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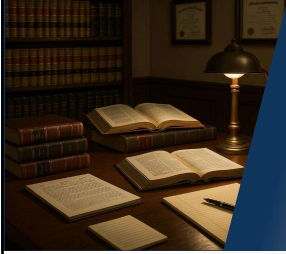
Best Practices to Avoid Retaliation Lawsuits

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Labor Code Section 1102.5



Labor Code Section 1102.5

- Most California lawsuits alleging workplace retaliation state a claim under this Labor Code Section





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Labor Code 1102.5

Statutory Language and Purpose:

- Protects employees who report violations of law or noncompliance with regulations
- Encourages a safe and lawful workplace by prohibiting retaliation against whistleblowers



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Labor Code 1102.5

Key Provisions and Protections:

- Employers **cannot retaliate** against employees for disclosing information about suspected legal violations
- Protection applies whether the report is made **internally or to a government agency**
- Covers both **actual** violations and situations where the employee **reasonably** believes a violation has occurred
- Also prohibits retaliation for **refusing to participate** in activities that would violate the law



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What is Retaliation

Retaliation occurs when an employer takes adverse action against an employee because the employee engaged in a legally protected activity



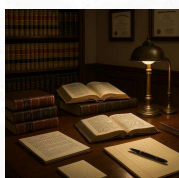
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Definition of Retaliation

What is "Protected Activity"?

Protected Activities Include:

- Reporting / complaining about suspected violations of law internally or to the government
- Participating in workplace investigations
- Exercising employment rights
- Refusing to participate in unlawful conduct



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Definition of Retaliation

Examples of Retaliation

In retaliation for engaging in protected activity:

- Termination or demotion
 - Termination is the most common lawsuit scenario
- Discipline
- Reduction in pay or hours
- Negative performance reviews
- Exclusion from meetings or opportunities

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Definition of Retaliation

Key Point:

Retaliation is prohibited even if the underlying complaint is ultimately unsubstantiated, as long as the employee had a **reasonable belief** of wrongdoing.

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Burden Shifting Framework

The deck is stacked against you.

Labor Code Section 1102.5 claims are challenging to defend against because the employer has a higher burden of proof.



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Burden of Proof – Labor Code 1102.6

Employer has a high burden of proof:

- **Initial Burden on Employee:** Show by a preponderance of the evidence that they engaged in protected activity, suffered an adverse employment action, and that the protected activity was a contributing factor to the adverse action.
- **Employer's Burden Under Labor Code 1102.6:** If the employee meets their burden, the employer must then demonstrate by **clear and convincing evidence** that the same adverse action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected activity.



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Burden of Proof – Labor Code 1102.6

Employer has a high burden of proof:

- **"Clear and convincing evidence"**
 - it is highly probable that a fact is true.
 - higher than "preponderance of the evidence" (more likely than not)
 - but lower than "beyond a reasonable doubt".
 - It essentially means the evidence must be so strong that it produces a firm belief or conviction in the fact-finder's mind.



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Burden of Proof – Labor Code 1102.6

The deck is more stacked:

- **"Guilty until proven innocent"**
 - AB 497, effective 1/1/24, creates a rebuttable presumption of retaliation if adverse action is taken within 90 days of the protected activity.
 - Employer may present evidence to overcome the presumption of guilt.



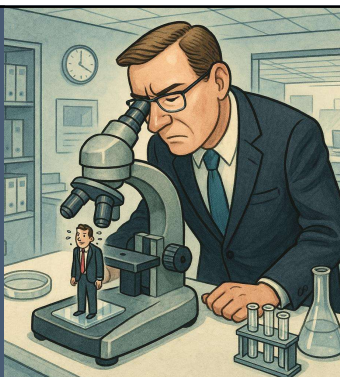
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Recognizing Retaliation in the Workplace

Signs of Retaliation:

- Sudden changes in job duties or assignments
- Unexplained disciplinary actions
- Increased scrutiny or micromanagement
- Exclusion from meetings, projects, or communications
- Unwarranted negative feedback



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Recognizing Retaliation in the Workplace

Timing Matters:

- Retaliatory actions often occur soon after an employee engages in a protected activity.
 - There is no “safe” passage of time, but remember the 90 day window for the presumption of guilt.



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Recognizing Retaliation in the Workplace

Patterns to Watch For:

- Consistent negative treatment following a complaint or report
- Different treatment compared to coworkers in similar roles.



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Common Pitfalls for Employers

Failing to Document Performance Issues

- Lack of objective, consistent documentation makes it difficult to justify employment decisions and defend against claims.
- Incomplete or overly positive appraisals can undermine efforts to address poor performance or support termination.
- Promptly making a record before any "protected activity" happens is important.



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Common Pitfalls

Inconsistent Application of Policies

- Unequal enforcement of rules or corrective action.
- Favoritism or informal exceptions (e.g., allowing some employees to negotiate pay or receive special perks).
- Not following established procedures, such as corrective action or disciplinary processes.



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Training and Education


- Whistleblower Protection Education:** Conduct comprehensive training on Labor Code § 1102.5 which prohibits employer retaliation against employees who report suspected violations of state or federal laws, rules, or regulations.
- Recognition of Protected Activities:** Train managers to identify what constitutes "protected activity" under § 1102.5, including employee disclosures to government agencies, law enforcement, supervisors, or colleagues with investigative authority.



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Training and Education

- Understanding the Rebuttable Presumption:** Ensure managers understand that under SB 497, adverse actions taken within 90 days of protected whistleblower activity create a rebuttable presumption of retaliation.
- Documentation Best Practices:** Teach proper documentation of performance issues and disciplinary actions, warnings/progressive discipline, to demonstrate legitimate, non-retaliatory reasons for employment decisions.
- Complaint Response Protocol:** Establish clear procedures for handling whistleblower complaints and reports of suspected violations with a focus on professionalism and non-retaliation.



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Do's for HR Professionals



- Document** legitimate reasons for all adverse employment actions with detailed performance records
- Implement **clear anti-retaliation policies** that specifically reference Labor Code § 1102.5 protections
- Create multiple **reporting channels** for employees to disclose suspected violations
- Conduct prompt, thorough **investigations** of all whistleblower complaints
- Schedule **independent reviews** of employment decisions following protected whistleblowing activities
- Train managers on **recognizing protected activities** and proper response protocols
- Check in regularly** with employees who have engaged in protected activities

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Don'ts for HR Professionals



- Cautiously take adverse action within 90 days of protected activity (creates rebuttable presumption of retaliation)
- Don't ignore complaints about potential legal violations
- Don't allow managers to discuss whistleblowing activities negatively
- Don't impose confidentiality requirements that could prevent reporting violations
- Don't overlook subtle forms of retaliation like isolation, schedule changes, or increased scrutiny



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Responding to Retaliation Allegations

Immediate Steps to Take

- Acknowledge the complaint without admitting liability or making promises about outcomes
- Document the allegation including dates, names, and specific claims made
- Preserve all relevant evidence including emails, performance reviews, and documentation of employment decisions





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Responding to Retaliation Allegations

Immediate Steps to Take

- Engage a neutral investigator who has no prior involvement with the parties or issues
- Contact legal counsel to discuss strategy and legal obligations
- Implement interim protective measures if necessary to prevent further potential retaliation
- Maintain confidentiality to the extent possible while conducting a thorough investigation





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Thank you!

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