

What is Protected Activity?

WORKSAFE
safety, health, and justice for workers
seguridad, salud, y justicia para los trabajadores



You have the right to be protected in the workplace from hazards and from retaliation if you exercise your right to take action about your health and safety rights or to have knowledge of hazards in the workplace. California Labor Code sections 6310 and 6311 talks about these rights.



Anti-Retaliation Protections

Under Labor Code sections 6310 and 6311, employers cannot retaliate or discriminate against workers that are:

- complaining about safety or health conditions or practices;
- instituting any proceeding related to their rights to safe and healthful working conditions or testifying in any such proceedings;
- participating in an occupational health and safety committee; or
- refusing to perform work where the worker believes that an occupational safety or health standard, or any safety order would be violated and the violation would create a real and apparent hazard to the employee or his or her co-workers.

If any of the following things have happened to you because you have exercised your health and safety rights, you can file a retaliation complaint with the Labor Commissioner, also known as the Division of Labor Standards Enforcement (DLSE). If you acted with another employee, you may file a case with the National Labor Relations Board (NLRB).



What Employer Activities are Considered Retaliation?

Protection from discrimination means that an employer cannot retaliate by taking “adverse action” against workers, such as:

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| Firing or laying off | Blacklisting |
| Demoting | Denying overtime or promotion |
| Disciplining | Denial of benefits |
| Failure to hire or rehire | Intimidation or making threats |
| Reassignment (affects promotions) | Reducing pay of hours |

A CLOSER LOOK AT FOUR TYPES OF PROTECTIVE ACTIVITY

But first of all – what is protected activity? Protected activity can fall into four different types. We always encourage workers to keep these things in mind when they exercise their rights:

1. If possible, engage in protected activity with another worker so that you can also pull in protections for what's called “concerned activity” under the National Labor Relations Act (NLRA). The NLRA protects workers if two or more workers engaged in protected activity.
2. When you decide to exercise your rights, make sure that you have a “**reasonable belief**” that the hazard you are complaining about violates a health or safety rule. You don't have to know the exact rule, regulation, standard or law, but it's important that you understand the basics of health and safety in your workplace and can identify when things are unsafe or when there is a hazard. If you aren't sure, talk to your union rep or Cal/OSHA by calling your local Cal/OSHA office. A listing can be found at: <http://www.dir.ca.gov/dosh/DistrictOffices.htm>.
3. You will have to prove that your employer **knew** that you complained about health and safety to show that they retaliated against you. So it's very important to document that you told your employer about the health and safety issue. You can do this by complaining in writing, following up your complaint in writing, or bringing a coworker to complaint with you.

Let's take a look at the four types of protected activities:

Protected Activity Type 1: you complain about a safety violation or an unsafe condition. The complaint (oral or written) must be to the:

- 1) employer or an agent (supervisor),
- 2) a government agency with statutory responsibility for or assisting DOSH with employee safety or health issues or any other agencies that oversee health and safety such as the California Highway Patrol (CHP), Federal Aviation Administration (FAA), and the Department of Transportation (DOT), or
- 3) worker's representative (union).

Protected Activity Type 2: you are involved in a proceeding related to health and safety (whether related to you or your co-worker). This can include any kind of hearing or investigation process in which the worker provides information regarding health and safety working conditions.

Protected Activity Type 3: you are involved in a health and safety committee.

Protected Activity Type 4: you have refused unsafe work. You must show that the work:

- 1) creates a real and apparent hazard regarding safety and health to you or your co-workers, and
- 2) that you believe that the hazard violates a health and safety standard, order, or law.



Examples of Protected Activity

Here are some examples of protected activity:

1. **Request** an inspection by filing a complaint with the DLSE;
2. **Complain** about job health and safety hazards to: your employer, a labor union, the California Occupational Safety and Health Administration (Cal/OSHA), or other government agency;
3. **Request** and receive information from your employer about hazards you may be exposed to, including Safety Data Sheets (SDSs) for hazardous materials you work with;
4. **Request and receive** information about precautions to take when working with potentially hazardous materials or equipment;
5. **Refuse** an assignment that a “reasonable person” would see as creating “a real danger of death or serious injury,” when there is not enough time to file an OSHA complaint and when you have requested that your employer correct the condition, but it remains dangerous;
6. **Discuss** health or safety matters with other workers;
7. **Request and receive** results of air sampling, noise monitoring, or any other health and safety testing;
8. **Respond** to questions from a Cal/OSHA inspector and point out hazards to the inspector, including telling the inspector about past accidents or illnesses and informing the inspector if your employer has temporarily eliminated hazards during the inspection;
9. **Request and receive** information about procedures to be followed if you are involved in an accident or are exposed to toxic substances;
10. **Report an injury** or illness to your employer – there must be a process that encourages reporting without fear of retaliation. Your state workers’ compensation laws also may have provisions to protect your right to file a claim without retaliation;
11. **Participate** in union activities concerning health and safety matters;
12. **Talk privately** with an Cal/OSHA inspector on a confidential basis; and
13. **Tell an inspector** whether your employer has been notified of hazards and whether you have received training for hazardous work.

WHAT ISN'T PROTECTED ACTIVITY?

Doing Nothing: Unfortunately, if you do nothing before the employer retaliates against you, your lack of action does not constitute “protective activity.” If there is an unsafe working condition and you do absolutely nothing in terms of complaining about the working condition, initiating any proceeding or testifying at a proceeding related to their health and safety rights, participating in an occupational safety or health committee, or refusing to work if you believed there was a safety violation that would create a hazard to you – then it is unlikely that the DLSE can do anything for you.

In addition, the DLSE has reported difficult cases where the worker has done the contrary to filing a complaint. That is, despite alleging an unsafe working condition or hazard on their complaint, the ensuing investigation reveals documentation, submitted reports, or other paperwork by the same worker to the employer attesting to the safety of the work environment or otherwise stating that the workplace was safe.

Complaining *After* the Adverse Employment Action: Cal/OSHA and the Labor Commissioner have reported that they sometimes receive complaints *after* the employee has already been fired, demoted, etc. For example, there is a health and safety issue, but the employee doesn't say anything or doesn't report it. They are fired. The employee then files a Cal/OSHA health and safety complaint. They may also

file a retaliation complaint with the Labor Commissioner. However, the worker may have a hard time proving that they were retaliated against since the adverse job action (being fired, demoted, harassed, etc.) happened before their Cal/OSHA health and safety complaint.

Thus, filing a complaint with Cal OSHA after being terminated would not qualify as retaliation. Of course, if the retaliation was on-going, and the employee is not fired or laid off – but instead, continuing to work at the workplace and continues to experiences on-going retaliation, then it would qualify since it has occurred after a protected activity.