

DEPARTMENT OF INDUSTRIAL RELATIONS

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**2017 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, 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. Senate Bill (SB) 96, enacted as part of the 2018 Budget, on June 27, 2017, and effective immediately, made numerous changes to the anti-retaliation provisions of Labor Code section 98.7 that will be discussed below.

The Labor Commissioner's Office may accept complaints alleging violations of almost 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 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.¹ 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

The policy changes to Labor Code section 98.7 are designed to streamline the Labor Commissioner's retaliation complaint investigation program to enable the Labor Commissioner to more effectively and efficiently enforce anti-retaliation laws and resolve retaliation claims. The

¹ With the passage of SB 306 (Hertzburg, Chapter 460, 2017), effective January 2018, the Labor Commissioner will gain additional enforcement tools including the discretion to issue a citation rather than a determination following an investigation into a retaliation complaint; the ability to proceed with an investigation into possible unlawful retaliation in the absence of a complaint; and the ability to seek injunctive relief where there is reasonable cause to believe a violation has occurred.

changes provide more flexibility for the internal review process and eliminate the extra step of appealing the Labor Commissioner's determinations to the Office of the Director of the Department of Industrial Relations (DIR). Minor changes expand existing timelines for the investigation of a complaint when processed under the existing administrative procedure, clarify the time limit for the Labor Commissioner to initiate an action, and codify case law that the time limit for an employee to file an action is tolled during the investigation. In addition, an attorney's fee provision now enables the state to recover costs for enforcement requiring judicial action.

The substantive changes to Labor Code section 98.7 made by SB 96 include the following:

- The Labor Commissioner may now close an investigation when a complainant files a civil action based on same or similar facts, and may reject a complaint if a complainant has already challenged their discipline or discharge through the State Personnel Board or other internal government procedure, or through a collective bargaining agreement grievance procedure that incorporates anti-retaliation provisions under the Labor Code;
- The Labor Commissioner is now entitled to reasonable attorney's fees from the employer if the Labor Commissioner is the prevailing party in an enforcement action under section 98.7. The court will determine what constitutes reasonable attorney's fees incurred by the Labor Commissioner in prosecuting the action.
- Any time limitation for a complainant to bring an action in court is tolled from the time of filing of the complaint until issuance of the Labor Commissioner's determination.
- The Labor Commissioner now has one year (rather than 60 days) after the complaint is filed to notify complainant and respondent of the determination.
- Determinations under section 98.7 are deemed final and not subject to administrative appeal except for cases under sections 6310 and 6311, which are appealable only by the complainant to the Director of DIR. For such appeals, new guidance ensures that the appeal process is at least as effective as that required by the federal Department of Labor and section 11(c) of the federal Occupational Safety and Health Act of 1970 (OSHA).

In addition to amending Labor Code section 98.7, SB 96 amends section 6310 by adding subdivision (a)(4), which clarifies that retaliation protection covers three categories of employees. Under this subdivision, the Labor Commissioner may accept and investigate retaliation claims from employees who report workplace injuries, illnesses or fatalities; who request access to occupational injury or illness reports and records made and maintained under Title 8, California Code of Regulations (CCR) § 14300.36; or who exercise rights protected by section 11(c) of the federal OSHA Act. This new provision of Labor Code section 6310 references Labor Code section 132(a) which provides that the Workers' Compensation Appeals Board retains exclusive jurisdiction in instances when an employee alleges retaliation because they filed or made known their intention to file a workers' compensation claim.

HIGHLIGHTS FROM THIS REPORTING PERIOD

Immigration-Related Retaliation

A key enforcement area in 2017 was immigration-related retaliation. DLSE received a total of 95 complaints alleging violations of Labor Code sections 244, 1019 or 1019.1, many of which alleged more than one violation. To win a finding of retaliation based on Labor Code section 244 or 1019, the employee must have engaged in an activity protected by the Labor Code and under the jurisdiction of the Labor Commissioner. This protection extends to former employees who seek unpaid wages. This

office issued eight cause, or merit, findings. Of these cases, four have been filed in court, one has been settled and three others will be filed in court for enforcement shortly. Investigation was completed in 28 other cases, with five cases settling and others closed for other reasons.²

In one case, a worker had previously agreed, during a scheduled hearing in the Labor Commissioner's San Diego office, to settle a claim for unpaid wages, liquidated damages, interest and waiting time penalties. The worker lived in Mexicali and crossed the border daily for work. In retaliation for pursuing the wage claim, the employer enticed the worker to cross the border from his home on the promise of being paid. When the worker crossed the border, border agents were waiting with paperwork relating to the worker's claim filed with the Labor Commissioner's office. The worker was detained, his tourist visa was confiscated and he was removed from the U.S. It appears the employer's primary motivation for requesting the worker cross the border was to enable immigration enforcement to intercept the worker, thus allowing the employer to escape his obligation to pay the worker owed wages and penalties. The employer's act was so egregious that a border agent encouraged the worker to seek assistance from the state. A retaliation complaint was filed and the employer completed payment per the prior settlement agreement for the wage complaint. However, following a separate retaliation investigation into the incident described above, the employer failed to comply with a new order for payment of penalties and posting a notice. This case is being referred to DLSE's Legal Unit for enforcement.

Equal Pay Act Claims

There was a dramatic increase in claims under Labor Code section 1197.5, which prohibits pay disparity based on sex, race or ethnicity, along with retaliation against an employee who asks about such discrepancies. In 2016, the total number of claims accepted was 34, while this past year DLSE accepted 70 claims under the revised statute. Of these claims, 49 alleged pay disparity based on sex, race or ethnicity, but did not allege retaliation. Notably this appears to be the first year that the Division received claims that only alleged a pay disparity, without an accompanying allegation of retaliation. Claims that alleged both pay disparity based on sex, race or ethnicity, and retaliation totaled 21. An investigation into a pay disparity is significantly different from a traditional retaliation investigation, as the identity of the worker who filed the claim may be anonymous to the investigator. Also, an investigation under section 1197.5 focuses on comparisons to those performing substantially similar work when viewed as a composite of skill, effort, and responsibility and performed under similar working conditions. A pay disparity only investigation may focus on more objective factors and require a broader look at the practices of the employer.

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;³ (b) the number of determinations issued,

² Of the 28 closures, six cases were abandoned, five were closed for lack of jurisdiction, 11 were withdrawn, one was closed because we were unable to locate the employer and, as discussed above, five cases settled.

³ 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, or of a different race or ethnicity, for substantially similar work done under similar working conditions, when that work is viewed as a composite

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 Labor Code 98.7 was not brought in court in a timely way, the report must also specify the reasons.

Exhibit A, submitted in accordance with Labor Code section 98.75, shows the number of complaints filed or opened in 2017 under various Labor Code 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: **4,178**
- Total number of cases accepted for investigation as within DLSE jurisdiction: **2,526**
- Total number of violations alleged for all cases accepted for investigation: **5,220**
- The 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 **2,022** alleged violations (complaints) of this nature.
- The second 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 **1,996** such violations alleged and accepted for investigation.

Exhibit B details the disposition of the various retaliation cases for which a determination was issued in 2017 based on the year the complaint was filed. The RCI Unit issued a total of **333** determinations, of which **268** were dismissals and **65** were cases with merit (findings for employees).

- Of the **65** cases with merit, **two** cases were resolved by employer compliance with the determination, **nine** recommended merit findings remain on appeal with the Director's Office, **15** cases are in the process of referral for enforcement, **three** cases were settled prior to court filing, **26** cases are pending court filing, and **seven** cases are in court.⁴
- The Labor Commissioner filed **18** cases in Superior Court (with **7** of these filings following determinations issued in 2017), settled **18** cases, and obtained judgments in **20** other cases.
- The RCI Unit held **three** investigative hearings for health and safety complaints in childcare facilities and **five** investigative hearings for other violations.

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, race or ethnicity, such as education, training or experience. Amendments to this section went into effect in 2016 and 2017.

⁴ In addition, one merit finding was overturned by the Director's Office on appeal. One merit finding we were unable to serve Respondent, and one case was closed when a federal court issued a judgment on identical or similar issues.

- In total, the Labor Commissioner closed **2,897** cases in 2017. Closed cases include complaints dismissed after issuance of determination, settlements, and cases withdrawn or abandoned by the complainants.

Exhibit C reports statistics over a seven-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 chart helps establish trends versus a one or two year anomaly.

OTHER ACCOMPLISHMENTS IN 2017

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

- The **65** merit findings ordered payment of \$1,734,035 in lost wages, \$241,582 in interest on the lost wages, and \$1,060,000 in penalties.
- The RCI unit was also able to reach **433** settlements prior to issuance of determinations for a total of \$2,224,784, payable to the individuals who filed the claims. (These figures include cases filed in prior years.)
- The legal unit obtained more than \$804,043 in settlements, as well as judgments exceeding \$558,936.
- There were only four cases remaining unassigned at the end of 2017, a significant change from the prior year (**1,532** cases had not yet been assigned at the end of 2016).

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

Respectfully submitted,



Julie A. Su
Labor Commissioner