

## OSH Retaliation for Advocates

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



Under Cal/OSHA and Federal OSHA, it is against the law for an employer to retaliate against an employee who demands a safe and healthful workplace.

### But the Retaliation Laws Do Not Work Very Well.


Unfortunately, employers sometimes do discriminate against workers for challenging unsafe working conditions. Employers are even more likely to take advantage of the more vulnerable, low-wage, immigrant workers who often lack union protections.

In California, although workers may file a health and safety complaint with Cal/OSHA, an entirely different division of the Division of Industrial Relations (“DIR”) handles any discrimination or retaliation they may experience. This is the Division of Labor Standards Enforcement (“DLSE”). Recent Federal OSHA audits of the DLSE investigatory process of occupational safety and health retaliation complaints revealed a troubled retaliation investigation process.

It is not uncommon for the DLSE to conduct an investigation that may not be completed within the 90-day period allotted by law. In fact, the DLSE has estimated that it takes them more than 300 days to process a complaint. For workers who are experiencing discrimination for protected activity, and for whom their livelihood is threatened as a result of exercising their rights, this process is simply untenable.

For this reason, it is important for workers to understand how to build a strong retaliation complaint if they file with the DLSE. It is also vital for advocates to create strategies to address retaliation in more effective ways. This includes focusing on prevention by learning how to document workplace issues and conditions in a systematic way as well as learning how to collectively act together to support one another when retaliation does occur.

This section focuses on the DLSE process, although other alternatives do exist:



### Options to Address Retaliation

Individual	Collective Action
DLSE Complaint	Implement Fairfax Memo
Union Grievance (if unionized)	Engage in Collective Action
Labor Code 6310 & 6311	NLRB Complaint
OSHA 11(c)	Media Campaign
NLRB Complaint	Organizing Campaign

The Labor Commissioner's Office, also known as the Division of Labor Standards Enforcement (DLSE), was established to review complaints for discrimination and retaliation that workers may experience from exercising health and safety rights. These rights are codified in Labor Code Sections 6310 and 6311:



## Anti-Retaliation Protections

Under Labor Code sections 6310 and 6311, employers cannot retaliate or discriminate against workers that are:

- complaining about safety or health conditions or practices;
- instituting any proceeding related to their rights to safe and healthful working conditions or testifying in any such proceedings;
- participating in an occupational health and safety committee; or
- refusing to perform work where the worker believes that an occupational safety or health standard, or any safety order would be violated and the violation would create a real and apparent hazard to the employee or his or her co-workers.

Any employee, who is discharged, threatened with discharge, demoted, suspended, or in any manner discriminated and/or retaliated against in the terms and conditions of his/her employment for engaging in a health and safety "protected activity" may file a complaint with the DLSE.

## A CLOSER LOOK AT FOUR TYPES OF PROTECTIVE ACTIVITY

The following are more specific examples of protected activities. When possible, workers should act in conjunction with other workers to pull in possible protections under National Labor Relations Act (NLRA) as well. See the Pink Tab (Section 7) of this packet in the section titled, "Alternative Remedies" for more information.

For any of the following examples,

1. If possible, engage in protected activity with another worker so that you can also pull in protections for what's called "concerned activity" under the National Labor Relations Act (NLRA). The NLRA protects workers if two or more workers engaged in protected activity.
2. When you decide to exercise your rights, make sure that you have a "**reasonable belief**" that the hazard you are complaining about violates a health or safety rule. You don't have to know the exact rule, regulation, standard or law, but it's important that you understand the basics of health and safety in your workplace and can identify when things are unsafe or when there is a hazard. If you aren't sure, talk to your union rep or Cal/OSHA by calling your local Cal/OSHA office. A listing can be found at: <http://www.dir.ca.gov/dosh/DistrictOffices.htm>.
3. You will have to prove that your employer **knew** that you complained about health and safety to show that they retaliated against you. So it's very important to document that you told your employer about the health and safety issue. You can do this by complaining in writing, following up your complaint in writing, or bringing a coworker to complaint with you.

The four types of protected activity are:

**Protected Activity Type 1:** you complain about a safety violation or an unsafe condition. The complaint (oral or written) must be to the:

- 1) employer or an agent (supervisor),
- 2) a government agency with statutory responsibility for or assisting DOSH with employee safety or health issues or any other agencies that oversee health and safety such as the California Highway Patrol (CHP), Federal Aviation Administration (FAA), and the Department of Transportation (DOT), or
- 3) worker's representative (union).

**Protected Activity Type 2:** you are involved in a proceeding related to health and safety (whether related to you or your co-worker). This can include any kind of hearing or investigation process in which the worker provides information regarding health and safety working conditions.

**Protected Activity Type 3:** you are involved in a health and safety committee.

**Protected Activity Type 4:** you have refused unsafe work. You must show that the work:

- 1) creates a real and apparent hazard regarding safety and health to you or your co-workers, and
- 2) that you believe that the hazard violates a health and safety standard, order, or law.



### Examples of Protected Activity

Here are some examples of protected activity:

1. **Request** an inspection by filing a complaint with the DLSE;
2. **Complain** about job health and safety hazards to: your employer, a labor union, the California Occupational Safety and Health Administration (Cal/OSHA), or other government agency;
3. **Request** and receive information from your employer about hazards you may be exposed to, including Safety Data Sheets (SDSs) for hazardous materials you work with;
4. **Request and receive** information about precautions to take when working with potentially hazardous materials or equipment;
5. **Refuse** an assignment that a “reasonable person” would see as creating “a real danger of death or serious injury,” when there is not enough time to file an OSHA complaint and when you have requested that your employer correct the condition, but it remains dangerous;
6. **Discuss** health or safety matters with other workers;
7. **Request and receive** results of air sampling, noise monitoring, or any other health and safety testing;
8. **Respond** to questions from a Cal/OSHA inspector and point out hazards to the inspector, including telling the inspector about past accidents or illnesses and informing the inspector if your employer has temporarily eliminated hazards during the inspection;
9. **Request and receive** information about procedures to be followed if you are involved in an accident or are exposed to toxic substances;
10. **Report an injury** or illness to your employer – there must be a process that encourages reporting without fear of retaliation. Your state workers’ compensation laws also may have provisions to protect your right to file a claim without retaliation;
11. **Participate** in union activities concerning health and safety matters;
12. **Talk privately** with an Cal/OSHA inspector on a confidential basis; and
13. **Tell an inspector** whether your employer has been notified of hazards and whether you have received training for hazardous work.

## WHAT ISN'T PROTECTED ACTIVITY?

**Doing Nothing:** Doing nothing prior to experiencing an adverse employment action does not constitute “protective activity.” If there is an unsafe working condition and the worker does absolutely nothing in terms of complaining about the working condition, initiating any proceeding or testifying at a proceeding related to their health and safety rights, participating in an occupational safety or health committee, or refusing to work if they believe there is a safety violation that would create a hazard to them – then it is unlikely that the DLSE can do anything to assist the worker.

In addition, the DLSE has reported difficult cases where the worker has done the contrary to filing a complaint. That is, despite alleging an unsafe working condition or hazard on their complaint, the ensuing investigation reveals documentation, submitted reports, or other paperwork by the same worker to the employer attesting to the safety of the work environment or otherwise stating that the workplace was safe.

Workers should document why they may have done this (even if there was an unsafe working condition) by taking notes and keeping a personal record with time and dates and details about the unsafe workplace condition and the circumstances under which they provided the documentation, reports, or paperwork that stated something different than what their complaint says. If the worker feels forced to provide such statements by his or her supervisor, they should be prepared to explain this.

**Complaining *After* the Adverse Employment Action:** Doing nothing until *after* experiencing an adverse employment action does not constitute “protected activity.” The nature of retaliation mandates that a protected activity must occur *before* the adverse employment action for it to be deemed a retaliatory or discriminatory action. Thus, filing a complaint with Cal OSHA after being terminated would not qualify. Of course, if the retaliation is on-going, and the employee is not fired or laid off – but instead, continuing to work at the workplace and continues to experiences on-going retaliation, then it would qualify since it has occurred after a protected activity.



### What Employer Activities are Considered Retaliation?

Protection from discrimination means that an employer cannot retaliate by taking “adverse action” against workers, such as:

- |                                   |                                |
|-----------------------------------|--------------------------------|
| Firing or laying off              | Blacklisting                   |
| Demoting                          | Denying overtime or promotion  |
| Disciplining                      | Denial of benefits             |
| Failure to hire or rehire         | Intimidation or making threats |
| Reassignment (affects promotions) | Reducing pay of hours          |

## WHAT WORKERS SHOULD DO IF THEY EXPERIENCE RETALIATION?

Workers who have complained about health and safety or refused unsafe work, or participated in a health and safety investigation or committee and then experienced retaliation should first document in as much detail as possible the protective activity and the employers’ reactions. If workers could begin documentation when they first experienced or witnessed the health and safety issue, this would be optimal.

Worker training is also vital in this process to assist workers in recognizing health and safety hazards on the job and to introduce the habit of documenting workplace issues to workers. Such documentation is vital as evidence for retaliation experienced by workers and may be key to disproving the employers' defenses for the adverse employment action. These defenses are sometimes just excuses to disguise the retaliation (referred to as a "pretext").

Some ways that workers can document workplace issues is as follows:

- Take pictures of workplace health and safety issues, preferably with an identifiable worker near the worksite – the picture should include details that will be helpful to identify the workplace, the employer, the health and safety hazard, and the worker in the picture (but do not engage in something dangerous for the sake of getting a picture!!);
- Keep all documents provided by their employer of the workplace;
- Take notes at employer provided trainings on health and safety, and keep copies of all documents passed out at such trainings (if not possible, take a picture of the document that the worker has to sign to indicate their attendance);
- Keep track of when workplace health and safety trainings take place, their topic, and their duration;
- Keep all paychecks and any documents provided by the employer that is issued with the paychecks;
- Keep a record of work schedule and work duties, noting any changes;
- Keep a workplace journal and note, with dates, workplace conditions that are observed; and
- Keep all documents the employer provides that indicate any changes in work schedule, pay, position, etc. If the employer does not provide anything, take pictures of the work schedule when it is posted.

## THE DLSE COMPLAINT PROCESS

**Who can file:** Any employee or applicant for employment who believes he/ she was discharged or denied employment or otherwise discriminated against in violation of any law under the jurisdiction of the labor commissioner may file a complaint with the labor commissioner.

**Time Period:** A complaint alleging discrimination and/or retaliation in violation of the laws under the jurisdiction of the labor commissioner must be filed within **six** months after the occurrence of the alleged discriminatory and/or retaliatory action.

**What to include in the complaint:** The form used to file a retaliation complaint (DLSE Form RCI 1) can be obtained by calling or visiting any DLSE office or online at the DLSE website: <https://www.dir.ca.gov/dlse/DLSE-Forms-Discrimination.htm>. This form can be found in English, Spanish, Chinese, Korean, Vietnamese, or Tagalog.

Although workers can provide complaints in other languages, take note, however, that it may take some time for the DLSE to get the complaint translated, possibly affecting the investigation. A recent audit by Federal OSHA discovered an untranslated Spanish document in one of the retaliation investigation files audited. The audit noted that the failure to translate the document made "review of the document difficult and potentially affecting the investigation." Thus, if feasible, enlist support from worker advocates or community agencies to submit the complaint in English to ensure a quicker response to complaints.

## THINGS TO REMEMBER BEFORE YOU FILE A DLSE RETALIATION COMPLAINT

**(1) Strength in Numbers:** Union members are in a much better position to enforce their rights than individual workers. Even if you are not in a union, you will be on firmer legal ground to fight retaliation if you join with at least one co-worker in raising questions or complaints about safety.

Under the National Labor Relations Act, actions taken by more than one worker may be eligible for protection because they are “concerted activity.” You can file a retaliation claim with the National Labor Relations Board (NLRB) in addition to filing a retaliation complaint with the DLSE.

**(2) Chart Your Course Carefully:** If you have a union at your workplace, always raise health and safety questions with it first. If you don’t have a union, consider whether your employer is likely to respond positively to a question or suggestion about safety. If so, you might be able to resolve the problem without conflict. But you should prepare in advance for a hostile response, no matter how unlikely it might seem.

**(3) Make Your Safety Complaint to a Government Agency for Additional Protection From Retaliation:** Make your complaint to a government agency, such as Cal/OSHA, your local Fire Department, or state or county Health Department, instead of to your employer. An employer who first learns about a safety complaint from an official investigation may hesitate to retaliate because the government is already investigating. However, complaining to the government first is no guarantee against retaliation.

**(4) Keep Good Records:** Keep dated notes of details and the names of witnesses. If your employer responds orally, make a note of what is said, when and by whom, and the names of any witnesses. It is a good practice to keep your notes on consecutive pages in a bound notebook. Keep copies of any documents. Also keep notes of your regular hours of work and duties; note that there are many forms of retaliation besides being fired.

**(5) Keep Records Away From the Workplace:** If your employer retaliates against you, you could be prevented from retrieving anything from the job.

**(6) Don’t Miss Deadlines:** If you have been retaliated against for exercising a health and safety right, you have 180 days or six months to file a retaliation complaint with the DLSE. It is best to file by certified mail, because you will have a record that the complaint was received. The NLRB deadline is also six months.

**(7) What to Include in Your Complaint – Section 31:** The “meat” of the complaint form is Section 31, which allows the worker to go into detail about the retaliation that they experienced. The Labor Commissioner offers a brief “Instruction and Guide” for how to fill out the form.

In this section, the workers should first select which box(es) best apply to the retaliation they suffered. The form provides several selections such as “termination” and “change in hours.” If none of these fit, the worker may fill out the “Other” as well. For the most part, retaliation usually involves some action that is perceived as negative or damaging to the worker.

The form requests information regarding the names of the persons carrying out the adverse action. Please note as many people as the worker believes is involved, even those that may have been “behind the scenes” in making the decision to take an adverse employment action against the worker.

This part also requests information about what happened in the space where the question, “Please describe what happened,” is given. It is important in this section to state that the worker engaged in a protected activity and then, as a consequence, shortly thereafter experienced some adverse or negative employment action.

Make sure the complaint shows these three things:

- (1) the employee engaged in protected activity or activities;
- (2) the employer took an adverse job action against the employee; and
- (3) there is a “causal link” between the employee’s protected activity and the employer’s adverse job action.



## Example of Section 31 response

“I was retaliated against after engaging in a protective activity. I was asked by my employer, ABC, Inc., to climb onto a roof with a 45 degree slant to trim tree limbs that were hanging over the roof and not accessible by ladder. There was no fall protection devices for working on the roof. The chainsaw given to me had a serious kickback issue. I was not given any gloves or eye protection to wear. Last week another worker had performed the same job and he slid off the roof after the chainsaw backfired and was seriously injured. I attempted it but slid down the roof as well. I complained to my supervisor, Tom Smith, that I believed the job violated health and safety requirements but he insisted that I do the job anyway. I then refused to perform the job unless there was fall protection and personal protective equipment provided to me. Tom Smith threatened to fire me. I filed a complaint with Cal/OSHA online later that same day. I have attached a copy of the Cal/OSHA complaint to this complaint form. The complaint’s investigation number is: 12345. The next day, Tom Smith told me that he had to move me to work on the Saturday shift, which was only a half-day shift. I lost about 6 hours of pay in making this shift change.”

The most important aspects of this description are as follows:

- The worker has identified who the company is (ABC, Inc.);
- The worker has identified who his/her supervisor was and who it was that took the negative employment action (shift change) on him/her;
- The health and safety issue is identified (roof work without fall protection, no PPEs, and poorly working chainsaw) – the worker does not have to know the exact safety violation, the worker only needs to have a *reasonable belief* that there was a safety violation;
- The worker has identified the protective activity that the worker took (complained to the supervisor and then complained to Cal/OSHA);
- The Cal/OSHA complaint is referenced as well as the Cal/OSHA inspector and a copy of the Cal/OSHA complaint is attached to the DLSE complaint; and
- The worker has identified how the employment action was an adverse action (the worker lost hours and wage earning opportunity as a result of the shift change).

**(8) Predicting the Employer’s Defense – Section 32a:** The next section asks the question, “What reason would the employer give for the changes that you experienced that are described in question 31 above?” This question helps the DLSE anticipate the potential defenses the employer may provide to explain the employment action experienced by the worker.

It is not uncommon for an employer to offer an explanation for the alleged retaliatory action that would sound reasonable to the DLSE. For example, the employer may say that massive layoffs at the worksite was the reason behind the terminations or that the employer was previously disciplined and had to be let go due to performance reasons. The worker should anticipate any such arguments that may be offered by the employer and provide documentation to support the workers’ claim that he/she experienced retaliation and that the employer’s provided reason is nothing more than a pretext.

The second part of this section asks, “What right did you exercise or action did you take that happened before the change in your employment described in question 31?” The worker may have already provided this answer in section 31, however, simply provide it again. Try to be as detailed and precise as possible. If extra pages are needed, then use them and refer to the additional pages in this section. Although the protected activity does not have to occur right before the adverse employment action, it is important to indicate why the worker feels that the adverse employment action was a result of the protected activity if the activity occurred some time ago.

**(9) Establishing Causal Connection – Section 32b:** Section 32b asks the question, “Describe how your employer knew about the activity or actions (e.g. exercising your rights) in question 32a?” The response to this question is important for the DLSE to be able to prove a connection between the workers’ protected activity and the adverse employment action that was taken against the worker. If the employer did not know that the worker engaged in the protected acts, than it may be difficult to prove that the employer acted against the worker in retaliation. Thus, it’s very important to show that whoever took the action against the worker knew about the worker’s protected activity.

Some questions that may help elicit answers include:

- Did the worker tell the employer about the health and safety complaint? Did anyone witness this?
- Did another worker or the worker’s supervisor tell the employer about the worker’s complaint or action? Did anyone witness this?
- Did the worker’s supervisor say something to the worker to let him/her know that he/she was aware of the worker’s actions?
- Did the worker’s supervisor say something to someone else indicating that he/she knew about the worker’s actions?
- Did the worker’s name appear on any complaints sent to the employer?

## **WHERE TO SEND THE COMPLAINT**

You can file a complaint yourself, or you can authorize a representative (such as an attorney, your union, a COSH group, or anyone who you designate) to do it for you.

For work performed North of Bakersfield, please mail the completed, signed and dated complaint form to:

Division of Labor Standards Enforcement  
Retaliation Complaint Investigation Unit  
2031 Howe Ave., Ste. 100  
Sacramento, CA 95825

For work performed South of Bakersfield, please mail the completed, signed and dated complaint form to:

Division of Labor Standards Enforcement  
Retaliation Complaint Investigation Unit  
605 W. Santa Ana Blvd. Bldg. 28, Room 625  
Santa Ana, CA 92701

It is important that the worker complete the entire form, providing all the information requested in order to avoid delay in the complaint process. Be sure to sign and date the complaint form. Copies of any supporting documents should be attached to the complaint form. Do not send originals, as they may be lost.

The website explicitly states this: “The complaint form CANNOT be filed electronically or by fax. If your internet browser supports email of pages, DO NOT use this feature to submit your complaint form as an original signature is required. You MUST print and mail a copy of the completed and signed complaint form to the above address.” **KEEP A COPY OF THE COMPLAINT.**



## WHAT DO DO AFTER FILING THE COMPLAINT

Call a few days after submitting the complaint to make sure it was received and logged into the system. Promptly return all calls or written correspondence from the DLSE. Keep your contact information updated, particularly if you are terminated and need to move.

Under the law, the DLSE is supposed to open, investigate, and come to a decision regarding a retaliation complaint within 90 days. Unfortunately, the DLSE's complaint processing time is still delayed over 300 days. This often makes the DLSE retaliation process untenable for workers facing retaliation who need a quicker response.

A federal audit has also found major concerns with the DLSE investigation process. The Labor Commissioner, Julie Su, has been working hard to tighten up the retaliation investigation process to address some of these issues. However, as of the FAME audit that was just released, some of the investigation issues remain outstanding. These include issues such as: improper screening, lack of interviews of complainants and witnesses, and lack of proper documentation in the investigatory file.

## UNDOCUMENTED WORKERS

Undocumented workers are covered by all of California's employment and labor laws. The DLSE has stated that immigration status is irrelevant in their investigations and will not be considered.

There are also new rights under immigration reform law that was passed recently. These rights protect immigrants from immigrant-based retaliation. See Section 3 (Blue Tab), "Immigrant Rights," for more information.

## ALTERNATIVES

### FED OSHA 11(c) or the Federal Whistleblower Protection Program

An employee alleging discrimination or retaliation can also file what is called an "11(c)" complaint with Federal OSHA. This is called "dual filing" and is an acceptable procedure under Federal OSHA. This complaint can be filed simultaneously with the State Labor Commissioner's complaint. Employees must, however, file with federal OSHA within **thirty days (30)** of the adverse action occurring.

If the Labor Commissioner's office fails to conduct an effective complaint investigation, the employee has the right to request that the Federal OSHA investigate the complaint.

In addition, Federal OSHA has jurisdiction over 21 other statutes besides OSHA's 11(c), thus a worker may qualify for protection under any of these other statutes depending upon the facts of their case.

### FILING A PRIVATE LAWSUIT

A worker may choose to file a private lawsuit outside of the DLSE complaint process for violations under Labor Code section 6310 and 6311. Workers do not have to file a complaint with the DLSE first. Under the anti-discrimination/retaliation statutes, the remedy that is available is the "make whole" remedy. This remedy can include, but is not limited to; reinstatement of employment, reversal of a demotion, payment of back wages, reinstatement of benefits, purging personnel files of any adverse memos or letters, a cease and desist order, and the posting of a notice in the workplace.

## NLRA

Workers who have acted together to address an OSH issue in the workplace and experienced retaliation as a result can file with the National Labor Relations Board (NLRB) under the National Labor Relations Act (NLRA) which gives private sector workers legal rights to join unions and bargain collectively with their employer.

This includes the right of *non*-unionized workers to act “collectively” in groups of two or more workers to improve workplace conditions, which can include OSH issues. Thus, if two or more workers refused unsafe work or report a workplace hazard and experienced retaliation, they can file with the DLSE as well as the NLRA even if they are not unionized.