved in that regard have been outweighed by the negatives. In particular, the WPP provisions setting forth the abeyance/joinder process are complex and therefore difficult to understand, and they have proved cumbersome to administer. Moreover, the fact that the WPP process is initially “on hold” in these dual-filing situations has frustrated complainants, causing them to feel that justice delayed is justice denied.

In light of the foregoing, the proposed revisions of the WPP will “uncouple” the WPP from the other grievance processes available to a complainant for filing a complaint regarding whistleblower retaliation. As a result, the WPP complaint process will be able to proceed expeditiously even when a complainant has exercised his/her right to also file a complaint regarding whistleblower retaliation under another University process. Because of the uncoupling, the revised policy can present a more linear explanation of the whistleblower retaliation complaint process, which will be more user-friendly for both complainants and administrators.

Notable Revisions:

- A. Section II. – Definitions (Section II. in current policy). Definitions have been alphabetized, a few definitions have been added (Adverse Personnel Action, Complainant, Employee, Sworn

¹ For Academic Personnel, this would be the processes available under Senate Bylaw 335, APM-140, or an applicable collective bargaining agreement.

Statement), and a few definitions have been modified (Improper Governmental Activity, Interference, Protected Disclosure, Retaliation Complaint, Use of Official Authority or Influence). These changes enable the streamlining of policy language and increase transparency.

B. Section III.B. – Authority and Responsibilities (Section III. in the current policy).

Subsections were added and text was revised to better reflect how the WPP process is administered. Noteworthy changes include:

1. The Chancellor subsection, rather than the Local Procedures subsection, explains who stands in the shoes of the Chancellor for the Laboratory, the Office of the President, and the Division of Agriculture and Natural Resources.
2. The Locally Designated Official (LDO) subsection no longer describes the preliminary review conducted by the LDO as that information is set forth in Section III.D.1., entitled “Preliminary Review by the LDO.” This subsection expressly designates the LDO as the official responsible for ensuring that complaints are processed in a timely manner.
3. A subsection regarding the Systemwide LDO was added and provides that the President will appoint the Systemwide LDO. The current policy states that the Senior Vice President – Business and Finance serves in this role, but a Presidential delegation of authority changed that several years ago. Therefore, this change corresponds with current practice. Consistent with the current policy, this subsection also explains that, when the Complainant is a current or former academic employee (or an applicant for an academic position) or the accused is an academic employee, the duties of the Systemwide LDO will be the responsibility of the Provost and Executive Vice President – Academic Affairs.
4. A subsection regarding the Investigations Workgroup was added to explain who may be part of this group and to clarify the role it may play.

C. Section III.C. – Filing a Retaliation Complaint (Where, When and How to File). This new section articulates what must be included in a complaint. The required allegations are presented more clearly than is the case in Section IV.D. of the current policy. This will make it easier for complainants to draft complete complaints at the outset, thereby decreasing the amount of time spent seeking additional information and clarification from complainants before a complaint can be accepted for processing under the WPP.

D. Section III.D. – Processing a Complaint. This new section provides a roadmap of the WPP process.

1. Subsection III.D.1 explains the preliminary review of the complaint that the LDO conducts and includes these important features:
 - i. The LDO will notify a complainant of deficiencies in the complaint, such as the absence of a Sworn Statement or the failure to include any of the required allegations, and give the complainant an opportunity to cure those deficiencies.
 - ii. Complaints that do not meet the criteria for processing under the WPP (e.g., when they lack the required Sworn Statement or are untimely) will nevertheless be reviewed by the LDO to determine whether they should be processed under the

Whistleblower Policy, thereby ensuring violations of University policy are addressed even if the stricter filing requirements of the WPP are not met.

- iii. The complainant will be advised in writing when the complaint is accepted for processing under the WPP and, if only parts of the complaint are accepted, that will be indicated, as well as the reason for the dismissal of any parts of the complaint.
 2. Subsection III.D.2 of the draft provides that the accused employee will be notified of the Retaliation Complaint and investigation when the investigation is initiated and will also be provided with a copy of the Retaliation Complaint at that time. While current policy (Section VI.C.) requires that the accused employee be provided with a copy of the complaint before findings are reached, providing the complaint earlier in the process will give the accused employee more notice and increase the transparency of the process.
 3. Subsection III.D.4 explains key elements of the Investigation, which will be conducted by the Retaliation Complaint Officer (RCO) or other investigator. Notable provisions are discussed below.
 - i. The investigator will, whenever possible, interview both the Complainant and the accused employee.
 - ii. As in current policy (Section VI.3.C.), the accused employee will have an opportunity to submit a written response to the Retaliation Complaint to be included in the record submitted to the Chancellor. However, the requirement that the investigator provide the accused employee with a copy of all documents on which s/he intends to rely in reaching findings has been eliminated.
 - iii. Rights and obligations of witnesses are addressed:
 - (1) The Complainant, the accused employee, and other witnesses must be allowed a reasonable amount of paid time off to participate in interviews.
 - (2) The Complainant, the accused employee(s), and other witnesses have a duty to cooperate with the investigator.
 - (3) The investigator is authorized to conclude the investigation based on the information available if the Complainant or an accused employee fails or refuses to be interviewed.
 - iv. The essential elements of an investigation report are identified.
 - v. The time frame for the investigation is established. The clock will start from the time that the LDO notifies the complainant that the complaint has been accepted for processing. Under current policy, the clock starts when the complaint is referred to the investigator, which is not always known to the complainant. It is contemplated that an investigation will be completed within 6 months of acceptance of the complaint, although the LDO may grant extensions upon request. Importantly, Section I and Section III.F. of the draft require that the complaint be resolved within 18 months of filing. There is no analogous deadline in the current policy.
- E. Section III.E. – Evidentiary Standards (Section V.A. in the current policy). The evidentiary standards remain the same, but the explanation is a more straightforward.
- F. Section III.F. – Decision by the Chancellor. This would replace Section VII in the current policy and is simplified because the WPP will be uncoupled from the other grievance

processes. This Section requires that the Chancellor's decision be issued no later than the 18 months after the complaint was initially filed.

- G. Section III.G. – Consequences for a University Employee Who Violated the Policy. This would replace Section VII.C. of the current policy, which is entitled “Corrective Action of a University Employee.” The new language contemplates that actions other than or in addition to disciplinary consequences could be warranted for an employee found to have violated the WPP. As in current policy, any disciplinary action would be taken in accordance with the existing staff or academic personnel procedures applicable to the employee.
- H. Section III.H. – Referral of Complaints to the Office of the President. While the current policy does identify situations when a complaint should be referred to the Office of the President for handling (Sections IV.B.4., VI.F., and VII.D.), the draft consolidates this information in one section to improve clarity. Because the WPP is being uncoupled from the other grievance processes, this information can also be simplified. The current policy states that, when a complaint is against the Chancellor, LDO, or the LDO's supervisor, the LDO shall request that it be handled at the Office of the President. The draft adds complaints against a Chief Campus Counsel to this list. A new provision authorizes an LDO to request that other complaints be processed at the Office of the President, when appropriate. A new provision clarifies that, when a complaint is processed at the Office of the President and a policy violation is found, the matter is referred back to the location to initiate appropriate action, except in cases where an adverse finding involves the Chancellor, in which case the matter will be referred to the President.
- I. Section III.I. – Appeals (Section VIII of the current policy). The permissible grounds for appeal and the fact that appeals on the merits are not allowed are stated in a more straightforward and user-friendly way than in current policy. A deadline for appeals (within 30 days of the local decision) has been added. This Section expressly states what must be part of the appeal (a statement regarding why the local decision should be overturned and copies of the complaint, the local decision, and the documents and other evidence that support the appeal). This specificity gives the Complainant guidance to prepare a viable appeal and ensures that the Office of the President will have the necessary information to resolve the appeal.
- J. Section III.J. – Reporting Requirements. This would replace Section IX of the current policy, which is entitled “Reports.” Instead of requiring that each location provide a report on July 31 of each year summarizing the number of whistleblower retaliation complaints filed and their disposition, the draft gives the Senior Vice President/Chief Compliance and Audit Officer the flexibility to request that locations provide information regarding complaints filed under the WPP and their status in the method s/he establishes for this purpose.
- K. Complaints alleging interference in violation of the WPP will be processed under the Whistleblower Policy, rather than the WPP, as stated in Section I of the draft.

Susan Carlson
February 19, 2014
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If you have any questions regarding the foregoing or the proposed revisions, please let me know.

Very truly yours,



Stephanie Leider

Enclosure

cc: Sheryl Vacca, Senior Vice President and Chief Compliance and Audit Officer
Karen Petrulakis, Chief Deputy General Counsel