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2016 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, which took effect in 1986 and was 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.¹ Through this Labor Code section, the Labor Commissioner has jurisdiction to investigate and resolve disputes arising from nearly four dozen statutes and regulations.

The Labor Commissioner's Office, also known as the Division of Labor Standards Enforcement (DLSE), issues a determination following an investigation into allegations raised in complaints filed with this office. 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 to take such action as deemed necessary to remedy the harm from the violation, including, where appropriate, rehiring or reinstating the aggrieved employee, reimbursing them for lost wages and interest thereon, paying a civil penalty, and posting a notice acknowledging unlawful treatment. 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.

HIGHLIGHTS FROM THIS REPORTING PERIOD

Calendar year 2016 continued the seven-year trend of increases in workload and production across the board in the Retaliation Complaint Investigation (RCI) Unit. The RCI Unit experienced growth in the number of statutes under the jurisdiction of the Labor Commissioner, now at 46, as well as increases in the number of claims received, cases accepted, violations alleged, and cases closed. Despite the record number of closures, there were 814 more new cases accepted than cases closed in 2016.

¹ Several Labor Code sections provide a longer statute of limitations, including sections 230 (c), (e), and (f), 230.1, and 230.2, which all provide a one-year filing period.

Of particular significance in 2016 was the increase in new claims made under Labor Code section 6310, the statute that protects workers from unsafe and unhealthy work environments. Following the directive from the Federal Occupational Safety and Health Administration and the Director of the Department of Industrial Relations, the RCI Unit accepted 136 claims alleging retaliation following a workplace injury or the report of a workplace injury, increasing the total number of claims accepted under Labor Code sections 6310 and 6311 to 558, up from 415 alleged violations the previous year.

The Unit also saw growth in the number of cases accepted that alleged violations of the Equal Pay Act found in Labor Code section 1197.5. This code section prohibits retaliation related to a worker's inquiry about equal pay and also provides a vehicle for a claim that members of the opposite sex were paid more than the complainant employee for substantially similar work. In 2016, of the 34 cases accepted under this Labor Code section, 19 claims alleged disparate pay only, 5 cases alleged retaliation only, and 10 cases alleged pay disparity and retaliation. The investigations into pay disparity under the Equal Pay Act differ significantly from other retaliation complaints and add to the complexity of the investigation. The training of subject matter experts within the RCI Unit to facilitate and improve the investigative process is underway. The legal unit has also worked with the Department of Fair Employment and Housing to ensure that staff are collaborative in the processing and investigations of these claims. The Unit is also working with various federal agencies with jurisdiction and enforcement authority over Equal Pay complaints.

In 2016 there were 163 cases alleging retaliation based on the protections found in Labor Code sections 245–249, under the Healthy Workplaces, Healthy Families Act of 2014, which grants employees paid sick leave. An additional protection was added for workers who experience unlawful immigration-related practices: Labor Code section 2814 provides for a civil penalty payable to the state for any misuse of the e-verify system. Six claims alleging a violation of this section were accepted and investigated during the past year.

The majority of the anti-retaliation statutes enforced by the Labor Commissioner are in the Labor Code; however, the Division also enforces statutes 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 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, at <http://www.dir.ca.gov/dlse/dlseDiscrimination.html>.

The most dramatic change over the past year for the RCI Unit has been in personnel, due to a natural turnover in staff and the addition of 19 new positions approved by the Legislature in the 2016-17 DLSE Resources BCP. Much of the latter part of 2016 was spent recruiting, interviewing, hiring, and training new staff, and this effort is ongoing to fill additional positions in 2017. In early January 2017, 75% of the staff in the RCI Unit had less than a year's experience in the unit. As a result, the training of staff is being systematized to allow for regular, recurring trainings for new staff and continuous skills development for more experienced staff. Particular efforts are being focused on developing the training capacity within the unit to support staff growth.

A summary of seven-year statistics for the Unit and illustrates the changes in claims, workload, case closures, and positive outcomes for complainants in recent years can be found in **Exhibit C** of this report.

REPORT OF PERFORMANCE

Labor Code 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 Labor Code sections 98.7 and 1197.5;² (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. The report must also specify the reasons for not bringing action in court if the action was not brought in a timely way under Labor Code 98.7.

Over the five-year period beginning in 2012 and ending in December 2016, the number of cases that the RCI Unit accepted increased dramatically by 70% (1,440 cases accepted in 2012 versus 2,441 cases accepted in 2016). Although the unit improved the closure rate of cases over this same period by closing 28% more cases in 2016 than in 2012 (1,270 cases closed in 2012 and 1,627 cases closed in 2016), the disparity between the number of cases closures and new cases accepted continued to grow. By the end of 2016, 1,532 cases remained unassigned.

To address this issue, the Labor Commissioner's Office is committed to training new staff to provide them with the analytical and writing skills necessary for them to quickly assimilate into the unit and conduct quality investigations. Improved supervision with five supervisors will enable the unit to work directly with investigators to improve on-the-job training and also provide more direction for deputies conducting complex investigations. With the addition of new attorneys, legal will become more involved earlier in the process in cases likely to have cause findings, thus improving both the quality and timeliness of these investigations.

To minimize the negative impact of the shortage of trained staff and to investigate all the cases filed in the last calendar year, the RCI unit is expanding the use of initial screening and the triage of cases. Triage is a system using support staff to make the initial contact with the parties and to gather initial responses to the complaint so that when the case is assigned for investigation all preliminary materials are in the file, allowing the investigator to move swiftly forward to identify key evidence and schedule interviews with the parties. This approach was piloted in Northern California during this reporting period, and in 2017 the Unit is expanding this approach to cases filed in Southern California.

² Labor Code Section 1197.5 prohibits an employer from paying its employees at a wage rate that is less than the wage rate it pays to employees of the opposite sex 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 wage rate is based on a seniority system, a merit system, a system that measures quantity or quality of production, or a factor other than sex, such as education, training or experience. Amendments to this section went into effect January 1, 2016.

Exhibit A shows the number of complaints filed or opened in 2016 under various Labor Code sections listed, and one section each from the Health and Safety Code and Unemployment Insurance Code submitted in accordance with Labor Code section 98.75 for 2016.

- Total number of complaints (violations alleged) received by the RCI Unit: **4,211**³
- Total number of cases accepted for investigation as within DLSE jurisdiction: **2,441** cases⁴
- Total number of violations alleged for all cases accepted for investigation: 4,300 cases⁵
- 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 (Labor Code section 98.6). There were **1,871** such cases accepted for investigation as possible violations of this Labor Code section.
- The second-largest group of complaints filed originated from alleged retaliation for disclosing violations or noncompliance with local, state or federal law (Labor Code section 1102.5). There were **1,489** complaints of this nature.

Exhibit B details the disposition of the various retaliation cases for which a determination was issued in 2016 based on the year the complaint was filed. The RCI Unit issued a total of **141** determinations, of which **114** were dismissals and **27** were findings for employees. Of the **27** cases with merit, **1** case was resolved by employer compliance with the determination; **9** recommended cases with findings remain on appeal with the Director's Office; **12** cases are pending court filing; **4** cases were settled prior to court filing; and **1** case is in the process of referral for enforcement.

- Of the **27** cases for which determinations were issued in this reporting period and the determination identified cause findings (as reported just above), **12** cases have not yet been filed in court and **9** cases remain on appeal. The delay is due in part to resource limitations and in part to the timing of the determinations issued in 2016, many of which were issued late in the year. The Labor Commissioner is required to file actions in court when the employer fails to comply.
- In 2016 the RCI Unit held **2** investigative hearings for health and safety complaints in child care facilities: one resulted in a dismissal, and the other was withdrawn. In total, the Labor Court project using administrative law judges to conduct investigative hearings either scheduled or held **11** such hearings: **2** cases were returned for additional investigative work, **3** cases have decisions pending, **6** cases were dismissed and **3** other cases were settled at the time of hearing or before a decision was issued.

³ This number represents the total number of complaints received by the Retaliation Complaint Investigation (RCI) Unit; it is a 16% increase over the prior year.

⁴ This is a 22% increase over the number of cases accepted for investigation in 2015.

⁵ This is an 8% increase over the number of allegations associated with cases accepted for investigation in 2015.

In addition to the 2016 determinations listed in **Exhibit B** and discussed above, the Labor Commissioner filed **46** cases with determinations issued in prior years, settled **27** other cases, and obtained judgments in **3** other cases. The legal unit obtained more than \$673,500 in settlements and obtained judgments with a value exceeding \$574,000 in 2016. The RDI unit was also able to reach **432** settlements in cases prior to the issuance of a determination; these settlements include cases filed in prior years.

In total, the Labor Commissioner closed **1,627** cases in 2016, the largest number of cases resolved in a calendar year on record. Closed cases include complaints dismissed after issuance of determinations, settlements, and cases withdrawn or abandoned by the complainants. **1,532** cases remained unassigned at the end of the year.

The RCI Unit continues to strive to find new, innovative approaches to handle the increase in the number of cases, investigations, and alleged violations each year.

Respectfully submitted,



Julie A. Su
Labor Commissioner