

DEPARTMENT OF INDUSTRIAL RELATIONS

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**Julie A. Su***California Labor Commissioner**Division of Labor Standards Enforcement***2012 RETALIATION COMPLAINT REPORT
(Labor Code Section 98.75)**

The Labor Commissioner respectfully submits this report to the Legislature.

Background

California law contains a strong public policy to protect employees from retaliation for exercising their rights. Labor Code section 98.7, effective in 1986 and amended in 1999, 2001, and 2002, provides that any person who believes he or she has been discharged or otherwise discriminated against in violation of any law under the jurisdiction of the Labor Commissioner may file a complaint with the division within six months after the occurrence of the violation. Through this Code section, the Labor Commissioner has jurisdiction to resolve disputes arising from 33 statutes and regulations.

The Labor Commissioner's office, also called the Division of Labor Standards Enforcement (DLSE), investigates complaints and makes determinations. In the event the Labor Commissioner determines a violation has occurred, the statute authorizes the Labor Commissioner to direct the violator to cease and desist from the violation and to take such action deemed necessary to remedy the violation including, where appropriate, rehiring or reinstatement of the aggrieved employee, reimbursement of lost wages and interest thereon, and/or payment of reasonable attorney's fees associated with any investigative hearing by the Labor Commissioner.

Current Reporting Period Highlights

DLSE has developed a new complaint form that eliminates questions requesting legal conclusions and is written in lay language. The information collected on the new form was formulated to better enable investigators to determine DLSE jurisdiction; to evaluate whether the basic elements of a claim are satisfied and, if not, to protect employers from frivolous case filings; to provide more complete information needed for investigation; to promote accurate investigations in a more expeditious timeframe; and to identify other sources of information about the claim that may reside with other agencies. The new form, along with the Instructions and Guide for completing the form, is available in English, Spanish, Korean, Vietnamese and Tagalog. In the past, all retaliation complaints were sent to Sacramento for processing and assignment, resulting in unnecessary delays. Today, all DLSE district offices accept in-person filings, and complaints involving work performed in the southern part of the

state (anywhere south of Bakersfield), are now processed in Santa Ana while those involving work performed in Bakersfield and north are processed in Sacramento.

DLSE has developed a fast-track process for complaints received from workers who were subject to retaliation as a result of participating in a Bureau of Field Enforcement (BOFE) investigation. These complaints are immediately referred to a retaliation investigator to expedite the retaliation investigation for prompt resolution. Cease and desist letters are sent to the employers involved. Corporate employers are also informed of a \$10,000 penalty for such violations. Cal/OSHA retaliation complaints are accepted by phone or facsimile and immediately assigned to an investigator. DLSE is exploring opportunities to expedite cases through joint investigations when a wage complaint and a retaliation complaint have been filed. DLSE works with all parties to seek faster resolution of both cases instead of conducting separate investigations. DLSE seeks global settlements in appropriate cases, and when resolution is not possible, the retaliation investigation proceeds. The new information sharing and cooperative investigation processes enable concurrent investigations for complaints filed in multiple units. This cooperation streamlines government function, maximizes use of limited resources, and achieves more timely and accurate results.

Retaliation investigators received extensive investigation training on proper conduct and effective techniques for interviewing witnesses and writing reports. These new tools and approaches help investigators streamline the investigation process and make the unit more efficient.

In addition to improving complaint investigations, the determination and notification process has also been revised. Before cases are closed, DLSE conducts closing conferences with all parties present to educate employees and employers on the law and the reasons for the outcome.

As noted above, DLSE is charged with enforcing 33 statutes and regulations prohibiting retaliation in the workplace. While the majority of these statutes are contained in the Labor Code, the Division also enforces statutes contained in the Health and Safety Code, the Unemployment Insurance Code and Orders of the Industrial Welfare Commission. In addition to dissemination of information to the public through all of its District Offices, the Division maintains a section of its website <http://www.dir.ca.gov/dlse/dlseDiscrimination.html> devoted to information available to both employers and employees on their rights and responsibilities pursuant to these various statutes and regulations. This section contains:

- Instructions on how and where to file a complaint.
- The *Summary of Procedures* required by Labor Code section 98.7, provided in English, Spanish, Chinese and Korean.
- An information sheet, available in English, Spanish and Korean, titled *Assurances of Participation Without Retaliation* providing information specific to the right of an employee

to speak to a representative of the Division without fear of retaliation (Labor Code section 1102.5).

- An information sheet, available in English and Spanish, titled *Filing a Retaliation/Discrimination Complaint* providing information on timelines within which to file a complaint and a list of explanations for all Labor Code sections and other legislative enactments under the jurisdiction of the Labor Commissioner.

Report of Performance

Labor Code section 98.75 requires that the Labor Commissioner submit a report annually on the complaints filed with the Labor Commissioner in the previous calendar year pursuant to Labor Code sections 98.7 and 1197.5.¹ The following data is submitted in accordance with Labor Code section 98.75 for 2012:

- Complaints received: 2,945
- Accepted for investigation as within DLSE jurisdiction: 1,440 cases.²
- Exhibit A shows the number of complaints filed or opened in 2012 under various Labor Code sections listed, and one section each from the Health and Safety Code and Unemployment Insurance Code.³
 - The largest group of complaints filed originated from alleged retaliation for filing or threatening to file a claim relating to a right within the jurisdiction of the Labor Commissioner (Labor Code section 98.6). There were **949** complaints of this nature representing over half of the alleged violations accepted for investigation and over **65%** of all cases opened during the year.
 - The second largest group of complaints filed originated from alleged retaliation for disclosing violations or non-compliance with state or federal law (Labor Code section 1102.5). There were **445** complaints of this nature comprising approximately **30%** of alleged violations accepted for investigation for the year.

¹ Labor Code section 1197.5 provides that no employer shall pay any individual in the employer's employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where the payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of work production, or differential based on any bona fide factor other than sex.

² Of the 1,440 cases accepted, 60 were filed in 2011.

³ Complaints filed alleging retaliation may contain one or more alleged violations, and for the purpose of reflecting all of the violations associated with the complaints filed, they are listed as a single issue in Exhibit A.

- At the end of calendar year 2012, **385** cases remain unassigned (13 percent of the 2,945 complaints received but 27 percent of the cases accepted for investigation) primarily due to staff turnover and more thorough, time-intensive investigations. In addition, DLSE accepted a total of 1,440 cases in 2012, 174 cases more than what was accepted in 2011.⁴ Further, the cases accepted for investigation in 2012 alleged 170 more violations than in calendar year 2011⁵, thus requiring more time for each investigated case. Finally, the year 2012 was still marked by furloughs of one (1) day per month for the investigators and support staff.
- DLSE closed 1,206 cases⁶.
- Exhibit B details the disposition of the various retaliation cases where a Determination was issued in 2012. There were a total of **262** Determinations issued, of which **203** were dismissals and **59** were findings for employees. Of the 59 cause findings, 9 were resolved by employer compliance with the Determination; one employer is complying by making payments; four were resolved through settlement; nine cases were filed in court; 25 are pending action by legal; seven were appealed to the Director; one determination was issued and is pending the appeal period; two are pending the demand, and one cause finding was reversed to a dismissal on appeal.

Respectfully Submitted,



Julie A. Su
Labor Commissioner

⁴ In 2011, there were 1,266 cases accepted for investigation.

⁵ These 1,266 cases accepted for investigation in 2011 alleged 1,624 violations.

⁶ There were 1,018 cases closed in 2011.

Exhibit A. Division of Labor Standards Enforcement Retaliation Complaints Filed for Calendar Year 2012

Labor Code	Description	Total
98.6	For filing or threatening to file a claim with the Labor Commissioner.	949
230(a) & (b)	For taking time off to serve on a jury or appear as a witness in court.	19
230(c)	For taking time off to seek medical help as a victim of domestic violence or sexual assault.	2
230.1	Employers with 25 or more employees; protects employee who is a victim of domestic violence or sexual assault for taking time off from work to obtain injunctive relief.	3
230.2(b)	Protects employees or family members of employees who are victims of a crime to take time off work to attend judicial proceedings.	1
230.3	For taking time off to perform duties as a volunteer firefighter, police or rescue worker.	1
230.7	For taking time off to attend a child's school at the request of child's teacher.	1
230.8	Employers with 25 or more employees; protects an employee for participating in school activities.	1
232(a) & (b)	For discussing or disclosing wages, and refusing to agree not to disclose wages.	9
232.5	Protects employee's right to discuss employer's working conditions.	6
233	Protects employee's ability to use sick leave to attend to illness of a family member.	8
432.7	Protects disclosure of employee's arrest record that did not result in a conviction.	3
1025-1028	Protects employee's right to participate in alcohol or drug program if 25 or more employees.	2
1101 & 1102	For engaging in political activity of the employee's choice.	2
1102.5	Protects employee's right to report violations or noncompliance with state or federal statute.	445
1197.5	Protects employees from sex based wage discrimination.	8
1198.3	Protects employees from refusing to work hours in excess of those allowed in IWC orders	1
2929(b)	Protects employees whose wages are garnished for payment of <u>one</u> judgment.	8
2930	For failure to show employee a shopping investigator report before discipline or discharge.	1
6310	For complaining about or initiating proceedings relating to safety or health conditions.	279
6311	For refusing to perform work in an environment hazardous to the employee or coworkers.	25
1596.881	Health and Safety Code regarding licensing of child care facilities.	5
1237	(UI Code). Protects employee's right to seek information on unemployment insurance.	15
	Total Violations Alleged	1,794
	Total Cases Accepted for Investigation	1,440

Exhibit B. Disposition of Cases Issued Determination in 2012

DISPOSITION	YEAR COMPLAINT FILED					
	Total	2008	2009	2010	2011	2012
Determinations Issued:	262					
Complaints Found Valid	59	4	4	8	27	16
Complaints Dismissed	203	9	36	40	99	19
Results of Cases with Findings for Employees:	59					
Compliance	9					
Non-compliance	50					
Results of Non-Compliance:						
Court Filings	9					
Settlements	4					
Pending Appeal Ruling	7					
Reversal on Appeal	1					
Pending Legal Action	25					
Pending Appeal Period	1					
Pending the Demand	2					
Complying through Payment Plan	1					
Investigative Hearings Held	0	0	0	0	0	0
Cases Closed in 2012	1,206					