

October 4, 2002

**UNIVERSITY OF CALIFORNIA
POLICY FOR PROTECTION OF WHISTLEBLOWERS FROM RETALIATION AND
GUIDELINES FOR REVIEWING RETALIATION COMPLAINTS
(WHISTLEBLOWER PROTECTION POLICY)**

I. Policy

The University of California is committed to protecting employees and applicants for employment from interference with making a protected disclosure or retaliation for having made a protected disclosure or for having refused an illegal order as defined in this policy. This policy is derived from the California Whistleblower Protection Act (Government Code Sections 8547-8547.12). Pursuant to this code section, a University employee may not: (1) retaliate against an employee or applicant for employment who has made a protected disclosure or who has refused to obey an illegal order, nor (2) directly or indirectly use or attempt to use the official authority or influence of his or her position or office for the purpose of interfering with the right of an applicant or an employee to make a protected disclosure to the University Auditor, the employee's immediate supervisor or other appropriate administrator or supervisor within the operating unit, the locally designated University official as defined in the University's Whistleblower Policy, or the State of California Bureau of State Audits about matters within the scope of this policy. It is the intention of the University to take whatever action may be needed to prevent and correct activities that violate this policy.

II. Scope of Policy and Definitions

This policy applies to complaints of retaliation or interference filed by employees or applicants for employment who have made or attempted to make a protected disclosure ("whistleblowers") or refused to obey an illegal order, as defined below.

Local retaliation complaint resolution procedures shall incorporate the following definitions.

A. Improper Governmental Activity

Any activity undertaken by the University or by an employee that is undertaken in the performance of the employee's official duties, whether or not that action 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 University property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of University property and facilities, or willful omission to perform duty, or (2) is economically wasteful, or involves gross misconduct, gross incompetence, or gross inefficiency.

B. Protected Disclosure

Any good faith communication that discloses or demonstrates an intention to disclose information that may evidence either (1) an improper governmental activity or (2) any 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.

C. Illegal Order

Any directive to violate or assist in violating an applicable federal, state, or local law, rule, or regulation or any 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.

D. Interference

Direct or indirect use of authority to obstruct an individual's right to make a protected disclosure.

E. 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, suspension, or other disciplinary action.

F. Retaliation Complaint

Any written complaint by an employee or an applicant for employment which alleges retaliation for having made a protected disclosure or for having refused an illegal order or interference with an attempt to make a protected disclosure, together with a sworn statement, made under penalty of perjury, that the contents of the complaint are true or are believed by the complainant to be true.

III. Authority and Responsibilities

A. Local Procedures

The Chancellor¹ shall establish local retaliation complaint resolution procedures in accordance with this policy. Authorities and responsibilities delegated to the Chancellor are assumed by the Laboratory Directors, the Senior Vice President—Business and Finance, and the Vice President—Agriculture and Natural Resources for employees within their respective jurisdictions.

¹ For the purpose of this policy, the Chancellor also means the Laboratory Directors for the Lawrence Berkeley National Laboratory, the Lawrence Livermore National Laboratory, and the Los Alamos National Laboratory; the Senior Vice President—Business and Finance; and the Vice President—Agriculture and Natural Resources.

B. Locally Designated Official (LDO)

The Chancellor shall appoint a Locally Designated Official (the LDO) to receive retaliation complaints and administer local implementing procedures. The LDO (or designee) shall determine (1) whether a complaint is timely; (2) whether it sets forth the necessary facts to support a claim of retaliation for having made a protected disclosure, having disobeyed an illegal order, or interference with the right to make a protected disclosure; and (3) whether a complaint is eligible for processing under University grievance or complaint resolution procedures available to the complainant (as noted in Section IV.A. below). The LDO may be the same official designated to administer local procedures for investigating whistleblower complaints.

C. Retaliation Complaint Officer (RCO)

The LDO may appoint one or more individuals or a standing body to serve as Retaliation Complaint Officer(s) to oversee the investigation of complaints filed by employees and applicants for employment alleging interference with or retaliation for making a protected disclosure or for refusing to obey an illegal order. The RCO may delegate conduct of the investigation, including any factfinding, to another person. The term “RCO” as used in this policy includes the person to whom the investigation may be delegated.

D. Chancellor

The Chancellor renders a decision when the RCO conducts an investigation and determines the appropriate corrective action, if any, as set forth in Section VII.C. below. The Chancellor may delegate his or her duties under this policy.

IV. Filing a Complaint

A retaliation complaint (grievance plus sworn statement) may be filed (A) under an applicable grievance or complaint resolution procedure, (B) with the LDO, or (C) with the employee’s supervisor. Threshold requirements for filing a retaliation complaint are described in Section IV.D. below. Employees who elect to file a grievance unaccompanied by a sworn statement made under penalty of perjury that its contents are true or are believed to be true are not covered by the retaliation provisions of the California Whistleblower Protection Act.

A. Filing Pursuant to an Applicable Grievance or Complaint Resolution Procedure

A retaliation complaint (grievance plus sworn statement) may be filed pursuant to the applicable personnel policy or collective bargaining agreement grievance or complaint resolution procedure. The individual designated locally to receive grievances (i.e., grievance liaison) pursuant to academic or staff personnel policies, or collective bargaining agreements, shall provide the LDO with a copy of the retaliation complaint. If the grievance is not accompanied by a sworn statement, but raises issues of retaliation covered by this policy, then the grievance liaison shall provide the LDO with a copy of the grievance. Campus procedures shall specify the individual responsible for advising the complainant of his or her rights to file a whistleblower retaliation complaint and the timeframe for filing. Local procedures shall refer to the following grievance and complaint resolution policies and/or their respective implementing procedures:

1. **Academic Personnel:** Academic personnel may file complaints alleging retaliation, if eligible, as follows:
 - a. Members of the Academic Senate Senate Bylaw 335
 - b. Non-Senate Academic Personnel APM - 140
 - c. Exclusively Represented Academic Personnel The applicable collective bargaining agreement
2. **Staff Personnel:** Staff personnel may file complaints alleging retaliation, if eligible, as follows:
 - a. Senior Managers PPSM II-70
 - b. Managers and Senior Professionals, Salary Grades VIII and IX PPSM 71
 - c. Managers and Senior Professionals (except Salary Grades VIII and IX) and Professionals and Support Staff PPSM 70
 - d. Exclusively Represented Staff Personnel The applicable collective bargaining agreement

B. Filing with the LDO

A written retaliation complaint may be filed directly with the LDO. A retaliation complaint filed with the LDO must be filed within 12 months of the alleged act or threat of interference or retaliation. If the complaint alleges a pattern of retaliation, the complaint must be filed within 12 months of the most recent alleged act or threat of interference or retaliation.

1. If the complaint received by the LDO is eligible for review under an existing grievance or complaint resolution procedure and the complainant also elects to file under the applicable grievance or complaint resolution procedure, the LDO will hold the retaliation complaint in abeyance until all of the steps preceding hearing, arbitration, or factfinding have been completed. (For example, under a collective bargaining agreement, the whistleblower retaliation complaint is joined with the grievance when the grievance advances to arbitration under the applicable procedure.) At that point in the review process, the retaliation complaint will be joined with the applicable procedure and referred to the RCO for handling as described in Section VI.A.3. below.
2. If a complaint received by the LDO is eligible for review under an existing grievance or complaint resolution procedure but the complainant elects not to file, the complaint will be referred to the RCO for investigation at the end of the grievance filing period.

3. The LDO shall refer a complaint to the RCO for investigation under the following conditions:
 - a) The complaint is not within the scope of or filed within the time limits of the complaint resolution procedure available to the complainant under applicable University personnel policies, collective bargaining agreements, or procedures established by the Academic Senate; or
 - b) The employee does not have a complaint resolution procedure available for some other reason (for example, the alleged retaliatory act cannot be grieved under the respective collective bargaining agreement); or
 - c) The complainant is an applicant for employment.
4. If a complaint that is normally eligible for investigation by the RCO alleges that the Chancellor, the LDO, or the LDO's supervisor interfered or took the retaliatory action, the LDO or designee shall request:
 - a) that the Senior Vice President—Business and Finance appoint a RCO when the complainant is a current employee in or applicant for a staff or management position; or
 - b) that the Provost and Senior Vice President—Academic Affairs appoint a RCO when the complainant is a current appointee in or applicant for an academic position.

C. Filing with a Supervisor

A written complaint filed with a supervisor shall be referred by the supervisor to the LDO and processed in accordance with Section IV.B. above.

D. Filing Requirements and Thresholds

1. The retaliation complaint filed with the LDO or the supervisor must set forth in sufficient detail the necessary facts including dates and names of relevant persons. The complaint must contain facts supporting the filing thresholds as set forth below in Sections IV. D. 2. a) through c), the alleged retaliatory act(s), and the effects on the complainant of the alleged retaliatory acts. The LDO may require the complainant to amend the complaint to provide sufficient detail. If the complainant does not amend the complaint to correct the insufficiencies identified by the LDO within a reasonable timeframe, as established in local procedures, the complaint may be dismissed by the LDO.
2. In order for a retaliation complaint to be accepted, the complainant must allege that:
 - a) he or she filed a report or made a protected disclosure alleging improper governmental activities pursuant to current University policy; or

- b) he or she was threatened, coerced, commanded, or prevented by intimidation from filing a report of improper governmental activities; or
 - c) he or she refused to obey an illegal order.
3. The LDO may consult with the local Investigations Workgroup in determining whether the alleged disclosure is a protected disclosure, and in determining whether an alleged order was an illegal order if the complaint is otherwise eligible for review.

V. Administrative Proceedings

A. Evidentiary Standards

1. Pursuant to California Government Code Section 8547.10(e) an arbitrator, University or non-University hearing officer, or University committee that hears a retaliation complaint shall be instructed that once the complainant demonstrates by a preponderance of the evidence that he or she engaged in activity protected by the University's Whistleblower Policy and that such activity was a contributing factor in the alleged retaliation, the burden of proof shall be on the supervisor, manager, or University to demonstrate by clear and convincing evidence that the alleged retaliatory action would have occurred independent of the employee's engagement in a protected disclosure or refusal of an illegal order. If the complaint is investigated by a factfinder, the factfinder shall find facts concerning the burden of proof so that the Chancellor is able to make this determination. If the University fails to meet this burden, the employee or applicant for employment shall have a complete affirmative defense to the adverse action which was the subject of the complaint.
2. However, pursuant to California Government Code Section 8547.10(d), a manager or supervisor is not prevented from taking, directing others to take, recommending, or approving any personnel action or from taking or failing to take a 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.

B. Special Evidentiary Standards for Health Care Workers

Pursuant to Section 1278.5 of the California Health and Safety Code, discriminatory treatment (as defined in the Section) of a health care worker for having presented a grievance or complaint, or having initiated, participated, or cooperated in any investigation or proceeding against the health facility on issues relating to care, services or condition of the health facility, if the health facility had knowledge of such action, shall raise a rebuttable presumption that discriminatory action was taken in retaliation, if the discriminatory action occurs within 120 days of the filing of the grievance or complaint.

VI. Complaints Investigated by the RCO

- A. When an employee files a complaint which contains an eligible allegation of retaliation under an existing University grievance or complaint resolution procedure, the RCO shall investigate the allegation of retaliation or interference as provided below:
1. If the complaint is filed under a complaint resolution procedure containing factfinding as specified in University policies as part of the final available step (e.g., Staff Policies 70, 71, and II-70 for some issues), the RCO will serve as the factfinder.
 2. If the complaint is filed under a grievance procedure in personnel policy, a collective bargaining agreement, or under procedures established by the Academic Senate, but is not eligible under that policy, collective bargaining agreement, or procedure for arbitration, hearing, or factfinding, the RCO will investigate the complaint after exhaustion of the available steps of the policy, collective bargaining agreement, or Academic Senate procedure. The investigation and findings will be limited to the interference or retaliation aspect of the complaint only.
 3. If the complaint is heard before an arbitrator, University or non-University hearing officer, or University committee, the RCO will receive a copy of that decision. If the decision does not include findings regarding the alleged interference or retaliation, the RCO shall request that the arbitrator, University or non-University hearing officer, or University committee revise the report to include findings regarding the alleged interference or retaliation. If the arbitrator, University or non-University hearing officer, or University committee subsequently fails to include such findings in the report, the RCO will conduct a separate investigation on that issue only.
- B. When no University grievance or complaint resolution procedure is available to the complainant, the RCO will conduct the investigation.
- C. Before findings are reached, the RCO (or factfinder, if the RCO has delegated conduct of the investigation) shall provide a copy of the complaint and any documents on which the RCO (or factfinder) intends to rely in reaching findings to the person accused of interference or retaliation. That person shall be provided the opportunity, within locally established time limits, to respond to the complaint and to file a written statement which the RCO (or factfinder) will make part of the record submitted to the Chancellor.
- D. The RCO shall present findings of fact based on the evidence and factual conclusions to the Chancellor within 120 days from the date on which the complaint was assigned to the RCO unless an extension is granted by the LDO.
- E. When an employee has filed a complaint under an applicable personnel policy or collective bargaining agreement grievance or complaint resolution procedure (1) which alleges retaliation for an action protected by this policy, and (2) a final University decision within the meaning of the applicable complaint resolution policy or collective bargaining agreement has been rendered, and (3) the employee later files a timely whistleblower retaliation complaint, the RCO shall review the decision. If there is

a finding of retaliation, the RCO shall review it to ensure that the remedy is consistent with the policy, and if not, the RCO shall make a recommendation to the Chancellor. If there is no finding of retaliation, the LDO shall request that the hearing officer, committee, or arbitrator reopen the case and apply the standard of proof specified in Section V. above, and if necessary, find additional facts for application of the standard. If the foregoing does not occur, the RCO shall find additional facts, if necessary, for application of the standard of proof specified in Section V. above. The case shall then be forwarded to the Chancellor for a decision.

- F. When it is alleged that the Chancellor, the LDO, or the LDO's supervisor interfered or took the retaliatory action, the Senior Vice President—Business and Finance or the Provost and Senior Vice President—Academic Affairs, whichever applies, shall appoint an RCO to undertake the investigation consistent with the provisions of Section VI.A. through E., above. The RCO shall present findings of fact based on the evidence and factual conclusions to the Senior Vice President—Business and Finance or the Provost and Senior Vice President—Academic Affairs, as appropriate, for a decision. The RCO's findings shall be presented within 120 days from the date on which the complaint was assigned to the RCO unless an extension is granted by the Senior Vice President—Business and Finance or Provost and Senior Vice President—Academic Affairs.

VII. Decision

A. Decision Based on Findings of an Arbitrator, University or Non-University Hearing Officer, or University Committee

1. The RCO shall be provided with a copy of the decision in those cases in which the complaint was heard before an arbitrator, University or non-University hearing officer, or University committee.
2. When there are findings that interference or retaliation has occurred, the RCO will provide that information to the Chancellor. If the decision is final and binding, the Chancellor may not alter the decision in any way, but may through the appropriate channels initiate corrective action against the University employee who interfered or retaliated based on the findings in the decision.

B. Decision Based on Findings of an Investigation Conducted by the RCO

1. The RCO is to present findings of fact based on the evidence and factual conclusions to the Chancellor who shall render a decision in the matter consistent with the standard of proof specified in Section V. above. The Chancellor may remand the findings to the RCO if further investigation is needed before making a decision. The Chancellor will communicate the decision in writing to the complainant and to the person or persons accused of violating the University's Whistleblower Protection Policy.
2. The Chancellor's written decision will include any appropriate relief for the complainant, but will not describe any corrective action which may need to be taken.

C. Corrective Action of a University Employee

The Chancellor through the appropriate channel, or in the case of Academic Senate members the appropriate Senate Committee, determines the appropriate corrective action, if any, which will be initiated against a University employee who is found to have retaliated against or interfered with an employee's or applicant's right to make a protected disclosure or to refuse an illegal order. Such action shall be in accordance with the applicable personnel policy or collective bargaining agreement. For a member of the Academic Senate, disciplinary proceedings are in accordance with academic personnel policies and procedures established by the Academic Senate.

D. Complaint Against the Chancellor, the LDO, or the LDO's Supervisor

With regard to complaints in which it is alleged that the Chancellor, the LDO, or the LDO's supervisor interfered or took retaliatory action, the findings of the investigation shall be presented for a decision to the Senior Vice President—Business and Finance or the Provost and Senior Vice President—Academic Affairs, in accordance with Section VI.F. above.

VIII. Appeal

An employee may appeal the local decision only on the basis that the complaint was ineligible for processing because it was untimely filed and/or the complaint did not qualify for review under the scope of this policy to:

- A. the Senior Vice President—Business and Finance if the complainant is a current employee in or applicant for a staff or management position; or
- B. the Provost and Senior Vice President—Academic Affairs if the complainant is a current appointee in or applicant for an academic position.

IX. Reports

Each location shall submit a copy of local procedures implementing this policy to the Office of the Senior Vice President—Business and Finance. Additionally, on July 31 of each year, each location shall submit to the Senior Vice President—Business and Finance a report summarizing the number of whistleblower retaliation complaints filed during the preceding fiscal year and their disposition. The Office of Human Resources and Benefits will provide a reporting format for this purpose.