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RETALIATION CLAIMS AND THE LABOR COMMISSIONER

by Laura K. Sitar

Most employers are familiar with the California Labor Commissioner's ability to investigate and adjudicate wage claims; however, you may not know the Labor Commissioner also has jurisdiction to resolve retaliation and discrimination claims arising from almost four dozen California statutes and regulations. (www.dir.ca.gov/dlse/HowToFileLinkCodeSections.htm) These laws prohibit employers from retaliating, discriminating, or taking adverse action against an employee or a prospective employee for activities such as whistleblowing, filing or participating in a complaint with the California Division of Labor Standards Enforcement (DLSE), participating in political activity or civil suit against an employer and numerous similar activities. *Labor Code* section 98.7 provides that any employee or prospective employee who believes he or she has been discriminated against or discharged in violation of any law under the jurisdiction of the Labor Commissioner may file a claim with the DSLE. If a violation is found, the Labor Commissioner has the power to order reinstatement, compensation for lost wages and under *Labor Code* sections 98.6 and 1102.5, civil penalties of up to \$10,000 per violation. In 2014, the most recent reporting period, the Retaliation Investigation Complaint Unit of the DSLE received 3853 complaints of which they investigated 1,876. The largest group of accepted cases originated from alleged retaliation for disclosing violations or noncompliance with local, state, or federal law (*Labor Code* section 1102.5). And as we have seen with civil complaints, the number of retaliation claims filed with the DLSE is growing each year.

What To Do If You Receive Notification of A Retaliation Claim Filed With The DSLE?

Notification:

Because of the increasing volume of claims and limited resources within the Retaliation Complaint Investigation Unit, employers are generally first notified simply that a complaint has been filed and that more information will be forthcoming once an investigator has been assigned. The employer is left to guess at the allegations made. It can take six months or more for an investigator to be assigned; however, it is important not to wait to begin preparing a defense. Immediately secure all pertinent information including the employee's personnel file and other documents including witness statements related to the adverse employment action which appears to form the basis of the employee's retaliation claim. This is also a good time to decide whether to consult an attorney for assistance.

Investigation:

Once an investigator has been assigned the employer will receive a copy of the employee's complaint and a request for additional information and a response to the allegations in the complaint. The response should be thorough and address the all allegations with supporting documentation and identification of witnesses. Hearings are rarely held so the employer's response is critical. (Only eighteen hearings were held in 2014.) The investigator will review the documents provided and may contact witnesses. To the extent possible, potential witnesses should be aware they may be contacted by an investigator; however, it's critical that they be allowed to respond without the fear of retaliation. The investigator may try to assist the parties to reach a settlement as well. If no settlement is reached, the investigator will prepare a written summary of findings which is forwarded to the Labor Commissioner.

Determination:

The Labor Commissioner will review the investigator's summary of findings and make a determination. If the employer is determined to have violated the law, the employer has the right to appeal within 10 days or comply with the determination. The appeal is heard by the Director of the Department of Industrial Relations. If the employer fails to comply with the Labor Commissioner's determination, the Labor Commissioner will file a civil action to enforce the determination.

Retaliation continues to be a hot topic in both civil and administrative forums. When any adverse employee action is taken it should become second nature to question whether the action is influenced by any retaliatory motive. And when reinstatement, lost wages and civil penalties of up to \$10,000 are at stake, it is important to take investigations by the Retaliation Complaint Investigation Unit of the DLSE very seriously. Employers are likely to see increasing numbers of them in the future.

About the Author:

A Shareholder at Wroten & Associates, Laura Sitar defends employment, professional negligence and elder abuse cases and provides invaluable employment related risk management services to help clients avoid litigation. She litigates cases on behalf of both individuals and companies involving all types of employment actions including harassment, discrimination, wrongful termination, retaliation and wage and hour claims. Her years with Wroten & Associates have provided her with a unique understanding of the many challenges facing long term care providers.

After a 15-year career in corporate management, where she directed the human resource function of a 2000 employee, \$100 million region, Ms. Sitar became an attorney. She began her second career in law 16+ years ago as an associate with a prestigious healthcare defense firm before joining Wroten & Associates where she is a shareholder.

Ms. Sitar graduated cum laude from Tufts University, in Boston Massachusetts in 1979. She attended Western State University, College of Law, where she graduated summa cum laude and valedictorian of her class in 1998. While at Western State she clerked for Justice William Rylaarsdam on the California Court of Appeals and successfully argued a sexual harassment and retaliation claim before the Ninth Circuit Court of Appeals. She was a recipient of the 1998 Fellowship of the American Board of Trial Advocates. Ms. Sitar has been a member of the California State Bar since 1998 and is admitted to practice in U.S. District Courts throughout California.

Ms. Sitar has participated in multiple mock elder abuse trials at the University of Southern California (USC) and has presented for the California Assisted Living Association (CALA) as well as other organizations. Ms. Sitar has written numerous articles, her most recent being titled "Engaging in the Interactive Process Required by the ADA." She is a member of the Defense Research Institute (DRI) and the California Association of Health Facilities (CAHF).