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Division of Labor Standards Enforcement*

## 2014 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 section 98.7, effective in 1986 and amended in 1999, 2001, 2002, and 2013, 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.<sup>1</sup> Through this Labor Code section, the Labor Commissioner has jurisdiction to resolve disputes arising from nearly three dozen statutes and regulations.

The Labor Commissioner's Office, also known as the Division of Labor Standards Enforcement (the Division), investigates complaints of retaliation and issues a determination. If 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 as deemed necessary to remedy the violation including, where appropriate, rehiring or reinstatement of the aggrieved employee, reimbursement of lost wages and interest thereon, payment of a civil penalty where appropriate, and posting a notice acknowledging unlawful retaliation. In the event that an investigative hearing is conducted, 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.

### HIGHLIGHTS FROM THIS REPORTING PERIOD

The Labor Commissioner's Office continued efforts to streamline the investigative process and improve efficiencies in completing more accurate and timely retaliation investigations. The Labor Commissioner used investigations conducted by the Criminal Investigations Unit and, when appropriate, sent a fast-track letter to any employer who discharged or otherwise retaliated against an employee or group of employees after a Bureau of Field Enforcement (BOFE) investigation. Using the improved process, the employer is directed to reinstate the employees (or employee) immediately and to cease and desist from any further retaliation as part of their cooperation with

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<sup>1</sup> Several Labor Code sections provide a longer statute of limitations. Labor Code sections 230.1 and 230.2 provide a one-year filing period, while Labor Code section 1197.5 provides at least a two-year period for filing the retaliation claim with the Labor Commissioner's Office.

BOFE investigators. As a result, in some cases the employees (or employee) were immediately offered their jobs back and in other cases threats of termination for cooperating with the investigation stopped. The new approach reinforces the anti-retaliation provisions of the Labor Code, strengthens other enforcement efforts, protects honest employers, and builds worker trust in state enforcement. No employee should be put in harm's way for cooperating with the government.

Significant legislative changes came into effect in 2014 to protect employees from the unlawful retaliatory action of their employers. A civil penalty of up to \$10,000 was added to Labor Code section 98.6 to strengthen enforcement actions and this penalty may be assessed against any type of employer, including a sole proprietor, a partnership, an LLC, or a corporation. In addition, changes to Labor Code section 1102.5 have extended protections for employees who report unlawful conduct directly to their employer. Under this provision, the employee is no longer required to report unlawful conduct to state or federal agencies and is protected from retaliation for reporting unlawful conduct directly to the employer.

In 2014, the Labor Commissioner's Office enforced 39 statutes and regulations prohibiting retaliation in the workplace, including Labor Code sections 244 and 1019, which identify unlawful immigration-related practices.<sup>2</sup> The Labor Commissioner's Office is allowed to pursue remedies for any workers whose employer threatens them or engages in an unlawful practice in response to any of nearly forty activities protected by the Labor Code. The majority of the anti-retaliation statutes enforced by the Labor Commissioner are contained in the Labor Code; however the Division also enforces statutes contained in the Health and Safety Code, the Unemployment Insurance Code, and the 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 devoted to information available to both employers and employees on their rights and responsibilities pursuant to these various statutes and regulations.<sup>3</sup> This section contains the following information:

- Instructions on how and where to file a complaint (the complaint form was modified and improved in 2012).
- The *Summary of Procedures* required by Labor Code section 98.7, provided in English, Spanish, Chinese, and Korean (these were also modified and reflect streamlined and improved investigative procedures).
- 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 relevant Labor Code sections (as well as several sections from two other Codes) that are under the jurisdiction of the Labor Commissioner.

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<sup>2</sup> Exhibit A shows only 23 of the 39 anti-retaliation statutes, because (1) the Retaliation Complaint Investigation (RCI) Unit did not receive any alleged violations for 10 of the statutes (and hence did not accept any such cases for investigation), and (2) 6 other statutes, including Labor Code sections 244 and 1019, were so new that the database was not set up to track them. In 2015, a newly configured database will track the newest types of anti-retaliation.

<sup>3</sup> <http://www.dir.ca.gov/dlse/dlseDiscrimination.html>

## REPORT OF PERFORMANCE

Labor Code section 98.75 requires that the Labor Commissioner submit an annual report on (a) the complaints filed with the Labor Commissioner in the previous calendar year pursuant to Labor Code sections 98.7 and 1197.5<sup>4</sup>; (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 with an order to remedy the unlawful discrimination or failed to comply, as well as the number of court actions brought by the Labor Commissioner to remedy unlawful discrimination and the results of those court actions. The report must also specify the reasons for not bringing action to court if the action was not brought timely under Labor Code section 98.7.

The following data is submitted in accordance with Labor Code section 98.75 for 2014:

- Complaints received: 3,853<sup>5</sup>
- Complaints found to be within DLSE jurisdiction and accepted for investigation (i.e., filed as cases): 1,874<sup>6</sup>

**Exhibit A** shows the number of cases opened in 2014<sup>7</sup> under various Labor Code sections listed, as well as under one section of the Health and Safety Code and one section of the Unemployment Insurance Code.

- The largest group of accepted cases originated from alleged retaliation for disclosing violations or noncompliance with local, state, or federal law (Labor Code section 1102.5). There were **1,290** cases of this nature, representing **42%** of all alleged violations for cases accepted for investigation in 2014. Of these cases, 69% contained at least one allegation of a violation of this Labor Code section.
- The second largest group of cases 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 **1,221** cases of this nature, making up 40% of all alleged violations for cases accepted for investigation in 2014. Of these cases, 65% contained at least one allegation of a violation of this Labor Code section.
- At the end of calendar year 2014, **421** cases remain unassigned (22% of the 1,874 complaints accepted), primarily due to the continued increase in the number of complaints filed each year, the dramatic increase in the number of violations to be investigated, and the workload associated with the thorough investigation of each complaint. The Division accepted 269 more cases in 2014 than in 2013 (1,874 cases

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<sup>4</sup> Labor Code section 1197.5 provides that no employer shall pay any of its employees 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 when 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.

<sup>5</sup> This number represents the total number of complaints received by the RCI Unit, of which nearly half were accepted for investigation.

<sup>6</sup> An accepted case may allege multiple violations, hence the number of alleged violations shown in Exhibit A is larger than the total number of cases accepted for investigation.

<sup>7</sup> Exhibit A reflects only the violations associated with the complaints filed *and* accepted for investigation in 2014.

in 2014 vs 1,605 in 2013). Furthermore, the cases accepted for investigation in 2014 alleged 1,157 more violations than in calendar year 2013 (3,045 allegations in 2014 vs 1,889 in 2013). Consequently, it took more time to investigate each case.

**Exhibit B** details the disposition of the various retaliation cases for which a determination was issued in 2014. The RCI Unit issued a total of **227** determinations, of which **180** were dismissals and **47** were cause findings for employees. Of the 47 cause findings, 16 cases are on appeal with the Director's Office, 1 case was dismissed on appeal by the Director's Office, 6 were resolved by employer compliance with the determination, and 24 involved noncompliance. The 24 cases of noncompliance break down as follows: 2 cases are in the process of referral for enforcement, and 22 cases have been referred for enforcement, of which 9 actions have been filed in court, 10 cases are pending court filing, 2 cases were settled, and 1 case is in settlement discussions. Any of these cases that do not result in settlements will also be filed in court. For the 2014 determinations, the 9 cases filed in court are still in litigation, so it is not yet possible to report the results of those court actions.

In addition to the 2014 determinations listed in Exhibit B and discussed above, the Labor Commissioner also filed in court 36 cases with determinations issued in prior years, settled 25 other cases, and has 3 pending settlements. Twelve other cases with determinations issued in prior years were closed as dismissed or withdrawn, or for other reasons.

In 2014, the RCI Unit was able to reach 401 settlements in cases prior to the issuance of a determination. These settlements include cases filed in prior years.

Of the cases for which determinations were issued in this reporting period, ten cases in which the employer has failed to comply or to settle have not been filed in court due to resource limitations. The Division continues to address the backlog of cases that need to be filed in court.

- Eighteen investigative hearings took place in 2014, of which 8 investigative hearings were for health and safety complaints. The Division began using administrative law judges to conduct investigative hearings and scheduled or held 10 such hearings. Of these, 3 determinations have been issued while the other cases are pending.
- The RCI Unit closed 1,508 cases in 2014, 235 more cases than in 2013. Closed cases include complaints dismissed after issuance of determinations, settlements, as well as cases withdrawn or abandoned by the complainants.

Respectfully Submitted,



Julie A. Su  
Labor Commissioner

**EXHIBIT A**  
**Division of Labor Standards Enforcement**  
**Calendar Year 2014 Disposition of Retaliation Cases**

<b>Labor Code</b>	<b>Description</b>	<b>Total</b>
96(K)	For loss of wages as a result of engaging in lawful conduct during nonworking hours.	16
98.6 <sup>1</sup>	For filing or threatening to file a claim with the Labor Commissioner.	1,220
230(a) & (b)	For taking time off to serve on a jury or appear as a witness in court.	14
230(c)	For taking time off to seek medical help as a victim of domestic violence, sexual assault or stalking.	3
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.	3
230.2(b)	Protects employees or family members of employees who are victims of a crime and allows these employees to take time off work to attend judicial proceedings.	1
230.7	For taking time off to attend a child's school at request of child's teacher.	1
230.8	For employers with 25 or more employees, protects employee for participating in school activities.	3
232(a) & (b)	For discussing or disclosing wages or for refusing to agree not to disclose wages.	10
232.5	Protects employee's right to discuss employer's working conditions.	29
233	Protects employee's ability to use sick leave to attend to illness of a family member.	14
432.7	Protects disclosure of employee's arrest record that did not result in a conviction.	7
1025–1028	For employers with 25 or more employees, protects employee's right to participate in alcohol or drug program.	1
1101 & 1102	Protects employees engaging in political activity of their choice.	7
1102.5 <sup>1</sup>	Protects employee's right to report violations or noncompliance with state or federal statute.	1,290
1197.5	Protects employees from gender-based wage discrimination.	6
2929(b)	Protects employees whose wages are garnished for payment of <u>one</u> judgment.	3
2930	For employer's failure to show employee a shopping investigator report before discipline or discharge.	0
6310	Protects employees who complain about or initiate proceedings relating to workplace safety or health conditions.	347
6311	Protects employees who refuse to perform work in an environment hazardous to the employee or co-workers.	29
6403.5	Protects health care workers who refuse to lift, reposition, or transfer a patient because of concerns about patient or worker safety or because of the lack of trained personnel or equipment.	1
<b>Other Code</b>		
1569.881	Health and Safety Code, regarding licensing of childcare facilities.	18
1237	Unemployment Insurance Code, regarding employee's right to seek information on unemployment insurance.	22
	<b>Total Cases Accepted for Investigation</b>	<b>1,874</b>
	<b>Total Violations Alleged for All Cases Accepted for Investigation<sup>2</sup></b>	<b>3,045</b>

<sup>1</sup> Immigration threats were not tracked separately but were instead treated as an adverse action under another violation, usually under sections 98.6 or 1102.5.

<sup>2</sup> As each complaint may contain more than one alleged violation, the total number of violations alleged (3,045) is greater than the total number of complaints accepted for investigation (1,874).

**EXHIBIT B**  
**Division of Labor Standards Enforcement**  
**Calendar Year 2014 Disposition of Retaliation Cases**

<b>Disposition</b>	<b>Total</b>	<b>2001</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>
Determinations Issued:	227							
Complaints Dismissed:	180		2	8	37	42	73	18
Complaints Found Valid:	47	1	0	4	1	18	20	3
Results of Cases with Cause Findings for Employees <sup>1</sup> :	47							
Findings on Appeal:	16							
Compliance:	6							
Noncompliance <sup>2</sup> :	24							
Dismissed on Appeal:	1							
Noncompliance:	24							
Awaiting Referral for Enforcement:	2							
Referred for Enforcement:	22							
Noncompliance Enforcement Results for 2014 Determinations:	22							
Court Filings:	9							
Awaiting Court Filing:	10							
Compliance or Settlement:	2							
Awaiting Settlement:	1							
Investigative Hearings Held:	18	0	0	0	1	2	5	10
<b>Cases closed in 2014</b>	<b>1,508</b>							

<sup>1</sup> The data for compliance and noncompliance refer to results for cases with a determination issued in Calendar Year 2014.

<sup>2</sup> In prior years, the results of noncompliance reflected all cases that were resolved by legal in the Calendar Year, but this year's reporting reflects only those cases with a determination issued in 2014.