



Improving OSH Retaliation Remedies for Workers

| A Worksafe Report

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WORKSAFE
safety, health, and justice for workers
seguridad, salud, y justicia para los trabajadores

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About Worksafe

Worksafe is a California-based organization dedicated to eliminating all types of workplace hazards. We advocate for protective worker health and safety laws and effective remedies for injured workers. We watchdog government agencies to ensure they enforce these laws. We engage in campaigns in coalition with unions, workers, community, environmental and legal organizations, and scientists to eliminate hazards and toxic chemicals from the workplace.

To protect the most vulnerable of California workers, we engage in impact litigation and provide legal training, technical assistance, and advocacy support to legal services programs who serve low wage and immigrant workers.

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EXECUTIVE SUMMARY

Many workers who experience workplace health and safety issues continue to work in problematic work environments where the threat of retaliation for reporting injuries, illnesses, or hazards is constant. Employers and their agents have far too frequently shown that they will use retaliatory means to silence workers in order to ensure that their safety ratings and workers' compensation premiums remain low.

Worksafe has been advocating for the health and safety rights of workers for the past three decades. These include the right to know about hazards in the workplace, the right to be protected from hazards, and the right to take action and report hazardous workplace conditions without fear of reprisal.

Workers are the experts on their own workplace conditions. Their experiences regarding workplace hazards provide invaluable information to government agencies and advocates to help track and identify workplace hazards, target violating employers, and develop strategies to improve health and safety in the workplace. For these reasons, it is extremely important to ensure that workers are protected so that they can exercise their right to voice concerns with their employers without reprisal.

Both the Federal Occupational Safety and Health Act ("Federal OSHA")¹ and the California Occupational Safety and Health Act ("Cal/OSHA")² have provisions to address retaliation and discrimination that workers may face as a result of exercising health and safety rights.

These rights include the following:

- Reporting their injuries, illnesses, and hazards to their employer, union, or a government agency;
- Participating in a workplace health and safety committee;
- Testifying in any proceeding about workplace health and safety issues;
- Filing a Cal/OSHA complaint and request for a workplace inspection; or
- Refusing to perform work that would violate a

Cal/OSHA or any occupational safety or health standard or order, where such violation would create a real and apparent hazard to the employee or other employees.

These provisions exist to protect workers and to advance health and safety in the workplace. However, with ongoing retaliation in the workplace, and the proliferation of workplace cultures which suppress injury, illness, and hazard reporting, workers are too afraid to exercise these rights.

In our trainings and ongoing legal assistance to worker leaders, legal aid organizations, unions, and worker advocates, Worksafe has heard time and again that workers, particularly low-wage immigrant workers, are constantly working under the fear of retaliation.

When viewed against the backdrop of low union density, this paints a precarious picture for California's workers. The vast majority of workers in California are non-unionized. In 2014, union members accounted for only 16.3% of wage and salary workers in California.³ Nationwide, union members accounted for only 11.1% of employed wage and salary workers in 2014. Workers who are members of a union often have alternative options, including expanded grievance procedures, for addressing issues with health and safety and retaliation. Their union can serve as their representative in discussions and negotiations with employers in advocating for better workplace conditions for union members. Non-unionized workers can only rely on assistance from government agencies such as the Division of Occupational Safety and Health ("DOSH"), the Division of Labor Standards Enforcement ("DLSE"), and the Federal Occupational Safety and Health Administration ("Federal OSHA") to enforce their rights and to protect them from retaliation.

Throughout 2014 and the beginning of 2015, Worksafe coordinated four regional Occupational Safety and Health ("OSH") Anti-Retaliation trainings and meetings throughout California in order to:

- Learn more about workers' experiences with OSH retaliation;
- Learn more about workers' experiences with injury and illness reporting programs, policies, and procedures that create disincentives to reporting;
- Build the capacity of worker leaders and advocates, unions, worker centers, and legal aid organizations to identify and file OSH retaliation complaints with state and federal agencies; and
- Develop regional strategies to address OSH retaliation.

These regional meetings were held in San Diego, Los Angeles, the Central Valley, and the Bay Area. This report compiles findings from our work in this field and from these regional trainings and meetings. In general, we learned that:

- California's workers face obstacles to reporting injuries, illnesses, and hazards to their employers because they face ongoing wage theft, outright threats and acts of retaliation, and/or a work culture that blames workers for injuries and creates disincentives for reporting;
- California's workers are being denied the right of protection from retaliation for reporting injuries and illnesses, which is a federally protected right; Workers and advocates need to see the progress that is being made in the DLSE Retaliation Unit with respect to the OSH investigatory process so that advocates and workers can feel confident enough to even file complaints with the DLSE;
- Temporary workers are unaware of their rights and remedies under the law and the employers' duties with respect to their health and safety; and
- California's workers need more help to exercise their OSH retaliation rights with the DLSE.

Worksafe believes that state and federal government agencies can collaborate with workers and advocates to improve the current system of remedies for workers so that employers are penalized for retaliatory behavior and workers are encouraged to come forward about their workplace conditions without fear of reprisals.

Such an agenda must include:

- An ever-improving DLSE OSH retaliation investigatory process with better outcomes and swifter resolutions for workers who file legitimate OSH retaliation complaints;
- Clarification by the DLSE regarding the workers' right to be protected from retaliation for reporting an injury;
- A robust, high level DOSH/DLSE Outreach and Education campaign around Workers' OSH Rights for workers, worker advocates, trade associations and employers, and DOSH and DLSE investigators;
- A more inclusive information tracking and sharing system by the DLSE regarding OSH retaliation cases that will allow government agencies, workers, and their advocates to be able to assess the strength of workers' remedies and to advocate for improvements;
- Increased resources for the DLSE Retaliation Unit so investigators can meet the increasing workloads;
- Stronger working relationships between DOSH and the DLSE around issues of OSH retaliation;
- A California initiative for temporary workers that will increase awareness of their OSH rights and remedies and the duties of employers to report any injuries and illnesses they suffer; and
- Implementation of the Federal OSHA interpretation of the illegality of injury and illness programs that create disincentives for worker reporting.

Worksafe has prepared this analysis and offers the stories of workers to underscore the importance of ensuring effective remedies for all workers. We hope that by developing a more effective retaliation enforcement system, workplace health and safety conditions will improve for all workers in California.

A summary of our major recommendations can be found on page 21.

I. CALIFORNIA'S WORKERS FACE OBSTACLES IN REPORTING INJURIES, ILLNESSES, AND HAZARDS TO THEIR EMPLOYERS.

California's workers face a litany of obstacles when they experience injuries, illnesses, and hazards in the workplace. Workers who attempt to exercise their health and safety rights often face other workplace violations as well, such as wage theft.

This is further complicated when the work environment does not encourage reporting, whether through outright retaliation or the existence of programs, practices, and policies that create disincentives to reporting.

Finding: Employees Who Are Facing Health and Safety Issues May Also Be Experiencing Wage Theft.

Where there is wage theft, there are usually health and safety violations. Poor working conditions often indicate wage theft and vice versa.⁴ Employers that do not prioritize paying their workers fairly often do not prioritize ensuring health and safety in the workplace.

A 2014 report titled "Health Impact Assessment of the Proposed Los Angeles Wage Theft Ordinance" noted, from a review of existing literature, that "a common denominator in low-wage industries is poor working conditions, including a dangerous physical work environment, physically demanding tasks, and strict work demands."⁵ Even more telling, a recent report focusing on federal contractors found that of the 49 federal contractors responsible for the largest wage theft or health and safety penalties, 35 were cited for failure to comply with *both* federal wage laws and federal health and safety laws.⁶

This is particularly troubling given the fact that, nationwide, low-wage occupations make up two-thirds of the 25 occupations with the highest rates of non-fatal work-related injuries and illnesses.⁷ Thus, it is not uncommon for advocates attempting to assist workers with wage theft issues to find a coexisting health and safety or injury/illness issue that workers are too afraid to address.

One such worker is Hien*⁸, a monolingual and illiterate Vietnamese woman who has never been provided with

any information about her workplace rights. Hien worked in an Asian-owned San Francisco-based grocery store since coming to the United States over a decade ago. Hien was always paid in cash at a rate of about \$5/hour despite the fact that the minimum wage in San Francisco was much higher. Hien was asked to come to work at 7 a.m. every morning. She toiled on a daily basis until about 10 p.m. at night but was never paid any overtime wages. Hien raised the issue of her low pay to her employer on several occasions only to have her shift changed and her hours cut. When she stopped complaining, her hours were increased. On a regular basis, Hien also experienced injuries as a result of working long hours and ongoing hazards in the workplace such as slippery floors and having to lift and carry heavy items. She was always reluctant to complain about these issues for fear of losing her job after watching others get fired for complaining. Hien was finally fired in 2014 after expressing concern over her low pay. She filed a wage and hour complaint but was reluctant to file a health and safety complaint because she was afraid her friends, who still worked at the location, would also be fired in retaliation for her Cal/OSHA complaint.

Another example is Jose*, a Los Angeles car wash worker who sustained a workplace injury when another employee hit him with a car they were washing. Jose's back was severely injured and he missed work for a week without pay. Jose did not file a claim for workers' compensation despite his injury because his employer explicitly told him not to. His employer also made threats to him and his coworkers that immigration authorities would be called if Jose asked for workers' compensation or reported any of their workplace hazards to DOSH. The employer docked Jose \$500 for damages to the car that struck him.

What Hien and Jose experienced is, unfortunately, not uncommon. Workers who face wage theft often face health and safety issues.

Finding: Workers Are Afraid To Report Because Retaliation Is Rampant.

It is common for workers to be discouraged from reporting injuries, illnesses, and hazards by employers who specifically instruct them *not* to report. This fosters a work culture that discourages reporting, or retaliate against them once they do report.

Worksafe's 2014 surveys of workers who accessed legal aid clinics across California revealed that workers were afraid to exercise their OSH rights as a result of witnessing their employers retaliate against coworkers who did report injuries, illnesses, or hazards, requested personal protective equipment, refused dangerous or unsafe work, or exercised any other protected OSH right.

Adverse employer activities included:

- Terminating, demoting, or taking hours away from workers who report;
- Explicitly telling workers not to file claims for workers' compensation;
- Threatening to alert immigration authorities;
- Penalizing workers for reporting injuries or illness by excluding them from safety bingos or prizes; or
- Penalizing workers who fail to meet a daily production quota because they reported an injury or illness.

This creates a climate of fear among workers where large percentages of workers are too afraid of retaliation to exercise their OSH rights. Working America's survey

of 3,000 predominantly non-unionized workers confirmed this when it found that 29% of workers surveyed were afraid to notify their employer about workplace hazards or injuries.⁹ Similarly, the 2010 report "Wage Theft and Workplace Violations in Los Angeles" noted that, of 1,815 surveyed workers in Los Angeles County, 20.1% indicated that they had not complained despite experiencing a serious workplace problem such as a dangerous working condition, discrimination, or not being paid the minimum wage.¹⁰ Of these 20.1%, 59.7% reported that they didn't complain because they were afraid of losing their jobs, 13.6% said they were afraid they would have their hours or wages cut, and 31.4% did not believe it would make a difference.

Even OSH inspectors realize this truth. When the Government Accountability Office (GAO) surveyed Federal OSHA inspectors, they found that 22% of the inspectors believed that employees could not file a complaint without experiencing some form of retaliation.¹¹

Workers who do exercise their OSH rights are more likely to experience retaliation. For example, of the workers surveyed in the above report, 14.7% admitted that they had made a complaint in the prior year or had attempted to form a union.¹² Nearly half (47.7%) reported being retaliated against for their actions. The retaliation included violations of workers' compensation, termination, decreased hours, increased workloads or threats about immigration status.¹³

Federal and State Whistleblower Protections

To address OSH retaliation, whistleblower programs have been established at the state and federal level. The federal Whistleblower Program enforces section 11(c)¹⁴ of OSHA:

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act."

This statute has been broadly interpreted at the federal level to include many rights, including the following:

- * Asking OSHA to inspect their workplace;
- * Exercising OSH rights without retaliation and discrimination;
- * Receiving information and training in an accessible language accessible about hazards, methods to prevent harm, and the applicable OSHA standards;

- * Reviewing records of work-related injuries and illnesses; and
- * Reporting injuries.¹⁵

California also has two statutes that mirror the federal whistleblowing statute – California Labor Code sections 6310¹⁶ and 6311.¹⁷ Labor Code section 6310 states that an employer cannot retaliate against an employee who has engaged in the following protected activity:

- * Made any oral or written complaint to DOSH or other governmental agencies;
- * Provided assistance to DOSH regarding employee safety or health;
- * Instituted/caused to be instituted any proceeding regarding health and safety rights; and
- * Participated in an occupational health and safety committee.

Labor Code section 6311 prohibits an employer from retaliating against an employee for refusing to perform work that the employee believes violates any OSH standard, safety order, or statute where the violation is believed by the employee to create a real and apparent hazard.

Further protections also exist in California’s Injury and Illness Prevention Program (“IIPP”) statute, Labor Code section 6401.7(a)(5) and California Code of Regulations, Rule 3203, which mandate that employers must have a:

“system for communicating with employees in a form readily understandable by all affected employees on matters relating to occupational safety and health, including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal.”

These state statutes are all further strengthened by record-keeping regulations, which ensure that employees are protected from retaliation or discrimination when reporting their injuries, illnesses, and hazards. Both federal and state laws have nearly identical record-keeping rules that require employers to record and report work-related fatalities, injuries, and illnesses.¹⁸

Specifically, the federal rule, 29 C.F.R. section 1904.36 states:

“Prohibition Against discrimination: Section 11(c) of the Act prohibits you from discriminating against an employee for reporting a work-related fatality, injury or illness. That provision of the Act also protects the employee who files a safety and health complaint, asks for access to the Part 1904 records, or otherwise exercises any rights afforded by the OSH Act.”

Similarly, California’s nearly identical regulation, California Code of Regulations, Rule 14300.36, provides that:

“Prohibition Against Discrimination: Section 11(c) of the Act and Sections 6310 and 6311 of the Labor Code prohibit you from discriminating against an employee for reporting a work-related fatality, injury, or illness. These provisions of the Labor Code also protect the employee who files a safety and health complaint, asks for access to records required by this article, or otherwise exercises any rights afforded by the Act or Sections 6310 and 6311 of the Labor Code.”

Finally, California also has relatively new protections which prohibit threats and retaliation based upon a worker’s immigration status subsequent to the exercise of a labor right. Such prohibited “unfair immigration-related practices” include: requesting more or different documents than the law requires to prove work authorization, using the E-Verify system improperly, and threatening to file a false police report or contact the immigration authorities. Possible penalties include the suspension of the employer’s business license, sanctions for any attorneys involved in such practices, and, if criminal extortion is involved, punishment of up to one year imprisonment and/or a fine of up to \$10,000.

Finding: Employer Injury and Illness Programs, Practices, and Procedures That Create Disincentives For Workers To Report Are Illegal.

To workers, programs such as safety lotteries, pizza parties, raffles, and rewards that are open only to employees, teams, or departments who have not reported an injury or illness over some period of time are often presented as fun workplace activities.

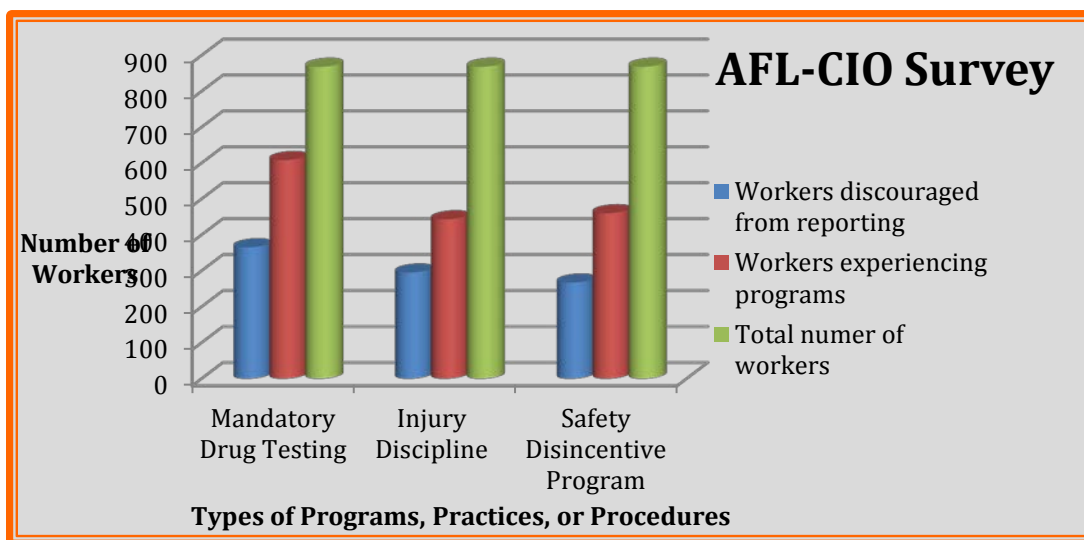
Also known as “Safety Incentive Programs,” these employer policies, practices, and programs are supposedly designed to protect the health and safety of workers. In fact, many create disincentives, however, to workers to report their injuries, illnesses, and hazards.

This is ultimately harmful to workers’ health and safety, leaving potential hazards unreported and ongoing. In essence, they set up a system where workers are “blamed” for job-related injuries and illnesses and create a climate where workers discourage each other from reporting in order to obtain the prize, lottery, etc.

Awareness of the existence of these programs came about as a result of strong campaigns led by unions such as the affiliates of the AFL-CIO, whose comprehensive study in 2009 resulted in the report titled “Extent and Impact of Employer Program and Practices on Workers Reporting Their Injuries – A Union Leader Survey.”¹⁹

This study which surveyed 868 workers from 7 large unions representing multiple sectors (construction, manufacturing, mining and trade, transportation, and utilities) found that:

- 70% of workers surveyed reported that their workplaces had mandatory drug or alcohol testing following a workplace injury – and of those policies, 60% had the effect of discouraging reporting while less than 9% actually encouraged reporting;
- 51% of workers surveyed reported having injury discipline programs where nearly two-thirds of the programs discouraged reporting and less than 9% encouraged reporting; and
- 53% of workers surveyed reported having safety incentive programs, of which 58% discouraged reporting and 12% encouraged actual reporting of injuries.



The Fairfax Memo

After years of union lobbying, Federal OSHA finally issued a memorandum often referred to as the “Fairfax Memo” on March 12, 2012, which clarified OSHA’s interpretation of the law:

“Reporting a work-related injury or illness is a core employee right, and retaliating against a worker for reporting an injury or illness is illegal discrimination under section 11(c). If employees do not feel free to report injuries or illnesses, the employer’s entire workforce is put at risk. Employers do not learn of and correct dangerous conditions that have resulted in injuries, and injured employees may not receive the proper medical attention or worker’s compensation benefits to which they are entitled.”²⁰

The memo stated that the following four types of employer safety incentive and disincentive programs, policies, practices, or procedures may be illegal under the record-keeping rules and 11(c) if they discourage employees from reporting:

1. Injury Discipline – employees are disciplined for reporting injuries;
2. Discipline for “untimely” reporting – employees are disciplined for not reporting injuries in the way and by the time required by the employer;
3. Discipline for “violating a safety rule”; and
4. Safety incentive programs – employees are disqualified from rewards and prize because injuries and illnesses are reported.

To enforce this interpretation, OSHA’s compliance officers have been regularly reviewing safety incentive programs as part of all standard workplace inspections and citations have been issued nationwide under the new policy. OSHA has also implemented policies into its OSHA Voluntary Protection Programs (“VPP”). VPP is made up of exemplary workplaces that have fostered cooperative relationships between management, labor, and OSHA toward the end goal of implementing a comprehensive safety and health management system. Companies in the VPP program must show OSHA that they have implemented positive incentive programs that encourage or reward workers for reporting injuries, illnesses, near-misses, or hazards.²¹

DOSH has also taken similar steps with the emphasis in the California state VPP program on removing employers who fail to comply.

The AFL-CIO study is confirmed by workers’ stories shared with us over the course of our anti-retaliation regional meetings:

➤ **Example of discipline for untimely injury reporting:** Jose, a warehouse worker in California’s Inland Empire, reported that a common employer practice in the warehouses is to place an employee on probation for “untimely reporting” of their injury. Jose said that the employer expects workers to report an injury as soon as the injury occurs. In fact, *Mother Jones* magazine recently reported that some companies have instituted rules requiring workers to report their injuries before the end of their shift in order to be eligible for workers’ compensation.²² He felt that this was unreasonable because often workers do not realize or identify their injury or illness until

the following day. Some injuries that may not become evident until later include muscle strains, back pain, and whiplash. Jose said that this rule punishes workers for reporting injuries and discourages workers from reporting because those who don’t discover an injury until a later time don’t want be placed on probation for “untimely” reporting.

➤ **Example of bonuses to discourage reporting:** Alejandra*, a janitor in Alameda County, reported that her employer uses a system of bonuses to reward managers and staff who do not report injuries. Each manager receives \$75 if their team does not report an injury in a 3-month period. Each member of the team also receives an award of \$50 after 3 months of not reporting an injury. On one occasion, Alejandra

reported an injury after she slipped at work on a floor flooded with water. Consequently, Alejandra said she did not receive the reward for that particular reporting period. It is not uncommon for managers at her worksite to pressure workers to not report. The managers argue that they want a “good” record so they could be eligible for the \$75 bonus. In addition, her coworkers also do not report because they want to receive the \$50 bonus and remain in good standing with their team manager.

➤ **Example of discipline for violating health and safety rules and using prizes to discourage reporting:** Marta Medina, a former warehouse worker in a National Distribution Center (NDC) warehouse in the Inland Empire, reported that a common practice at the warehouse was to write up an employee for not working “safely.” She said that NDC gave prizes such as a \$50 gas card and a pizza party at the end of 3 months to workers who do not report injuries. Those workers who reported injuries were disqualified from the gas card and pizza party and also received a write-up. The “safety write-ups” served as a way to blame the worker for the workplace injury.

➤ **Example of bonus program that discourages reporting:** Food packing workers in the Central Valley - with the help of a union and Worksafe - identified an employer program which rewarded workers who had been employed at the facility for at least a month by making them eligible to win \$100 if they have:

1. No open workers' comp claims within the past 6 months;
2. No accidents within the past 6 months; and
3. No safety rule violations or write-ups.

Union representatives reported that the program had the effect of discouraging workers from reporting injuries because the workers did not want to be disqualified from the safety raffle or face other types of retaliation. This has contributed to inaccurate reporting of injuries and illnesses by the employer.

Recommendation: California Needs A Proactive OSH Anti-Retaliation Campaign To Empower Workers And Inform Employers Of Their Duties.

In April 2014, the DLSE and the DIR initiated a statewide multilingual public awareness campaign titled “Wage Theft is a Crime.”²³ The campaign sought to educate workers and employers about labor standards such as minimum wage, overtime, and meal and rest break requirements. It featured outreach to community-based organizations as well as a combination of print, radio, and online media in order to reach a broad range of low-wage workers.

The campaign was hugely successful and received the 2014 HPRA National ¡BRAVO! Award for Public Education Campaign of the Year. Worksafe believes such a campaign focused on OSH retaliation would be extremely helpful for workers. Worksafe believes that OSH retaliation is a form of wage theft and that, like stealing a worker’s money, it amounts to stealing their health and disabling them financially. Doing so takes away their ability to be economically viable.

OSHA’s recent report “Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job”²⁴ provides an explanation of how workplace injuries and illnesses contribute to income inequality:

“They force working families out of the middle class and into poverty, and keep the families of lower-wage workers from entering the middle class. Work injuries hamper the ability of many working families to realize the American Dream. The costs of workplace injuries are borne primarily by injured workers, their families, and taxpayer-supported components of the social safety net.”

Given the prevalence of OSH retaliation, especially among the most vulnerable workers, Worksafe believes that a similar campaign highlighting OSH retaliation would be extremely valuable in increasing worker awareness, as well as potentially deterring employer abuse. Worksafe recommends that the DLSE and DOSH partner to do a similar health and safety-oriented campaign in which the right to engage in OSH-protected activities is highlighted, as well as the repercussions for engaging in retaliation against workers who experience and report a workplace condition such as an injury, illness, or hazard. We believe that such a program will empower workers and inform employers about the consequences of violating the law.

Moreover, as stated in Dr. Michael’s OSHA report, “[t]he most effective solution to the problem posed...is

to prevent workplace injuries and illnesses from occurring.” The best way to do this, in our opinion, is to:

- (1) Improve the current remedies workers have to address retaliation;
- (2) Effectively punish employers that retaliate against employees for exercising OSH protected rights;
- (3) Remove and replace safety disincentive programs with programs that reward and encourage reporting; and
- (4) Alter workplace culture such that workers are encouraged to report their injuries, illnesses, and hazards *without fear of reprisal*.

The next sections of this report will discuss recommendations for the above points in more detail.

Recommendation: DOSH Should Enforce Cal/OSHA’s Record-Keeping Rule Pursuant To The Fairfax Memo.

Given how prolific safety disincentive programs, practices, and policies are in California, and their negative effect on worker health and safety in the workplace, DOSH and the DLSE should issue their own memo mirroring the Fairfax Memo to clarify their policies. DOSH and DLSE should then train and inform their investigators on the existence of these programs and provide their investigators with the training and tools necessary to vigorously enforce this new policy.

Eliminating these programs will go a long way towards removing factors in the workplace that discourage reporting. The end goal is to adjust the current work culture to adopt programs that reward, rather than punish, workers for reporting injuries, illnesses, and hazards.

Recommendation: The DLSE And DOSH Should Form A Cross-Agency Referral Process That Seeks To Refer, Track, And Take Advantage Of Information Gained From DLSE Investigations.

When a DLSE investigation results in a finding that the employer engaged in retaliation for protected OSH activities, a possibility exists that such activity may be pervasive in that workplace. Therefore, individual retaliation cases can indicate systemic issues that affect other workers in the workplace and can serve as the “sentinel event” to trigger further worksite investigations

in the same manner seen in public health policy. Specifically, public health policy dictates that if there is a case of work-related asthma or hearing loss, for example, it should be viewed as an opportunity to identify and eliminate hazards that affect a larger group of exposed workers.

Failure to take advantage of this is a missed opportunity for the DLSE and for DOSH to improve workplaces for all of the workers present, not just the specific worker who filed the OSH retaliation complaint. Currently, the DLSE and DOSH already have a referral process whereby DOSH investigators refer workers to the DLSE when DOSH investigations discover the possible existence of retaliation.

Worksafe recommends that DOSH and the DLSE also incorporate a cross-referral process whereby OSH retaliation cases investigated by the DLSE that reveal potential worksite-wide or systemic employer retaliatory activity are then referred *back* to DOSH or to the Labor Enforcement Task Force (LETTF)²⁵ for further targeted enforcement activities.

The LETTF is a coalition of California government enforcement agencies that work together in partnership with local agencies to target enforcement activities against employers to combat the underground economy. The DLSE and DOSH are two lead LETTF agencies. This is a potential mechanism for further collaborative enforcement efforts between these two agencies.

A referral back to DOSH from the DLSE of potential systemic workplace retaliation can result in DOSH conducting further investigations to uncover potential record-keeping or IIPP violations that result in discouraging employee reporting of injuries and illnesses. Record-keeping violations include the employer failing to report employee injuries and illnesses or having programs, practices, or procedures that discourage employer reporting. IIPP violations include the failure of the employer to have a process that allows employees to report injuries, illnesses, and hazards without retaliation. DOSH can then work with the employer to ensure that their existing programs, policies, and procedures do not result in further discriminatory actions against employees for reporting workplace conditions.

II. CALIFORNIA'S WORKERS ARE BEING DENIED THE RIGHT OF PROTECTION FROM RETALIATION FOR REPORTING INJURIES AND ILLNESSES.

Long recognized as a protected OSH right, the right to be free from discrimination for reporting an injury or illness is mentioned in nearly all of Federal OSHA's education and outreach materials,²⁶ as well as in the materials of other agencies referring to protected rights under OSHA.²⁷ The DLSE, however, has recently stated that it will not take any complaints filed by workers who have been retaliated against for reporting an injury or illness. Rather, it will refer all such complaints to the Department of Worker's Compensation ("DWC") to file a complaint under Labor Code section 132(a)'s protections for retaliation related to workers' compensation.

Finding: The DLSE Does Not Currently Accept Complaints Filed by Workers Retaliated Against For Reporting Injuries.

Reporting injuries and illnesses is a fundamental OSH right that serves as the foundation for enabling the accurate assessment of health and safety issues in the workplace. Accurate record-keeping provides information that is important for employers, workers, government agencies, and advocates to:

- evaluate the safety of a workplace;
- identify and abate workplace hazards;
- understand industry hazards;
- implement worker protections to reduce and eliminate hazards;
- improve programs to reduce workplace hazards and prevent injuries, illnesses, and fatalities; and
- target health and safety inspections.

Workers rarely report an injury to their supervisor without reporting the underlying hazard. For example, Antonio*, a worker at a California waste recycling plant, reported to his employer that he was punctured by a hypodermic needle while sorting through recycling wastes with only thin latex gloves for protection. Antonio reported

simultaneously his injury of being punctured as well as his possible exposure to biohazards, infectious diseases, and toxic materials. If he experienced retaliation and filed a DLSE complaint, he may not know to identify the hazard in his complaint. Moreover, the DLSE intake processors may not be asking the right questions to capture this information.

Reporting an injury and being eligible for workers' compensation benefits are closely related. It is Worksafe's opinion that workers like Antonio who report an injury are triggering *both* of their rights to be free from retaliation from reporting an injury as well as to be free from retaliation for applying for workers' compensation. Thus, they should have *two* remedies under California law: filing an OSH retaliation complaint with the DLSE *and* filing a DWC Labor Code section 132(a) complaint.

That is, workers should be protected for reporting their injuries and illnesses under the record-keeping and IIPP laws which fall under the DLSE's jurisdiction. California's record-keeping regulation, California Code of Regulations, Rule 14300.36, cites the equivalent federal code, Section 11(c) prohibiting employers from "discriminating against an employee for reporting a work-related fatality, injury, or illness." California's IIPP laws²⁸ mandate that employers set up a system for workers to report workplace conditions without fear of retaliation.

Workers are *also* protected under California's Workers' Compensation laws – specifically, Labor Code section 132(a)²⁹ – which protects workers who are retaliated against for filing or expressing their intention to file for workers' compensation.

The DLSE's current policy does not allow for the acceptance of retaliation complaints filed as a result of reporting an injury. This is based on the rationale that such cases are covered under Labor Code section 132a. In our opinion, however, reliance on

that code alone would result in a gap in the law which would leave workers who report an injury, but do not file or do not intend to file a workers' compensation at a loss.

The DLSE's position is that it does not have jurisdiction over violations of these regulations and that legislative change may be necessary before the DLSE can accept and investigate these claims. Worksafe disagrees. When California's Occupational Safety and Health Act was enacted in 1973, there was an understanding by legislators that, with respect to the record-keeping rules, employers must comply with record-keeping provisions that are reflected in the federal OSH Act as well as federal regulations.³⁰

As a state-plan state, California's workplace safety programs are required to be as effective as, if not better than, the federal equivalent. Thus, we believe that the DLSE's interpretation is in contradiction to Federal OSHA's guarantee of such a right and that the DLSE is currently not "at least as effective as"³¹ (ALEA) Federal OSHA.

California's workers have the right to be protected, especially since the DLSE has agreed to represent California whistleblowers in the Federal Whistleblowing Program's stead. Failure to ensure California workers the rights they would be entitled to under federal law is an injustice to California's workers.

Finding: Injured Workers Are Being Shuffled Between Agencies Without Any Relief.

When workers attempt to obtain relief from the DLSE for retaliation from reporting an injury or illness, their complaint is denied and they are referred to the DWC. Rather than accepting their complaint, however, the DWC oftentimes refers the complaint *back* to the DLSE because they believe that it falls under the DLSE's jurisdiction. The worker is then left in limbo. This issue was noted by Federal OSHA in their 2014 Follow-up Fame Report.³²

The Communications Workers of America (CWA) have reported that their California-based workers are experiencing this shuffle between agencies

when they attempt to file retaliation complaints with both the DLSE and the DWC to address retaliation suffered as a result of reporting an injury. CWA reported that their workers are in a precarious situation because they were fired shortly after reporting the injury, and prior to being able to initiate a workers' compensation complaint. The DLSE refers such workers to the DWC, believing it to be a workers' compensation case. The DWC then refers the worker back to the DLSE believing it **not** to be a DWC case since no workers' compensation application or complaint has been filed yet. Under Labor Code section 132(a), however, the retaliation suffered can stand alone as a workers' compensation complaint. Similarly, the worker should be protected under California's record-keeping codes at the DLSE for reporting their injury.

Reporting an injury and the failure to receive workers' compensation benefits are so inter-related that these two agencies have forgotten that two distinct rights exist. Retaliation against workers being injured often takes the form of employers ignoring or refusing to respect workers' rights. The message to workers to not report their injury under Cal/OSHA laws as well as workers' compensation laws often come in the same breath from employers. The result is a harmful work environment, an atmosphere in which workers are afraid to come forward about their injuries, illnesses, and workplace hazards, and inevitable health and safety consequences for the entire workforce.

Finding: Vulnerable Workers Are Not Getting The Medical Treatment That They Need For Work-Related Injuries.

The ultimate result in this back and forth shuffle is that workers end up suffering grave economic inequality as a result of work environments that discourage and retaliate for reporting. This is what happened to Javier* who came to Worksafe's quarterly injured worker clinic. Javier shared with us that he lost *both* his feet while working in an auto mechanic shop in Oakland.

When Javier first injured his right ankle as a result of a workplace hazard, he told his employer but was immediately threatened with job loss and pressured into not filing a workers' compensation claim

because the employer was illegally uninsured. Javier did not file a claim for workers' compensation and he was not covered under an employer health plan. Javier did not receive the proper medical attention he needed and he developed an infection in the injured foot that spread to his other foot. He was afraid to report the severity of the infection to his employer as a result of the employer's threats. Without appropriate medical care, Javier ended up losing both of his feet. He eventually lost his job and is now dependent upon public assistance.

Similarly, Armando, a car wash worker from Los Angeles, told us that a few drops of the chemical he was using to wash cars splashed into his eye. Armando's co-workers and supervisor witnessed the workplace incident. Upon witnessing Armando's injury, his supervisor explicitly told him that they did not carry workers' compensation, and that if he reported his injury, he would be fired. After this incident, Armando and his coworkers were afraid to report any more injuries or illnesses or the dangerous chemicals.

These stories clearly demonstrate how serious workplace injuries can go unreported in workplaces due to a work culture that discourages and retaliates against workers for reporting. Ultimately, when injuries go unreported, employers are not held accountable to workers for their injuries, they fail to ensure a healthy and safe work environment, and it's the workers who pay with their health.

Recommendation: The DLSE And The DIR Need To Ensure That California Workers Have The Right To Be Protected From Retaliation For Reporting An Injury Or Illness.

Currently, California is not as effective as Federal OSHA, which extends protection from retaliation for the right to report an injury or illness while California does not. We believe the failure to protect such workers jeopardizes the importance of empowering workers and mandating employers file complete and truthful reports of injuries and illnesses in the workplaces. This data is vital to ensuring the health and safety of workers and in preventing injuries, illnesses, and most importantly,

fatalities. We recommend that the DLSE work with advocates and Federal OSHA to find a resolution to this gap in services. The 2014 Follow-up Federal Annual Monitoring Evaluation (FAME) Report indicates that OSHA is currently working with the DIR to resolve this issue.

Recommendation: The DLSE Should Revise its Intake Process To Help Workers Identify The Hazards Connected To Workers' Retaliation Complaints Revolving Around An Injury or Illness.

In the meantime, we recommend that the DLSE implement procedures to ensure that workers who report retaliation from injury reporting also report the accompanying hazard. This can be accomplished by updating the current retaliation complaint form to include a question regarding what hazard or health and safety issue caused the worker's reported injury. That way, the DLSE can learn the underlying hazard that caused the injury and whether the worker reported the hazard to their employer.

In turn, advocates should make sure that OSH complaints reflect the hazard that caused the injury and the inclusion of any actions on the part of the worker to inform the employer of the hazard.

Recommendation: When There Is A New Standard That Addresses The Right To Report, The DLSE Should Receive Training On It And Be Prepared To Enforce It.

From time to time, new standards may be enacted that include new worker rights, such as the provisions for reporting the signs and symptoms of heat exposure under the new Heat Illness Prevention Standard.

This new standard requires that employees be trained on "[t]he importance to employees of immediately reporting to the employer, directly or through the employee's supervisor, symptoms or signs of heat illness in themselves, or in co-workers."³³ Employees have the right, then, to report immediately their signs and symptoms of heat illness and injuries. Retaliation for exercising this right would be a clear violation of the law.

The DLSE's current policy would result in such a complaint being missed despite the fact that it clearly falls under the new standard. Workers who file complaints based upon retaliation for reporting signs of heat illness and injuries would be disenfranchised by the DLSE's failure to know and understand OSH laws, as well as their current policy of not taking injury only complaints of retaliation.

To ensure optimal protection for all workers, both inspectors at DOSH and the DLSE should receive ongoing trainings and updates on changing OSH law in order to fully enforce workers' rights. Similarly, enforcement collaborative such as the LETF should also receive up-to-date trainings to have a comprehensive understanding of all health and safety rights.

III. WORKERS WANT A RETALIATION COMPLAINT PROCESS THEY CAN RELY ON.

Since California has opted to have their own state plan, it must also have a whistleblower program to protect workers who come forward to exercise their OSH rights. When a state has their own state plan, they are provided with funding from the federal government to operate their state plan, and they are expected to be at least as effective as the federal program.³⁴

The California whistleblower program, housed at the DLSE, has components that many believe make it stronger than the federal whistleblower program. These include the protection of more labor laws, the possibility of civil penalties payable to the aggrieved worker, protections for undocumented workers, and an extended statute of limitations. The federal OSHA whistleblower program provides protection for over 20 federal statutes whereas the DLSE provides protection for over 33 state statutes. Moreover, some workers may qualify for dual protection under both state and federal law, or they may only be covered under one or the other since the federal statutes have jurisdiction over certain areas that state laws do not (for example, the Federal Railroad Safety Act, the Toxic Substances Control Act, etc.).³⁵

In addition, as stated above, under strengthened retaliation statutes, workers may be entitled to civil penalties in the amount of \$10,000 for every OSH retaliatory act. Although several federal whistleblower statutes provide for civil penalties, the federal whistleblower equivalent, often called "Section 11(c)," does not. Moreover, Californians have five more months than the federal statute to file an OSH retaliation complaint. Under the DLSE, workers have up to 180 days (6 months) from the date of the adverse employment activity to file their DLSE complaint.³⁶

Under Federal OSHA, however, workers only have 30 days to file an OSH retaliation complaint.³⁷ Finally, California has made a concerted effort to ensure that the immigration status of the worker is irrelevant in the adjudication of a retaliation complaint. Inquiries into the immigration status of the worker are strictly prohibited.³⁸

At each of our regional meetings, DLSE representatives made presentations and provided an update on OSH retaliation cases, as well as the DLSE's efforts towards improving their OSH retaliation unit. This included improving their overall retaliation investigation process, updating training and training materials for retaliation investigators, and establishing a triage system to identify possible merit cases early so that they can be expedited through the retaliation process. Little detail was provided regarding the above-mentioned improvements to enable workers and advocates to evaluate whether or not filing an OSH complaint would fare better under the improvements, but activists were encouraged by the DLSE presenters' insights about changes in the way retaliation investigations are conducted.

Of note, Worksafe has seen an increase of merit cases, or OSH retaliation cases decided in favor of the complainant, from 14% in 2011 to 22% in 2012 and 23% in 2013, compared to a National Average for State Plans for fiscal years 2011 to 2013 of 20%.³⁹ This is a significant improvement from earlier figures of 5.71% in fiscal year 2003, 11.22% in 2004, 13.95% in 2005, and 7.62% in 2006. Moreover, the most recent 2014 Follow-up FAME Report indicated an improvement in the OSH retaliation investigation process.

Despite this progress, the DLSE still suffers from a

backlog of retaliation cases that predate Julie Su's tenure. It is also reported that the resolution of cases can take up to a year.

Workers also report difficulties with the retaliation remedy afforded by the DLSE. These complaints include: the DLSE losing their complaint, lack of communication or connection with the DLSE investigator, language access, and long wait times for the final outcome of their case. Thus, before advocates can feel comfortable recommending or referring the DLSE's retaliation complaint process to workers, we still need greater assurance that the DLSE is moving in the right direction to improve the process. Ultimately, without a retaliation complaint process that is effective and timely, any advocacy on the part of worker leaders, advocates, and unions to file OSH retaliation complaints with the DLSE could be disastrous to workers who need swifter and stronger enforcement of their rights.

Finding: Federal OSHA Continues To Identify Outstanding Issues With The DLSE OSH Retaliation Program.

Over the years, Federal OSHA has conducted annual audits of the DLSE program. These audits, titled the "Federal Annual Monitoring Evaluation (FAME) Reports,"⁴⁰ are conducted by the Federal Whistleblower team responsible for monitoring and evaluation of California's whistleblower program.

The audits evaluate the DLSE's processing of California's OSH retaliation cases and highlight deficiencies in the DLSE's program. Because they audits focus on deficiencies, they may not evaluate aspects of the DLSE's program that is satisfactory, performing well, or even excelling. Thus, audits do not necessarily evaluate the DLSE's model for investigation, California laws protecting workers, or the DLSE's investigative techniques.

With that said, a federal audit of a subset of the DLSE's case files from 2009 to 2011 found that, overall, the quality of DLSE's investigations was poor. Worksafe identified the following issues as flagged by the audit as the most problematic for low-wage workers:

- Overall poor quality in investigations with failures to screen cases properly, conduct adequate interviews of parties and witnesses, obtain and analyze evidence

properly, and investigate complaints in a timely fashion;

- Problems related to notifying and communicating with the complainant, including failure to notify the complainant at the beginning of the process, hold a closing conference, send a closing letter, or explain their right to appeal;
- Failure to test whether the employers' reasons provided for firing or otherwise penalizing workers were potentially discriminatory;
- Insufficient analysis of the 4 core elements of a whistleblower retaliation case, which are needed to complete a case record for further evaluation;
- Failure to complete OSH retaliation cases by the statutory requisite of 90 days; and
- Lack of investigator training in OSH issues.

In the last year, Federal OSHA conducted a follow-up evaluation, examining 11 randomly selected OSH retaliation cases. The most recent 2014 Follow-up FAME report discovered the following improvements:

- Improved case file documentation evidencing that investigators were conducting important phases of investigation: All case files contained the requisite investigative documentation for interviews of the complainant, relevant witnesses, or the closing conference;
- Complete and thorough investigation: 10 of the 11 case files reviewed evidenced that a thorough investigation was conducted;
- Case conclusion was supported by evidence: 9 of the 11 case files had sufficient evidence to support the conclusion reached by the discrimination investigator.

These show very promising improvements in the DLSE's OSH investigation system. Of continuing concern, however, is the amount of time that it takes for the DLSE to complete its investigation of an OSH retaliation complaint. A vast majority of cases filed with the DLSE have failed to be investigated and closed within the requisite 90 days of filing.⁴¹ Case investigation continues to take approximately 333 days (close to a year), as reported by the Labor Commissioner in the Fall of 2014.

This may be due in part to staffing issues, as well as the plethora of violations that employers are considered for under California law as opposed to federal law. Current estimates place the ratio of investigators to OSH

retaliation cases at approximately 15:1 for Federal OSHA but around 100:1 for the DLSE.

Attempting to address these issues with more resources in 2006, the Cal/OSHA budget allocated five full-time OSH retaliation investigators and a dedicated attorney to OSH retaliation cases.⁴² This resulted in a moderate improvement; however, as discussed above, with the increase in retaliation cases filed overall in the DLSE's retaliation unit and the increase in DLSE jurisdiction over violations, it seems apparent that the current number of investigators may not be sufficient to meet the workload. In fact, the DLSE hinted at this problem in their 2014 Retaliation Complaint Report.⁴³

This issue is extremely important to low-wage immigrant workers who have filed retaliation complaints with some hope of a remedy within a reasonable amount of time. If the current wait time for the completion of an investigation is 333 days or more, most workers may have lost hope, suffering in silence as retaliation continues in their workplaces. Moreover, without any ability to rely upon a reasonable date for the completion of their investigation, it's not surprising that workers may abandon or withdraw their cases.

For example, in 2006, out of 85 discrimination complaints docketed and closed, 38 were withdrawn by the complainant and 26 were abandoned by the complainant.⁴⁴ In 2007, the DLSE reported that 32 complaints out of 189 were abandoned by the complainant.⁴⁵ Given that the length of time to case closure has not lessened, it can be assumed that workers are still withdrawing or abandoning their complaints – or choosing not to file complaints with the DLSE at all.

Recommendation: The DLSE Should Continue Working To Improve The OSH Retaliation Investigation Process.

Based upon meetings with the DLSE Retaliation Unit and the 2014 Follow-up FAME report, it appears that the DLSE is working to address the issues identified in the FAME audits. We support the DLSE's progress and wish to support them in developing a thorough and competent investigatory process that is also timely.

In particular, we urge the DLSE to:

- Request that more investigatory positions for the retaliation unit be authorized in the next state budget;

- Continue to improve its training of inspectors with respect to investigatory processes and OSH issues and to include cross-agency training with DOSH;
- Increase education and outreach to workers and their advocates with regard to their OSH retaliation rights; and
- Continue to address Federal OSHA-identified issues in the annual FAME audits.

Recommendation: Workers And Advocates Need More Information To Advocate For Workers And For More Resources For The DLSE.

Currently, the information that workers and advocates receive regarding OSH retaliation cases is limited to the DLSE's annual Retaliation Unit report.⁴⁶ This information is statutorily defined and does not provide more in-depth information regarding OSH retaliation cases that would be helpful to advocates and workers to better understand where our own strategic work needs to focus. For example, their recent 6-page 2014 Retaliation Complaint Report⁴⁷ contained an exhibit demonstrating that OSH retaliation complaints ranked third among all those filed, but failed to contain any other information at all regarding these complaints. Moreover, information provided by the DLSE to Federal OSHA for their FAME audits is very scant, limited to the percentage of complaints completed within the 90 calendar day period, the percentage of complaints that were meritorious,⁴⁸ and meritorious cases that have been settled.⁴⁹

Without further information, workers and advocates have no clear understanding of how they can advocate for workers or for resources to help the DLSE. Advocates were provided with a small clue in the DLSE's recent 2014 Retaliation Complaint Report, in which the DLSE indicated that by the end of the calendar year, 421 cases (22% of the 1,874 retaliation complaints received for the year) remained unassigned due to the combination of increased annual complaints and the "dramatic increase in the number of violations to be investigated."⁵⁰ The Labor Commissioner's overall conclusion was that the DLSE experienced a considerable increase in workload.

In fact, the report states that the number of violations investigated by the DLSE jumped from 1,889 in 2013 to an astounding 3,045 in 2014.⁵¹ This is a jump of approximately 161% and most likely due in part to the work of Labor Commissioner, Julie Su, in increasing

worker access to the DLSE’s services. In this time, however, the DLSE has only seen an increase of two additional investigators. During this same period of time, the number of complaints filed also increased from 1,605 to 1,874. Thus, the increase in investigators does not appear to be sufficient to match both the increase in caseload and violations to be investigated.

Through all of this time, the number of investigators assigned to OSH retaliation cases, most likely, remained steady at five, and the number of OSH retaliation cases had a moderate increase from 323 complaints filed in 2013 to 376⁵² filed in 2014. Reviewing this information for a five year period, however, starting at the year 2010, the DLSE has actually experienced a 210% increase in OSH cases. In this light, it’s apparent that the number of OSH dedicated investigators may not be enough. Sandwiched in the middle of the workload increase faced by the DLSE, however, it is clear that OSH retaliation investigations may be affected negatively. Thus, it appears clear to advocates that further resources are needed at the DLSE for an increase in the number of investigators. Workers and advocates have a vested interest in ensuring the success rate of OSH retaliation complaints, and so this may be a rallying point for stakeholders. Worksafe recommends that the DLSE provide supplemental reports that specifically focus on OSH retaliation – for example, the types of cases the DLSE is getting under Labor Code sections 6310 and 6311, the ways in which advocates can file stronger complaints and assist in the investigation of their complaints, and the resource needs of the Division. Worksafe understands that the DLSE has been working on improving its database system to enable it to collect, compile, and analyze more data from the retaliation complaints. We encourage the DLSE to continue their work in developing a better case tracking system that can gather and share data with the public in an accessible database system similar to Federal OSHA’s system⁵³ or

the Department of Labor’s database. Alternatively, the DLSE can include such information in the quarterly reports that are provided at Cal/OSHA Advisory Committee meetings or in their annual audits with Federal OSHA.

These reports can include information such as:

- the demographics of complainants;
- what protected activities complainants engaged in;
- what industries they worked in;
- how long it took the DLSE to contact the complainant after their complaint was filed; and
- data regarding what types of cases were successfully sent through the DLSE’s fast track or “triage” program.

With the above information, the DLSE and advocates can do a number of things:

- analyze the types of workers who are filing complaints and extrapolate who is not filing complaints to target education, outreach, and advocacy, and to address issues that may be obstacles, such as low-literacy, access, language, and culture;
- analyze what protected activity workers are engaging in to extrapolate which rights workers may not know about or may be too afraid to exercise in order to target education, outreach, and advocacy;
- analyze data about why cases are closed, dismissed, or referred out, so that workers and advocates can develop “best practices” around how to file effective complaints with the DLSE; and
- analyze the information collected so that the DLSE can create better State Activity Mandated Measures (SAMM)⁵⁴ indicators to leverage resources with other agencies and partnerships (such as the DLSE and LETF) in their targeting of enforcement activities.

SAMM

State Activity Mandated Measures, or “SAMMs,” are indicators created by Federal OSHA that measure particular issues of interest. States with state OSH plans must track and provide reports to Federal OSHA on these indicators so that Federal OSHA can analyze and compare the numbers to assess the states’ ability to meet various goals, expectations, or benchmarks. These measure, for example, the average number of days to initiate a complaint inspection, the percentage of complaints for which complainants were notified in a timely manner, etc.

IV. CALIFORNIA'S WORKERS NEED MORE HELP TO EXERCISE THEIR OSH RETALIATION RIGHTS WITH THE DLSE.

The Su administration has seen an increase in DLSE's engagement with advocates and a pronounced commitment to decreasing the decade-long backlog of retaliation cases with improved retaliation protocols, partnerships with law schools, increased trainings to investigators, and a new "triage" system to identify cases with merit. Despite this, however, workers and advocates remain unaware of or confused about their rights and remedies under the DLSE.

Finding: Workers And Advocates Are Unaware And/or Confused About Their Rights And Remedies Under The DLSE And Federal OSHA.

With respect to the DLSE, workers and advocates have expressed to Worksafe that they either did not know about or were confused about the DLSE's whistleblower protection program. Though most knew about the DLSE's wage theft division, few realized that the DLSE also handled OSH retaliation complaints.

Lack of knowledge aside, part of this confusion may be brought on by the fact that a worker's first introduction to a state agency with respect to health and safety issues is often at a DOSH worksite inspection. The fact that the DOSH inspector can come in and ask questions about health and safety in the workplace but then be unable to provide assistance to workers should they face retaliation from answering the inspectors' questions confounds all workers and advocates. In many states, the occupational safety and health division is the same division that handles the OSH whistleblower complaints.

At the DOSH inspection, the inspector is supposed to hand out the DLSE's informational half-page flyer to the employer and employee representative at the informal conference held prior to the site inspection. Oftentimes, however, employees are non-unionized and no employee representative is present at the opening conference. DOSH, then, should be providing the half-page flyer to all employees that are interviewed at the worksite and to any other employees that request a copy. The practices should be clearly explained in DOSH's Policies and Procedures so that District and Regional Managers can enforce and monitor the flyer's distribution.

The half-page flyer, which is currently not available anywhere on the internet, explains to workers in English, Spanish, and Chinese their right to be protected from retaliation if the worker complains or provides any information to a government agency about their working conditions. The flyer then refers them to the DLSE, which is an entirely different state agency than the one conducting the investigation. This distinction may not be adequately explained to workers and the confusion persists.

Theoretically, after receiving the flyer, workers concerned about retaliation can obtain further information about their whistleblower rights at a local DLSE office or on the DLSE's website.⁵⁵ The DLSE website has relevant multilingual publications online; however, workers have to be able to navigate the website in English first to find the multilingual materials.

Moreover, DOSH announced at a recent Cal/OSHA Advisory Committee meeting held on March 13, 2015, that they may replace this flyer with their own factsheet entitled "Health and Safety Rights: Facts for California Workers." This factsheet is four pages long and may be inaccessible for low-literacy workers. It has two paragraphs that discuss "Protection Against Retaliation." Worksafe has submitted our comments and concerns to DOSH about the factsheet. Should DOSH choose to replace the existing flyer with the proposed four-page factsheet, Worksafe recommends that both the DLSE and DOSH collaborate with workers and advocates regarding the types of materials provided to workers and the best strategies to get such information to them.

Alternatively, DOSH may provide materials created by the DLSE. The DLSE has also recently rolled out a multi-color booklet that is very worker-friendly, and in multiple languages, titled "Report Retaliation to the California Labor Commissioner's Office." The booklet is attractive and potentially very useful to workers, though it is far too conspicuous, especially if provided to workers who fear being retaliated against. These booklets can be provided to advocates who are assisting the workers and given to them at a location away from the worksite.

Additionally, as mentioned previously, the new immigration-based anti-retaliation laws enacted in January 2014 may further add to this confusion. Workers and advocates may not be aware of the new laws or may not know exactly how to apply them. These statutes create new protections for immigration-based retaliation and have the possibility of being read broadly enough to cover retaliation for OSH-based protected activity. These new laws create stronger penalties to deter employer retaliation.

For example, under these new statutes, employers risk having their businesses licenses suspended if they retaliate against workers who exercise their rights by threatening to report immigration status.⁵⁶ These laws also reach out to penalize attorneys who are often shielded from taking retaliatory actions on behalf of their client employer. Under the new statutes, attorneys may face discipline, suspension, or disbarment if they threaten to report immigrant workers involved in an administrative or civil employment suit.⁵⁷

The new laws also expand the grounds for a finding of retaliation by prohibiting adverse action against an employee for exercising a California labor right, whistleblowing, or participating in political activity or a civil suit against the employer.⁵⁸ Thus, if a worker filed a health and safety complaint under Labor Code sections 6310 and/or 6311, their complaint now also constitutes a whistleblowing violation under Labor Code section 1102.5. Section 1102.5 has been strengthened to include civil penalties per retaliatory act that is payable to the worker.⁵⁹

The reach of these laws to OSH-protected rights is currently untested, as the laws are so new and workers and advocates are just beginning to learn about them. Confusion and a general lack of awareness still exist about how best to file cases based on the new laws, as well as the more established laws (Labor Code sections 6310 and 6311), particularly where OSH retaliation is concerned.

Recommendation: DOSH Needs To Be More Consistent In Providing OSH Retaliation Information To Workers.

Because California has a separation between DOSH's handling of health and safety complaints and the DLSE's jurisdiction over OSH retaliation complaints, it is imperative that DOSH inspectors find ways to explain

this nuance to workers more clearly. They can do so either by providing them with the half-page DLSE factsheet about their retaliation rights or by providing something less conspicuous, such as a wallet-size card that explains OSH retaliation rights and resources.

Currently, workers and advocates report that workers are not always receiving the DLSE half-page flyer from DOSH inspectors. DOSH and the DLSE need to coordinate efforts and figure out a consistent strategy to inform workers of their rights.

Recommendation: DOSH, The DLSE, And Federal OSHA Should Conduct More Education And Outreach To Workers And Advocates To Inform Them Of Their Whistleblower Rights.

A DIR campaign involving DOSH and the DLSE with respect to OSH retaliation will increase workers' awareness about their whistleblower rights. Such a campaign can include better, more accessible informational flyers, wallet-sized cards with relevant information, and informational workshops focused on OSH retaliation. We recommend a robust, high level campaign that mirrors some of those that the DLSE and DOSH have ran in the past, such as DOSH's Heat Illness Campaign and the DLSE's Wage Theft Campaign.

The DLSE and/or DIR can also translate their websites into Spanish or other languages, and provide multilingual outreach materials to worker centers, community organizations, and advocates. Similarly, Federal OSHA can champion or support such a campaign with their own supplemental multilingual outreach materials.

Incidentally, we also recommend that Federal OSHA update their website to be clearer with respect to directing traffic to the DLSE website. Currently, Federal OSHA's whistleblower website directs visitors interested in California's whistleblower program to the DOSH website. However, DOSH does not administer the state's whistleblower program; the DLSE does. Federal OSHA links should lead directly to the DLSE's page, which provides information for filing retaliation complaints.⁶⁰ We also recommend that Federal OSHA provide information on their website in such a way as to be translatable to other languages, especially Spanish.

Recommendation: New Immigrant-Based Retaliation Laws: Further Outreach, Training and Test Cases Needed.

Since the enactment of the new immigrant-based anti-retaliation laws as well as the other statutes that expand and strengthen the current retaliation laws, advocates such as the National Employment Law Project (NELP) and Worksafe have conducted trainings to educate advocates and workers about these new protections. How the new protections can be utilized in OSH retaliation cases is still unclear, however. Worksafe recommends that further outreach efforts be conducted both by advocates and the agencies to workers.

The DLSE has reported some cases filed that incorporate or cite the new protections. It is possible that the laws may currently be serving their purpose of deterring immigrant-based activity, or workers may still be too fearful to report abuses either from lack of knowledge about the new laws or from lack of belief in their effectiveness.

The only way to test the effectiveness of the laws is to use them, however. Advocates and workers need to be aware of the conditions that may qualify for complaints filed with the DLSE under these new laws and to begin filing these cases. It may be that a concerted effort to find test cases may be necessary to test the effectiveness of the new laws.

V. TEMPORARY WORKERS NEED A CALIFORNIA INITIATIVE.

Workers who are most adversely affected by a weak retaliation enforcement system are temporary workers. These workers are a component of the growing trend among employers to subcontract work. They are often referred to as “contingent,” “contractual,” “seasonal,” “freelance,” or “permatemp” workers. Their OSH rights deserve extra attention due to their vulnerability.

In general, they face lower wages, fewer benefits, and less job security. A recent investigation by ProPublica revealed that in California, temporary workers had about a 50% greater risk of being injured on the job than traditional direct-hire employees.⁶¹ Given their tenuous situation, the right to report injuries and illnesses and receive medical attention is extremely vital to this group of workers.

Yet, temporary workers are often confused about their status. The issue of reporting injuries gets even more muddled since as these workers must report injuries to both the client firm (for recordkeeping purposes) and the staffing agency (if they intend to file for workers’ compensation) under both state and federal policies and procedures.⁶²

It’s no wonder that temporary workers are unsure and sometimes misinformed about their health and safety rights on the job, to whom they should report an injury, how to obtain medical benefits for injuries, and whether or not they are protected under California’s labor and employment laws.

For example, despite the fact that the IIPP laws require certain employers to have an injury and illness prevention program which includes trainings for employees, confusion still exists between the primary (the staffing agency) and secondary (the host employer) employer on a dual employer worksite about whether the staffing agency or the host employer is responsible for developing the IIPP and providing training.

Sometimes this means that inadequate or no training is provided to workers, which increases their likelihood of serious injury and even death. Take the case of Hugo Tapia, for example, a temporary worker in Santa Rosa.



Hugo was a temporary employee hired by Volt Information Services, which provides staffing for Thermal Sun Glass Products in Santa Rosa. Hugo was assisting two other Volt temporary employees with unloading products off of a rolling A-frame rack. The two Volt employees

had rolled the rack out of the shop and down the driveway, where it got stuck. They asked Hugo to help dislodge it. A safety rope had not been used to secure the load. The pushing caused the heavy glass to move and separate from the rack. Several glass sheets, each

weighing about 110 pounds, fell on Hugo. Hugo was only 21 when he was killed at work on April 19, 2013. Hugo had only been with the company for two weeks as a temporary worker before he was killed. During this time, Thermal Sun did not provide Hugo or any of the other temp workers with the training, supervision, and safety precautions that could have prevented Hugo's death.

Recommendation: California Should Have A Temporary Worker Initiative.

To protect the health and safety rights of temp workers, we recommend the following:

- Temporary workers must have stronger tools to combat workplace retaliation; and
- Both employers in dual and multi-employer settings must (a) possess a clear understanding of their responsibilities to temporary workers, and (b) provide adequate safety trainings to temporary workers which includes a discussion of their rights, as well as to

whom temporary workers should report injuries and illnesses.⁶³

To meet these goals, we also recommend that the agencies adopt a Temporary Worker Initiative, similar to Federal OSHA's Temporary Worker Initiative (TWI),⁶⁴ launched on April 29, 2013. The purpose of that initiative is to increase OSHA's focus on temporary workers in order to highlight employers' responsibilities and to prevent work-related injuries and illnesses among temporary workers.

A similar Californian initiative can provide information to temporary workers about their health and safety rights, who to report to if they are injured, their rights under workers' compensation, and what to do if they experience retaliation. Such information can take multiple forms that would be accessible to temporary workers, such as Public Service Announcements (PSA), media campaigns, and worker-centered trainings

RECOMMENDATION SUMMARY

We must all work together to increase the strength of protections for workers who experience OSH-based retaliation. Based on the data and analysis presented in this report, Worksafe puts forth the following recommendations:

(1) IMPROVE DLSE'S OSH RETALIATION INVESTIGATION PROCESS.

Of highest priority is the DLSE's need to resolve the conflict regarding their current policy of not accepting complaints from workers who experienced retaliation after reporting an injury, despite long-standing federal protection for such a right. Without clarity regarding this right, workers continue to experience retaliation and employers continue to have free rein to exploit vulnerable workers. Worksafe understands that the DIR, DLSE, and Federal OSHA are currently looking into ways to resolve this issue.

Worksafe encourages the DLSE to make changes to their intake process to ensure that they are capturing the underlying hazard when workers report injuries and/or illnesses. In the meantime, we look forward to learning more about their process to ensure that the California program is at least as effective as the federal one.

In addition, if legislative change is necessary to bring California into compliance and to ensure that workers' rights to report injuries and illnesses is protected from reprisal, then Worksafe would recommend taking the steps necessary to enact such legislation.

Secondly, the DLSE should continue their efforts to improve their enforcement mechanism for OSH retaliation cases by addressing the issues identified in the Federal FAME audits. The DLSE should continue to keep stakeholders informed of these improvements so that we can continue to appropriately represent workers as well as advocate for resources for the DLSE, if necessary.

(2) STRENGTHEN OVERALL ENFORCEMENT BY DOSH AND THE DLSE

Both agencies should continue to strengthen their enforcement efforts with targeted campaigns to address OSH retaliation. DOSH should ensure that it is informing workers about their retaliation rights during health and safety investigations. In addition, the DLSE should assess, as DOSH has, their staffing needs and whether or not more staffing and more investigators are needed to ensure that the DLSE can make progress towards improving their OSH retaliation enforcement system.

DOSH should incorporate the interpretations of the Fairfax Memo and cite employers for programs, practices and procedures that create a disincentive in the workplace to reporting injuries and illnesses.

Overall, the state agencies also need to be more effectively engaged with each other. There should be better communication, particularly between DOSH and the DLSE with regard to OSH issues. For example, DOSH is missing an opportunity by not following up on cases where the DLSE has found that the employer engaged in retaliation and that the retaliation was potentially systemic. Through the establishment of a cross-agency referral process, DOSH and the DLSE can work together to strengthen their enforcement efforts. Through a referral of pertinent cases back to DOSH, further efforts can be made to work with the employer to prevent further retaliation. Such collaboration would ensure systemic rather than individual fixes.

(3) EDUCATION AND OUTREACH

The DLSE, DOSH, and Federal OSHA should engage in a well-funded, robust, and high profile education and outreach campaign similar to the DLSE's "Wage Theft Is A Crime" campaign that highlights OSH retaliation specifically. The campaign should also draw attention to employer injury and illness reporting programs that create disincentives to reporting.

Furthermore, new laws were passed last year that strengthened retaliation bills such that employers may face penalties for immigrant-based retaliation. Since these laws are still fairly new, outreach should be done to advocates and workers to inform workers of these new rights.

Education and outreach should be conducted with:

- **Workers, advocates, and union reps**
- **Trade associations and employers**
- **DOSH and DLSE investigators**

Workers need to be informed of their protected rights and the avenues they have for redress in a language that is accessible and understandable to them. The issue of temporary workers, in particular, needs to be addressed. Temporary workers need to be informed of their rights, and employers informed of their duties with respect to the health and safety of temporary workers.

This can be done in a multi-agency campaign. Trade associations and employers need to be informed about the illegalities of engaging in retaliatory activities following protected OSH activities, as well as the illegality of programs, practices, and procedures that create disincentives to reporting. This can be done through DOSH's consultation program. Employers and trade associations should be provided with alternative safety incentive programs that reward workers for reporting and that work to improve workplace conditions.

Finally, DOSH and DLSE investigators should engage in ongoing cross-agency training that includes understanding the importance of DOSH as the first interface with workers around OSH retaliation issues. Cross-agency trainings should be ongoing and occur at least annually to update inspectors on new occupational health and safety laws, regulations, and standards.

(4) EVALUATION & ACCOUNTABILITY

DOSH and the DLSE need to be more transparent with respect to how OSH retaliation is being handled by both agencies. Without this knowledge, workers and advocates are left with a system that appears to be broken and which they can neither depend upon nor advocate for.

With better indicators and more information, workers, advocates, and agencies can better understand how California's whistleblower program is working, what improvements need to be made, and how to hold California's agencies accountable for any such improvements. Without this additional information, all we have to rely on is Federal OSHA's comprehensive audit, which is not very favorable to the DLSE.

¹ 29 U.S.C. § 660(c) (commonly referred to as “Section 11(c).”)

² California Labor Code §§ 6310 and 6311.

³ Bureau of Labor Statistics, Union Membership in California – 2014, available at: http://www.bls.gov/regions/west/news-release/unionmembership_california.htm [Last accessed 4/5/15.]

⁴ Human Impact Partners, Health Impact Assessment of the Proposed Los Angeles Wage Theft Ordinance, June 2014, p. 31.

⁵ Id.

⁶ Majority Committee Staff of the Senate Health, Education, Labor, and Pensions Committee, “Acting Responsibly? Federal Contractors Frequently Put Workers’ Lives and Livelihoods at Risk,” (December 2013), p. 18, available at: www.help.senate.gov/imo/media/doc/Labor%20Law%20Violations%20by%20Contractors%20Report.pdf [Last accessed 4/22/15.]

⁷ Id; see also Leigh, J. Paul, “Number and Costs of Occupational Injury and Illness in Low-Wage Occupations,” 2012 (reporting that the 1.7 million injuries and illnesses suffered by low-wage workers in 2010 incurred costs coming out to \$39.1 billion.)

⁸ The identities and identifying information of workers indicated with an asterisk have been changed to protect them against further retaliation.

⁹ Working America, “Occupational Safety and Health: Not Safe to Work, Not Safe to Complain,” 2010, p. 1.

¹⁰ Milkman, et al., Wage Theft and Workplace Violations in Los Angeles,” Institute for Research on Labor and Employment University of California, Los Angeles, 2010, pp. 3-4, 27.

¹¹ H. Comm. On Educ. & Labor, U.S. House of Representatives, Comprehensive Occupational Safety and Health Reform Act, H.R. Rep. 102-663, at 47, 1992 (referencing U.S. Gov’t Accountability Office, GAO/HRD-91-9FS, Occupational Safety & Health: Inspectors’ Opinions on Improving OSHA Effectiveness 41, 1990, available at <http://www.gao.gov/assets/90/88995.pdf> [Last accessed 4/6/15.]

¹² Milkman, p. 27.

¹³ Milkman, p. 27; Riley, Kevin, et al. Patterns of Work-Related Injury and Common Injury Experiences of Workers in the Low-Wage Labor Market, UCLA Labor Occupational Safety and Health Program, March 2015, p. 3.

¹⁴ 29 U.S.C. § 660(c) (commonly referred to as “Section 11(c).”)

¹⁵ OSHA Website: <https://www.osha.gov/workers/index.html> [Last accessed 4/14/15.]

¹⁶ Labor Code § 6310(a): No person shall discharge or in any manner discriminate against any employee because the employee has done any of the following: (1) Made any oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, his or her employer, or his or her representative. (2) Instituted or caused to be instituted any proceeding under or relating to his or her rights or has testified or is about to testify in the proceeding or because of the exercise by the employee on behalf of himself, herself, or others of any rights afforded him or her. (3) Participated in an occupational health and safety committee established pursuant to Section 6401.7.

¹⁷ Labor Code § 6311: No employee shall be laid off or discharged for refusing to perform work in the performance of which this code, including § 6400, any occupational safety or health standard or any safety order of the division or standards board will be violated, where the violation would create a real and apparent hazard to the employee or his or her fellow employees. Any employee who is laid off or discharged in violation of this section or is otherwise not paid because he or she refused to perform work in the performance of which this code, any occupational safety or health standard or any safety order of the division or standards board will be violated and where the violation would create a real and apparent hazard to the employee or his or her fellow employees shall have a right of action for wages for the time the employee is without work as a result of the layoff or discharge.

¹⁸ Both federal statute 29 United States Code (U.S.C.) § 657 of OSHA and California Labor Code §§ 6409.1 and 6410 of Cal/OSHA require employers to report occupational injuries and illnesses to government agencies. The accompanying federal and state regulations, 29 Code of Federal Regulations (C.F.R.) §§ 1904 and 1904.1 and 8 California Code of Regulations (C.C.R.) §§ 14300 and 14300.1, both provide that all covered employers with more than 10 employees¹⁸ are required to prepare and maintain records of work-related fatalities, injuries, and illnesses. In California, an employer with fewer than 10 employees must still file reports of occupational injuries and illnesses to the Division of Labor Statistics and Research and they must “immediately” report any workplace incident that results in serious illness or death to DOSH. Federal regulations have a similar provision that requires employers with fewer than 10 employees to report “any workplace incident that results in a fatality or the hospitalization of three or more employees” to OSHA.

¹⁹ Kajola, Bill, AFL-CIO, Extent and Impact of Employer Program and Practices on Workers Reporting Their Injuries – A Union Leader Survey, 2009; see also United Steelworkers Health, Safety, and Environmental Department, “Behavior-Based Safety/’Blame-the-Worker’ Safety Programs: Understanding and Confronting Management’s Plan for Workplace Health and Safety,” 2010.

²⁰ OSHA Whistleblower Policy Memorandum (“Fairfax Memo”), 2012.

²¹ https://www.osha.gov/dcsp/vpp/policy_memo5.html [Last accessed 4/16/15.]

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- ²² Redden, Molly, “Walmart, Lowe’s, Safeway, and Nordstrom Are Bankrolling a Nationwide Campaign to Gut Workers’ Comp,” Mother Jones, Mar. 26, 2015, <http://www.motherjones.com/politics/2015/03/arawc-walmart-campaign-against-workers-compensation> [Last accessed 4/16/15.]
- ²³ www.wagetheftisacrime.com [Last accessed 6/33/15.]
- ²⁴ OSHA, “Adding Inequity to Injury: The Costs of Failing to Protect Workers On the Job,” 2015.
- ²⁵ Information on the Labor Enforcement Task Force (LETF) can be found here: <http://www.dir.ca.gov/letf/letf.html> [Last accessed 5/13/15.]
- ²⁶ <http://www.whistleblowers.gov/index.html> [Last accessed 4/22/15.]
- ²⁷ See Department of Labor reference to OSHA rights: <https://www.osha.gov/workers/index.html#13> (stating that “If your employer does discriminate or retaliate against you for trying to report an injury or illness, you have the right to file a retaliation complaint with OSHA.”) [Last accessed 4/22/15.]
- ²⁸ Labor Code § 6401.7(a)(5) and California Code of Regulations, Rule 3203.
- ²⁹ Labor Code § 132(a) provides, in relevant part, “It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment. (1) Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file a claim for compensation with his or her employer or an application for adjudication, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor and the employee’s compensation shall be increased by one-half, but in no event more than ten thousand dollars (\$10,000), together with costs and expenses not in excess of two hundred fifty dollars (\$250). Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer.”
- ³⁰ Susan Ann Myers, *The California Occupational Safety and Health Act of 1973*, 9 Loy.L.A.L.Rev. 905 (1976), pg. 923.
- ³¹ 29 U.S. Code § 667(c)(2) (also known as § (18)(c)(2)) states regarding the conditions for approval of a state plan: “The Secretary shall approve the plan submitted by a State under subsection (b) of this section, or any modification thereof, if such plan in his judgment” ... “(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under § 655 of this title...”
- ³² California 2014 Follow-up FAME Report for Evaluation Period of October 1, 2013 to September 30, 2014 (“2014 FAME Report”), pg. 6.
- ³³ Title 8 C.C.R. § 3395(f)(1)(F): Heat Illness Prevention.
- ³⁴ According to the most recent FAME report, the closeout financial report for fiscal year October 1, 2013 to September 30, 2014 stated that the final program costs were \$69,664,524, \$26,625,400 of which was federal funds and \$26,625,400 of which was the state matching fund with an additional \$16,413,724 that is expected to come 100% from state funds. The additional funds contributed by the state come from the Occupational Safety and Health Fund, which originate from a user fee levied upon insured and self-insured employers. 2014 FAME Report, pg. 4.
- ³⁵ For a complete list of Federal statutes, see: <http://www.whistleblowers.gov> [Last accessed 6/22/15.]
- ³⁶ Labor Code § 98.7(a).
- ³⁷ 29 U.S.C. §660 (c)(2).
- ³⁸ Labor Code § 1171.5.
- ³⁹ 2013 FAME Report, p. 26.
- ⁴⁰ The 2013 FAME Report can be found on the Federal OSHA website: <https://www.osha.gov/dcsp/osp/efame/california.html#2012> [Last accessed 3/10/15.]
- ⁴¹ 29 U.S.C. § 660(c)(3).
- ⁴² 2006 FAME Report (for evaluation period October 1, 2005 to September 30, 2006), pp. 15-16.
- ⁴³ DLSE 2014 Retaliation Complaint Report, pg. 3-4, <http://www.dir.ca.gov/dlse/DLSEreports.htm#RCReports> [Last accessed 6/19/15.]
- ⁴⁴ 2006 FAME Report, p. 15.
- ⁴⁵ 2007 FAME Report (for evaluation period October 1, 2006 to September 30, 2007), p. 14.
- ⁴⁶ Past and current reports can be found here: <http://www.dir.ca.gov/dlse/DLSEreports.htm#RCReports> [Last accessed 6/24/15.]
- ⁴⁷ DLSE 2014 Retaliation Complaint Report, pg. 5.
- ⁴⁸ 2013 FAME Report, Appendix D-2 – SAMM 13 and 14.
- ⁴⁹ 2012 FAME Report (for evaluation period October 1, 2011 to September 30, 2012), p. 25-26 – SAMM 15.
- ⁵⁰ DLSE 2014 Retaliation Complaint Report, pg. 3-4.
- ⁵¹ Id. pg. 4.
- ⁵² Id. pg. 5, Exhibit A (The 376 OSH complaints are counted in the total amount of cases filed for the year – 1874.)

⁵³ <https://www.osha.gov/pls/imis/establishment.html> [Last accessed 4/22/15.]

⁵⁴ More information can be found at:

https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2430#appe [Last accessed 3/10/15.]

⁵⁵ DLSE locations can be found at: <http://www.dir.ca.gov/dlse/DistrictOffices.htm> [Last accessed 5/13/15.]

⁵⁶ Labor Code §§ 244(b), 1019; Cal. Bus. & Prof. Code § 494.6.

⁵⁷ Cal. Bus. & Prof. Code § 6103.7.

⁵⁸ Labor Code §§ 98.6(a); 1102.5.

⁵⁹ Labor Code § 98.6(b)(3).

⁶⁰ This can be found at the following website: <http://www.dir.ca.gov/dlse/HowToFileDiscriminationComplaint.htm> [Last accessed 4/22/15.]

⁶¹ Grabell, Michael, Olga Pierce and Jeff Larson, Temporary Work, Lasting Harm, ProPublica December 18, 2013,

<http://www.propublica.org/article/temporary-work-lasting-harm> [Last accessed 4/22/15.]

⁶² In fact, in addressing “dual employers” (which are most likely to employ temporary workers), Cal/OSHA’s Policy and Procedures Manual provides that “any injury or illness should be recorded on the Log 300 only once, either by the secondary employer or by the primary employer, depending on which employer is supervising the employee on a day to day basis.” Thus, one of the dual employers has the responsibility to report the injuries and illnesses of temporary workers.

⁶³ See requirements under Labor Code § 3203: Injury and Illness Prevention Program.

⁶⁴ https://www.osha.gov/temp_workers/index.html [Last accessed 4/22/15.]