

**FORM OF WHISTLEBLOWER POLICY FOR A
CALIFORNIA PUBLIC BENEFIT NONPROFIT CORPORATION**

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WHISTLEBLOWER POLICY¹

OF

[NAME OF CORPORATION]

ARTICLE 1 INTRODUCTION AND PURPOSE²

[Name of Corporation] (the “Corporation”) requires its directors, officers, employees and volunteers to observe high standards of business and personal ethics in the conduct of their duties and responsibilities. The purpose of this policy is to encourage and enable employees and volunteers of the Corporation to report any action or suspected action taken within the Corporation that is illegal, fraudulent or in violation of any adopted policy of the Corporation, to a source within the Corporation before turning to outside parties for resolution.³ This policy applies to any matter which is related to the Corporation’s business and does not relate to private acts of an individual not connected to the business of the Corporation. This policy is intended to supplement but not replace the Corporation’s unlawful harassment and discrimination policy, “open door policy” and/or any other grievance procedure,⁴ and any applicable state and federal laws governing whistleblowing applicable to nonprofit and charitable organizations.⁵

ARTICLE 2 VIOLATIONS; REPORTING IN GOOD FAITH

All employees and volunteers of the Corporation are encouraged to report⁶ any action or suspected action taken within the Corporation that is illegal, fraudulent, or in violation of any adopted policy of the Corporation (each, a “Violation”).⁷ Anyone reporting a Violation must act in good faith, without malice to the Corporation or any individual in the Corporation, and have reasonable grounds for believing that the information shared in the report indicates that a Violation has occurred. *[Any report which the complainant has made maliciously or any report which the complainant has good reason to believe is false will be viewed as a serious disciplinary offense.]*⁸

ARTICLE 3 NO RETALIATION⁹

No employee or volunteer who in good faith reports a Violation or cooperates in the investigation of a Violation shall suffer harassment, retaliation, or adverse employment or volunteer consequences. Any individual within the Corporation who retaliates against another individual who in good faith has reported a Violation or has cooperated in the investigation of a Violation is subject to discipline, including termination of employment or volunteer status.¹⁰

If an individual believes that someone who has made a report of a Violation or who has cooperated in the investigation of a Violation is suffering from harassment, retaliation, or other adverse employment or volunteer consequences, the individual should contact the Compliance Officer.

Any individual who reasonably believes he or she has been retaliated against in violation of this policy shall follow the same procedures as for filing a complaint (outlined in Article 4 below).

ARTICLE 4 REPORTING PROCESS¹¹

If an individual reasonably believes that a Violation has occurred, the individual is encouraged to share their questions, concerns, suggestions, or complaints with any person within the Corporation who may be able to address them properly.¹²

In most cases, the direct supervisor of an individual is the person best suited to address a concern. However, if an individual is not comfortable speaking with their supervisor or if they are not satisfied with the supervisor's response, the individual is encouraged to speak directly to the Compliance Officer, *[insert name of designated board member, i.e., the Chairperson of the Board, or other designated outside party to whom a report may be made]* or anyone in management they feel comfortable approaching.¹³

ARTICLE 5 CONFIDENTIALITY¹⁴

The Corporation encourages anyone reporting a Violation to identify themselves when making a report in order to facilitate the investigation of the Violation. However, reports may be submitted on a confidential basis by the complainant or may be submitted anonymously by *[insert procedure for reporting anonymous Violations, e.g., filling out a reporting form and depositing the form in a designated drop box]*.¹⁵ Reports of Violations or suspected Violations will be kept confidential to the extent possible, consistent with the need to conduct an adequate investigation, to comply with all applicable laws, and to cooperate with law enforcement authorities.¹⁶ Furthermore, the Corporation will explore anonymous allegations to the extent possible, but will weigh the prudence of continuing such investigations against the likelihood of confirming the alleged facts or circumstances from attributable sources.

ARTICLE 6 COMPLIANCE OFFICER; HANDLING REPORTED VIOLATIONS

The supervisor, manager, or board member who receives a report of a Violation from the complainant is required to notify the Compliance Officer of that report, except as provided below with respect to a report relating to the Compliance Officer. The Compliance Officer will notify the complainant and acknowledge receipt of a report of Violation within *[five to ten]* business days, but only to the extent that the complainant's identity is disclosed or a return address is provided.

The Compliance Officer, or their designee, is responsible for promptly investigating all reported Violations and for causing appropriate corrective action¹⁷ to be taken if warranted by the investigation. The complainant will be notified about what actions will be taken, to the extent reasonably possible and consistent with any privacy or confidentiality limitations. If no further action or investigation is to follow, an explanation for the decision will be given to the complainant.¹⁸ *[Insert any additional review procedures]*.¹⁹

In the event the Compliance Officer is suspected of having committed a Violation, then the Violation will be reported to *[insert designated officer, e.g., the Chief Financial Officer]* and the Violation will be investigated by **[designated officer]** under close supervision of the Board of Directors.

Compliance Officer: **[Name and contact information]**

ARTICLE 7 ACCOUNTING AND AUDITING MATTERS; REPORTS

The *[insert designated body responsible for addressing any accounting or auditing matters, e.g., the executive committee, the audit committee, etc.]* is responsible for addressing all reported concerns or complaints of Violations relating to corporate accounting practices, internal controls, or auditing. Therefore, the Compliance Officer must immediately notify the **[designated body]** of any such concern or complaint.²⁰

In addition, the Compliance Officer will advise the *[Executive Director/Board President]* and/or the **[designated body]** of any other reported Violations, the current status of the investigation, and the outcome or corrective action taken at the conclusion of the investigation.

* * *

Adopted by the Board of Directors at its Meeting on _____.²¹

* * *

My signature below indicates my receipt and understanding of this policy. I also verify that I have been provided with the opportunity to ask questions about the policy.

Name: _____

Date: _____

« ¹ **HOW TO USE THIS FORM:** This sample whistleblower policy has been developed for use by small and mid-sized California public benefit nonprofit corporations for educational purposes only. The endnotes discuss the applicable law, recommended practices, and why we have included certain language. **Bold** and *bold italicized* bracketed text in this form indicates where the user is required to insert language or make a choice among different options to replace the bracketed terms.

Important Note: In creating a whistleblower policy, it is very important that a nonprofit corporation institute procedures that the corporation is likely to be able to comply with consistently in the long term. Therefore, each user of this form should think through every provision carefully, and should not include any provisions that will be too burdensome for the corporation to follow under its circumstances. Although the first step –

creating an environment where a whistleblower will report problems that exist – is the crucial one, to be fully effective a whistleblower policy must be consistently applied, claims investigated and evaluated, and proper enforcement action taken when necessary.

Why adopt a Whistleblower Policy? Since 2009, nonprofit tax-exempt §501(c)(3) organizations that are required to file the IRS annual informational tax return called the Form 990 have been asked whether the organization became aware during the year of a material diversion of its assets (see Note 20) and whether the organization has adopted a written whistleblower policy (IRS Form 990, Part VI, Lines 5 and 13, respectively, available at www.irs.gov/pub/irs-pdf/f990.pdf#page=6).

While nonprofit organizations are not required by the IRS to adopt a whistleblower policy in order to maintain tax-exempt status, the IRS has signaled with the Form 990 that having such a policy is encouraged as a good governance practice. The IRS commentary on the Form 990 stated that the IRS “believes that a well-governed charity is more likely to obey the tax laws, safeguard charitable assets and serve charitable purposes than one with poor or lax governance.” The commentary also stated that the IRS “encourages the board of directors to adopt an effective policy for handling employee complaints and to establish procedures for employees to report in confidence any suspected financial impropriety or misuse of the charity’s resources.” The adoption of a whistleblower policy is thus recommended for all nonprofit organizations in order to protect the nonprofit from monetary losses, employee fraud and damage to its reputation, and to demonstrate to the IRS that the organization is committed to good governance and accountability practices.

Moreover, legislation such as the Sarbanes-Oxley Act of 2002 (“SOX”), California’s Nonprofit Integrity Act of 2004, and proposed legislation in other states suggest that nonprofit organizations should consider “best practice” governance policies and mechanisms similar to the provisions of SOX, as doing so may prepare them for future legislative requirements.

⌞ ² This sample policy covers the following key areas: a clear definition of individuals covered by the policy, responsibility for reporting violations, applicable areas of complaints and those responsible for addressing them, the prevention of retaliation against whistleblowers, the process of reporting violations, confidentiality, the compliance officer’s duties, procedures for acknowledging reported violations, and the involvement of the audit committee, if applicable, in complaints involving internal controls and auditing.

Form 990: The Form 990 instructions state that a whistleblower policy should serve three purposes: (1) it should encourage staff and volunteers to come forward with credible information regarding illegal practices or violations of adopted policies of the organization; (2) the policy should explicitly state that the organization will protect the individual from retaliation for coming forward with the information; and (3) it should identify those staff, board members or outside parties to whom such information can be reported (IRS Form 990 instructions, available at www.irs.gov/pub/irs-pdf/i990.pdf#page=24). Thus, the corporation must adopt a policy that meets at least these three purposes in order to answer “yes” to Section VI, Line 13 of the Form 990.

⌞ ³ Whistleblowing can be defined in a number of ways. In its simplest form, whistleblowing involves the act of reporting wrongdoing within a corporation to internal or external parties. Internal whistleblowing entails reporting the information to a source within the corporation. External whistleblowing occurs when the whistleblower takes the information outside the corporation, such as to the media or regulators. Establishment of a clear and specific definition of whistleblowing itself should be a fundamental component of every whistleblower policy.

Form 990: To meet the Form 990 definition of a whistleblower policy, the policy must encourage staff and volunteers to come forward with credible information regarding illegal practices or violations of adopted policies of the corporation.

« ⁴ The corporation should take care to create a whistleblower policy that is consistent with any existing policies of the corporation, especially those that deal with employees and volunteers.

« ⁵ See Note 9 for a description of the federal and state whistleblower protection laws that apply to California nonprofit corporations.

« ⁶ As mentioned in Note 3, to meet the Form 990 definition of a whistleblower policy, the policy must encourage employees and volunteers to report credible information regarding illegal practices or violations of adopted policies of the corporation. Though not specifically addressed in this policy, directors and board officers owe fiduciary duties to the corporation and to the general public that go beyond simply disclosing such activity. These duties require directors and board officers to ensure that adequate procedures and mechanisms are instituted to help prevent and correct such activity. For that reason, it is important that the whistleblower policy provide for reporting of any concerns or complaints and their resolution to the board (see Article 6).

« ⁷ Examples of activities covered by this whistleblower policy include violations of federal, state, or local law, violation of the corporation's policies, falsification of records, misappropriation or misuse of funds, improper or undocumented financial transactions, and other fraudulent financial matters, among others. Users of this form may wish to include a few illustrative examples of activities or behavior that should be reported under this policy. Such a provision could read as follows:

“The following are examples of Violations that should be reported:

- (a) Stealing or misappropriation of the Corporation's funds, supplies or other assets.*
- (b) Fraud or deliberate error in the preparation, evaluation, review, or audit of any financial statement or accounting records of the Corporation.*
- (c) Deviation from full and fair reporting of the Corporation's financial condition.*
- (d) Deficiencies in or non-compliance with the Corporation's internal accounting controls.*
- (e) Authorizing or receiving compensation for goods not received or services not performed.*
- (f) Authorizing or receiving compensation for hours not worked, or failing to account for un-worked (but paid) hours as vacation, sick leave or other paid time off.*
- (g) Pursuit of a benefit or advantage in violation of the Corporation's conflict of interest policy.*
- (h) Unauthorized alteration or manipulation of the Corporation's documents or computer files in violation of the Corporation's records management and retention policy.”*

For purposes of clarity, activities of individuals unconnected to the business of the corporation are not covered by this policy; for example, if an employee shoplifts or a volunteer who is employed by another business engages in a fraudulent practice in performing his duties at that place of employment, those illegal activities would not be covered by this policy.

« ⁸ The corporation should consider whether to include this sentence given the unintended dampening effect it may have on an individual's willingness to report a suspected violation. Regardless of whether the sentence is included, however, the protection against retaliation is only triggered when an individual reports a suspected violation based upon a reasonable belief (see Note 9).

«⁹ The corporation must ensure that no punishment – including firing, demotion, suspension, harassment, failure to consider the individual for promotion, or any other kind of discrimination – is inflicted on an individual who, in good faith, reports a violation or cooperates in the investigation of a reported violation. A *reasonable belief* or suspicion that a violation exists is enough to create a protected status for the whistleblower even if their claims are ultimately determined to be unfounded.

Case law interpreting the validity of whistleblowing and retaliation claims under various whistleblowing statutes indicates that courts typically require both a subjective and objective component of the reasonable belief standard. The subjective component requires that the complainant or whistleblower make the allegations in good faith (i.e., actual belief that a violation has taken place). The objective component requires that a “reasonable person” would have believed the reported conduct violated the relevant statute. However, in a recent decision the Ninth Circuit held that a complainant’s subjective belief that the possibility of a violation should be *investigated* - rather than a belief that a violation actually occurred - is sufficient to meet the subjective belief standard of the statute. [*Van Asdale v. International Game Technology*, 577 F.3d 989 (9th Cir. 2009)] Though this decision interprets a statute not applicable to nonprofit corporations, the decision does provide additional guidance regarding the court’s viewpoint on the implementation of a whistleblower policy.

Form 990: To meet the Form 990 definition of a whistleblower policy, the policy must explicitly state that the corporation will protect an individual from retaliation for coming forward with credible information regarding illegal practices or violations or adopted policies of the corporation.

Sarbanes-Oxley Act: The sweeping federal corporate governance reform known as Sarbanes-Oxley (SOX) generally does not apply to tax-exempt corporations. However, two major SOX provisions do apply to tax-exempt corporations: rules dealing with the destruction of documents and records and the prohibition of retaliation against whistleblowers. Specifically, SOX section 1107 prohibits a corporation from retaliating against any whistleblower who provides truthful information to a law enforcement officer regarding the commission, or possible commission, of any federal offense. [18 U.S.C. § 1513(e)] Note that this prohibition on retaliation, which includes actions interfering with a person’s lawful employment or livelihood, extends beyond employees to include external parties, such as independent contractors. For example, if an independent contractor were to report a violation, the corporation would not be allowed to speak ill of them to others as retaliation. Finally, civil and criminal sanctions may be imposed on a corporation and any individual within the corporation who is responsible for the retaliatory action.

California Law: Under California Labor Code section 1102.5, the corporation may not prevent an employee from disclosing information to a government agency or law enforcement agency, a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance when the employee has reasonable cause to believe the information discloses a violation of a state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. Furthermore, the corporation may not retaliate against an employee for making such a disclosure or for refusing to participate in an activity that would result in a violation of state or federal statute, or violation or noncompliance with a state or federal rule or regulation. A corporation may also not retaliate against an employee because the employee is a family member of a person who has, or is perceived to have, engaged in any act protected by section 1102.5 of the California Labor Code. Civil and criminal sanctions may be imposed on a corporation and any individual within the corporation who is responsible for the retaliatory action.

The law also requires that all employers display a posting describing employees' rights and responsibilities under the whistleblower laws. The California Division of Labor Standards Enforcement has made a sample posting available on its website at www.dir.ca.gov/dlse/WhistleblowersNotice.pdf.

« ¹⁰ The corporation can protect itself against claims of retaliation by educating supervisors and board members on whistleblower protections, quickly taking disciplinary action against any individual who engages in retaliation, and maintaining well-documented personnel files, including thorough records of any disciplinary actions.

« ¹¹ A whistleblower policy must address the process individuals should follow in filing their claims. This reporting process should be widely publicized throughout the corporation. For example, a corporation could incorporate the process within existing human resource communication policies. Employees could be informed through employee handbooks. Training could be provided internally during the human resources orientation process or by an outside party. Information can be posted throughout the corporation and on its website.

« ¹² Corporations may require whistleblowers to direct their claims to a certain person, such as a compliance officer, or, alternatively, to follow a ladder of reporting until they reach the top of management. The latter helps ensure that the individual addresses the claim with a supervisor before heading straight to the CEO or an external party. Specific reporting mechanisms within the process could include telephone or email hotlines, websites or suggestion boxes. For a sample reporting form, see **Appendix A**.

« ¹³ While employees should feel comfortable raising concerns directly with their supervisors, many employees are reluctant to do so for fear of retaliation, especially where their concerns pertain to violations by their supervisors. Thus, the whistleblower policy should provide several options for employees to raise concerns, including an option of reporting a violation anonymously.

Form 990: To meet the Form 990 definition of a whistleblower policy, the policy must identify those staff, board members, or outside parties to whom credible information regarding illegal practices or violations or adopted policies of the corporation can be reported.

« ¹⁴ Protecting whistleblowers' confidentiality is an important part of any whistleblower policy. Confidentiality is of great concern because the goal is to create an atmosphere where individuals will feel comfortable submitting their names with claims to allow for further information gathering and investigation. Allowing individuals to file anonymous claims may increase the possibility of claims actually being reported; however, it may also increase the possibility of false claims being filed.

« ¹⁵ The corporation should consider establishing anonymous voicemail and anonymous email or secure suggestion drop boxes to facilitate the anonymous complaint process. For a sample reporting form that allows for anonymous complaints, see **Appendix A**.

« ¹⁶ For purposes of clarity and full disclosure, users of this form may wish to list specific circumstances under which confidentiality will not be maintained. Such instances would include, for example, when the whistleblower agrees to be identified or otherwise self-discloses their identity, or when the person accused of committing a violation is entitled to the information as a matter of legal right in disciplinary proceedings.

« ¹⁷ Effective enforcement has the potential not only to significantly reduce fraudulent activity but also to send a signal to both internal and external constituencies that the corporation exercises good corporate governance. Just as

for-profit corporations must answer to shareholders, nonprofit corporations must answer to the California Attorney General regarding the stewardship of resources (see Note 20).

« ¹⁸ Open communication is essential when informing whistleblowers about the outcome of an investigation. The corporation should avoid attempting to disclose as little as possible, because doing so may cause the whistleblower to escalate the complaint outside of the corporation. Instead, there should be communication with the complainant, full explanation of the corporation's response, and reiteration of its policy of zero tolerance for retaliation.

« ¹⁹ The policy should explain how the claims will be investigated once received and whether the whistleblower should expect to receive any feedback. Additional complaint review procedures to be followed by the compliance officer that may be inserted into this Article if relevant to the corporation include: (1) documenting every reported violation, (2) working with legal counsel to decide whether the problem requires review by the compliance officer or should be directed to another department such as Human Resources, (3) keeping the board of directors and the audit committee, if applicable, informed of the progress of the investigation, (4) interviewing individuals, (5) requesting and reviewing all relevant documents of the corporation, and/or requesting that an auditor or counsel investigate the complaint, and (6) preparing a written record of the reported violation and its disposition to be retained for such period of time as the board of directors may determine (see Note 20 for reporting requirements when a violation involves the misuse of funds). For a rudimentary sample complaint review policy, see Appendix B. Regardless of the specific mechanisms selected, there should be a process for communicating with complainants, receiving information, and addressing identified concerns.

« ²⁰ The corporation should ensure that the duties and responsibilities outlined in this provision are consistent with any existing committee charters.

Audit Committee/Nonprofit Integrity Act: California's Nonprofit Integrity Act requires nonprofit corporations with annual revenues of \$2 million or more – exclusive of government contracts – to have an audit committee and conduct an audit. If, however, a corporation does not meet this threshold and does not have an audit committee, the policy can designate the board of directors or the executive committee or other applicable committee as the party responsible for addressing any accounting or auditing matters. For more information about the Nonprofit Integrity Act, please refer to the California Attorney General's website, at <https://oag.ca.gov/charities>.

Reporting Embezzlement/Theft on the Form 990: Part VI, Line 5 of the Form 990 (www.irs.gov/pub/irs-pdf/f990.pdf#page=6) asks whether the corporation became aware during the year of a material diversion of its assets, whether or not the diversion occurred during that year. If "yes," the corporation must explain the nature of the diversion, the amounts or property involved, the corrective actions taken to address the matter, and any other pertinent circumstances. The instructions define a diversion of assets as any unauthorized conversion or use of the corporation's assets other than for the corporation's authorized purposes, including but not limited to embezzlement or theft (Form 990 instructions, available at www.irs.gov/pub/irs-pdf/i990.pdf#page=22).

Reporting Embezzlement/Theft on the California Attorney General Form RRF-1: Part B, Line 2 of the Form RRF-1 (http://oag.ca.gov/sites/all/files/agweb/pdfs/charities/charitable/rrf1_form.pdf) asks whether there was any theft, embezzlement, diversion, or misuse of the corporation's charitable property or funds during the applicable reporting period. If "yes," the corporation must explain the nature of the diversion, the date and the amount of the loss, a description of the steps the corporation took to recover the loss, and a description of the procedures the corporation implemented to prevent a recurrence of the situation (Form RRF-1 instructions, available at http://oag.ca.gov/sites/all/files/agweb/pdfs/charities/charitable/rrf1_instructs_05.pdf).

«²¹ The whistleblower policy may be drafted and implemented by management, but it should then be submitted to the audit committee, if applicable, or board of directors for approval. Upon approval of the policy, the corporation should develop implementation and enforcement mechanisms that are consistent with the policy and with any other policies and/or procedures already in place (e.g., an existing unlawful harassment and discrimination policy). The policy and these mechanisms should be periodically reviewed by the audit committee, if applicable, or the board of directors.

Below is sample board resolution language for approval of a whistleblower policy:

“WHEREAS, the Board believes it is the policy of the Corporation to be committed to ethical behavior, and to encourage directors, officers, employees and volunteers who reasonably believe that they are aware of any action or suspected action taken within the Corporation that is illegal, fraudulent, or in violation of any adopted policy of the Corporation, to disclose any such violations without fear of retaliation, discrimination, or harassment; and

WHEREAS, the Board deems it appropriate and in the best interests of the Corporation to adopt a written Whistleblower Policy.

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby approves the adoption of a Whistleblower Policy in the form previously presented to the Board and attached to this resolution.”

ADDITIONAL MATERIALS AND INFORMATION

Public Counsel

- Whistleblower Policy: <https://publiccounsel.org/publications/annotated-form-of-whistleblower-policy/>
- Form 990 Resources
 - Annotated Form 990: <https://publiccounsel.org/publications/annotated-irs-form-990-2011/>
 - Conflict of Interest Policy: <https://publiccounsel.org/publications/annotated-form-of-conflict-of-interest-policy-2010/>
 - Records Management and Retention Policy: <https://publiccounsel.org/publications/annotated-form-of-records-management-and-retention-policy/>
- Annotated Form of Bylaws: https://publiccounsel.org/wp-content/uploads/2021/12/Annotated_Bylaws.pdf
- Guide for the Voluntary Dissolution of a California Nonprofit Public Benefit Organization: <https://publiccounsel.org/publications/dissolution-of-a-california-nonprofit-corporation-2017/>

Internal Revenue Service

- Form 990 (including filing tips and other resources): <https://www.irs.gov/charities-non-profits/form-990-resources-and-tools>
- Tax Information for Charities: www.irs.gov/charities

California Attorney General

- Guide to Charities: <https://www.oag.ca.gov/system/files/media/Guide%20for%20Charities.pdf>
- Nonprofit Integrity Act FAQ: <https://oag.ca.gov/charities/laws>

FREE LEGAL ASSISTANCE

Public Counsel’s Community Development Project provides free legal assistance to qualifying nonprofit organizations that share our mission of serving low-income communities and addressing issues of poverty within Los Angeles County. If your organization needs legal assistance, or to provide comments on this form, visit www.publiccounsel.org/practice_areas/community_development or call (213) 385-2977, extension 200.