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Division of Labor Standards Enforcement*

**2011 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 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 31 statutes and regulations.

The Labor Commissioner's office, through the Division of Labor Standards Enforcement (DLSE), investigates complaints and makes a determination. 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.

HIGHLIGHTS FROM THIS REPORTING PERIOD

DLSE has reinvigorated its response to retaliation by establishing priorities to effectively address myriad problems and more thoroughly and efficiently investigate retaliation complaints. We have developed processes to better prioritize retaliation complaints. Specifically, cases that fall into one or more of the following three categories receive priority attention: (1) alleged retaliation after a worker files a wage claim with DLSE; (2) alleged retaliation incident following an investigation of an employer through the Bureau of Field Enforcement (Bureau), Labor Enforcement Task Force (LETF, formerly EEEEC), or Public Works team; or (3) alleged retaliation after a complaint is made to Cal/OSHA for health and safety violations. Our new approach not only makes the anti-retaliation provisions of the Labor Code meaningful, it strengthens all of our 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.

As noted above, DLSE is charged with enforcing 31 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 Code sections under the jurisdiction of the Labor Commissioner.

One additional change during this reporting period is that now all of our field deputies take with them a half-page flyer to inform employers and employees of their obligations and rights under anti-retaliation provisions of state law. This flyer is distributed in the field on all inspections. It is translated into Spanish and Chinese and efforts will be made to translate it into other languages. This practice is an attempt to provide education about these provisions and prevent or deter retaliation before it occurs.

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 2011:

- Complaints received: **2,742**.
- Accepted for investigation as within DLSE jurisdiction: **1,266** cases.²
- Exhibit A shows the number of complaints filed or opened in 2011 under various Labor Code sections listed, and one section each from the Health and Safety Code and Unemployment Insurance Code.³

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 a differential based on any bona fide factor other than sex.

² Complaints received that do not allege a violation within DLSE jurisdiction are not opened or filed for investigation.

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 as reflected in Exhibit A.

- 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 **800** complaints of this nature representing half of all alleged violations and over **60%** 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 **432** complaints of this nature comprising approximately **27%** of alleged violations filed for the year.
 - At the end of calendar year 2011, **342** cases remain unassigned (12 percent of the 2,742 complaints received) primarily due to the fact that DLSE was short two investigators for the whole year and had only one support staff to handle all clerical work. In addition, DLSE accepted a total of **1,266** cases in 2011, **270** cases more than what was accepted in 2010.⁴ Further, the cases accepted for investigation in 2011 alleged more violations than in calendar year 2010⁵, thus requiring more time for each investigated case. Finally, the year 2011 was still marked by furloughs of one (1) day per month for the investigators and support staff.
 - DLSE closed **1,018** cases.⁶
- Exhibit B details the disposition of the various retaliation cases where a Determination was issued in 2011. There were a total of **215** Determinations issued, of which **184** were dismissals and **31** were findings for employees. Of the 31 cause findings, four were resolved by employer compliance with the Determination; one case was filed in court; nine cases are pending settlement; two are newly-issued cause findings where the appeal period has not expired; one was closed because Respondent could not be located despite diligent search efforts; seven are currently pending appeal with the Director's office; and seven are awaiting legal enforcement action by DLSE's Legal unit.

Respectfully Submitted,



Julie Su
State Labor Commissioner

Attachments

⁴ In 2010, there were 996 cases accepted for investigation.

⁵ These 996 cases accepted for investigation in 2010 alleged 1254 violations.

⁶ There were 1162 cases closed in 2010.

Exhibit A. Division of Labor Standards Enforcement Retaliation Complaints Filed for Calendar Year 2011

Labor Code	Description	Total
96(K)	For loss of wages as a result of engaging in lawful conduct during nonworking hours.	6
98.6	For filing or threatening to file a claim with the Labor Commissioner.	800
230(a) & (b)	For taking time off to serve on a jury or appear as a witness in court.	20
230(c)	For taking time off to seek medical help as a victim of domestic violence or sexual assault.	7
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.	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.	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
232.5	Protects employee's right to discuss employer's working conditions.	8
233	Protects employee's ability to use sick leave to attend to illness of a family member.	18
432.7	Protects disclosure of employee's arrest record that did not result in a conviction.	11
1025-1028	Protects employee's right to participate in alcohol or drug program if 25 or more employees.	4
1101 & 1102	For engaging in political activity of the employee's choice.	5
1102.5	Protects employee's right to report violations or noncompliance with state or federal statute.	432
1197.5	Protects employees from sex based wage discrimination.	7
2929(b)	Protects employees whose wages are garnished for payment of <u>one</u> judgment.	4
2930	For failure to show employee a shopping investigator report before discipline or discharge.	4
6310	For complaining about or initiating proceedings relating to safety or health conditions.	230
6311	For refusing to perform work in an environment hazardous to the employee or coworkers.	19
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.	37

Total Violations Alleged	1,624
Total Cases Accepted for Investigation	1,266

Exhibit B. Disposition of Cases Issued Determination in 2011

DISPOSITION	YEAR COMPLAINT FILED						
	Total	2006	2007	2008	2009	2010	2011
Determinations Issued:	215						
Complaints Found Valid	31		3	4	7	13	4
Complaints Dismissed	184	2	11	33	39	80	19
Results of Cases with Findings for Employees:	31						
Compliance	4						
Non-compliance	27						
Results of Non-Compliance:	27						
Court Filings	1						
Settlements	0						
Pending Settlements	9						
New Cause Findings	2						
Missing Respondent	1						
Pending Appeal with Director	7						
To Be Referred to Legal	7						
Investigative Hearings Held	5	0	0	0	0	1	4
Cases Closed in 2011	1,018						