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# Avoiding Workplace Retaliation Claims

Presenters

Mike Sexton

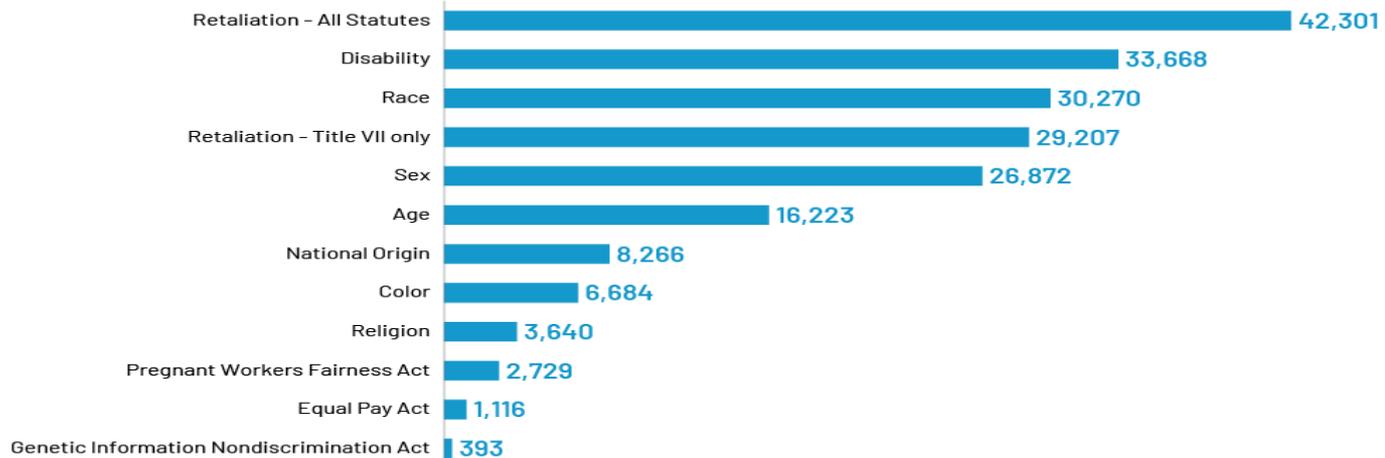
Van Torossian

Tiffany Woods

# Federal Retaliation Claims Are Not Going Away

FY 2024 was the **17<sup>th</sup> consecutive year** in which retaliation claims topped the charts at **47.8%** of the EEOC's total charges

## 2024 EEOC Charges



# Closer to Home in **California...**

- According to the California Civil Rights Department 2024 Annual Report:
  - reporting or resisting any form of discrimination or harassment: 1,775 claims (**43.5%** of all CRD complaints)
  - requesting and/or using some form of leave and/or accommodation: 1,681 claims (**41.2%** of all CRD complaints)

# Recent Retaliation Lawsuit:

- Complaint filed in LASC in **May 2020**.
- Five (5) truck drivers sued their former ER (and 7 managers) for retaliation (including violation of CA Labor Code 1102.5).
- Allegations included being:
  - targeted after reporting safety violations and other violations of law; and,
  - branded as “troublemakers” and that the ER set out to retaliate against them (including termination and/or constructive termination).
- Defense: EEs were poor performers who made complaints against supervisors who were trying to hold them accountable.

# Recent Retaliation Verdict:

- Verdict in **January 2026 (5 years, 8 months)**
- Jury awarded EEs **31.1M** economic damages
- Jury awarded EEs **21.3M** in punitive damages
- **Fees and Costs TBD**

# Key California Statutes

- **Fair Employment and Housing Act (“FEHA”). Govt. Code § 12940(h)**
- **Labor Code § 98.6** – no discrimination or retaliation for complaining/ filing of a complaint for actions in violation of the Labor Code
- **Labor Code § 1102.5** – whistleblower retaliation
- **Labor Code § 1197.5** – no retaliation wage rate inquiries
- **Labor Code § 6310** – no retaliation for complaining about safety and health conditions or practices

and **MANY, MANY MORE...**



# CA Govt Code Section 12940(h)

- “It is an unlawful employment practice...for any employer...to:
  - discharge, expel, or otherwise discriminate against any person
  - because that person has opposed any practices forbidden under this part
  - or because the person has:
    - filed a complaint
    - testified or
    - assisted in any proceeding under this part.”

# CA Labor Code Section 98.6

- Prohibits discrimination and retaliation against an employee (or applicant) who
- Has engaged in any conduct delineated in the CA Labor Code (e.g., filed a DLSE claim, signed a declaration in connection with a PAGA matter, made a written or oral complaint related to wage payment, etc.)

# CA Labor Code Section 1102.5

- (b) ER shall not retaliate against an EE:
  - for disclosing information
  - because the ER believes that the EE has disclosed or may disclose information:
    - to a government or law enforcement agency;
    - *to a person who has the authority over the EE to investigate, discovery or correct the violation or non-compliance; or,*
    - by testifying before any public body conducting an investigation
  - if the EE has reasonable cause to believe that the information discloses a violation of state or federal statute...or violation of or non-compliance with a local, state or federal rule or regulation.



# ***Lawson v. PPG Architectural Finishes, Inc.,*** 12 Cal. 5th 703 (2022)

- CA Labor Code Section 1102.5 case.
- Once the EE has established “by a preponderance of the evidence” that he/she has been retaliated against...
- The ER bears the burden of demonstrating “*by clear and convincing evidence.*”
  - that it would have taken the same action against the EE for legitimate independent reasons.

# CA Labor Code Section 1197.5

- (a) ER shall not pay EEs at wage rates less than rates paid to EEs of another sex for substantially similar work.
- (k) ER shall not retaliate against any EE for any action taken by the EE to invoke or assist in any manner the enforcement of this section.

# CA Labor Code Section 6310

- Prohibits retaliation against EEs who:
  - make any complaint to Cal-OSHA or other governmental agencies regarding employee safety or health.
  - institute and/or testified at any proceeding regarding employee safety or health.
  - participated in any health and safety committee (“IIPP”).



## AND BEWARE...

Recent Amendments to the CA Labor Code create **rebuttable presumptions of retaliation** if an employer takes an adverse action against an employee within ninety (90) days of an employee engaging in “protected activity”.

# 5 Elements to a Retaliation Claim

CACI 2505 (essential factual elements for FEHA Retaliation)

1. Plaintiff engaged in “*protected activity*”
2. Defendant subjected Plaintiff to an “*adverse employment action*”
3. That the PA was a “*substantial motivating factor*” for the AEA
4. Plaintiff was harmed
5. Defendant’s AEA was a substantial factor in causing the harm

# Things to Keep in Mind

Claims of retaliation are independent from the underlying claim

Many statutes provide the specific bases for “Protected Activities”

“Adverse Employment Actions” are broad and hard to identify

**Causation / timing is KEY**

# Common “AEA” Allegations

- Negative comments regarding the protected activity
- Being excluded or singled out
- Change in attitude towards EE
- Increased workload
- Sudden or trivial discipline
- Performance Improvement Plans
- Threats
- Termination



# How Do We Prove Our Case?

What We Have to Prove	How We Prove it
The employee was not treated differently than other employees in a similar situation.	<b>Documentation</b> of other employees' performance management for the same or similar conduct.
There was a legitimate, non-discriminatory reason for the adverse employment action.	<b>Documentation</b> showing the employee has been coached or disciplined about the performance gap or issue consistent with company policy.
The legitimate, non-discriminatory reason was not pretextual (not a lie).	<b>Documentation</b> of company policy and our adherence to company policy, including the timing of <u>when</u> the AEA decision was made and <u>who</u> made the decision.

# What AEAs Should Be Documented?

- Coaching Conversations
- “One on Ones” involving “Constructive Feedback”
- Mistakes / Missed Metrics
- Complaints against EE
- Performance Reviews
- Violations of Company Policy
- Disciplinary Actions (e.g., demotion, reduction in pay, etc.)
- Performance Improvement Plans
- Terminations

**Retain All Documentation (as well as the thought process and individuals involved)**



# Documentation – Best Practices

**Remember:** it's “quality” not “quantity” that will carry the day.

1. Consider who your audience is/will be:
  - documents should be clear and understandable
2. Be specific:
  - supervisors should provide the backup documentation for prior review
3. Document only relevant facts, not opinions:
  - Stick with Who, What, Where, When, Why, and How



# Documentation – Best Practices

## 4. Should be timely:

- any notes should be made and reviewed contemporaneously (and should be dated, legible, etc.)

## 5. Identify meeting participants, and specify if privileged.

## 6. When documenting what someone said, attribute to the appropriate person.

- Notes should state: *“Sally said this is a hostile environment”* not *“This is a hostile environment”*

# Documentation: What Not to Do

1. Don't document or base feedback on gossip or subjective opinions:
  - *"I heard you were late a lot last month."*
2. Don't exaggerate:
  - *"This employee is always late."*
3. Don't jump to conclusions:
  - *"You were late so many times, I have to assume you don't care about this job."*
4. Don't document premature disciplinary conclusions:
  - *"He is going to lose his job over this."*
5. Don't violate company policy just to discipline the EE.
  - *e.g., Company policy allows for 3 call outs but EE is written up after only 2.*

# Examples of Language to **Avoid** in Documentation

Instead of this...	...Consider this
<p><i>“You need to be more of a team player.”</i></p> <p><i>“You are not a ‘good fit’ for the team.”</i></p>	<p><i>“When working with colleagues and supervisors:</i></p> <ul style="list-style-type: none"><li><i>- You are required to provide a written response to all requests for information or assistance within one day. If you cannot prepare a substantive response within one day, inform the sender that you received their message, and provide an estimated timeframe for completion of the request.”</i></li></ul>
Instead of this...	...Consider this
<p><i>“You need to work on your attitude.”</i></p>	<p><i>“On June 11, 2025, several of your colleagues (Mike, Tiffany and Van) saw you raise your voice at your co-worker (Vince). This behavior is not acceptable and is in violation of Company Policy (No. 1234).”</i></p>

## Scenario 1: “The Post Complaint PIP”

- A salesperson complains to HR about her manager’s sexist comments and favoritism.
- 2 weeks later, her manager wants to issue a 60-day PIP for missed revenue targets and “poor customer service”.
- Pre-complaint documentation is thin, but objective revenue/sales metrics show underperformance.



# Scenario 1: “The Post Complaint PIP”

## Issues to consider:

- Temporal proximity and manager’s knowledge of the “Protected Activity.”
- Review the “pre-complaint” documentation
- Review comparators (e.g., did others receive PIPs for similar infractions).
- Consider making changes in reporting structure, shifts, etc.
- Check for any prior complaints of harassment/favoritism against manager and subsequent employee PIPs.

## Scenario 2: “Attendance Discipline After a Safety Complaint”



- A warehouse employee reports heat illness non-compliance to Cal/OSHA (not HR).
- 45 days later, the supervisor wants to give the complaining employee on a “*final*” written warning based on “poor attendance”.
- The complaining employee has a history of migraines and is asking for a modified schedule.

## Scenario 2: “Attendance Discipline After a Safety Complaint”

Issues to consider:

- Labor Code Sections 1102.5 and 6310.
- Temporal Proximity (within 90 days).
- Review Attendance Policy.
- Review Comparators and who had knowledge of the protected activity.
- *FEHA issues: reasonable accommodation and engage in the interactive process.*

# Investigating Retaliation Complaints

## Things to Consider Before the Investigation:

Who should conduct the investigation: HR, In-house counsel, third party investigator, or outside counsel? Consider:

- Potential bias, conflict of interest, skill/training of investigator.
- High risk or high profile issues likely to be litigated.
- Regulatory issues with legal procedures (e.g., SEC whistleblower under Dodd-Frank, etc. (*SEC Whistleblower Reform Act of 2025*)).
- Should it be privileged, how to protect privilege, and when to consider waiving privilege.
- Pending or threatened litigation and/or administrative action.

# Investigating Retaliation Complaints

## During the Investigation:

- Consult in house and/or outside counsel for legal advice if legal issues arise (e.g., SEC, FCPA if an international investigation, etc.).
- No right to counsel in, or recording of, interviews (non-union setting).
- Reluctant witnesses can't be forced. Send email + document in report.
- Prevent scope creep. Park side issues and keep witnesses on point.
- Maintain timely communications with EE.

## After the Investigation:

- Take Remedial Action: if appropriate.
- Consider communications to maintain no adverse impact on "the brand" and/or employee relations.
- Document findings.
- Communicate results to the EE.

## Scenario 3: Social Media “Opposition” vs. Confidentiality Violation

- An employee posts on Instagram that her supervisor makes racist comments at work and shares a screenshot of a Slack thread that includes client information and names.
- Company policy restricts the disclosure of client confidential information.



## Scenario 3: Social Media “Opposition” vs. Confidentiality Violation

Issues to consider:

- Is there any “protected activity.”
- CA Labor Code Sections 1101, 1102 and 1103: is the employee engaging in “political activities.”
- CA Labor Code Sections 96(k) and 98.6: Is the employee engaging in “lawful off duty conduct.”
- National Labor Relations Act: Is the employee engaging in “protected concerted activity.”
- *Remedial action for the underlying complaint.*

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**QUESTIONS?**

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