

# CALIFORNIA

## EMPLOYMENT LAW LETTER

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### WHISTLEBLOWING

## **Military attorney adequately protected by whistleblower statute**

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*An attorney in the California National Guard alleged that his superiors retaliated against him after he filed a complaint with the California State Bar. His statutory whistleblower allegation was referred outside his chain of command to Governor Edmund G. Brown, Jr., and resulted in an investigation by the U.S. Army's inspector general. The attorney sued to compel the governor to conduct an investigation, but the trial court and the court of appeal denied the attorney's claim.*

### ***Judge advocate blows the whistle***

Major Dwight D. Stirling serves in the California National Guard and works as a part-time judge advocate in the California Military Department (CMD). In March 2014, he reported to the California State Bar that nonattorneys were practicing law in the CMD's legal department.

Stirling claimed that after he filed the complaint, the CMD retaliated against him by initiating a "secretive professional responsibility investigation" against him, reassigning him to a remote facility and directing

him to work alone, and "flagging" him, which is an unfavorable personnel action that prevents him from being promoted and receiving awards, schooling, and other administrative benefits. He alleged that the CMD's retaliation "stunted" his career, causing irreparable damage to his earning capacity and professional reputation.

In January 2015, Stirling filed a whistleblower allegation under California's Military Whistleblower Protection Act. Because Stirling's supervisor at the time was the acting California Military Department inspector general, his allegation was referred outside the chain of command to Governor Brown, who did not investigate the matter.

The inspector general also referred Stirling's allegation to the chief of the National Guard Bureau, who turned it over to the U.S. Army's inspector general's office, which initiated an investigation. Stirling filed a petition to compel the governor to act on his whistleblower allegation. The trial court denied his petition, and the court of appeal affirmed.

### ***Governor has no duty to investigate***

The National Guard serves both as a state militia and as the reserve force for the U.S. Army and Air Force. It is a state agency under state authority and control, while simultaneously serving on behalf of the federal government during national emergencies. The governor is commander in chief of the California National Guard. The adjutant general heads the CMD. The inspector general



## WORKPLACE TRENDS

**Survey finds most applicants don't negotiate job offers.** A survey from CareerBuilder finds that 56% of workers don't negotiate for better pay when they are offered a job. Those who don't attempt to negotiate say they don't feel comfortable asking for more money (51%), they are afraid the employer will decide not to hire them (47%), or they don't want to appear greedy (36%). The survey also shows that the majority of employers expect a counteroffer. Fifty-three percent of employers said they are willing to negotiate salaries on initial job offers for entry-level workers, and 52% say when they first extend a job offer to an employee, they typically offer a lower salary than they're willing to pay so there is room to negotiate.

**Employees' caregiving roles subject of study.** A new study from Merrill Lynch, conducted in partnership with Age Wave, finds that the 40 million family caregivers in the U.S. spend \$190 billion per year on their adult care recipients. The study also found that 84% of employers say caregiving will become an increasingly important issue in the next five years, but just 18% strongly agree that their workplace is currently "caregiving-friendly." "Meaningful, well-designed employer benefits can make a crucial difference in helping caregivers navigate the high stress of caring for a loved one, and help them balance these responsibilities with the rest of their working and financial lives," Kevin Crain, head of Workplace Financial Solutions for Bank of America Merrill Lynch, said in response to the findings. "Just as child care has been an issue in the past that led to revolutionizing HR benefits, the aging of the population means we need to consider how caregiving is becoming an increasingly important issue for employers and employees."

**Study points out challenges of remote work.** Communicating and working from different locations via technology present significant challenges for remote workers, according to the authors of a new study of 1,153 employees. Fifty-two percent of respondents in the study by David Maxfield and Joseph Grenny, authors of *Crucial Conversations* and *Crucial Accountability*, feel their colleagues don't treat them equally. Sixty-seven percent of remote employees said they don't think their colleagues fight for their priorities, versus 59% of on-site employees. Forty-one percent of remote employees felt colleagues say bad things about them behind their backs, versus 31% of on-site employees. Sixty-four percent of remote employees felt that colleagues make changes to projects without warning them, versus 58% of on-site employees. Thirty-five percent of remote employees felt that colleagues lobby against them, versus 26% of on-site employees. ❖

is responsible for investigating legal violations and reports of waste, fraud, abuse of authority, or threats to public health and safety (i.e., misconduct).

The Military Whistleblower Protection Act, codified in Military and Veterans Code Section 56, affords protection to California National Guard members who face actual or threatened adverse personnel actions in retaliation for reporting misconduct. In response to a servicemember's report of a prohibited personnel action, the inspector general must expeditiously:

- (1) Determine whether there is sufficient evidence, in accordance with federal regulations, to warrant an investigation; and
- (2) If so, ensure that an adequate investigation is conducted.

After completing an investigation, the inspector general must report the results to the adjutant general. If the inspector general is not outside the immediate chain of command of both the complaining servicemember and the individual(s) accused of retaliation, the inspector general must refer the allegation to the governor and the chief of the National Guard Bureau.

Stirling argued that upon the referral of his whistleblower allegation, Section 56 required the governor to step into the shoes of the inspector general, undertake an expeditious investigation into the matter, and report his findings. The plain language of Section 56, however, does not require the governor to undertake an investigation of whistleblower allegations.

Section 56(e) states only that "if the inspector general is not outside the immediate chain of command," then "the inspector general shall refer the allegation to the Chief of the National Guard Bureau and the Governor." The statute does not include a requirement that the governor conduct an investigation. The court of appeal found the statute unambiguous and refused to impose a duty to investigate on the governor when the legislature had declined to do so.

### **Section 56 does not violate equal protection**

Stirling contended that not requiring the governor to conduct an investigation into his whistleblower allegation violated the Equal Protection Clause of the California Constitution. Not so, said the court of appeal. Equal protection requires that similarly situated persons receive equal treatment under the law. To the extent that the state has adopted a classification that affects two or more similarly situated groups unequally, a court must assess, in the context of the law being challenged, whether the distinction in treatment is justified.

Section 56 effectively creates two classifications of California National Guard servicemembers: (1) those who are inside the inspector general's chain of command and (2) those who are outside the chain of command. Importantly, the policy of encouraging members to report misconduct without fear of retribution extends equally to both groups. Section 56 guarantees that both classifications of servicemembers will have access to impartial decision makers. And neither the inspector general nor the governor is compelled to conduct an investigation of a whistleblower allegation.

The distinction between the two classifications was made only to avoid the conflict of interest that might arise if the

complaining servicemember is in the inspector general's immediate chain of command. Thus, there is no unequal treatment between the two classifications of California National Guard servicemembers. Here, Stirling's whistleblower allegation was referred to the chief of the National Guard Bureau and subsequently accepted by the U.S. Army's inspector general's office, which initiated an investigation. If the Army finds wrongdoing, the governor, the adjutant general, or the inspector general would be expected to take the necessary corrective action. *Stirling v. Governor Edmund G. Brown, Jr.* (California Court of Appeal, 4th Appellate District, 1/4/18).

### ***Bottom line***

Employees' whistleblower complaints about unlawful conduct should be promptly and efficiently documented and investigated in accordance with applicable statutory or employer-instituted investigative procedures. Regardless of whether the complaint is raised in the military or civilian context, it is important to comply with technical requirements in these situations in order to minimize the risk of legal liability for retaliation or statutory violations.

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