

CALIFORNIA'S NEW WORKER PROTECTIONS AGAINST RETALIATION

OCTOBER 2013

In October 2013, California passed three bills, AB 263, AB 524, and SB 666, into law.¹ These new laws provide California workers who seek to exercise their workplace rights with strengthened protections against employer retaliation, including specific protections for immigrant workers. The laws will take effect on January 1, 2014.

STRENGTHENED LABOR CODE PROTECTIONS AGAINST RETALIATION FOR ALL WORKERS

AB 263 and SB 666 strengthen the California Labor Code's protections for all workers, by expanding the grounds for a finding of retaliation, increasing penalties for retaliation, and broadening protections for whistleblowers:

Broadened grounds for a finding of employer retaliation. California Labor Code Section 98.6 prohibits employers from retaliating, discriminating, or taking adverse action against an employee or a prospective employee for exercising any right under the Labor Code, filing or participating in a complaint with the California Division of Labor Standards Enforcement (DLSE), whistleblowing, or participating in political activity or a civil suit against an employer, among other activities. The new law now also bars employers from retaliation because a worker has made an oral or written complaint that he or she is owed unpaid wages. Cal. Lab. Code § 98.6(a) (AB 263, SB 666).

Broadened protections for whistleblowers. The new laws expand employee whistleblower protections to prohibit retaliation by any person acting on behalf of the employer. In addition, the new laws broaden whistleblower protections to prohibit retaliation based on a worker's testimony or provision of information to a public body regarding the employer's violation of a local, state, or federal statute or regulation, to any person with authority over the employee, or to another employee who has the authority to investigate the claim. Cal. Lab. Code § 1102.5 (AB 263, SB 666).

¹ A.B 263, 2012-2013 Leg. Session (Ca. 2013); A.B 524, 2012-2013 Leg. Session (Ca. 2013); S.B. 666, 2012-2013 Leg. Session (Ca. 2013).

Ability to update personal information without fear of retaliation. Employers may no longer discharge, discriminate, retaliate, or take any adverse action against an employee because s/he updates or attempts to update personal information with an employer, unless the changes are related to skills, qualifications, or knowledge related to the job. Cal. Lab. Code § 1024.6 (AB 263).

Increased penalties for employer retaliation. Under the new law, employers may now face a penalty of up to \$10,000 per employee for each instance of retaliation. Cal. Lab. Code § 98.6(b)(3) (AB 263, SB 666).

STREAMLINED PROCESS FOR CIVIL SUITS UNDER THE CALIFORNIA LABOR CODE

Clarification That Workers May Bring a Civil Suit under the California Labor Code without Administrative Exhaustion. The new laws clarify that employees do not need to exhaust administrative remedies before the DLSE before bringing claims in court, unless the claim expressly requires exhaustion. Cal. Labor Code § 244(a) (SB 666). No administrative exhaustion is required for claims of unlawful discharge or discrimination. Cal. Labor Code § 98.7(g) (AB 263).

NEW PROTECTIONS AGAINST IMMIGRATION-RELATED THREATS BY EMPLOYERS

AB 263, AB 524, and SB 666 include new protections for workers against employers who retaliate by threatening to report immigration status.

Suspension of business licenses for employers who retaliate against workers who exercise their rights by threatening to report immigration status.

- o The report or a threat to report an employee's citizenship or immigration status or that of a family member because the employee has exercised a right under the California Labor Code is prohibited. Cal. Labor Code § 244(b) (SB 666).
- o An employer's business license may be suspended or revoked if the DLSE or a court finds that an employer has retaliated against a complaining worker by making a report or threatening to report the citizenship or immigration status of a worker or the worker's family member. The DLSE must consider the harm of suspension or revocation on other workers, and any good faith efforts to resolve violations of the Labor Code. This does not apply to employers who are requesting current or prospective employees to submit an I-9 Employment Eligibility Verification form within the first three days of employment. Cal. Bus. & Prof. Code § 494.6 (SB 666).

- o A court may order the suspension of an employer’s business license if it is found to have engaged in a retaliatory “unfair immigration-related practice” against a person exercising a right protected under the California Labor Code or a local workplace ordinance. Cal. Labor Code § 1019 (AB 263).
- Protected rights may include: filing a complaint, informing another person about workplace rights, or seeking information to see if an employer is in compliance with state or local workplace laws.
- An “unfair immigration-related practice,” when undertaken for a retaliatory purpose, may include:
 - Requesting more or different documents than those required under 8 U.S.C. § 1324a(b) to show work authorization, or refusing to honor documents that on their face appear to be genuine;
 - Using the federal E-Verify system to check employment status in a manner not required under 8 U.S.C. § 1324a(b), or any memorandum governing use of the E-Verify system;
 - Threatening to file or filing a false police report;
 - Threatening to contact or contacting immigration authorities.
 - An unfair immigration-related practice does not include any conduct undertaken at the express and specific direction or request of the federal government.
- There is a presumption that an employer has engaged in the retaliatory use of an unfair immigration-related practice within 90 days of a worker’s exercise of rights protected under the California Labor Code or a local ordinance.
- An employee or other person subject to an unfair immigration-related practice may bring a civil action for equitable relief and any damages and penalties, and may recover attorneys’ fees and costs. Cal. Labor Code § 1019 (AB 263).

Discipline, suspension, or disbarment of attorneys who threaten to report immigrant workers involved in an administrative or civil employment suit. An attorney may be disciplined, suspended, or disbarred by the California State Bar if s/he reports or threatens to report the suspected immigration status of an individual (or family member) or a witness in an administrative or a civil proceeding because the individual has exercised a right related to employment. Cal. Bus. & Prof. Code § 6103.7 (SB 666).

Threats to report immigration status may constitute criminal extortion. Extortion is the obtaining of property from another person, with his or her consent, through the use of wrongful force or fear. Cal. Penal Code § 518. The new law clarifies that a threat to report any individual’s immigration

status or suspected immigration status in order to obtain his or her property may constitute criminal extortion. Cal. Penal Code § 519 (AB 524). The penalty for criminal extortion is imprisonment of up to one year and/or a fine of up to \$10,000. Cal. Penal Code § 524.²

Additional resources on retaliation against workers in California:

- National Employment Law Project, *Workers' Rights on ICE: How Immigration Reform Can Stop Retaliation and Advance Labor Rights—California Report* (2013), available at: http://nelp.3cdn.net/79a636339c0c2dcf72_l7m6b8j1i.pdf.
- State of California, Department of Industrial Relations, Labor Commissioner's Office, *How to File a Retaliation Complaint*, available at: <http://www.dir.ca.gov/dlse/howtofilediscriminationcomplaint.htm>.
 - The California Labor Federation and the National Employment Law Project are available for training on the new bills. Please contact Caitlin Vega, cvega@calaborfed.org and Eunice Cho, echo@nelp.org.
 - Michael Marsh, California Rural Legal Aid, at mmarsh@crla.org is tracking cases of administrative exhaustion and attorney discipline.

For more information on retaliation against workers in California, please contact:

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² Extortion constitutes a valid qualifying criminal activity for a U visa under 8 U.S.C. § 1101(a)(15)(U)(iii). See National Employment Law Sheet, Fact Sheet: The U Visa: A Potential Immigration Remedy for Immigrant Workers Facing Abuse (2011), available at: <http://www.nelp.org/page/-/Justice/2011/UVisa.pdf>.

