

THE CALIFORNIA STATE UNIVERSITY
OFFICE OF THE CHANCELLOR



BAKERSFIELD September 12, 2018

CHANNEL ISLANDS

MEMORANDUM

CHICO

DOMINGUEZ HILLS **TO:** CSU Presidents

EAST BAY **FROM:** Timothy P. White
Chancellor

FRESNO

FULLERTON **SUBJECT:** Complaint Procedure for Allegations of Retaliation for Having Made a
Protected Disclosure under the California Whistleblower Protection Act —
Executive Order 1116

HUMBOLDT

LONG BEACH

Attached is a copy of Executive Order 1116, which supersedes Executive Order 1058 and revises the complaint procedure for allegations of retaliation for having made a protected disclosure of improper governmental activities and/or significant threats to health or safety. This complaint procedure applies systemwide and is a companion to Executive Order 1115 (formerly Executive Order 929) *Complaint Procedures for Protected Disclosures of Improper Governmental Activities and/or Significant Threats to Health or Safety*.

LOS ANGELES

MARITIME ACADEMY

MONTEREY BAY

NORTHRIDGE

In accordance with policy of the California State University, the campus president has the responsibility for implementing executive orders where applicable and for maintaining the campus repository and index for all executive orders.

POMONA

If you have questions regarding this executive order, please contact Equal Opportunity and Compliance at EO-TitleIX-Compliance@calstate.edu or (562) 951-4641.

SACRAMENTO

SAN BERNARDINO

SAN DIEGO

TPW/LH/tl

SAN FRANCISCO

Attachment

SAN JOSÉ

c: CSU Office of the Chancellor Leadership
Vice Presidents, Academic Affairs
Vice Presidents, Business and Administration
Vice Presidents, Student Affairs
Associate Vice Presidents, Academic and Faculty Affairs
Human Resources Officers
Campus Whistleblower Administrators

SAN LUIS OBISPO

SAN MARCOS

SONOMA

STANISLAUS

THE CALIFORNIA STATE UNIVERSITY
Office of the Chancellor
401 Golden Shore
Long Beach, California 90802-4210
(562) 951-4641

Executive Order: 1116

Effective Date: September 12, 2018

Supersedes: Executive Order 1058

Title: Complaint Procedure for Allegations of Retaliation for Having Made a Protected Disclosure under the California Whistleblower Protection Act

I. Policy Statement

The California State University (CSU) is committed to providing a work environment where Employees are free to report suspected Improper Governmental Activities or conditions that significantly threaten the health or safety of Employees or the public without fear of Retaliation¹. The CSU prohibits Retaliation by any Employee of the CSU against Employees, Former Employees, and Applicants for CSU employment for having made a Protected Disclosure.

This executive order (EO) fulfills the requirements of Government Code Section 8547.12(a) of the California Whistleblower Protection Act, by revising the Retaliation Complaint procedure for Employees, Former Employees and Applicants for employment at CSU campuses or the Chancellor's Office (CO) who allege Retaliation for making a Protected Disclosure under the California Whistleblower Protection Act. If this EO is in conflict with the provisions of any memorandum of understanding under Government Code Section 3560, et. seq., the memorandum of understanding shall control.

II. Scope of Procedure

This procedure is for CSU Employees, Former Employees, and Applicants for CSU employment who believe they have been Retaliated against for making a Protected Disclosure. The Retaliation Complaints should be submitted with a Sworn Statement within 12 calendar months of the most recent alleged actual or attempted retaliatory act.²

¹ Key terms are capitalized and are defined at Article III of this EO. Terms contained within this policy and procedure are intended to be gender neutral.

² Government Code § 8547.12 (a)

Procedures for making a Protected Disclosure with the CSU of Improper Governmental Activity or condition that may significantly threaten the health or safety of Employees or the public which do not involve any allegations of Retaliation are separate and covered under EO 1115, titled *Complaint Procedures for Protected Disclosure of Improper Governmental Activities and/or Significant Threats to Health or Safety*. Please refer to EO 1115 for additional details.

III. Definition of Terms

- A. **Adverse Action** refers to an action that has a substantial and material adverse effect on the Complainant's existing or potential terms and conditions of employment, including, but not limited to, failure to hire, corrective action (including written warning, letter of reprimand, salary decrease, demotion, suspension), and termination. Minor or trivial actions or conduct not reasonably likely to do more than anger or upset a Complainant does not constitute an Adverse Action.
- B. **Applicant** refers to an individual who has completed and submitted an application form for a specific, available position at a campus of the CSU or at the CO.
- C. **Appropriate Administrator** means the Management Personnel Plan (MPP) Employee designated by the President or Chancellor to administer this EO. For the CO, the "Appropriate Administrator" shall be the Vice Chancellor of Human Resources or designee.
- D. **Clear and Convincing Evidence** is an evidentiary standard that is higher than the Preponderance of the Evidence standard. The standard is satisfied when evidence demonstrates an allegation is highly and substantially probable and results in a firm belief or conviction that it is true.
- E. **Complainant** means an Employee, former Employee, or Applicant for CSU employment who submits a Retaliation Complaint under this EO for Retaliation for having made a Protected Disclosure.
- F. **Employee** refers to any person currently employed by the CSU.
- G. **Filing Date** means the date that the Retaliation Complaint was received by the Employee's supervisor, manager, or the Appropriate Administrator.
- H. **Former Employee** refers to any person previously employed by the CSU who was employed at the time the alleged Retaliation event(s) occurred.

- I. Illegal Order³** refers to 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.
- J. Improper Governmental Activity⁴** means any activity by the CSU, a CSU department or Employee that is undertaken in the performance of the Employee's duties, undertaken inside a CSU office, or if undertaken outside a CSU office by the Employee, directly relates to the CSU, whether or not that action is within the scope of 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, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, or (2) is economically wasteful, or involves gross misconduct, incompetence, or inefficiency. "Improper Governmental Activity" includes Significant Threats to Health or Safety and Illegal Order(s).
- K. Investigator** means the individual(s) authorized to analyze the allegation(s) and conduct fact finding related to cases of alleged Retaliation. The Appropriate Administrator may be the Investigator for a particular Retaliation Complaint, or may delegate that function as appropriate.
- L. Preliminary Review** means the initial analysis conducted by the Appropriate Administrator to assess whether sufficient evidence is presented in the Retaliation Complaint to conduct an investigation.
- M. Preponderance of Evidence** means the greater weight of the evidence; i.e., that the evidence on one side outweighs, preponderates over, or is more than, the evidence on the other side. The Preponderance of the Evidence is the applicable standard for demonstrating facts and reaching conclusions in an investigation conducted pursuant to this EO.
- N. Protected Disclosure⁵** is 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 (1) an Improper Government Activity, or (2) any condition that may significantly threaten the health or safety of Employees or the public made for the purpose of remedying that condition.
- O. Respondent** means the CSU, a CSU department or an Employee who is alleged to have committed the retaliatory act against the Complainant.

³ Government Code § 8547.12 (b)

⁴ Education Code § 89572 (c); Government Code § 8547.2 (c)

⁵ Education Code § 89572 (e); Government Code § 8547.2 (e)

- P. Retaliation** is an Adverse Action attempted or actually taken against the Complainant by an Employee because the Complainant made a Protected Disclosure.
- Q. Retaliation Complaint (or Complaint)** is a Complaint filed under this EO that alleges that an Employee or CSU department retaliated by attempting to or actually taking an Adverse Action against the Complainant because the Complainant had previously made a Protected Disclosure.
- R. Significant Threats to Health or Safety⁶** means working condition(s) which the Complainant reasonably and in good faith believes constitutes a substantial hazard to his/her own health and safety or the health and safety of others.
- S. Sworn Statement⁷** is a statement signed by the Complainant and made under penalty of perjury that states that the contents of the Retaliation Complaint are true or are believed by the Complainant to be true.
- T. Working Days** are defined as Monday through Friday, excluding all official holidays or closures at the campus or the CO where the Retaliation Complaint is reviewed.

IV. General Provisions

- A.** Retaliation Complaints, responses, and information gathered during the course of the investigation by the university shall be shared only with individuals who have a legitimate reason to know.
- B.** It is the campus and CO's responsibility to adopt and implement the procedures set out in this EO for handling Retaliation Complaints submitted by Employees, Former Employees, and CSU Applicants.
- C.** The CSU will provide reasonable accommodations to qualified individuals with a disability. Reasonable accommodations will be determined by the Appropriate Administrator following an interactive process with those involved to identify the nature and extent of the restrictions and the appropriate accommodation.
- D.** The Complainant is required to fully cooperate in the investigation, be honest, maintain confidentiality, and provide information to the Investigator. In addition, the Complainant must participate in a timely intake interview. In the event that the Complainant does not cooperate, the Appropriate Administrator may end the investigation.
- E.** The Complainant may withdraw the Retaliation Complaint at any time but may not thereafter submit another Retaliation Complaint on the same alleged act(s) of Retaliation.

- F.** When submitting a Retaliation Complaint or issuing any notices required by this EO, personal delivery, electronic mail, overnight, certified or regular mail may be used. When using personal delivery, regular, overnight or certified mail, the date of receipt by the Employee's supervisor, manager, or Appropriate Administrator shall establish the Filing Date or response. Electronic communications must be sent to the designated CSU or campus e-mail address unless the intended recipient has specified a different address, and will be deemed received on the date sent.

V. Timelines and Extensions

- A.** Unless otherwise noted, all timelines contained within this EO refer to Working Days or calendar months.
- B.** Timelines set forth in this EO may be extended by the Appropriate Administrator, provided the Complainant is informed of the new timeline in writing. In no instance shall the extension be more than 18 calendar months from the Filing Date.⁸

VI. Retaliation Complaint Procedure

- A.** Any Employee, Former Employee or Applicant for CSU employment may submit allegations of Retaliation for having made a Protected Disclosure. The Retaliation Complaint may be submitted to the Employee's supervisor or manager, or with the Appropriate Administrator.⁹ Supervisors or managers must immediately deliver Retaliation Complaints to the Appropriate Administrator. Retaliation Complaints against the Chancellor, a President and/or Vice President and Retaliation Complaints made by Chancellor's Office Employees may be filed with the CO. The Appropriate Administrator will conduct a Preliminary Review to determine if the Retaliation Complaint will be processed by the CO.
- B.** Allegations must be submitted in writing to ensure a clear understanding of the issues raised. Reasonable accommodations may be made for Complainants with disabilities.
- C.** The Retaliation Complaint must be received by the Appropriate Administrator within 12 calendar months of the most recent alleged act of Retaliation.¹⁰ The Filing Date is the date the Retaliation Complaint was received by the Employee's supervisor, manager, or the Appropriate Administrator.
- D.** The Retaliation Complaint may be made on the form attached as Attachment A or in any other writing that clearly indicates the intent to file a Retaliation Complaint for having made a Protected Disclosure or specifically references this EO.

⁶ Government Code § 8547.2 (e)

⁷ Government Code § 8547.12 (a)

⁸ Government Code § 8547.12 (c)

⁹ Government Code § 8547.12 (a)

¹⁰ Government Code § 8547.12 (a)

E. The Retaliation Complaint shall contain the following:

1. The Complainant's name, position title or position applied for, mailing address, phone number, and email address.
2. A detailed description of the original Protected Disclosure that led to the alleged Retaliation, including the name(s) and title(s) of the responsible Employee(s) who were alleged to have engaged in the Improper Governmental Activities.
3. The name(s) of the individual(s) to whom the Improper Governmental Activity was reported, and the date and manner of the disclosure.
4. A description of the alleged actual or attempted retaliatory actions, including the date(s), the name(s) and title(s) of the Employee(s) who were alleged to have engaged in Retaliation, and an explanation of the reasons why those actions constituted Retaliation.
5. A list of witnesses to the alleged actual or attempted retaliatory actions, including their names, positions, contact information, and the facts known by each.
6. Copies of any documentary evidence that supports the Retaliation Complaint.
7. A dated, Sworn Statement by the Complainant under penalty of perjury that the Retaliation Complaint is true or is believed by the Complainant to be true.

VII. Acknowledgement

The Appropriate Administrator shall acknowledge receipt of the Retaliation Complaint in writing within ten (10) Working Days of the Filing Date.

VIII. Preliminary Review

- A.** The Appropriate Administrator shall evaluate the allegation(s) and determine whether the Retaliation Complainant has provided sufficient information to initiate an investigation.
- B.** An investigation is initiated if it is established that:
 1. The Complainant had previously submitted a Protected Disclosure.
 2. The Complainant submitted a valid Retaliation Complaint no later than twelve (12) calendar months after the most recent alleged Retaliation.
 3. There is evidence which suggests that the Protected Disclosure was a motivating factor that led to the alleged Adverse Action(s).

4. The allegations, if true, constitute Retaliation.
 5. The allegations were accompanied by information specific enough to be investigated.
- C.** During the Preliminary Review, additional information and documents may be submitted to support the initial Retaliation Complaint. All supplemental documents must be submitted with a dated Sworn Statement. Supplemental materials will be submitted in accordance with any deadline requirements set by the Appropriate Administrator. The Appropriate Administrator has the discretion to decline to accept supplemental materials due to time constraints.
- D.** If the Complainant raises any new allegations during the Preliminary Review, the Appropriate Administrator shall decide whether to include those allegations as part of the Retaliation Complaint. If they are not included as part of the initial Retaliation Complaint, the Complainant must file a new Retaliation Complaint to address those allegations.
- E.** If the Appropriate Administrator determines that an investigation should be conducted, the Complainant is notified, and a formal investigation is initiated.
- F.** The Preliminary Review should be concluded, and the Complainant notified in writing of the outcome of this process, no longer than thirty (30) Working Days from the Filing Date. If an investigation will not occur, the Appropriate Administrator will inform the Complainant that the Retaliation Complaint will not be investigated and state the reasons.

IX. Investigation Process

- A.** If an investigation is initiated, the Appropriate Administrator will manage the investigation, or may assign the Retaliation Complaint to an Investigator. If the Appropriate Administrator delegates the responsibility for analysis, investigation, and/or fact finding, the Appropriate Administrator is still responsible for ensuring that the procedures in this EO are followed. Other campuses or CSU departments may be consulted during the investigation based on their areas of oversight responsibility or expertise (e.g., environmental health and safety, risk management, academic affairs, finance, audit, and legal counsel). If the Complaint alleges Retaliation by the Chancellor, a President or Vice President, the Appropriate Administrator shall consult with the Office of General Counsel and the Vice Chancellor of Human Resources (or designee) who shall determine the appropriate handling of the Retaliation Complaint. Complaints against the Chancellor, a President and/or Vice President shall be processed by the campus if the Chancellor, President, and/or Vice President's role in the alleged incident was limited to a decision on a recommendation made by another administrator, and the Chancellor, President, and/or Vice President had no other substantial involvement in the matter. The timelines and procedures for the Retaliation Complaint process are unchanged.

- B.** Investigators have a duty of fairness, objectivity, thoroughness, ethical behavior, and observance of legal and professional standards. If actual or perceived conflict of interest is suggested, the Appropriate Administrator shall determine if the investigation needs to be reassigned.
- C.** The Investigator will notify the Respondent(s) in writing that an investigation has commenced, that an interview will be scheduled, and provide a summary of the allegations. The Respondent(s) may submit a written response to the allegations, which shall be included in the investigation report.
- D.** The Investigator will review the Retaliation Complaint and other relevant materials submitted by the Complainant and the Respondent(s). In addition, the Investigator may request and review other documents and materials relevant to the allegations. The Investigator should make every effort to interview the Complainant, Respondent(s), and any other witnesses who the Investigator believes are necessary in order to conduct a thorough investigation. If the Complainant, Respondent(s), or witness declines to be interviewed, the Investigator will complete the investigation based upon the information available.
- E.** The Complainant, Respondent(s), and witnesses have a duty to cooperate with the Investigator. This includes a duty to participate in interviews as requested by the Investigator, to answer the Investigator's questions honestly, and to provide documents and other materials requested by the Investigator.
- F.** The Complainant, the Respondent(s), and witnesses have a responsibility not to interfere with the investigation. Evidence shall not be withheld, destroyed or tampered with, and witnesses shall not be influenced, coached, or intimidated.
- G.** Witnesses shall not be subjected to an Adverse Action as a result of participating in good faith in an investigation under this EO. A violation of this provision would constitute an Improper Governmental Activity under Executive Order 1115.
- H.** If preliminary findings suggests possible violation of this EO, the Investigator will provide the Respondent(s) with the opportunity to comment on the materials and other information which the Investigator plans to rely in making investigatory findings.
- I.** If the Investigator finds by a Preponderance of Evidence that a Protected Disclosure was a contributing factor in the alleged Adverse Action, the Investigator must determine by using the Clear and Convincing Evidence standard whether the alleged Adverse Action would have still occurred for legitimate, independent reasons even if the Complainant had not engaged in a Protected

Disclosure. If the Investigator finds that the Respondent has met this burden of proof, the Investigator shall find no Retaliation.¹¹

- J. Nothing in this EO 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 Action with respect to any Employee, Former Employee, or Applicant for CSU 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.
 - K. At the conclusion of the investigation, the Appropriate Administrator will prepare a written report containing the investigation findings based on the evidence and the Investigator's conclusion as to whether Retaliation in violation of the EO occurred, using the applicable evidentiary standards. In instances when the investigation is performed by someone other than the Appropriate Administrator, then the investigation report will provide sufficient detail to enable the Appropriate Administrator to make an independent determination as to whether a violation occurred. The investigation report will include the Retaliation Complaint, a list of witnesses interviewed, any response to the allegations Respondent(s) chose to submit, and any other documents on which the Investigator has relied in making findings.
 - L. The Investigator shall complete the investigation within ninety (90) Working Days from the conclusion of the Preliminary Review.
- X. The Decision**

After reviewing the investigation, the Appropriate Administrator must make the final decision and issue a determination letter to the Complainant and Respondent(s) no later than 120 Working Days from the Filing Date. The determination letter shall include a summary of the allegations, summary of the investigation, whether allegations were substantiated, and whether appropriate actions, if any, will be taken in response to the Retaliation Complaint. The response shall be written in a manner that is consistent with the privacy interests of each person who was involved in the situation addressed by the response. This determination letter is the final CSU decision, pursuant to Government Code Section 8547.12(c).



Timothy P. White, Chancellor

Dated: September 12, 2018

¹¹ Government Code § 8547.12 (e)

Revision History:

As a result of the issuance of this executive order, the following documents are superseded as of the effective date of this Executive Order and are no longer applicable:

- Executive Order 1058 (*Complaint Procedure for Allegations of Retaliation for Having Made a Protected Disclosure under the California Whistleblower Protection Act*), dated April 15, 2011
- Executive Order 822 (*Revised Complaint Procedure for Allegations of Retaliation for Disclosure under the California Whistleblower Protection Act*), dated May 23, 2002
- Executive Order 664 (*Complaint Procedure for Allegations of Retaliation for Disclosure of Improper Governmental Activities*), dated January 1, 1997

NOTE TO SUPERVISORS AND MANAGERS: UPON RECEIPT OF THIS FORM, YOU ARE REQUIRED TO IMMEDIATELY DELIVER IT TO THE APPROPRIATE ADMINISTRATOR AT YOUR CAMPUS RESPONSIBLE FOR ADMINISTERING THIS EXECUTIVE ORDER

---CONFIDENTIAL---

Complaint of Retaliation for Having Made a Protected Disclosure Under the California Whistleblower Protection Act

Government Code Section 8547.12 and Education Code Section 89571 forbid Retaliation by any Employee of the California State University (CSU) against Employees, Former Employees, or Applicants for CSU employment for having made Protected Disclosures under that statute. "Protected Disclosure" is 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 (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. "Improper Governmental Activity" means any activity by the CSU, a CSU department or Employee that is undertaken in the performance of the Employee's duties, undertaken inside a CSU office, or if undertaken outside a CSU office by the Employee, directly relates to the CSU, whether or not that action is within the scope of 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, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, or (2) is economically wasteful, or involves gross misconduct, incompetence, or inefficiency. "Improper Governmental Activity" includes Significant Threats to Health or Safety and Illegal Order(s).

Allegations of such Retaliation may be submitted with the Employee's supervisor or manager or with the Appropriate Administrator.

Please provide the requested information. Use additional sheets of paper if necessary and write your name and the date at the top of each page.

PLEASE TYPE OR PRINT CLEARLY

Campus: _____ Name: _____

Home Address: _____

City: _____ State: _____ Zip Code: _____

Telephone Number: _____ Email Address: _____

Check one:

Employee

Position title: _____

Former Employee

Position held on last day worked: _____

Applicant for employment

Position applied for: _____

1. Describe in detail the actions that were the basis for the original Protected Disclosure and constituted the alleged Improper Governmental Activity. In the alternative, please provide a copy of the EO 1115 investigation report related to the original reported Protected Disclosure.

2. As related to your original reported Protected Disclosure, list all persons allegedly involved in the Improper Governmental Activity and their involvement.

3. List all persons to whom the alleged Improper Governmental Activity was reported, the date reported, and whether the report was oral or in writing (if in writing, attach a copy of the original complaint).

4. Describe the specific alleged retaliatory actions taken, the names and titles of the persons who retaliated, the dates of the alleged retaliatory actions and the reasons why those actions constitute Retaliation.

5. List all witnesses to the alleged retaliatory actions including their names, position titles, contact information, and the facts known by each.

6. Please attach any documentation in support of your charge. List all supporting documentation that is attached. Also identify any other documentation you believe exists but do not have authority to access.

I hereby declare under penalty of perjury that the contents of this written complaint are true, or are believed by me to be true.

Signature

Date

For University Use Only: Date Retaliation Complaint Received _____

Signature _____