

DEPARTMENT OF INDUSTRIAL RELATIONS

Headquarters Office

1515 Clay Street, Suite 401

Oakland, CA 94612

510-285-2118

**Patricia K. Huber***Assistant Chief**Division of Labor Standards Enforcement***2018 RETALIATION COMPLAINT REPORT
(LABOR CODE §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 (LC) section 98.7, enacted in 1986 and amended in 1999, 2001, 2002, 2013, and 2017, establishes procedures for the Labor Commissioner's Office, also known as the Division of Labor Standards Enforcement (DLSE), to investigate retaliation complaints and to enforce determinations of unlawful retaliation issued by the Labor Commissioner.

The Labor Commissioner's Office may accept complaints alleging violations of four dozen statutes prohibiting retaliation. Following an investigation into allegations raised in these complaints, the Labor Commissioner issues a determination. If the evidence does not establish a finding of retaliation, the determination will explain the findings, and the case will be dismissed and closed. If the Labor Commissioner determines that a violation has occurred, the statute authorizes the Labor Commissioner to direct the violator to cease and desist from committing the violation and may order, where appropriate, rehiring or reinstating the aggrieved employees, reimbursing them for lost wages and interest thereon, paying civil penalties, and posting a notice acknowledging the unlawful treatment of the employees. In the event of an investigative hearing, the Labor Commissioner may order the payment of reasonable attorney's fees associated with the hearing. If the employer does not appeal or comply, the Labor Commissioner is mandated to promptly file an action in court to enforce the determination.

SIGNIFICANT LEGISLATION RELATED TO PROHIBITING RETALIATION

In 2018, Assembly Bill (AB) 168 added LC section 432.3,¹ which prohibits employers from seeking the salary history or information about compensation and benefits from applicants for employment. It further provides that, consistent with LC section 1197.5, salary history cannot, by itself, justify pay disparity.

Also effective January 1, 2018, was AB 46 which amended LC section 1197.5 to clarify covered employers included both public and private sector employers. (See LC section 1197.5(l).) The Labor Commissioner's Office had previously accepted complaints from public sector employees pending legal review. The Labor Commissioner closed all cases filed against public sector employers prior to January 1, 2018, for lack of jurisdiction.

¹ This statute was amended and clarified in AB 2282, with an effective date of January 1, 2019, permitting employers to ask applicants about their salary expectations. At the same time, the amendment prohibits using salary history to justify any disparity in compensation. AB 2282 also prohibits reliance on salary history to justify pay disparity based on sex, race, or ethnicity.

This legislation follows several earlier amendments to LC section 1197.5. The California Fair Pay Act, Senate Bill (SB) 358, effective January 1, 2016, contains stronger provisions to combat pay disparity based on gender, including an expansion of the law to permit comparison of jobs that involve “substantially similar work,” as opposed to “equal work.” This amendment also narrowed the exceptions to finding pay disparity by eliminating the “same establishment” requirement, making it more difficult to satisfy a catch-all “bona fide factor other than sex” defense and ensuring that employers reasonably apply legitimate factors and account for the entire pay differential.

Effective in January 2017, the Legislature amended LC section 1197.5 with SB 1063 to add race and ethnicity as protected categories to the Equal Pay Act’s prohibition against unequal pay based on sex. The provisions, protections, procedures, and remedies relating to race- or ethnicity-based claims are identical to the existing ones relating to sex. That same year, AB 1676 amended LC section 1197.5 to bar an employer from justifying a pay disparity based on sex, race, or ethnicity based solely on prior history.

Prior to the passage of the SB 358, LC section 1197.5 placed a heavy burden on a claimant to prove pay disparity by requiring a comparison of equal work at the same establishment. As stated in the preamble to the legislation, the result was that LC section 1197.5 was “rarely utilized because the current statutory language makes it difficult to establish a successful claim.” The amendment to the Equal Pay Act achieved with the passage of SB 1063 addressed one of the largest factors in wage inequity: race and ethnicity. Studies show that African American and Latina women earn far less than Caucasian men earn and that African American men earn 75% of the average salary of a Caucasian man.

The impact of this legislation, with five amendments passed over a three-year period, has been a dramatic and ongoing increase in the number of claims under LC section 1197.5.²

HIGHLIGHTS FROM THIS REPORTING PERIOD

The Labor Commissioner created an online complaint form for all retaliation complaints and Equal Pay Act claims that is accessible on the Division’s website. The use of the online form over the first six months it was available suggests a tremendous increase in the number of new claims filed in 2019.

Notable Enforcement Actions to Protect Workers

In a trial conducted by DLSE’s Retaliation Complaint Investigation (RCI) attorneys, a worker filed a wage claim with the Labor Commissioner’s Office alleging overtime violations. Only a few days after the Notice of Claim and Conference was mailed to the parties, the worker was fired. Despite his best efforts, the worker was unable to find work for three years. During this time, he suffered from depression, loss of appetite, and intense shame and stress, as a result of which he took medication for two years. Ultimately, he took a job at an egg processing plant in Nebraska. He sold his home and uprooted his family as a direct consequence of the employer’s unlawful act.

In the judgment following the trial, this worker was awarded back pay and interest, and the Labor Commissioner was awarded a \$10,000 penalty under LC section 1102.5. In addition, the court ordered

² In 2015, prior to the amendments to LC section 1197.5, only 6 claims for retaliation or pay disparity were filed. In 2018, a total of 184 claims alleging wage discrimination based on sex, race, ethnicity, and/or retaliation based on inquiries about pay disparity were filed and accepted for investigation.

\$170,000 in compensatory damages for a grand total award of \$279,220.32. An award of compensatory damages for pain and suffering at trial is a rare and notable achievement.

In another case, a worker learned that his manager was embezzling money from the business after payments to vendors and his own paycheck were returned by the bank because of insufficient funds. He reported the manager's illegal activity to the owner of the business. A few days later, the manager terminated the worker who had reported the financial irregularities. A merit-finding determination and demand was issued for monetary remedies, including lost wages, interest, and civil penalties, totaling \$126,254.41, and nonmonetary remedies, including posting a notice and offering reinstatement. The employer complied with the nonmonetary remedies in the demand, and the Labor Commissioner's Office negotiated a monetary settlement of the claim for \$90,000, prior to a referral for enforcement through the courts.

In an immigration threat case, a home health-care worker who was a single mother filed a complaint alleging that she heard her employer was trying to deport her after she had advised this employer that she was going to contact the Labor Commissioner about wage and workhour issues. The investigation revealed that the employer expressed that merely terminating the worker would be insufficient, as it would not deter her from contacting the Labor Commissioner. The employer asserted only deportation could rid them of the problem. The employer ordered its employees to contact and report their co-worker to immigration enforcement authorities anonymously. When the co-workers refused to contact those authorities, the employer reported the worker to a social service agency via an anonymous letter, seeking to disqualify her from receiving benefits. The determination assessed \$30,000 in penalties due to the worker and \$30,000 in civil penalties due to the state. The employer paid the full amount and agreed to settle the wage claim for an additional \$20,000. The worker received a payment of \$50,000, and the employer paid the full civil penalties to the state. The employer also posted a Notice to Employees, advising them of the results of the investigation, the civil penalties assessed, and their rights under the Labor Code.

Additional highlights:

- RCI legal received the final payment of a \$217,000 settlement of a case in litigation. This case involved an employee who filed a wage claim with the Labor Commissioner's Office for unpaid wages. Her employer learned of the claim, threatened to and later terminated the employee. The Labor Commissioner's Office filed an action against the employer and the employee intervened in that action. The parties were able to reach a settlement that included a monetary payment to the employee, attorney's fees to the Labor Commissioner's Office, and a requirement that the employer post a notice to inform employees of their rights under the Labor Code.
- The Department of Industrial Relations' Labor Court completed a merit finding following a hearing, awarding damages to a complainant who had been terminated for reporting a workplace injury. The Labor Commissioner assisted the parties in settling this case prior to issuance of the determination for a monetary amount larger than the original award and a posting affirming the employer's commitment to protect employees who report workplace injuries or file a workers' compensation claim.
- In a case alleging a violation of LC section 1311.5, the Labor Commissioner awarded \$64,286 to a worker who was a minor at the time of her termination; she was terminated for reporting that she was not paid the minimum wage and was not given meal or rest periods.

REPORT OF PERFORMANCE

LC section 98.75 requires the Labor Commissioner to submit a report annually on the following topics: (a) the complaints filed with the Labor Commissioner in the previous calendar year, pursuant to LC sections 98.7 and 1197.5;³ (b) the number of determinations issued, investigative hearings held, complaints dismissed, and complaints found to be valid, grouped by the year in which the complaints were filed; and (c) the number of cases in which the employer complied or failed to comply with an order to remedy the unlawful discrimination, as well as the number of court actions brought by the Labor Commissioner to remedy unlawful discrimination and the results of those court actions. If any action under LC section 98.7 was not brought to court in a timely way, the report must also specify the reasons.

Exhibit A, submitted in accordance with LC section 98.75, shows the number of complaints filed or opened in 2018 under various LC sections and one section each from the Health and Safety Code and Unemployment Insurance Code. In summary:

- Total number of complaints (violations alleged) received by the RCI Unit: **5,633**.
- Total number of cases accepted for investigation as within DLSE jurisdiction: **2,590**.
- Total number of violations alleged for all cases accepted for investigation: **5,664**.
- The largest group of complaints filed originated from alleged retaliation for filing or threatening to file a claim relating to a right that is under the jurisdiction of the Labor Commissioner or the exercise of any rights afforded in the Labor Code (LC section 98.6). There were **2,145** such violations alleged and accepted for investigation.
- The second-largest group of complaints filed originated from alleged retaliation for disclosing violations or noncompliance with local, state or federal law (LC section 1102.5). There were **2,095** alleged violations (complaints) of this nature.

Exhibit B details the disposition of the various retaliation cases for determinations issued in 2018 based on the year in which the complaint was filed. The RCI Unit issued **411** determinations, of which **338** were dismissals, and **73** were cases with merit (findings for employees).

- Of the **73** cases with merit determinations issued in 2018, **five** cases were resolved by employer compliance with the determination, **five** cases were settled prior to court filing, **41** cases were referred for enforcement and are pending court filing, and **18** cases were filed in court. In addition, **one** case was dismissed as the employer is in receivership, **one** case is in payments through a bankruptcy filing, and **two** other cases have settlements pending.
- In 2018, the Labor Commissioner filed **25** cases in Superior Court (with **18** of these filings following determinations issued in 2018), settled **28** cases, and obtained judgments in **four** other cases.

³ LC section 1197.5 prohibits an employer from paying its employees a wage rate that is lower than that paid to employees of the opposite sex, or of a different race or ethnicity, for substantially similar work done under similar working conditions, when that work is viewed as a composite of skill, effort, and responsibility, unless the employer demonstrates that the difference in the wage rate is based on a seniority system, a merit system, a system that measures the quantity or quality of production, or a factor other than sex, race, or ethnicity, such as education, training, or experience. Amendments to this section went into effect in 2016 and 2017.

- The RCI Unit held **three** investigative hearings, two cases were dismissals, one recommended cause; however, that case was settled prior to the issuance of the determination.
- In total, the Labor Commissioner closed **2,588** cases in 2018. Closed cases include complaints dismissed after issuance of determination, settlements, and cases withdrawn or abandoned by the complainants.

Exhibit C reports statistics over an eight-year period for comparative purposes and to highlight the growth in the number of statutes enforced, new claims submitted, total cases accepted, and violations alleged among other things. This chart helps establish trends versus a one- or two-year anomaly.

OTHER ACCOMPLISHMENTS IN 2018

Not included in the exhibits are the following details related to merit findings, settlements, and judgments.

- The **73** merit findings ordered payment of \$1,989,104.41 in lost wages, \$446,834.53 in interest on the lost wages, and \$2,082,500 in penalties pursuant to Labor Code sections 98.6, 248.5, 1091.1, 1102.5, and 2814.
- The RCI unit was also able to reach **507** settlements prior to issuance of determinations.
- The legal unit obtained more than **\$1,023,000** in settlements, as well as judgments exceeding **\$536,457**.
- The number of cases carried over⁴ from 2018 to the current year was **3,079**, a decrease from the previous year, when **3,128** were carried over from 2017 to 2018.

The RCI Unit continues to strive to effectively handle annual increases in alleged violations, cases, and investigations.

Respectfully submitted,

Patricia Huber

Patricia K. Huber
Assistant Chief

⁴ Cases that are carried over are cases in investigation with no recommended finding or other disposition.

EXHIBIT A
Division of Labor Standards Enforcement
Calendar Year 2018 Retaliation Violations Alleged per LC 98.75 (a)

Labor Code	Description of Violations Alleged	Total Allegations
96(k)	For loss of wages as a result of engaging in lawful conduct during nonworking hours	0
98.6	For filing or threatening to file a claim with the Labor Commissioner	2,145
230(a)	For taking time off to serve on a jury or appear as a witness in court	7
230(b)	For taking time off to appear as a witness in court	5
230(c)	For taking time off to seek medical help as a victim of domestic violence, sexual assault, or stalking	11
230(e)	Protection based on employee's status as a victim of domestic violence, sexual assault, and/or stalking	29
230(f)	Protects victims of domestic violence, sexual assault, and/or stalking who request reasonable accommodations	21
230.1	For employers with 25 or more employees, protects employee who is a victim of domestic violence, sexual assault, or stalking for taking time off from work to obtain injunctive relief	4
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	4
230.3	Protects employees who are victims of listed crimes and take time off from work	1
230.4	Protects employees who are volunteer firefighter, reserve peace officer or emergency personnel to take time off from work for fire or law enforcement training. Applies to employers with 50 or more employees.	2
230.5	Protects employees who are victims of listed crimes and take time off from work	1
232(a) & (b)	Protects employees who discuss or disclose wages or refuse to agree not to disclose wages	10
232.5	Protects employee's right to discuss employer's working conditions	16
233	Protects employee's ability to use sick leave to attend to illness of a family member	26
244	Prohibits employer from reporting or threatening to report an employee's citizenship or immigration status to a state, federal, or local agency because the employee exercises a right under the Labor Code, the Government Code or the Civil Code. This protection also extends to former and prospective employees and their family members.	78
247	Prohibits paid sick leave retaliation	244
432.3	Prohibits employer from relying on prior salary history as a factor in a job offer. Employer must provide a pay scale upon request.	2
432.7	Prohibits employer from requiring employee or job applicant to disclose any arrest record that did not result in a conviction	8
1019	Protects employees engaging in activities protected by the Labor Code from unfair immigration-related practices	54
1019.1	Prohibits an employer from requiring applicants and employees to provide new or different documents to satisfy section 1324a(b) of Title 8 of US Code to prove eligibility for employment.	8

EXHIBIT A
Division of Labor Standards Enforcement
Calendar Year 2018 Retaliation Violations Alleged per LC 98.75 (a)

1024,6	Allows employees to update personal information without fear of retaliation	0
1025-1028	Protects employee's right to participate in alcohol or drug program if 25 or more employees	2
1030-1033	Protects employees who request lactation accommodations	4
1040-1044	Requires employer with 25 or more employees to reasonably accommodate an employee who reveals a problem with literacy and prohibits termination because of the disclosure, if the employee satisfactorily performs his or her work.	1
1101-1102	Protects employees who engage in political activities of the employee's choice	4
1102.5	Protects employee's right to report violations or noncompliance with local, state or federal statute	2,095
1197.5	Protects employees from retaliation based on sex-, race-, or ethnicity-based wage discrimination—Total claims under statute:	
a	–Claims alleging sex-based wage discrimination	62
a & b	–Claims alleging sex-based and race or ethnicity wage discrimination:	39
a, b, k	–Claims alleging sex-based and race or ethnicity wage discrimination and retaliation:	9
a & k	–Claims alleging sex-based wage discrimination and retaliation	18
b	–Claims alleging race or ethnicity wage discrimination:	39
b & k	–Claims alleging race or ethnicity wage discrimination and retaliation:	6
k	–Claims alleging retaliation based on sex-based wage discrimination:	1
k	–Claims alleging retaliation based on race or ethnicity wage discrimination:	9
k	–Claims alleging retaliation based on sex-based wage, and race or ethnicity wage discrimination:	1
1311.5	Protections for Child Labor Violations	5
2814	Prohibits an employer from using E-Verify to check the status of an existing employee or applicant who has not been offered employment.	4
2929(b)	Protects employees whose wages are garnished for payment of one judgment	2
2930	Protects employees who are disciplined or discharged based on a shopping investigator's report; employer must provide a copy of the report before the discipline or discharge.	1
6310	Protects employees who complain about or initiate proceedings relating to workplace safety or health conditions	561
	–Claims alleging retaliation after workplace injury included above (not retaliation after workplace safety complaints)	72
6311	Protects employees who refuse to perform work in an environment hazardous to the employee or co-workers	36
Other Codes		
1596.881	Health and Safety Code, regarding licensing of childcare facilities	5

EXHIBIT A
Division of Labor Standards Enforcement
Calendar Year 2018 Retaliation Violations Alleged per LC 98.75 (a)

1237	Unemployment Insurance Code, protects employee's right to seek information on unemployment insurance	12
	Total Number of Complaints (violations alleged) Received by RCI Unit	5,633
	Total Cases Accepted for Investigation	2,590
	Total Violations Alleged for All Cases Accepted for Investigation	5,664

EXHIBIT B

Calendar Year 2018 Disposition of Retaliation Cases per Labor Code 98.75 (b)

Disposition	2013	2014	2015	2016	2017	2018	Total
Determinations issued	15	41	70	112	129	44	411
Cases with merit	4	7	14	25	18	5	73
Cases dismissed	11	34	56	87	111	39	338
Investigative hearings held			1	2			3

Results of cases with merit	73
Compliance ¹	5
Settlement prior to referral for enforcement	5
Payments in bankruptcy	1
Possible settlements	2
Employer in bankruptcy receivership ²	1
Noncompliance	
Referred for enforcement (awaiting court filing)	41
Court filings for 2018 determinations	18
Legal Activity (including determinations from prior years)³	
Court Filings	25
Settlements	28
Judgments	4
Cases Closed in 2018	2,588

¹ The data for compliance and noncompliance both refer to results for cases with a determination issued in calendar year 2018.

² Case closed due to receivership without recovery

³ Includes legal activity on cases with determinations filed in prior years.

EXHIBIT C
Division of Labor Standards Enforcement
Eight-Year Statistics from the RCI Unit

Legislative Report Statistics	2011	2012	2013	2014	2015	2016	2017	2018
Retaliation statutes enforced	31	33	33	39	45	46	46	48
Total number of complaints (violations alleged) received	2,742	2,945	3,514	3,853	3,629	4,211	4,178	5,633
Total cases accepted	1,266	1,440	1,605	1,874	1,998	2,441	2,526	2,590
Total violations alleged	1,624	1,794	1,899	3,045	3,928	4,300	5,220	5,664
Cases closed	1,018	1,206	1,270	1,508	1,520	1,627	2,897	2,588
Unassigned or backlogged cases:	342	385	408	421	1,024	1,532	4	642
Positive outcomes for complainants: Cause findings + settlements	205	296	404	447	504	459	498	580