



How California can Lead on Retaliation Reforms to Dismantle Workplace Inequality

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About NELP

Founded in 1969, the nonprofit National Employment Law Project (NELP) is a leading advocacy organization with the mission to build a just and inclusive economy where all workers have expansive rights and thrive in good jobs. Together with local, state, and national partners, NELP advances its mission through transformative legal and policy solutions, research, capacity building, and communications. For more information, visit us at www.nelp.org

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Introduction

“I think of my family. One has to work to survive. In this country and in this state, it is too expensive. Rent, food, everything is very expensive. But it is true that I have seen so much injustice, sometimes it even gives me fear, [but] I think, ‘What job am I going to find?’ because I have seen over the years that in the fast food industry there is a lot of discrimination, wage theft, many injustices that all workers experience. So that’s why I like to participate, because this fear truly has to end. Being able to raise my voice has served a lot to my colleagues. They have followed me, been with me, and they have been able to raise their voices too.”¹

“After our boss knew that we were taking collective action, she was furious and began to cut our hours, give us the hardest shifts, like the closing shifts, and even fired employees. Retaliation is so common because many immigrant workers don’t know their rights. We need to ensure a safe workplace and protection from retaliation, especially during this pandemic, when restaurant workers have to interact with customers and may be scared to speak up. I hope that other workers will hear our story and learn and protect their rights.”²

Workers across California in sectors such as food service, car wash, and caregiving are coming together to fight for owed wages and safer working conditions. The quotes above come from, respectively, the Fight for 15-led campaign for better conditions in the fast-food industry and a three-year organizing campaign supported by the Chinese Progressive Association and the Asian Law Caucus, which resulted in 22 restaurant workers recovering \$1.6 million in stolen wages.

These campaigns are powerful examples of worker action and solidarity. However, there remains a fundamental power imbalance between workers and employers that makes it difficult for workers to raise complaints and take collective action to improve workplace conditions. Because employers can fire workers for almost any reason—or for no reason at all—under California’s system of “at will” employment, workers often experience retaliation when speaking up about workplace conditions. Widespread economic insecurity makes the threat of losing one’s job or income as a result of employer retaliation especially and immediately catastrophic.

To better understand the impact of employer retaliation and at-will firings in California, the National Employment Law Project (NELP) commissioned YouGov to conduct a survey of 1,000 adults in the California workforce in January 2022. The survey sample included workers aged 18-64 across the income spectrum and was representative by age, gender, race, and years of education. Survey responses revealed a high prevalence of workplace violations, low rates of violation reporting, high rates of employer retaliation, and frequent unfair and arbitrary firings. Key findings include:

- Thirty-eight percent of California workers have experienced a workplace violation.

- Only 10 percent of those workers reported them to a government agency, and almost half (47 percent) did not report violations to anyone.
- Of the workers who reported violations to their employer or to a government agency, a majority (116 of 216 respondents) experienced employer retaliation.
- Fifty-one percent of working Californians said that concern about employer retaliation would influence their decision about whether or not to report a workplace violation in the future.
- More than two in three California workers said access to a hardship fund that would provide them immediate monetary relief if they were retaliated against could help them report a future violation to a government agency.
- An overwhelming majority of working Californians—92 percent—support the establishment of a retaliation hardship fund that would provide one-time financial assistance to workers who file good faith complaints about employer retaliation.
- Forty-one percent of California workers have been fired or let go at some point. Less than one third of those workers (29 percent) said they were given fair warning before being fired, and most (64 percent) said they have never received severance pay.
- More than 40 percent of workers—including 46 percent of Latinx workers and 55 percent of Black workers—said that concern about being fired or disciplined may have prevented them from joining their co-workers to push for job improvements.
- A large majority of working Californians of all political parties—81 percent—support the adoption of laws protecting workers from unfair and arbitrary firings.

This report builds on the survey’s findings to examine how retaliation and unfair firings permitted under today’s at-will employment framework put workers at a fundamental disadvantage when it comes to exercising their rights. The report highlights the costs of this power imbalance for workers and their broader communities and offers the following policy recommendations to California lawmakers:

- Establish a retaliation fund to provide workers with the immediate economic support they need to exercise their rights.
- Bring the state’s varied and complex array of anti-retaliation laws into harmony and ensure that the same protections for workers exist across the California Labor Code.
- Create a rebuttable presumption of retaliation within 90 days and ensure that penalties for retaliation consistently go directly to the worker rather than to the state’s general fund.

- Increase funding for the Labor Commissioner’s Retaliation Complaint Investigation Unit to support its enforcement of more than 45 labor laws.
- Adopt a “just cause” policy to address arbitrary and unfair firings.

The first two sections of the report detail the survey’s findings that few workers who experience workplace violations actually report it, and of those that do, a majority experience employer retaliation as a result. These findings are borne out by complaint data collected from the state’s main workplace enforcement agencies. This retaliation is a major reason why workers do not come forward. The third section of the report describes some of the immediate catastrophic consequences that flow from employer retaliation, with many workers already just a paycheck or two away from being unable to cover their bills. Section 4 highlights some of the inadequacies in existing state anti-retaliation laws that force workers to bear significant financial risk before holding employers accountable. Section 5 situates workers’ experiences in California’s at-will employment system, where most employers can legally fire workers with no notice for almost any reason or no reason at all. At-will employment creates a climate of fear that undermines workers ability to speak up about mistreatment, and perpetuates longstanding racial inequities in the workplace. The survey’s data confirms this, finding that unfair and arbitrary firings are common among California’s workforce and that the threat of these firings coerces workers into accepting harmful working conditions. Finally, Section 6 offers the policy recommendations listed above.

Why Do Workers Experience Retaliation?

Numerous studies confirm that workers, especially those in low-paying industries, experience high rates of workplace violations, including wage and hour violations, unsafe working conditions, and more. But workers in the US generally bear the burden of enforcing their own labor protections—worker complaints are virtually the only way that violations are brought to the attention of public agencies or the courts. When a worker comes forward to report a workplace violation, we know that employers often retaliate or threaten to retaliate against the worker. Under our current system, workers bear the entire risk of retaliation from their employer when they report violations.

What Does Retaliation Look Like?

Retaliation takes many shapes and can be difficult to pinpoint or prove. Employers, for example, may fire a worker, demote a worker, reduce a worker’s hours, change a worker’s schedule to a less favorable one, subject a worker to new forms of harassment, unfairly discipline a worker, threaten to report a worker or a worker’s family member to immigration authorities, blacklist workers from future employment, and much more.

What Does Retaliation Cost Workers?

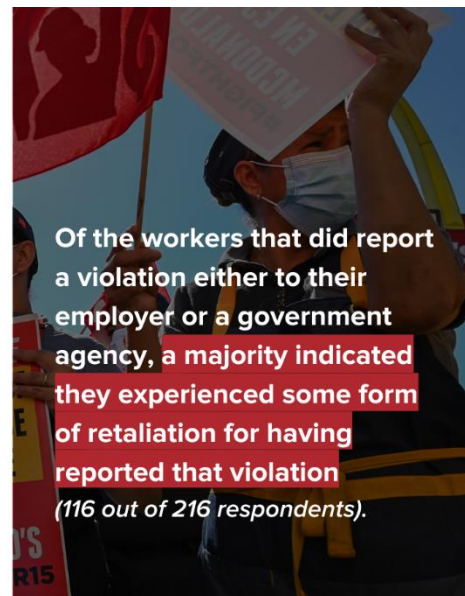
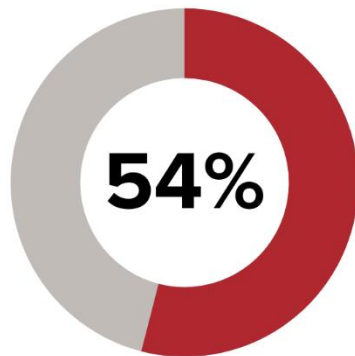
When workers experience retaliation for trying to protect their rights, the costs can quickly escalate from both a financial and emotional standpoint, especially for the countless workers nationwide who live paycheck to paycheck. A worker may experience lost pay, for example, which can lead to missed bill payments, lower credit scores, eviction, repossession of a car or other property, suspension of a license, inability to pay child support or taxes, attorney's fees and costs, stress, trauma, and more.



I. Few Workers Who Experience Workplace Violations Report Them, and the Majority of Those that Do Report Experience Employer Retaliation as a Result

Our survey of California’s workforce found that 38 percent of respondents have experienced a workplace violation, but only 10 percent of those respondents reported the violation to a government agency. While more than a quarter (26 percent) have reported a violation to human resources and 29 percent have reported a violation to their supervisor, almost half (47 percent) of workers who experienced violations did not report them to anyone.

Of the workers who did report a violation, either to their employer or to a government agency (216 respondents), a majority (116 out of 216 respondents) indicated they experienced some form of retaliation for having reported that violation.



State agency data, detailed below, corroborate our findings that employer retaliation is a serious problem in California with California enforcement agencies receiving tens of thousands of complaints each year alleging unlawful retaliation. Three of the principal agencies tasked with handling retaliation complaints for California workers are the US Equal Employment Opportunity Commission (EEOC), the Retaliation Complaint Investigation Unit (RCI) within the California Labor Commissioner’s Office, and the California Civil Rights Department (formerly the Department of Fair Employment and Housing) (CRD). The EEOC handles complaints concerning workplace discrimination and related retaliation under various federal laws,³ RCI enforces over four dozen California retaliation protection statutes,⁴ and the CRD enforces the Fair Employment and Housing Act, Unruh Civil Rights Act, Disabled Persons Act, Ralph Civil Rights Act, Trafficking Victims Protection Act, and other anti-discrimination laws involving state-funded activities, along with retaliation stemming from workers’ reliance on those laws.⁵

Data from these agencies spanning 2017 through 2019 shows:

- California workers submitted more than 69,000 complaints alleging retaliation to the EEOC, RCI, and CRD.
- In 2019 alone, the EEOC, RCI, and CRD received more than 24,000 complaints from California workers alleging unlawful retaliation.
- At the EEOC and CRD, retaliation complaints made up a significant share of all employment-related complaints.
- Retaliation complaints accounted for more than 50 percent of all charges filed with the EEOC.
- Retaliation complaints made up between 11 and 26 percent of employment-related complaints submitted to CRD for investigation.



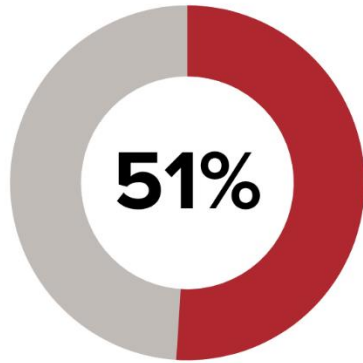
See Table 1 for more details on retaliation complaints submitted to the EEOC, RCI, and CRD based on publicly available data.

Table 1.

Retaliation Complaints Submitted in California, 2017-2020				
Agency	2017	2018	2019	2020
US Equal Employment Opportunity Commission⁶	2,752 (50.7% of all state charges)	2,183 (50.3% of all state charges)	2,319 (54.2% of all state charges)	2,306 (55.8% of all state charges)
Retaliation Complaint Investigation Unit within California Labor Commissioner's Office	4,178⁷	5,633⁸	6,515⁹	5,334¹⁰
California Civil Rights Department	1,094¹¹ retaliation complaints for investigation (11% of all employment complaints)	2,785¹² retaliation complaints for investigation (26% of all employment complaints)	2,717¹³ retaliation complaints for investigation (19% of all employment complaints)	
	8,468¹⁴ retaliation basis in complaints seeking a right-to-sue	17,697¹⁵ retaliation basis in complaints seeking a right-to-sue	13,181¹⁶ retaliation basis in complaints seeking a right-to-sue	
TOTAL	16,492	28,298	24,732	Total (2017-2020): 69,522

II. Workers Cite Concerns about Employer Retaliation and the Threat of Job Loss As Major Reasons for Not Reporting Employer Violations

Even as state enforcement agencies receive tens of thousands of retaliation complaints per year, our survey findings and previous research in California reveal that filed complaints are just the tip of the iceberg when it comes to workplace violations and retaliation. Of the almost one in two California workers who experienced violations but did not report them, a majority (96 out of 179) indicated that concern about retaliation was a deterring factor.



More than half of working Californians (51 percent) say that concern about retaliation would influence their decision to report a workplace violation in the future.

More than 4 out of 10 survey respondents reported that concern about employer retaliation has possibly stopped them from speaking up about dangerous or unhealthy working conditions in the past. Black and Latinx workers were more likely than white workers to say that this was the case. Forty-nine percent of Black workers and 45 percent of Latinx workers indicated this was their experience, compared to 39 percent of white workers. Finally, more than half of working Californians (51 percent) said that concern about employer retaliation would influence their decision about whether or not to report a workplace violation in the future. These results show that retaliation concerns keep many workers from coming forward. Previous California worker surveys have presented similar findings.¹⁷



III. Given Widespread Economic Precarity in California, Retaliatory Firings Can Have Catastrophic Consequences for Workers

Members of the Pilipino Association of Workers and Immigrants described in focus group conversations that their economic needs and the need to have a job keep them in jobs where their rights are violated and where they endure conditions harmful to their health:

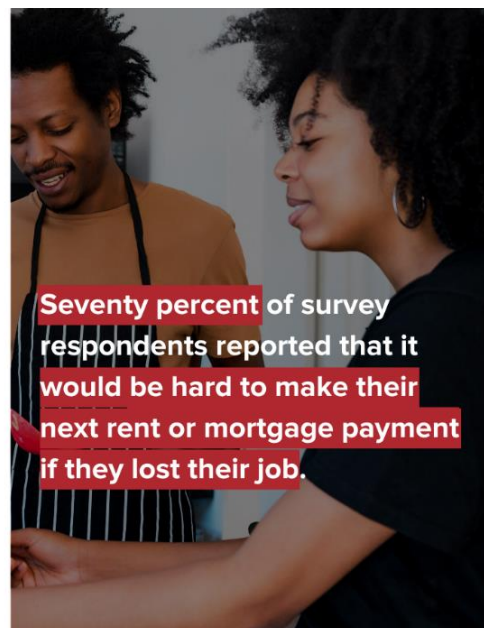
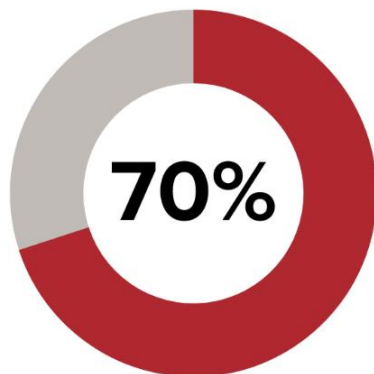
“Even if it isn’t true, employers say that if you go to the Labor Commission, you won’t be able to find a job. The employers have an association and have a blacklist of workers who filed claims.”

“We are not even paid the minimum wage, but we have tons of bills to pay. We don’t have medical insurance. Our priority is remitting money back home, but, with low wages and bills, we don’t have much money to send home. We end up having to take second and third jobs. We end up getting sick. When I was 40, it wasn’t so bad, but now that I am 50, I have back pain and neck pain.”¹⁸

With many workers just a paycheck or two away from not being able to pay their bills, the real threat of being fired or having pay or hours cut can factor heavily in a worker’s decision about whether to come forward with concerns.

Our survey found that 40 percent of the California workforce would be unable to cover a month or less of regular expenses if they lost their job. Seventy percent reported that it would be hard to make their next rent or mortgage payment, with nearly half of those reporting that it would be “very” hard.

Among survey respondents who had prior job losses, 79 percent also reported significant economic hardship from those job losses, including not being able to pay bills on time (40 percent), seeking food from a food bank (20 percent), delaying health care or medication



(22 percent), and using all their savings (36 percent).

These survey results are consistent with numerous other reports detailing the economic insecurity of California's workforce. For example, according to the California Future of Work Commission's March 2021 report, the majority of renter households in the state pay more than 30 percent of their income toward housing.¹⁹ According to the Northwestern Institute for Policy Research and the California Association of Food Banks, about one in every five Californians experiences food insecurity, meaning that they "do not know where their next meal will come from — with greater levels of hunger experienced by Black and Latinx families."²⁰ According to a Public Religion Research Institute study of California workers, almost half (47 percent) of California workers struggle with poverty, and they are more likely to be Latinx workers (60 percent of Californians who work and struggle with poverty are Latinx).²¹

Workers in California and across the country lack adequate emergency savings that could help them weather even a brief interruption in work. For example, a 2019 AARP national study found that 53 percent of households do not have an emergency savings account and highlighted how "people of color in the United States face a massive wealth gap compared to whites, and women have significantly less wealth than men."²² It cited a Federal Reserve finding that "the median [B]lack family had just \$3,600 in household wealth in 2018, the median Latino family had \$6,600, and the median white family had \$147,000."²³ In 2018, the Federal Reserve reported that 4 in 10 adults would have difficulty covering a hypothetical unexpected expense of \$400.²⁴ More broadly, the Federal Reserve found that 3 in 10 adults are "either unable to pay their bills or are one modest financial setback away from hardship."²⁵

Making matters worse, most California workers lack access to a meaningful safety net if they lose their job or part of their income.

First, while severance pay policies can sometimes provide some immediate financial support for workers who are laid off or who voluntarily resign, most workers across the income spectrum do not have access to such pay. Our survey found that only 14 percent of California workers who had lost jobs received severance pay after every job loss. Sixty-four percent of workers who lost jobs have never received severance pay.

Second, while an essential program, California's unemployment system does not offer workers reassurance that they can obtain quick and meaningful economic support in case of job loss. California workers may receive a maximum of only \$450 per week in unemployment benefits. The California Budget & Policy Center has illustrated how that amount falls far short of what California workers need to support their families and look for work.²⁶ For "the majority of California renters with low incomes who spend at least half of their income on rent," current benefit levels mean that they would have to spend their entire unemployment benefit to pay rent alone without other income.²⁷ In addition, as the COVID-19 pandemic has starkly exposed, the California unemployment system is plagued by outdated infrastructure, long delays for benefits, abrupt suspensions, and concerns about fraud.²⁸ Even if the system worked efficiently for workers, a successful application for benefits still relies on employers "to exchange information that is necessary in determining

eligibility” with the Employment Development Department.²⁹ Workers who have been fired in retaliation will not generally expect their employer to cooperate with a request for unemployment assistance. Employers may even falsely report that a worker was fired for misconduct, making a worker initially ineligible for unemployment benefits and forcing them to appeal the denial, delaying benefits even longer. Furthermore, undocumented immigrant workers remain ineligible for unemployment benefits.³⁰

This economic precarity heavily influences whether workers decide to raise workplace concerns, especially in an employment-at-will framework where employers can fire workers without cause and in an environment where protections against retaliation are inadequate and do not mitigate the immediate financial harm that comes with being fired, demoted, blacklisted, or otherwise punished for coming forward.

IV. California’s Anti-Retaliation Laws Fall Short Because They Force Workers to Bear Significant Financial Risk Before Holding Employers Accountable

A 2019 NELP 50-state survey of anti-retaliation laws tied to the reporting of minimum wage or other wage-theft violations showed that California is one of a handful of states where the statutes include provisions that NELP considers minimally necessary to help deter retaliation and provide meaningful remedies for workers: a private right of action; state monetary penalties; attorneys’ fees and costs for workers who file lawsuits; and both compensatory and punitive damages for workers.³¹ The California Labor Commissioner alone is charged with enforcing over four dozen anti-retaliation statutes.³² One of those relatively strong statutes is California Labor Code Section 98.6, which requires employers to pay up to \$10,000 in penalties to workers who suffered retaliation, and Labor Code Section 1102.6, which shifts the burden of proof under Labor Code 1102.5 (the whistleblower statute) to the employer to demonstrate by clear and convincing evidence that there was a legitimate, independent reason for the adverse action.³³ And a number of other California statutes stand out nationally, such as those that expressly prohibit various forms of immigration-based retaliation³⁴ and do not require an adverse action and the recent 2017 amendment (SB 306) that allows the Labor Commissioner to seek a preliminary court injunction to stop retaliation with “reasonable cause” to believe a discrimination or retaliation violation has occurred.³⁵ These types of valuable tools should continue to form key components of any effort to fight retaliation.

However, despite various strengths, none of California’s anti-retaliation laws provide workers who experience retaliation with monetary relief when they need it most: immediately or soon after an employer retaliates.

After experiencing retaliation, a worker must generally file a new complaint alleging unlawful retaliation. At that point, the worker assumes a difficult legal burden of proving that retaliation happened,³⁶ and retaliation investigations and litigation can take months or years before reaching a final decision. The CRD reported in 2019 that even after reducing the average number of days for the agency to close a case, the 2018 average was still 109

days.³⁷ In 2018, more than 6,000 CRD cases experienced a wait of 30 days or more just to complete the intake interview.³⁸ A FY 2019 report on California’s Occupational Safety and Health program performance found that the California Division of Labor Standards Enforcement completed only one percent of its investigations within 90 days and that the average number of days for investigation completion was 582.³⁹ The EEOC informs complainants that the agency takes “approximately 10 months to investigate a charge.”⁴⁰ And even when a court or agency finally orders an employer to pay a worker monetary damages after retaliation, getting an employer to actually pay the judgment presents its own challenge.⁴¹

In sum, by the time a worker obtains any relief from a retaliation investigation or lawsuit in California (if they do at all), a worker who was fired for reporting a violation or whose employer reduced their pay (e.g., by cutting hours or assigning a worker to a less desirable shift with fewer tip earnings) has suffered potentially devastating and long-term economic consequences. When workers across the state generally have little or no job security and most cannot afford even a \$400 emergency, one missed or reduced paycheck can quickly snowball into a missed rent or mortgage payment; eviction; cut utilities; an inability to provide food, medicine, or school supplies for their children; a reduced credit score; late fees; unpaid child support or unpaid traffic fines with their own punitive repercussions; and more. This economic risk compounds the other serious risks that workers face when asserting their rights. When an employer retaliates, workers often endure painful emotional distress, ongoing harassment, or other unfair treatment at work. And workers who face detention or deportation because their employer reported them to immigration authorities experience uniquely traumatic consequences and potentially permanent separation from their families and community.

V. Unjust and Arbitrary Firings: California’s At-Will Employment System Creates an Enormous Power Imbalance Between Workers and Employers, With Far Reaching Consequences in the Workplace and Beyond

A. At-Will Employment Allows Employers to Fire Workers for Almost Any Reason or No Reason at All

One major reason that California workers lack strong protection from retaliation is that employers can generally fire workers for any reason or no reason at all, unless otherwise explicitly prohibited by law. Without protection from arbitrary and unfair firings, workers have a much harder time speaking up on the job and enforcing their rights.⁴² And even when the law prohibits retaliatory firings for workers who file complaints with government agencies or organize at their workplaces, employers can easily deny that firings are motivated by retaliation and point to any other arbitrary reason as the impetus for firing.

The US is unique among industrialized nations in that employees can be fired abruptly—without notice, a chance to address employment problems, or even a stated reason—and left with bills due and no paycheck or severance pay. By contrast, Australia, Brazil, Japan, Mexico, the United

Kingdom, and most of the European Union, among many other countries, require employers to provide workers with a sufficient reason for termination.⁴³

In the US, employment termination policies are generally regulated by state jurisdictions. Currently in California, employment is presumed to be at-will, meaning that an employer may discharge a worker at any time, without any reason or cause so long as no other law or employment contract is violated.

The at-will employment doctrine that allows employers to legally fire workers without warning or explanation was not determined through any democratic legislative process. Instead, conservative judges gradually imposed the doctrine through judicial rulings in the decades following the passage of the 13th Amendment, which banned slavery and most forms of servitude.⁴⁴

A century and a half later, at-will employment still underpins the power imbalance between employers and workers. While both workers and employers take on a certain amount of risk when they enter an employment relationship, workers take on greater risk because their livelihood is at stake. In addition to not needing to give advance notice or justification for termination, employers also do not have to set clear performance standards, apply rules or expectations consistently, or even inform workers of how discipline or termination decisions are made. This stymies complaint-driven enforcement of workplace laws because workers have to weigh any action they take against the possibility of discipline and termination.

Lack of job-security protections also compounds the negative effects of systemic racism in the workplace and the labor market. Workers of color—especially Black and Latinx workers—face widespread systemic racism and segregation in the workplace and labor market, including a high prevalence of discrimination in the hiring process, on the job, and in disciplinary matters.⁴⁵ These circumstances mean that workers of color must contend with heightened challenges in an at-will employment system. Black workers—who are the “last hired, and first fired”—especially bear the brunt of the job insecurity caused by at-will firings.⁴⁶

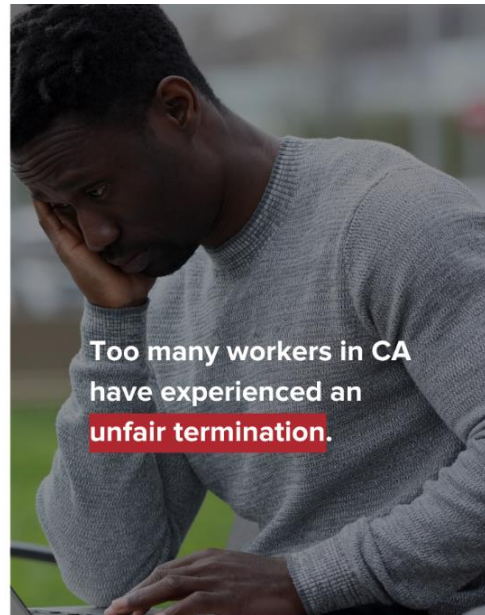
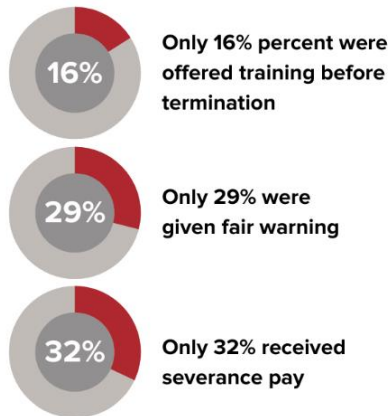
Our survey of the California workforce provides insight into unfair firings in the state, revealing how widespread the problem is and the many negative impacts for workers, families, and communities.



B. Unfair and Arbitrary Firings are Common

Our findings show that an alarmingly large share of workers in California have experienced an unfair termination. More than 4 in 10 California workers have been fired or let go from a job at some point, and only 29 percent of those workers were given fair warning.

Of those fired or let go from a job:



Of workers who were fired or let go, just 16 percent said they were offered more training before termination. And fewer than one in three received severance pay.

A participant in the focus groups conducted with members of the CLEAN Carwash Worker Center described an experience of being fired after taking part in an investigation:

"I worked at the [NAME OF EMPLOYER WITHHELD] for several years. During my time there an investigation began by the state of California to look into the conditions of work at the business. At this car wash, we did not have fixed hours of work. We were asked to arrive early and wait in an alley for work, sometimes for hours. We were never paid for this time. I was one of the worker leaders during the time and always shared what was happening at the car wash with the investigators. That was why they fired me on [DATE WITHHELD]. When that happened, I asked my manager why he was firing me. He said it was simply because there was no longer work for me. But they always told me that I was one of their best workers. I came back the next day and said, 'Did you fire me for speaking up on the job, for standing up for my rights, and fighting to improve the work conditions here?' But of course, he only repeated that I was no longer needed at the car wash."⁴⁷

Workers are aware that there is a risk of being fired anytime, even if not filing a formal complaint. When describing what she feels about work, one participant in a focus group with members of the Pilipino Worker Center said:

“For me, what I think about and bothers me is that our employer can fire us at any time they want to. What’s more they have favoritism. That, I worry about.”⁴⁸

C. At-Will Employment Coerces Workers into Accepting Harmful and Illegal Working Conditions

At-will firings enable employers to use the threat of termination as a form of economic coercion. Under the at-will system, if workers fear the threat of unfair discipline or dismissal from managers, they will be more likely to accept low pay, unfavorable terms of employment, and poor working conditions; this is especially true for those with the least power in the labor market. Some may also feel pressure to accept illegal situations such as wage theft or health and safety hazards. Even if employers are not violating any actual laws, at-will employment can create pressure for workers to behave in ways that are detrimental to their well-being, such as deprioritizing their health needs, consenting to undesired overtime hours, refraining from taking time off, or enduring verbal abuse.

Our survey bears this out, with a significant share of California workers reporting pressure in their workplace to accept harmful and even illegal working conditions. Seventy-three percent of respondents worked while sick to avoid being fired. Forty-three percent reported that an employer pressured them to accept wage theft, or that they worked extra hours without pay to avoid being fired. More than a third (34 percent) of workers accepted pay that was less than what they were owed to avoid being fired.

Additionally, 39 percent of workers reported experiencing hazardous or unsafe working conditions, and 35 percent reported working at a dangerous or unreasonable pace, because of concern about possibly losing their jobs. Almost half (47 percent) of workers have endured verbal hostility from a manager or supervisor without saying anything, and two out of three workers (68 percent) also reported skipping breaks to avoid being fired.

More than half of respondents (53 percent) reported not asking for pay increases or benefits they felt they deserved for fear of job loss. Forty-two percent said that termination concerns also silenced them from speaking up about dangerous and unhealthy working conditions. And more than 40 percent of workers—including 46 percent of Latinx workers and 55 percent of Black workers—said that concern about being fired or disciplined may have prevented them from joining with their co-workers to push for job improvements.

These findings show in vivid detail how at-will employment goes hand in hand with exploitative working conditions. As one caregiving worker explained in a Pilipino Worker Center focus group:

“If you complain, the agency will tell you, ‘Okay, will you like us to get another caregiver? Because either you like it or not. You do the job, we’re going to pay you. That’s it. If you cannot do the job, we’re going to find another one.’”⁴⁹

A sushi delivery driver in a focus group conducted by the Chinese Progressive Association described being fired simply for raising a question about a delivery route:

“I’d have to deliver from the warehouse to pick up sushi from South San Francisco, then deliver in San Francisco and Berkeley and Alameda County. The route takes a lot of time to deliver. I didn’t complain to the employer, but in the last week of my job, my route included delivery to San Jose. It didn’t make sense since it was a different direction from my route, and I told my employer. He wasn’t happy with what I told him. The next day he didn’t give me a work schedule. The employer pretty much fired me. That day the boss told me to return the company car keys, and I will send someone to go to your home to retrieve the car. (Did they give any explanation why you were fired?) No.”⁵⁰

People who have been formerly incarcerated by the US’s anti-Black criminal legal system experience particular employment pressures that often cause them to accept poor working conditions. Probation, parole, and other court-surveillance and supervision programs regularly mandate maintaining or seeking employment as a standard set of conditions to remain free from incarceration. Twenty-five percent of state prison admissions are due to “technical rule violations” of parole.⁵¹ Technical rule violations are not allegations of a new criminal offense but are violations of parole rules that regularly include passing alcohol and/or drug tests; satisfactory payment of criminal justice debt; completing court-mandated classes; maintaining curfew; and seeking and maintaining employment.⁵² This threat of reincarceration drives many court-surveilled workers to enter and remain in jobs with depressed labor standards and to avoid speaking up about illegal working conditions.

VI. Policy Recommendations: A Retaliation Hardship Fund, Consistency Across the Labor Code, and a State “Just Cause” Standard

California’s current legal system for handling workplace violations demands too much from workers and fails to curb widespread wage theft, discrimination, and unsafe and unfair working conditions. The state can more effectively support workers by addressing arbitrary firings, retaliation, and the financial consequences of employer retaliation.

A. Create a Retaliation Fund to Provide Workers with the Financial Support They Need When an Employer Retaliates

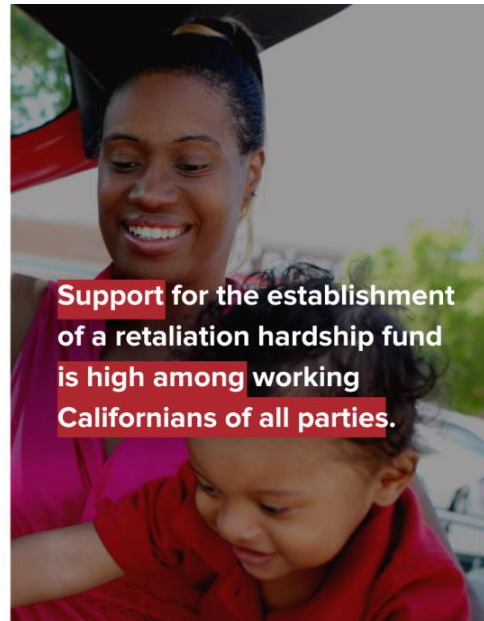
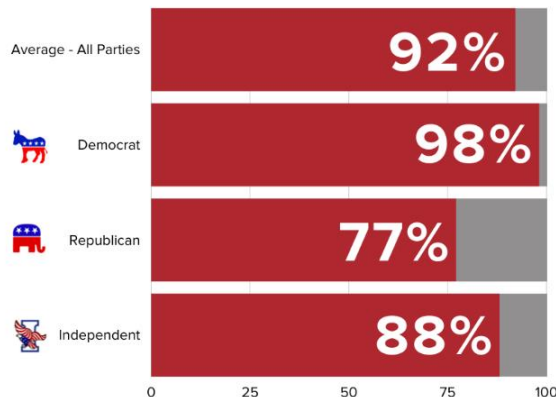
California lawmakers should address the critical gap in today’s anti-retaliation laws that leaves workers without economic support when they need it most, through a state-funded retaliation fund.

A retaliation fund would allow a worker who has reported a workplace violation to a state agency to access quick, meaningful, and one-time financial assistance if their employer retaliates against them (e.g., by firing, cutting pay or hours, demotion, blacklisting, etc.). The fund would directly fill the urgent gap left by California’s existing anti-retaliation statutes, under which it can take months, if not years, for a worker to obtain financial support and a final decision on a retaliation complaint. The fund could draw on state general funds for an initial period of time and eventually be funded through penalties

collected from employers who are found to have retaliated unlawfully.

The concept of a retaliation fund is not new. As NELP outlined in a 2021 report on retaliation funds, worker organizations have long used different types of mutual support funds to assist workers in exercising their rights.⁵³ California also already operates restitution funds for garment⁵⁴ and car wash workers⁵⁵ who are unable to obtain the compensation they are owed by employers through the legal system.

Such a fund could encourage significantly more workers to come forward with workplace violations. Our survey found that for more than two in three California workers, access to a retaliation hardship fund could help them report a future violation to a government agency. And an overwhelming majority of working Californians—92 percent—support the establishment of a retaliation hardship fund that would provide one-time financial assistance to workers who file good-faith complaints about employer retaliation. Appendix A outlines how such a fund in California could be structured and function.



B. Simplify California’s Anti-Retaliation Laws to Help Workers Understand and Assert Their Rights

Lawmakers should create consistency across the state’s Labor Code provisions addressing retaliation so that workers can more easily understand and enforce their rights. As part of this process, lawmakers should consistently apply existing laws that presume any harmful action an employer takes against a worker within 90 days after the worker asserts a basic workplace right is retaliation. For example, under existing law, California employers are presumed to have committed retaliation within 90 days and must prove otherwise in the warehouse and fast-food industry, as well as when their actions include immigration-related threats.⁵⁶ Lawmakers should also ensure that any penalties paid by employers, such as the up to \$10,000 penalty for retaliation, goes to the worker rather than to the general fund.

California’s laws need to be strongly worded and strongly enforced. When workers file complaints of retaliation with the Labor Commissioner’s office, they should feel confident that their claims will be handled with the appropriate urgency. Unfortunately, despite increases in funding in the 2022 state budget, the Labor Commissioner’s Retaliation Complaint Investigation Unit is still under-resourced, which creates challenges for enforcing the more than 45 labor laws and resolving its large backlog of cases. Lawmakers should substantially increase funding for the Retaliation Complaint Investigation Unit, which receives considerably less funding than the Labor Commissioner’s Office Wage Claim Adjudication unit and the Bureau of Field Enforcement.

C. Adopt a State “Just Cause” Law to Protect Workers from Unfair and Arbitrary Firings

Our survey found that a large majority—81 percent—of working Californians of all parties support the adoption of laws protecting workers from unfair and arbitrary firings. Replacing California’s at-will firing system with a just-cause termination standard would require employers to provide legitimate reasons and fair warnings before terminating workers. Effective just-cause policies also require employers to notify workers of performance problems in advance and provide an opportunity to address them. And, when workers are fired, such policies guarantee severance pay or, if they were terminated without just cause, a right to reinstatement. Finally, by requiring a good reason for terminations, just-cause protections more effectively protect workers from retaliation when they insist on other workplace rights. Appendix B outlines the key provisions a California just-cause law should contain.

VII. Conclusion

The wellness of individual workers, their families, and their communities depends on their ability to thrive inside and outside of work. That is only possible when workers can fully exercise and enforce their workplace rights without concern for losing their jobs. Current California laws, however, perpetuate a deep power imbalance between workers and their employers that forces workers into harmful, unjust, and unstable working conditions. This power imbalance stems from unjust and arbitrary firings permitted under California’s at-will employment system, rampant retaliation by employers, and economic insecurity. California workers simply have too much to lose if they raise concerns at work or report violations, despite existing anti-retaliation laws. A just-cause standard to end unfair firings, in addition to a retaliation fund to provide immediate economic support for workers contesting retaliatory job actions, would put California’s workers on much stronger footing to demand better workplace conditions and to hold employers accountable.



Appendix A – Key Elements of a Retaliation Fund

What is a retaliation fund?

- A retaliation fund allows a worker who has filed a wage-theft or other complaint with a state agency to access quick and meaningful financial assistance when their employer fires them or cuts part of their pay because of that complaint.
- Retaliation funds directly fill the urgent gap left by California’s existing anti-retaliation statutes under which it can take months, if not years, for a worker to obtain a final decision on a retaliation complaint.
- Retaliation funds are not entirely new. As NELP outlined in its 2021 report on retaliation funds,⁵⁷ worker organizations have long used different types of mutual support funds to aid workers in exercising their rights.
- A variety of public and private economic hardship funds have played an important role in supporting workers and families. During the COVID-19 pandemic, for example, cities and states like Boston, New York City, Atlanta, San Antonio, Tucson, and Washington, DC established hardship funds to support impacted individuals and families.⁵⁸ Prior to the pandemic, states and localities proved that governments could establish funds to provide financial support to workers and others in a wide range of contexts. The federal Emergency Food and Shelter Program, for example, distributes funds to local governments that, in turn, distribute the funds to private nonprofit organizations who provide financial assistance to individuals facing economic hardship.⁵⁹ All states, including California, operate a compensation fund to provide financial support to victims of crime.⁶⁰
- California also funds and operates restitution funds for garment⁶¹ and car wash workers⁶² who are unable to obtain the compensation they are owed by employers through the legal system. (Maine and Oregon operate similar funds for workers that are not industry specific.) In addition, California law has established the Travel Consumer Restitution Corporation, a fund to help California consumers who “suffer losses as a result of the bankruptcy, cessation of operations, insolvency, or material failure of a seller of travel to provide. . .transportation or travel services contracted.”⁶³

What kind of retaliation would the retaliation fund cover?

- A worker would be able to receive financial support from the retaliation fund if their employer fired them or reduced their pay in any way because the worker filed a complaint about the employer with a state agency. The retaliation fund must define “adverse actions” broadly given the countless and often subtle ways in which employers retaliate. At a minimum, an “adverse action” that results in losing one’s job or pay should include the following:
 - firing a worker
 - constructive discharging (where the employer creates a work environment that forces a worker to leave the job)
 - demoting a worker
 - blacklisting that keeps a worker from finding a new job
 - reducing hours
 - changing schedules in a way that impacts income
 - making immigration-based threats that force a worker to leave the job
 - reducing pay in other ways

How much support should a worker recover from the retaliation fund?

- A worker should be able to obtain a one-time financial assistance payment from the retaliation fund. This arrangement can draw from existing hardship models where one-time payments are not considered taxable income, making it easier for agencies to administer.
- In California, workers should be able to obtain at least \$2,500 as a one-time payment.
- The primary objective in setting the amount of financial assistance available to workers through a retaliation fund is to ensure that financial support can meaningfully help sustain a worker while searching for a new job, processing their retaliation complaint, and responding to the financial and related consequences of losing a job or part of their pay due to retaliation.

How would a retaliation fund be funded?

- A California retaliation fund could be funded for an initial period of time with state general funds. The state can divert penalties for retaliation to maintain the retaliation fund in the future.
- Workers should not have to repay financial support received through the fund. The burden of repaying into the fund should fall to employers who are found to have retaliated unlawfully.

- When a worker receives financial support from the retaliation fund, if the worker’s employer is found to have unlawfully retaliated after a full investigation or court decision, the employer should be required to replenish the fund with three times the amount of financial support that the worker received. This would be similar to the way a growing number of states and cities, including California, require employers to pay treble (i.e., three times) damages for wage theft.

How would workers access the fund? Who would be eligible?

- Accessing financial support from a retaliation fund should be as simple as possible in order to provide support to a worker immediately after they lose their job or part of their pay due to retaliation.
- The following steps can help ensure quick access to meaningful financial support:
 - **Step 1.** A worker files a complaint with a state labor-enforcement agency alleging an employer violation (e.g., the worker submits a wage-theft complaint to the Labor Commissioner).
 - **Step 2.** The state labor-enforcement agency that receives a worker’s complaint sends a notice of the complaint to the employer(s) named in the complaint, or the agency obtains evidence that the employer became aware of the complaint filed.
 - **Step 3.** If the employer fires the worker or reduces the worker’s pay in what the worker reasonably believes amounts to retaliation for filing their complaint, the worker submits a good-faith complaint alleging retaliation to the labor-enforcement agency charged with administering the retaliation fund within 90 days of the alleged retaliation along with a request for financial support from the fund.
 - **Step 4.** The agency that administers the retaliation fund will review the request for financial support and issue a one-time payment to the worker as soon as possible. Critically, a worker should not have to wait until an investigation or court case determines whether retaliation occurred, because that takes months, if not years, and the delay would defeat the purpose of the fund: to provide support when a worker needs it most. In implementing a retaliation fund, the implementing agency must seek to support the worker when a worker has alleged retaliation in good faith.

What safeguards can help avoid potential misuse?

- While nothing should suggest that the proposed retaliation fund would be vulnerable to misuse by workers, some safeguards can assuage potential doubts:

- The fund should only be available to workers who have filed a complaint with a labor-enforcement agency. Agencies can retain their existing discretion over whether to investigate each and every complaint.
- If, in the course of an investigation, a worker is found to have intentionally lied or fabricated evidence, the agency administering the retaliation fund could revoke that worker's eligibility for all future support from the fund.

What is the role of community partnerships in successful implementation of a fund?

- Worker leaders, advocates, academics, and others with experience addressing wage-theft and other violations have long emphasized the need for enforcement agencies to form close partnerships with local, community-based organizations. In establishing a retaliation fund, California lawmakers should also ensure that the fund administrator can engage effectively with community organizations to successfully implement the fund, including through grants and formal agreements that allow community-based groups to conduct outreach, educate, help process complaints and requests for financial support, and so on.





Appendix B – Key Provisions of a “Just Cause” Law

- 1. Good reason for discharge** – The core of a just-cause employment system is a requirement that the employer must show that there is a justifiable reason for discharging a worker, such as poor work performance that does not improve after feedback and coaching, violation of important employer policies, or employee misconduct. Just-cause systems also allow employers to discharge workers for bona fide economic reasons, such as when business declines or a position is no longer needed, without a need to show just cause.
- 2. Duty on the employer** – Under a just-cause system, the employer is responsible for demonstrating a good reason for discharging the worker—the reverse of the current system, where employees must demonstrate that a firing was for an impermissible reason. Shifting that responsibility to the employer is widely recognized as key for protecting workers against arbitrary and unfair firings, including against firings that are currently illegal but where workers have difficulty enforcing their rights, such as in cases of racial discrimination or retaliation against whistleblowers.
- 3. Certain activities are categorically protected** – Just-cause legislation should also clarify that certain reasons are categorically *not* grounds for discharge. Examples of categorically protected employee activities should include: (1) communicating to any person, including other employees, government agencies, or the public about job conditions; and (2) refusing to work under conditions that the employee reasonably believes would expose them, other employees, or the public to an unreasonable threat of illness or injury on the job.
- 4. Fair notice to workers and opportunity to address problems** – Another key component is fair notice to the worker of any performance problems and the opportunity to address them before being discharged. This process, which is often called “progressive discipline,” is well established. It also mirrors the process that many responsible employers already use: giving employees feedback and coaching on performance issues and support in addressing them before getting to the point of possible discharge. However, a just-cause policy should make clear that certain kinds of serious misconduct may trigger a bypass of the progressive discipline process and allow for immediate employer action. These should include conduct that threatens the safety or well-being of other people, such as violence or harassment.
- 5. Equal coverage of temp and staffing employees** – Economic theory suggests that if it becomes more difficult for employers to discharge workers, they will shift employment to temp and staffing agencies because such employees are generally

not subject to the same standards. Therefore, it is crucial that just-cause employment protections apply equally to employees working through temp or staffing agencies. A just-cause policy should expressly address these issues—for example, by requiring the same showing of just cause for ending employment.

- 6. Limits on defined-term employment** – Another key consideration for a just-cause policy is under what circumstances to allow employers to hire workers for defined projects or terms, after which their employment can end without a need to demonstrate just cause. Examples of reasonable defined-term employment might include short-term, seasonal jobs in industries that need additional staffing during certain times of the year, and projects for which the need for employees or the funding to pay them will end once the project is completed. However, it is important that such authorization for defined-term employment be limited to clearly defined circumstances that prevent it from becoming a loophole through which employers can meet ongoing staffing needs. In addition, during the course of such defined-term employment, just-cause protections against early discharge should apply.
- 7. Protections to ensure economic discharges are not a loophole** – It is important to ensure that economic (i.e., non-performance-based) discharges, when they are necessary, do not become a means for sidestepping just-cause protections. Employers should be allowed to make economic discharges when business conditions warrant, but there should be standards for demonstrating their necessity to ensure they are not used to disguise otherwise impermissible discharges.
- 8. Protections against intensive surveillance and monitoring** – Just-cause legislation is an opportunity to begin to address the harmful and discriminatory impact of employers’ growing use of electronic surveillance, algorithmic decision-making, and automated employee evaluation systems. Electronic monitoring and decision-making can result in employees being disciplined and even discharged with little human involvement in those assessments. Pervasive monitoring of workers also means that minor infractions can easily be found and used to sidestep just-cause protections. Just-cause legislation should limit the use of data collected through electronic monitoring for termination and disciplinary decisions.
- 9. Severance pay** – When workers are discharged—whether for just cause or economic reasons—providing severance pay is crucial for mitigating the very harmful economic impacts of job loss. Without severance pay, workers and families face dramatic income cuts and extreme hardship, including being unable to pay rent or a mortgage, potentially leading to eviction or foreclosure. To provide workers with a cushion as they search for new employment, just-cause protections should guarantee a basic period of severance pay, such as four weeks. Guaranteeing severance pay is not only fair and broadly popular, but it also avoids

the common employer practice of pressuring workers to sign away their rights in exchange for receiving severance pay.

- 10. Strong remedies and relief** – A just-cause policy should include strong remedies for violations, including the right to reinstatement and money damages, together with additional penalties or liquidated damages that are sufficient to deter noncompliance. Money damages must reflect the full scope of damages that workers face. Without such meaningful sanctions for discharges without cause, any new just-cause policy would not achieve the goal of ensuring fair process before workers are subjected to job loss.
- 11. Effective enforcement vehicles, including qui tam** – Government labor agencies simply do not have the capacity to adequately enforce employment protections on their own. Therefore, a just-cause policy should include effective tools to allow workers to bring enforcement actions on their own. These should include a private right of action, authorization for recovery of attorneys’ fees, and authorization for “qui tam” enforcement. Similar to a private right of action, qui-tam enforcement allows workers and members of the public to supplement government agency enforcement by stepping into the government’s shoes to bring enforcement proceedings as “private attorneys general.” Significantly, it can allow representative organizations, such as unions or worker centers, to bring enforcement action, ensuring that the burden of challenging employer lawbreaking does not remain solely on individual workers, who may face retaliation.
- 12. No waivers of rights permitted** – A just-cause policy should provide that workers’ rights may not be waived through private agreements absent court or Department of Labor supervision and explicitly prohibit employers from requiring workers to enter into a private agreement to waive their just-cause and whistleblower rights.
- 13. Rights that are enforceable before judges and juries, regardless of forced arbitration requirements and class/collective-action waivers** – Finally, a just-cause policy should ensure that its protections can be enforced by workers before judges and juries. Forced arbitration requirements deny workers the right to go before a judge and jury when their employer breaks the law. Instead, workers must bring any claims to a secret proceeding before a private arbitrator who is not accountable to the public. Because these arbitrators depend on corporations for repeat business, they strongly favor employers. Making matters even worse, class and collective-action waivers routinely incorporated into these requirements prevent groups of employees from banding together to challenge employer lawbreaking. An effective just-cause policy must ensure that forced arbitration requirements and class/collective-action waivers will not interfere with the ability of workers to enforce their rights under that policy.



Appendix C – Survey Methodology

Between January 7 and January 23, 2022, YouGov interviewed 1,152 respondents through an online survey. The respondents were then matched down to a sample of 1,000 to produce the final dataset. Respondents were collected as part of a California state representative sample as well as California resident oversamples of Black and Latinx respondents.

The respondents were matched to a sampling frame representing employed residents between 18 and 64 years of age. The sampling frame consisted of interlocking parameters of gender, age, race, and education. The frame was constructed by stratified sampling from the full 2020 Current Population Survey sample with selection within strata by weighted sampling with replacements (using the person weights on the public use file).

The matched cases were weighted to the sampling frame using propensity scores. The matched cases and the frame were combined, and a logistic regression was estimated for inclusion in the frame. The propensity score function included age, gender, race/ethnicity, years of education, and region. The propensity scores were grouped into deciles of the estimated propensity score in the frame and post-stratified according to these deciles.

The weights were then post-stratified on a four-way stratification of gender, age (4-categories), race (4-categories), and education (4-categories), to produce the final weight. The margin of error for the entire survey is $\pm 3.6\%$



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⁴⁹ CCWP Focus Group with California members of the Pilipino Worker Center, in English, held in October 2021. On file with author.

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