

DEPARTMENT OF INDUSTRIAL RELATIONS

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**2019 RETALIATION COMPLAINT REPORT
(LABOR CODE §98.75)**

The Labor Commissioner respectfully submits this report to the Legislature.

BACKGROUND

The mission of the California Labor Commissioner's Office (LCO), also known as the Division of Labor Standards Enforcement (DLSE), is to ensure a just day's pay in every workplace in the State and to promote economic justice through robust enforcement of labor laws. By combating wage theft, protecting workers from retaliation, and educating the public, we put earned wages into workers' pockets and help level the playing field for law-abiding employers. The Labor Commissioner seeks effective, efficient, and prompt resolutions to alleged instances of wage theft.

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 LCO to investigate retaliation complaints and to enforce determinations of unlawful retaliation issued by the Labor Commissioner.

The Retaliation Complaint Investigation (RCI) unit within the LCO may accept complaints alleging violations of almost four dozen statutes prohibiting retaliation. Following an investigation into allegations raised in these complaints, the Labor Commissioner may issue a determination pursuant to Labor Code section 98.7. If the evidence does not establish a finding of retaliation, the determination will explain the findings, and the Labor Commissioner will dismiss and close the case. 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 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

Due to significant expansion in enforcement responsibilities, newly enacted legal tools, and increased public awareness of wage theft, the LCO has seen tremendous growth in the complexity of claims, the number and scope of affected parties, and the ability to return earned wages to California workers. The RCI team is poised to assist in the enforcement of these new responsibilities and tools notwithstanding the concomitant delays that such complexities bring. Changes in the law demand that the LCO continue to create and engage in strategic, effective ways to combat retaliation, along with securing sufficient resources, to meet its statutory obligations effectively.

What follows is a brief legislative history, encompassing selected new enforcement tools and RCI enforcement responsibilities.

Citation Authority—Labor Code Section 98.74

Section 98.74 was added to the Labor Code in 2018 to grant the Labor Commissioner the authority to issue citations for violations of anti-retaliation laws under its purview. However, the new law required several technical fixes, which were addressed through the passage of SB 229 in 2019. The amendments allow the Labor Commissioner to move forward with issuing citations in retaliation cases to provide remedies to workers who face unlawful retaliation more effectively. This is a powerful enforcement tool to enable the RCI unit to achieve its mission of protecting and employer workers who engage in protected activity. The amendments contain the following provisions:

1. Identifies the procedure to enter judgments on final citation amounts
2. Creates a procedure for uncontested citations and a deadline for payments ordered
3. Changes the bond requirements to reflect remedies in retaliation cases
4. Creates procedures to enter judgments on citation decisions after a hearing
5. Imposes consequences for employers who fail to comply with a judgment or settlement
6. Clarifies penalties for employers who fail to comply with final orders for injunctive relief
7. Clarifies interest rate preference and exemption of fees for judgments
8. Amends the statute to apply enforcement procedures to all existing citations in retaliation cases issued at the time of the enactment or after January 1, 2020.

Reverification of Documents—Labor Code Sections 1019.2 and 1019.4

SB 112 amended LC section 1019.2 and added LC section 1019.4 in 2019 to respond to a federal district court decision preliminarily enjoining section 1019.2(a) as preempted by federal immigration law. The amendments clarify that the statute does not conflict with federal immigration law by detailing employer conduct that is not prohibited in the reverification process and defines key terms, such as “reverify” and “reverifying” to be consistent with federal law.

Labor Code Section 432.3—Job Applicants: Salary Expectations and Prior Pay

AB 2282, passed in 2018, amends LC section 432.3 by adding language to allow employers to ask an applicant about the salary expectation for the position the applicant is seeking and prohibiting the use of prior salary to justify any disparity in compensation based on race, sex, or ethnicity. The legislation also defines “pay scale,” “reasonable request,” and “applicant” in section 432.3.

Labor Code Section 1197.5—Prior Pay and Consideration of Current Employee’s Salary

AB 2282 also amends LC section 1197.5 by forbidding employers from relying on prior salary to justify any pay disparity based on sex, race, or ethnicity. The new legislation also amends section 1197.5 to allow employers to consider a current employee’s existing salary when making a compensation decision, so long as any wage differential resulting from that compensation decision is justified by one or more of the factors listed in the section.

Additional Legislation

In addition, AB 1976 (2018) and SB 142 (2019) amended the State’s lactation accommodation laws (LC sections 1030–1034) to provide more robust protections for employees who express milk at work. Employees who seek lactation accommodations are protected from retaliation.

SB 1412 amended LC section 432.7 in 2018 to limit the types of criminal convictions about which an employer can ask a job applicant to those that are relevant to the position sought. SB 1412 also specifies when employers may seek or receive an applicant’s criminal history report and clarifies that employers are not prohibited from conducting criminal background checks and restricting employment based on criminal history if required by law.

HIGHLIGHTS FROM THIS REPORTING PERIOD

California Equal Pay Act

The California Equal Pay Act prohibits an employer from paying any of its employees wage rates that are lower than the rate paid to employees of the opposite sex, of another race, or of another ethnicity, for substantially similar work, when viewed as a composite of skill, effort, and responsibility and performed under similar working conditions.

In order to investigate these claims, the Labor Commissioner requests descriptions of job duties and wage rate histories for relevant workers from the employer. In addition, the Labor Commissioner requests evidence to determine whether a difference in pay for substantially similar work is due to seniority, merit, a system that measures production, and/or a “bona fide factor other than sex, race, or ethnicity.” The investigation requires analysis of comparable jobs to determine whether there is substantial similarity and pay disparity. The investigation may require analysis of the duties for multiple job classifications and compensation for those in comparative positions. A single complaint can require the analysis of a large number and broad range of employee classifications.

The number of claims filed with the LCO under the Equal Pay Act remains high. There were 177 Equal Pay Act claims filed in 2019 and 431 cases filed over the past three years. In 2019, 137 EPA investigations were completed, with 45 cases withdrawn and 27 settlements. The remaining cases were closed for other reasons, including abandonment, lack of jurisdiction, and concurrent filing in court. There were no merit findings.

Immigration Threat

Immigration threat cases remain a top priority for the LCO. In 2019, 86 immigration complaints were filed, and 275 immigration complaints have been filed over the past three years. These cases typically involve multiple statutory protections under LC sections 244, 1019, 1019.1, 1028.6, and 2814. In 2019, 70 immigration case investigations were completed, with 17 cause findings, 18 settlements, and 13 withdrawals. The remaining 22 cases were closed for other reasons, including failure to establish a prima facie case, abandonment, and lack of jurisdiction.

In one immigration case, a worker performed handy work at someone’s house. When he was not paid for his work, the worker quit and asked for his final wages. His employer refused to pay. The worker then approached the homeowner of the project to request his pay. (Depending on the circumstances, the homeowner may be considered a joint employer.) The following day, the employer gave the worker a letter stating, “Please don’t contact me or the homeowner. My brother runs ICE [Immigration and Customs Enforcement] for the bay area. I have your car license and phone number and if you bother the homeowner, I will turn you in to ICE.” The employer admitted to writing the letter, and, after a conference with a Deputy Labor Commissioner, the parties agreed to settle the matter for \$10,000.

In another immigration case, a worker told her employer that she was filing a claim with the LCO for unpaid wages. The employer then threatened to report her to immigration authorities. Shortly after the complainant’s wage conference, the employer filed a retaliatory police report. The RCI legal unit was able to obtain a settlement of \$20,000 for the worker, prior to filing the matter in court.

Prospective Retaliation—Cooperation with BOFE on an Immigration Threat Case

After a citation was issued by the Bureau of Field Enforcement (BOFE) in Temecula, workers reported that the employer held staff meetings during which they were told that their immigration status would be reverified. Deputy Labor Commissioners from BOFE and RCI met with nine workers and conducted interviews. The RCI unit issued a letter informing the employer of multiple possible violations of the Labor Code, including LC section 91, which identifies interference with the duties of a Deputy Labor Commissioner as a potential misdemeanor. The letter included an order to cease and desist from all retaliatory acts, required cooperation with the LCO and the purging of any negative information related to the BOFE inspection from individual employee files, and the posting of a Notice to Employees in a conspicuous place. The employer asserted that there had been a misunderstanding, as he intended to inform his staff that new employees, not current employees, would be entered into the E-Verify system. RCI staff made two visits to the employer and conducted subsequent follow-up with the employees who raised concerns. The employer posted the notice within three days of receiving the RCI unit letter, cooperated with both investigations, and issued no other threats to employees. The evidence did not establish that the employer threatened the employees; however, this investigation is noteworthy because it was preventive. The Labor Commissioner's rapid response resulted in a quick resolution of the issue, and employees were not retaliated against for their participation in the BOFE investigation and citation.

OSHA

The Department of Industrial Relations and the LCO reached an agreement in principle with the federal Department of Labor (DOL) and Occupational Safety and Health Administration (OSHA) to develop a data-sync program to synchronize separate databases used by DOL and the LCO. The systems collect similar data but require separate data entry. The agreement will eliminate duplicate entry of data into the RCI program database, CalAtlas, and the federal database. Data mapping of the two systems is continuing. Significant savings in staff time and the elimination of inconsistencies in reporting will be achieved when the program is finalized in 2020.

As reflected in the annual reports to the Legislature, the number of OSHA-related cases has increased dramatically; in 2019, the Labor Commissioner received 649 new cases claiming violations of LC sections 6310 and 6311. Over the past four years, there have been 2,318 new cases.

One OSHA case involved both retaliation and claims filed with other State agencies. After lengthy negotiations with the worker, the relevant union, the employer, and other agencies, the Deputy Labor Commissioner was instrumental in settling all claims for a total of \$250,000. The settlement agreement included future lost wages, emeritus status, and an agreement by the employer to provide management with specific types of training.

Public Works

In another case, a worker filed an anonymous public works complaint. Within days of receiving notice of the complaint, the contractor terminated the worker. The worker spoke to his manager on multiple occasions about his belief that his pay was below the appropriate prevailing wage rate, but management failed to address his concerns. The RCI unit's investigation revealed that the worker was the only employee terminated weeks before everyone else, and his co-workers overheard managers making disparaging comments about the worker who filed the complaint. The contractor could not prove a legitimate, non-retaliatory justification for his termination. The worker was a specialist in his field and struggled to find comparable work after his termination. He took lower-paying construction jobs while he gained other skills. The Labor Commissioner served a cause-finding determination, and the parties later settled for \$75,000.

Healthy Family Healthy Workplace Act

The RCI unit worked to resolve complaints filed by airline employees asserting violations of the Healthy Family Healthy Workplace Act of 2014. Over 70 complaints alleged possible violations of LC sections 98.6, 233, 234, and 245–248. The airline employer had an unlawful policy in which the employees were docked paid sick leave automatically for absences, resulting in the exhaustion of paid sick leave, thereby eliminating the protections outlined in the Healthy Family, Healthy Workplace Act for future absences. After paid sick leave was exhausted, the employer could then use the attendance control policy to subject employees to discipline for future absences.

After the RCI investigation, and lengthy negotiations, the employer agreed to change its policy on paid sick leave. Under the revised policy, employees are not required to exhaust their paid sick leave when other leave is available and have the option to choose how and when to use their paid sick leave.

A handful of claims remain open, and settlement negotiations are ongoing.

Legal

In 2019, RCI's legal team litigated and filed some of the Labor Commissioner's first enforcement cases involving LC section 248.5 (Healthy Workplaces, Healthy Families Act of 2014). In one case, the employer agreed to change its sick leave policy such that a doctor's note was no longer required and to remedy its unlawful denial of paid sick leave to all affected employees in California.

Other highlights include settlement of a heavily litigated immigration threat case in which the Labor Commissioner alleged that the employer gave a copy of the complainant's wage claim documents to U.S. Customs and Border Patrol agents in retaliation for the complainant's having filed a wage claim. This case included causes of action under multiple LC sections and required significant evidence and witness coordination between State and federal agencies.

RCI's lawyers advise and provide training for the retaliation investigation, determination, and citations processes, and they prosecute citations or file civil complaints to enforce findings of unlawful retaliation. Retaliation cases are unique in that one must establish the improper motives of an employer at trial, usually through circumstantial evidence. Vigorous enforcement of retaliation cases continues to engender more discovery. Cases have become increasingly time-consuming to litigate. In an effort to make the RCI unit's enforcement efforts more efficient and effective, the RCI legal unit has greatly increased its review of matters, advice and counsel, and general legal support of the investigation process so that legal expertise is incorporated at the inception of these complex cases.

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;¹ (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

¹ As explained above, LC section 1197.5 prohibits an employer from paying its employees at a wage rate that is lower than the rate paid to employees of the opposite sex, or of a different race or ethnicity, for substantially similar work 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.

(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 2019 under various LC sections and one section each from the Health and Safety Code and Unemployment Insurance Code. In summary:

- Total number of complaints received by the RCI unit: **6,515**
- Total number of cases accepted for investigation as within DLSE jurisdiction: **2,336**
- Total number of violations alleged for all cases accepted for investigation: **5,327**
- 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 (LC section 98.6). There were **1,950** alleged violations of this nature.
- 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 **1,940** such violations alleged and accepted for investigation.

Exhibit B details the disposition of the various retaliation cases for which a determination was issued in 2019 based on the year in which the complaint was filed. The RCI unit issued **542** determinations, of which **482** were dismissals, and **60** were cases with merit (findings for employees).

- Of the **60** cases with merit, **1** case was resolved by employer compliance with the determination, **1** case is pending settlement, **10** cases were settled prior to referral for enforcement, **45** cases are pending court filing, and **3** cases have been filed in court.
- The Labor Commissioner filed **32** cases in Superior Court (with **3** of these filings following determinations issued in 2019), settled **17** cases, and obtained judgments in **11** other cases. In addition, several appeals have been filed, including an appeal of an adverse ruling in an LC section 432.7 case in which the conviction had been judicially expunged, an appeal of a ruling regarding an arbitration clause, and another appeal pertaining to an adverse action in a retaliation case.
- Under LC section 98.7(b)(1), the Labor Commissioner may, at her discretion, hold an evidentiary hearing. The RCI unit did not hold any investigative hearings in 2019.
- In total, the Labor Commissioner closed **2,483** cases in 2019. Closed cases include complaints dismissed after issuance of determination, settlements, and cases withdrawn or abandoned by the complainants.

Exhibit C reports statistics over a six-year period for comparative purposes and to highlight the growth in the number of statutes enforced, new claims submitted, total cases accepted, violations alleged, among other things. This table shows the trend over a longer period, rather than merely one- or two-year anomalies.

OTHER ACCOMPLISHMENTS IN 2019

The exhibits do not include the following details related to merit findings, settlements, and judgments.

- The **60** merit findings ordered payment of **\$1,063,621** in lost wages, **\$63,500** in compensatory damages, **\$194,769.92** in interest on the lost wages, **\$775,500** in penalties payable to the worker, and **\$461,000** in penalties payable to the State.
- The RCI unit also reached **478** settlements prior to the issuance of determinations for a total of **\$4,217,515**, payable to the people who filed the claims (including cases filed in prior years).
- The RCI legal unit obtained **\$697,000** in court judgments and settlements. This amount includes statutory penalties and attorney's fees and costs to the LCO. In addition to monetary amounts, the legal unit obtained significant injunctive relief, including posting notices to employees, training, purging negative information from the complainants' files, reference letters, and cease and desist orders.

The RCI unit continues to seek innovative approaches for ensuring a just and fair workplace for all Californians.

Respectfully submitted,

Lilia García-Brower
Labor Commissioner

EXHIBIT A
Division of Labor Standards Enforcement
Calendar Year 2019 Retaliation Violations Alleged per LC 98.75(a)

Labor Code	Description of Violations Alleged	Total Allegations
98(k)	For loss of wages as a result of engaging in lawful conduct during nonworking hours	4
98.6	For filing or threatening to file a claim with the Labor Commissioner	1,950
230(a)	For taking time off to serve on a jury or appear as a witness in court	10
230(b)	For taking time off to appear as a witness in court	4
230(c)	For taking time off to seek medical help as a victim of domestic violence, sexual assault, or stalking	25
230(e)	Protection based on employee's status as a victim of domestic violence, sexual assault, and/or stalking	39
230(f)	Protects victims of domestic violence, sexual assault, and/or stalking who request reasonable accommodations	16
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	5
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
230.5	Protects employees who are victims of listed crimes and take time off from work	2
230.7	For taking time off from work to appear at a pupil's school at the request of the pupil's teacher, if the employee gives reasonable notice	3
230.8	For employers with 25 or more employees, protects employee who participates in school activities	1
232(a) & (b)	Protects employees who discuss or disclose wages or refuse to agree not to disclose wages	11
232.5	Protects employee's right to discuss employer's working conditions	7
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.	83
245-249	Prohibits paid sick leave retaliation	255
432.3	Prohibits employer from relying on prior salary history as a factor in a job offer. Employer must provide pay scale upon request.	1
1019	Protects employees engaging in activities protected by the Labor Code from unfair immigration-related practices	68
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	21
1025-1028	For employers with 25 or more employees, protects employee's right to participate in alcohol or drug program	1
1030-1033	Protects employees who request lactation accommodations	8
1102.5	Protects employee's right to report violations or noncompliance with a state or federal statute	1,940

EXHIBIT A
Division of Labor Standards Enforcement
Calendar Year 2019 Retaliation Violations Alleged per LC 98.75(a)

Labor Code	Description of Violations Alleged	Total Allegations
1197.5	Protects employees from retaliation based on sex-, race-, or ethnicity-based wage discrimination	177
a	-Claims alleging sex-based wage discrimination: 78	
a & b	-Claims alleging sex-based and race- or ethnicity-based wage discrimination: 29	
a, b, & k	-Claims alleging sex-based and race- or ethnicity-based wage discrimination and retaliation: 6	
a & k	-Claims alleging sex-based discrimination and retaliation: 11	
b	-Claims alleging race- or ethnicity-based discrimination: 43	
b & k	-Claims alleging race- or ethnicity-based wage discrimination and retaliation: 4	
k	-Claims alleging retaliation based on sex-based wage discrimination: 1	
k	-Claims alleging retaliation based on race- or ethnicity-based wage discrimination: 2	
k	-Claims alleging retaliation based on sex-, race-, or ethnicity-based wage discrimination: 3	
1198.3	Prohibits retaliation against an employee who refuses to work hours in excess of those permitted by the Industrial Welfare Commission Orders	1
2814	Prohibits an employer from using E-Verify to check the status of an existing employee or applicant who has not been offered employment	1
2929(b)	Protects employees whose wages are garnished for payment of one judgment	1
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 occurs	1
6310	Protects employees who complain about or initiate proceedings related to workplace safety or health conditions	592 ¹
(a)(4)	-Claims alleging retaliation after report of workplace injury included above (not retaliation after workplace safety complaints): 44	
6311	Protects employees who refuse to perform work in an environment that is hazardous to the employee or co-workers	57
6403.5	Protects an employee who refuses to lift, reposition or transfer a patient due to concerns about patient or worker safety or because of the lack of trained lift team personnel or equipment	1
Other	Other Code sections under the jurisdiction of the Labor Commissioner's Office	
1596.881	Health and Safety Code, regarding licensing of child-care facilities	2
1237	Unemployment Insurance Code, protects employee's right to seek information on unemployment insurance	10
	Total Number of Complaints Received by RCI Unit²	6,515

¹ As of April 1, 2020, there were 160 cases pending to be screened for a Labor Code section 6310 violation.

² This is the number of new complaints received in 2019 prior to screening. Of the 6,515 new complaints, 3,454 were received through the online filing system, and 3,061 were filed by mail, by phone, or by referral.

EXHIBIT A
Division of Labor Standards Enforcement
Calendar Year 2019 Retaliation Violations Alleged per LC 98.75(a)

Labor Code	Description of Violations Alleged	Total Allegations
	Total Cases Accepted for Investigations: Accepted Cases³	2,336
	Total Violations Alleged in Cases Accepted for Investigation	5,327

³ After filing, each case must be screened prior to acceptance. To screen cases, RCI staff conduct an interview of the complainant and provide additional time to submit information to establish a prima facie case of retaliation.

EXHIBIT B
Calendar Year 2019 Disposition of Retaliation Cases per Labor Code 98.75 (b)

Disposition	2012	2013	2014	2015	2016	2017	2018	2019	Total
Determinations Issued	3	6	32	38	93	118	177	75	542
Cases with merit	0	0	3	8	13	16	15	5	60
Cases dismissed	3	6	29	30	80	102	162	70	482
Investigative hearing held									0

Results of cases with merit	60
Compliance	1
Settlements prior to referral for enforcement	10
Pending settlement prior to referral for enforcement	1
Noncompliance	
Referred for enforcement (awaiting court filing)	45
Court filings for 2019 determinations	3
Legal Activity	
Court Filings	32
Settlements	17
Judgments	11
Cases Closed in 2019	2,483

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

Legislative Report Statistics	2014	2015	2016	2017	2018	2019
Retaliation statutes enforced	39	45	46	46	48	48
Total number of complaints received	3,853	3,629	4,211	4,178	5,633	6,515
Total cases accepted	1,874	1,998	2,441	2,526	2,590	2,336
Total violations alleged in cases accepted	3,045	3,928	4,300	5,220	5,664	5,327
Cases closed	1,508	1,520	1,627	2,897	2,588	2,483
Unassigned or backlogged cases	421	1,024	1,532	4	642	732
Positive outcomes for complainants Cause findings + settlements	447	504	459	498	580	548