

Worksafe Guide: Filing a DLSE Retaliation Complaint

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



WHAT SHOULD YOU DO IF YOU'VE BEEN RETALIATED AGAINST?

If you have exercised your health and safety rights and you were retaliated against, you should first document in as much detail as possible the protective activity and the employers' reactions. It's best to begin taking notes and keeping copies of documents and records as soon as you experience or witness health and safety issues in the workplace. What you are doing is building the evidence for your case.

This is why it's so important that you receive proper training to recognize health and safety hazards on your job. Your notes are vital as evidence if you should be retaliated against for exercising your health and safety rights.



Things you can do to prove your case:

- Take notes and keep a personal record with times, dates, and details about the unsafe workplace conditions. Remember to include things like:
 - What the lighting was like – was it easy to see?
 - What equipment was around? How noisy it was?
 - How many other workers were around? Who were they?
 - How was your body affected? Did your eyes water? Were you sneezing? Were you dizzy?
 - What was the condition of the workplace? Was the floor wet? What did it smell like?
- Take notes and keep copies of the documents, records, or paperwork that shows an untrue picture of the workplace. For example, some workers have been forced to sign statements about workplace conditions being safe when they were not. If this happened to you, do your best to have a witness, report the incident to Cal/OSHA, or get whatever documentation you can of what happened to you.
- Take pictures of workplace health and safety issues, preferably with an identifiable worker near the worksite – the picture should include details that will be helpful to identify the workplace, the employer, the health and safety hazard, and the worker in the picture (but do not engage in something dangerous for the sake of getting a picture!!);
- Keep all documents provided by their employer of the workplace;
- Take notes at workplace trainings on health and safety, and keep copies of all documents passed out at such trainings (or take a picture of the documents if they are taken away);
- Keep track of workplace health and safety trainings: dates, locations, topic, and how long;
- Keep all paychecks and any documents that come with your paycheck;
- Keep a record of work schedule and work duties, noting any changes;
- Keep a workplace journal and note, with dates, workplace conditions that are observed; and
- Keep all documents the employer provides that indicate any changes in work schedule, pay, position, etc. If the employer does not provide anything, take pictures of the work schedule when it is posted.

THE DLSE COMPLAINT PROCESS

Who can file: Any employee or applicant for employment who believes he/ she was discharged or denied employment or otherwise discriminated against in violation of any law under the jurisdiction of the labor commissioner may file a complaint with the labor commissioner.

Time Period: A complaint alleging discrimination and/or retaliation in violation of the laws under the jurisdiction of the labor commissioner must be filed within **six** months after the occurrence of the alleged discriminatory and/or retaliatory action.

What to include in the complaint: The form used to file a retaliation complaint (DLSE Form RCI 1) can be obtained by calling or visiting any DLSE office or online at the DLSE website: <https://www.dir.ca.gov/dlse/DLSE-Forms-Discrimination.htm>. This form can be found in English, Spanish, Chinese, Korean, Vietnamese, or Tagalog.

Although workers can provide complaints in other languages, take note, however, that it may take some time for the DLSE to get the complaint translated, possibly affecting the investigation. A recent audit by Federal OSHA discovered an untranslated Spanish document in one of the retaliation investigation files audited. The audit noted that the failure to translate the document made “review of the document difficult and potentially affecting the investigation.” Thus, if feasible, enlist support from worker advocates or community agencies to submit the complaint in English to ensure a quicker response to complaints.

THINGS TO REMEMBER BEFORE YOU FILE A DLSE RETALIATION COMPLAINT

(1) Strength in Numbers: Union members are in a much better position to enforce their rights than individual workers. Even if you are not in a union, you will be on firmer legal ground to fight retaliation if you join with at least one co-worker in raising questions or complaints about safety. Under the National Labor Relations Act, actions taken by more than one worker may be eligible for protection because they are “concerted activity.” You can file a retaliation claim with the National Labor Relations Board (NLRB) in addition to filing a retaliation complaint with the DLSE.

(2) Chart Your Course Carefully: If you have a union at your workplace, always raise health and safety questions with it first. If you don’t have a union, consider whether your employer is likely to respond positively to a question or suggestion about safety. If so, you might be able to resolve the problem without conflict. But you should prepare in advance for a hostile response, no matter how unlikely it might seem.

(3) Make Your Safety Complaint to a Government Agency for Additional Protection From Retaliation: Make your complaint to a government agency, such as Cal/OSHA, your local Fire Department, or state or county Health Department, instead of to your employer. An employer who first learns about a safety complaint from an official investigation may hesitate to retaliate because the government is already investigating. However, complaining to the government first is no guarantee against retaliation.

(4) Keep Good Records: Keep dated notes of details and the names of witnesses. If your employer responds orally, make a note of what is said, when and by whom, and the names of any witnesses. It is a good practice to keep your notes on consecutive pages in a bound notebook. Keep copies of any documents. Also keep notes of your regular hours of work and duties; note that there are many forms of retaliation besides being fired.

(5) Keep Records Away From the Workplace: If your employer retaliates against you, you could be prevented from retrieving anything from the job.

(6) Don't Miss Deadlines: If you have been retaliated against for exercising a health and safety right, you have 180 days or six months to file a retaliation complaint with the DLSE. It is best to file by certified mail, because you will have a record that the complaint was received. The NLRB deadline is also six months.

(7) What to Include in Your Complaint – Section 31: The “meat” of the complaint form is Section 31, which allows the worker to go into detail about the retaliation that they experienced. The Labor Commissioner offers a brief “Instruction and Guide” for how to fill out the form.

In this section, the workers should first select which box(es) best apply to the retaliation they suffered. The form provides several selections such as “termination” and “change in hours.” If none of these fit, the worker may fill out the “Other” as well. For the most part, retaliation usually involves some action that is perceived as negative or damaging to the worker.

The form requests information regarding the names of the persons carrying out the adverse action. Please note as many people as the worker believes is involved, even those that may have been “behind the scenes” in making the decision to take an adverse employment action against the worker.

This part also requests information about what happened in the space where the question, “Please describe what happened,” is given. It is important in this section to state that the worker engaged in a protected activity and then, as a consequence, shortly thereafter experienced some adverse or negative employment action.

Make sure the complaint shows these three things:

- (1) the employee engaged in protected activity or activities;
- (2) the employer took an adverse job action against the employee; and
- (3) there is a “causal link” between the employee’s protected activity and the employer’s adverse job action.



Example of Section 31 response

“I was retaliated against after engaging in a protective activity. I was asked by my employer, ABC, Inc., to climb onto a roof with a 45 degree slant to trim tree limbs that were hanging over the roof and not accessible by ladder. There was no fall protection devices for working on the roof. The chainsaw given to me had a serious kickback issue. I was not given any gloves or eye protection to wear. Last week another worker had performed the same job and he slid off the roof after the chainsaw backfired and was seriously injured. I attempted it but slid down the roof as well. I complained to my supervisor, Tom Smith, that I believed the job violated health and safety requirements but he insisted that I do the job anyway. I then refused to perform the job unless there was fall protection and personal protective equipment provided to me. Tom Smith threatened to fire me. I filed a complaint with Cal/OSHA online later that same day. I have attached a copy of the Cal/OSHA complaint to this complaint form. The complaint’s investigation number is: 12345. The next day, Tom Smith told me that he had to move me to work on the Saturday shift, which was only a half-day shift. I lost about 6 hours of pay in making this shift change.”

The most important aspects of this description are as follows:

- The worker has identified who the company is (ABC, Inc.);
- The worker has identified who his/her supervisor was and who it was that took the negative employment action (shift change) on him/her;
- The health and safety issue is identified (roof work without fall protection, no PPEs, and poorly working chainsaw) – the worker does not have to know the exact safety violation, the worker only needs to have a *reasonable belief* that there was a safety violation;
- The worker has identified the protective activity that the worker took (complained to the supervisor and then complained to Cal/OSHA);
- The Cal/OSHA complaint is referenced as well as the Cal/OSHA inspector and a copy of the Cal/OSHA complaint is attached to the DLSE complaint; and
- The worker has identified how the employment action was an adverse action (the worker lost hours and wage earning opportunity as a result of the shift change).

(8) Predicting the Employer’s Defense – Section 32a: The next section asks the question, “What reason would the employer give for the changes that you experienced that are described in question 31 above?” This question helps the DLSE anticipate the potential defenses the employer may provide to explain the employment action experienced by the worker.

It is not uncommon for an employer to offer an explanation for the alleged retaliatory action that would sound reasonable to the DLSE. For example, the employer may say that massive layoffs at the worksite was the reason behind the terminations or that the employer was previously disciplined and had to be let go due to performance reasons. The worker should anticipate any such arguments that may be offered by the employer and provide documentation to support the workers’ claim that he/she experienced retaliation and that the employer’s provided reason is nothing more than a pretext.

The second part of this section asks, “What right did you exercise or action did you take that happened before the change in your employment described in question 31?” The worker may have already provided this answer in section 31, however, simply provide it again. Try to be as detailed and precise as possible. If extra pages are needed, then use them and refer to the additional pages in this section. Although the protected activity does not have to occur right before the adverse employment action, it is important to indicate why the worker feels that the adverse employment action was a result of the protected activity if the activity occurred some time ago.

(9) Establishing Causal Connection – Section 32b: Section 32b asks the question, “Describe how your employer knew about the activity or actions (e.g. exercising your rights) in question 32a?” The response to this question is important for the DLSE to be able to prove a connection between the workers’ protected activity and the adverse employment action that was taken against the worker. If the employer did not know that the worker engaged in the protected acts, then it may be difficult to prove that the employer acted against the worker in retaliation. Thus, it’s very important to show that whoever took the action against the worker knew about the worker’s protected activity.

Some questions that may help elicit answers include:

- Did the worker tell the employer about the health and safety complaint? Did anyone witness this?
- Did another worker or the worker’s supervisor tell the employer about the worker’s complaint or action? Did anyone witness this?
- Did the worker’s supervisor say something to the worker to let him/her know that he/she was aware of the worker’s actions?
- Did the worker’s supervisor say something to someone else indicating that he/she knew about the worker’s actions?
- Did the worker’s name appear on any complaints sent to the employer?

Where to send the complaint:

You can file a complaint yourself, or you can authorize a representative (such as an attorney, your union, a COSH group, or anyone who you designate) to do it for you.

For work performed North of Bakersfield, please mail the completed, signed and dated complaint form to:

Division of Labor Standards Enforcement
Retaliation Complaint Investigation Unit
2031 Howe Ave., Ste. 100
Sacramento, CA 95825

For work performed South of Bakersfield, please mail the completed, signed and dated complaint form to:

Division of Labor Standards Enforcement
Retaliation Complaint Investigation Unit
605 W. Santa Ana Blvd. Bldg. 28, Room 625
Santa Ana, CA 92701

It is important that the worker complete the entire form, providing all the information requested in order to avoid delay in the complaint process. Be sure to sign and date the complaint form. Copies of any supporting documents should be attached to the complaint form. Do not send originals, as they may be lost.

The website explicitly states this: “The complaint form CANNOT be filed electronically or by fax. If your internet browser supports email of pages, DO NOT use this feature to submit your complaint form as an original signature is required. You MUST print and mail a copy of the completed and signed complaint form to the above address.” **KEEP A COPY OF THE COMPLAINT.**

What to do after filing the complaint

Call a few days after submitting the complaint to make sure it was received and logged into the system. Promptly return all calls or written correspondence from the DLSE. Keep your contact information updated, particularly if you are terminated and need to move.

Under the law, the DLSE is supposed to open, investigate, and come to a decision regarding a retaliation complaint within 90 days. Unfortunately, the DLSE’s complaint processing time is still delayed over 300 days. This often makes the DLSE retaliation process untenable for workers facing retaliation who need a quicker response.

A federal audit has also found major concerns with the DLSE investigation process. The Labor Commissioner, Julie Su, has been working hard to tighten up the retaliation investigation process to address some of these issues. However, as of the FAME audit that was just released, some of the investigation issues remain outstanding. These include issues such as: improper screening, lack of interviews of complainants and witnesses, and lack of proper documentation in the investigatory file.