

Whistleblower Investigations Workshop

Tuesday, March 29, 2022
CSU Office of the Chancellor

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Welcome

Tammy Kenber

Associate Vice Chancellor, Human Resources Management

Laura Anson

Senior Director, DHR/Whistleblower/Equal Opportunity
Compliance Services

Tina Leung, Pamela Arimoto, Charmian Yan

DHR/Whistleblower/Equal Opportunity Compliance Unit

Ruth Jones and Kelly Bendell

Office of General Counsel

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When the Whistle Blows: Is it IGA? Should I Send an NOI?

Kelly Bendell, University Counsel
Ruth Jones, University Counsel
CSU Office of General Counsel

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The Whistleblower Complaint



A disclosure to the CSU from an individual or entity about an alleged **improper governmental activity** or a significant threat to health or safety.

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What is Improper Government Activity?

An activity by a CSU department or employee that is:

A violation of a state/federal law or regulation

Economically wasteful

Gross misconduct/gross incompetency

Gross inefficiency

Significant Threats to Health or Safety

Illegal Orders
(See EO 1116, Section III.J.)

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Significant Threats to Health or Safety



“Working condition(s) which the Complainant reasonably and in good faith believes constitute a substantial hazard to his/her own health and safety or the health and safety of others.”

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Illegal Order



“[R]efers 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.”

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Violation of State or Federal Law



“Including, but not limited to corruption, malfeasance, bribery, theft of government property, fraud, conversion, malicious prosecution, misuse of government property, willful omission to perform duty or willful omission to perform duty.”

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IGA Guidance



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What is Economically Wasteful Conduct?

When it appears that...



(i) funds or resources are used or expended in a way that **deviates substantially** from the way a reasonable person would expect the funds to be ordinarily used or expended.

&



(ii) the use or expenditure does not result in a useful or valuable benefit to CSU that is reasonably proportionate to or commensurate with the amount of funds or resources used or expended.

Note: Conduct or activity should not be considered “economically wasteful” if it represents a proper exercise of business judgment or discretion.

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What is Gross Misconduct?

Conduct or activity that...



(i) the alleged wrongdoer acted willfully, deliberately or recklessly disregarded or violated their duties and obligations as a CSU employee;

(ii) there is no valid or reasonable explanation for the conduct or activity the person engaged in; **and**

(iii) the alleged wrongdoer's conduct or activity could or did negatively impact CSU in a material or significant way either from a monetary or operational standpoint.

Discretionary decisions generally do not fall within the concept of gross misconduct unless the decision was arbitrary, capricious or indisputably wrong.

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Gross Incompetence

Conduct or activity will rise to the level of gross incompetence if it appears that:

Isolated instances of poor or unsatisfactory performance, errors, mistakes or even negligence which are not extreme and substantial in nature do not rise to the level of gross incompetence.

- (i)** the actor performed in a way that fell substantially and extremely short of the standard of care or performance that one would reasonably expect from a competent person in the same situation, and
- (ii)** there is no valid or reasonable explanation for the actor's extremely deficient performance.

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Gross Inefficiency

Conduct or activity will rise to the level of gross inefficiency if it appears that:

- (i) the conduct or activity represents an extreme departure from what a reasonably careful person would do to prevent or minimize the loss of funds or resources;
- (ii) the alleged wrongdoer was aware of what a reasonably careful person would be expected to do in the same situation;
- (iii) the alleged wrongdoer fails to perform in that way;
- (iv) there is no logical or reasonable explanation why the alleged wrongdoer did not perform in that way; **and**
- (v) the actor's conduct or activity resulted in a material and significant loss of funds or resources.

Isolated instances of poor or unsatisfactory performance, errors, mistakes or even negligence which are not extreme and substantial in nature do not rise to the level of gross incompetence.

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Questions?

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Is it an IGA?



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Complainant filed a whistleblower complaint that the supervisor purchased computers that were specifically designed for graphics and other visual programs. The department rarely uses these programs. The complaint asserts that the department should have purchased cheaper computers and not the expensive computers designed for graphics.

Is it an IGA?



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An employee filed a complaint that the supervisor reorganized the department without following an external consultant's recommendations.

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A professor has filed a whistleblower complaint against the department chair. The professor alleges that the department chair received a grant for a fellowship program but that some of the funds were improperly used to redecorate the chair's office.

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A professor filed a whistleblower complaint that the department chair violated the university hiring policy. The complaint alleges that the department chair applied for and received a grant for a fellowship program. The department chair did establish the fellowship, but the chair selected his wife as the program fellow without a search.

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The Purpose of A Notice of Investigation



Gives notice of the allegations and possible policy violations to the individual(s) who may be disciplined upon a finding of responsibility so that the individual(s) can provide information and challenge the evidence gathered.

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E.O. 1115 Complaints

Generally, a notice of investigation is **not** appropriate for E.O. 1115 investigations.

NOI should be issued only when the focus of the investigation is on whether a specific individual is responsible for IGA and, if responsible, discipline will be sought.

NOI should include:

- the prohibited conduct alleged, when and where the conduct occurred.
- what policy has potentially been violated.

Unless Complainant has waived their rights, must keep the identity of the Complainant confidential.

- Potential need for Complainant participation in subsequent discipline proceeding against employee involved with IGA.

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BEFORE ISSUING E.O. 1115 NOI, CONSULT WITH:



- The CO DHR/Whistleblower Compliance Unit
- Campus Counsel, or
- Whistleblower Resource Attorneys

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E.O. 1116 Investigation Notice Provisions

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.

E.O. 1116
XI. C.

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.

E.O. 1116
XI. H.

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Elements of Notice of Investigation for Whistleblower Retaliation Investigations

- **Factual allegations include the prohibited conduct alleged, when and where the conduct the occurred.**
- **What policy has potentially been violated.**

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Questions?

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Allison West, Employment Practices Specialist

Just the Facts:
Perfecting the Investigative
Interview

Presented by
Allison West
Employment Practices Specialist

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Allison West, Employment Practices Specialist



Allison West is an employment attorney by background and uses her legal skills coupled with sound human resources practices to help create safe and respectful work environments. She conducts workplace investigations and delivers training to HR and other professionals on how to effectively conduct investigations. Allison is a top-rated speaker at conferences around the country and is a noted national expert in employment law and HR related topics.

Allison is a Charter and Sustaining Member of the Association of Workplace Investigators (AWI) and was a Board Member from 2013-2017. Allison also served as junior faculty at the AWI Institute. She was on the ASIS Technical Committee which created international ANSI Standards for investigations in a final publication entitled *Managing the Investigative Process – Guidance on Conducting Investigations*. Allison is a member of the State Bar of California and holds a Senior Professional in Human Resources and SHRM-SCP certification and an AWI-CH certificate.

Allison West, Employment Practices Specialist

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Closing Remarks



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Questions?

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Thank you for attending!

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