

DEPARTMENT OF INDUSTRIAL RELATIONS
Labor Commissioner's Office
Retaliation Complaint Investigation Unit
320 W. Fourth Street Suite 450
Los Angeles, CA 90013
Phone: (213) 620-6330 Email: retaliation@dir.ca.gov



February 1, 2023

Elizabeth R Buelna
3867 TEAK ST
SAN DIEGO, CA 92113-2857
ebuelna85@gmail.com

Re: Elizabeth Rafaela Buelna v. DEL TACO
State Case No. RCI-CM-921003

Dear Elizabeth R Buelna:

This office has received your retaliation complaint, filed with this office on November 23, 2022, alleging that you suffered unlawful retaliation in violation of California law.

Parties are encouraged to engage in settlement discussions amongst themselves. Alternatively, if you are interested in participating in an informal meeting to resolve your complaint, please send an email to retaliation@dir.ca.gov with "SETTLEMENT" in the subject line. Your participation is voluntary. Only if both parties agree, your case will be temporarily assigned to a Deputy Labor Commissioner who is experienced in working with parties to reach satisfactory settlements.

Please keep in mind that RCI investigations can be lengthy and may not result in your desired outcome. Settlement allows the parties to come to a compromise and provide relief, resolution, and peace of mind.

As soon as the case is assigned to an investigator, you and the employer will be contacted and given an opportunity to present documents, position statements, or witness names to support your respective positions. Hold on to these documents until the assigned investigator requests them from you.

We suggest that you obtain the first and last names, addresses, and telephone numbers for witnesses who may be able to tell us more about your claim. Also, please save any documentation that you may have, such as wage statements, emails, letters, text messages, or notices. It is helpful if you keep notes of any conversations you have had, noting the date and with whom the conversation took place. Also, if you have a recollection of what happened, it is helpful if you write it down while your memory is fresh. A chronology of events can be very useful.

Do not delete, destroy, or discard any potential evidence that relates to the claims, facts, or defenses raised by the complaint. This includes, but is not limited to, any

relevant electronic evidence, such as text messages, social media posts, emails, or voicemails. If you have a policy or practice of regularly deleting, destroying, or discarding documents, information, or things, those policies or practices should be suspended in relation to any potential evidence. Deleting, destroying, or discarding any potential evidence is against the law.

Please tell us if your address or phone number changes. If we are unable to contact you, we will be unable to proceed with the investigation, and we will be forced to close your case.

The enclosed "Summary of Procedures" will provide additional information about our process. Again, we will be in contact with you to let you know who the investigator is that will be investigating your complaint.

During the investigation, you are required to mitigate your damages by looking for other employment or working elsewhere. As you apply for employment opportunities, keep detailed records of the positions you apply for, any interviews that you attend, and any employment offers that are made to you. If you do accept an offer, please let me know. Keeping these records will assist the agency with calculating and proving what you may be owed.

If you filed a retaliation complaint because you made a workplace health or safety complaint, you may also file a separate complaint with the U.S. Department of Labor within 30 days of the date of the violation.

Keep in mind that legal claims cannot be brought indefinitely; legal claims have a "statute of limitations," which is a time limit. Filing a complaint with our agency may not prevent the statute of limitations from running out on all the claims you may have, so if you are interested in pursuing this claim or other related claims in a lawsuit, consult with an attorney right away.

Sincerely,

Steven Montoya
Deputy Labor Commissioner

RETALIATION AND DISCRIMINATION COMPLAINTS



Labor Commissioner's Office

Summary of Procedures

Employees, former employees, and applicants for employment who suffer retaliation or discrimination by their employer because they engaged in an activity protected by a law under the jurisdiction of the Labor Commissioner may file a complaint with the Labor Commissioner's Office. The Labor Commissioner's Office is also known as the Division of Labor Standards Enforcement or DLSE. A summary of procedures used by the Labor Commissioner's Office to investigate complaints under Labor Code section 98.7 is described below.

In the event your address or contact information changes during the investigation it is important that you notify our office. This requirement applies to employees as well as employers.

Retaliation

Retaliation occurs when an employee engages in an activity protected by law and then suffers an adverse employment action as a result of that protected activity. Adverse actions may include such things as discharge, demotion, suspension, reduction in pay or hours, refusal to hire or promote, immigration related threats, and other adverse employment actions.

Preparing a Complaint

The retaliation complaint form can be completed and filed on-line at: www.dir.ca.gov/dlse/Filing_your_complaint.htm, or a paper form (RCI 1) may be used to prepare a retaliation complaint. The paper form may be obtained by calling or visiting any Labor Commissioner's Office or it can be downloaded.

When preparing a complaint, enter all of the information that is requested on the form in the spaces provided. Sign and date the completed paper form. Copies of any supporting documents may be submitted as attachments, but cannot be used instead of a completing the complaint form. Do not submit original documents, retain the originals for your records.

Time Limits for Filing a Complaint

In most cases, an employee, former employee, or job applicant alleging retaliation under a law within the jurisdiction of the Labor Commissioner must file the complaint with the Labor Commissioner's Office within one year of the adverse action.

There are a few exceptions to the one year deadline. A complaint alleging retaliation for complaining about a violation of licensing regulations or other laws related to child day care facilities (Health and Safety Code Section 1596.881) must be filed within 90 days after the adverse action. A complaint alleging retaliation against a minor must be filed within the applicable period, but the start of that period is delayed until the minor is 18 years old (Labor Code section 1311.5).

A pay disparity complaint alleging that a worker was paid less for substantially similar work than an employee of the opposite sex, or another race or ethnicity (Labor Code section 1197.5) must be filed within two years of

the alleged violation or within three years of a willful violation. However, a retaliation complaint alleging that a worker was punished for asking about a lower rate of pay must be filed within one year.

Additionally, any employee, former employee, or job applicant who alleges retaliation for having complained about a workplace health or safety issue has a separate right to file a concurrent complaint with federal OSHA within 30 days of the adverse action.

Filing a Complaint

The retaliation complaint form (RCI 1) can be filed in person at any local Labor Commissioner's Office. The form can also be filed by mailing it to either of following locations:

Labor Commissioner
Retaliation Complaint Investigation Unit
2031 Howe Ave., Ste. 100
Sacramento, CA 95825

Labor Commissioner
Retaliation Complaint Investigation Unit
320 W. Fourth St., Ste. 450
Los Angeles, CA 90013

When a form is filled in online, the form is automatically submitted to the Labor Commissioner's Office after the Submit button is successfully clicked on the last page of the online form.

Review of the Complaint

After the complaint is filed, it will be reviewed and preliminary information will be gathered to determine whether the Labor Commissioner has jurisdiction over the issues raised. If it is determined that the Labor Commissioner has jurisdiction, the complaint will be accepted for investigation.

Investigation of the Complaint

After the complaint has been accepted for investigation, the employee, former employee, or job applicant will be contacted by a Deputy Labor Commissioner in the Retaliation Complaint Investigation Unit. The Deputy Labor Commissioner will be your primary contact person and will conduct the investigation into the complaint. The investigator is a neutral fact-finder. They do not represent either party at any time during the investigation. The investigator cannot provide legal advice to any party.

Labor Code section 98.7 requires the investigator to interview the worker, the employer, and relevant witnesses, individuals who possess information regarding the alleged violations. To protect the identity of non-management witnesses, the investigator cannot confirm or deny who is actually interviewed. Such witnesses are confidential and may not be disclosed to either party.

The investigator may request the parties meet in a conference in furtherance of the investigation and to explore settlement. Cooperation by both parties is essential to ensure that all available facts are uncovered in the investigation. The Retaliation Complaint Investigation Unit has the authority to issue subpoenas to obtain evidence related to the case. Information obtained during the investigation is subject to Public Records Act requests, and therefore is not confidential. However, the identity of witnesses shall remain confidential, unless disclosure is required for a civil action filed by the Labor Commissioner.

When a complainant files a pay disparity complaint under the Equal Pay Act (EPA), Labor Code section 1197.5, the investigator will not disclose the complainant's name until the validity of the complaint is determined, unless disclosing the name becomes necessary to investigate the complaint. The complainant's name will remain confidential if the complaint is withdrawn before the name is disclosed.

Interviews with Complainant

The individual who filed the claim, the complainant, is required to make themselves available for interviews. In a typical investigation, the complainant is interviewed two or three times. There is an initial interview to establish the fundamentals of a retaliation claim, or prima facie case. Often times the investigator will schedule an additional interview to review the employer's response. It is essential that the complainant participate in interviews. Letters or emails are not sufficient to adequately test the allegations or to evaluate the employer's version of events. If the individual refuses the initial interview, the case will be closed for lack of cooperation. In the event subsequent interview requests are refused, the investigator will determine whether there is sufficient evidence to proceed or if the case will be closed for lack of cooperation.

Hearing on the Complaint

In a very limited number of cases, and at the sole discretion of the Retaliation Complaint Investigation Unit, the Labor Commissioner may order a hearing to establish the relevant facts before concluding the investigation. The hearing is an informal, investigative proceeding. A hearing officer conducts the hearing, and both sides may bring an attorney, union representative, or other person of their choice to represent them.

The Labor Commissioner may subpoena witnesses and documents for the hearing. If the Labor Commissioner issues a subpoena requested by a party, that party is required to pay applicable witness fees. After the hearing, the hearing officer will file findings of fact and conclusions as part of the investigation.

Results of Investigation

Once the investigation is complete, if no settlement has been reached, the investigator will prepare an investigation report that will be submitted to the Labor Commissioner or other designee to make a determination.

The Determination Letter

The Labor Commissioner will review the investigative report and send the parties a determination letter; the letter will outline the evidence established during the investigation and report the findings of the investigation.

Result of the Investigation Is a Cause or Merit Finding

If the Labor Commissioner determines that the employer violated the law by retaliating against the employee, former employee, or job applicant, the employer will be given 30 days to comply with the order in the determination letter and remedy the retaliation, or attempt to settle the case.

In cases where the Labor Commissioner has determined that sufficient evidence exists to support a finding of retaliation, the Labor Commissioner may order a variety of remedies including reinstatement, payment of lost wages, interest on the lost wages, removal of related negative reports in the employee personnel file, and the posting of a notice acknowledging the retaliation.

In addition, Labor Code sections 98.6 and 1019.1 provide for a penalty amount of up to \$10,000 per violation, payable to the worker if the evidence establishes retaliatory conduct by the employer. Other penalties may be assessed for violations of the Healthy Family, Healthy Workplace statute and Labor Code sections 1311.5 and 2814. For employers that are corporations and limited liability companies, Labor Code section 1102.5 provides for an additional penalty of up to \$10,000 for each violation of that section. This penalty is payable to the State.

If the employer fails to comply with the requirements of the determination letter in the time required, an attorney for the Labor Commissioner will file a court action to enforce the determination letter and collect the assessed damages and penalties. The employer may also be held responsible for the Labor Commissioner's attorney's fees.

Citation, in lieu of Determination Letter

The Labor Commissioner may decide to select certain cases for citation. This means that if the Labor Commissioner determines that there has been retaliation, a determination letter will not issue and a citation will

issue instead. The employer has the option of appealing the citation, but if no appeal is filed, then employer must pay the citation amount or it becomes a final judgment; once there is a final judgment, the Labor Commissioner's office can then begin to try to collect on the judgment.

If a timely appeal is filed, then a hearing is held before a hearing officer. The hearing will be like an informal court case; the hearing officer is like a judge, and the Labor Commissioner will present evidence, such as emails or employment records, and employee testimony to support the citation. Then, the hearing officer will issue a written decision, which becomes a final judgment if the employer does not challenge the decision by filing a writ in superior court.

If a writ is filed, a judge will review the hearing officer's decision for "substantial evidence." The employer must also file a bond for the citation amount with the writ; this guarantees that the citation amount will be paid if the employer loses on writ.

Result of the Investigation is a Dismissal of the Complaint

If the Labor Commissioner determines that there is insufficient evidence of retaliation, the Labor Commissioner will dismiss the case and take no further action. The employee, former employee, or job applicant may file a civil complaint against the employer to pursue the matter further.

Appeal Rights

Complaints alleging violation of Labor Code section 6310 or 6311 (related to workplace health and safety) include appeal rights for the worker if the Labor Commissioner dismisses the complaint for insufficient evidence of retaliation. There is no appeal right under these provisions for the employer.

The worker's right to appeal is required by federal OSHA, and the Labor Commissioner's Office is required to provide the same appeal right for violations of Labor Code section 6310 and 6311. The appeal is made to the Director of Industrial Relations. In the appeal, the worker must state the grounds for the appeal and the reason the decision is unjust or unlawful. Every issue to be considered by the Director must be identified. The Director will provide all parties with a copy of the appeal, allowing an opportunity to respond. The worker must file the appeal within 15 days of the date of receipt of the determination letter. The appeal must be filed in writing and mailed to the Director of the Department of Industrial Relations at:

Office of the Director - Legal Unit, RCI Appeals
1515 Clay St., Ste. 701
Oakland, CA 94612

In addition to the appeal right discussed above, individuals who have filed complaints alleging retaliation for complaining about a workplace health and safety issue, have the right to file a Complaint Against State Program Administration (CASPA) with the federal Occupational Safety and Health Administration (OSHA). In this complaint to OSHA, an individual who is not satisfied with the procedures followed in the Labor Commissioner's investigation may request that federal OSHA review the case file to ensure the case was appropriately investigated. A CASPA complaint can only be filed after appeal rights with the State have been exhausted. A CASPA complaint is filed at:

U.S. Department of Labor - OSHA
Attention: Area Director
Ronald Dellums Federal Building
1301 Clay St., Ste. 1080N
Oakland, CA 94612

Contact the Labor Commissioner's Office

If you have questions regarding investigation procedures followed by the Labor Commissioner's Office, please contact the Retaliation Complaint Investigation Unit by calling (916) 263-2991, or by email at

retaliation@dir.ca.gov. If you have questions regarding a retaliation claim based on workplace health and safety (OSHA), please call (714) 558-4913, or email OSHAretaliation@dir.ca.gov.