

# New California Law Makes It Easier for Employees to Establish Retaliation Claims

By Adam Rosenthal © Sheppard Mullin

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**C**alifornia Gov. Gavin Newsom recently signed into law the Equal Pay and Anti-Retaliation Protection Act ([https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=202320240SB497](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB497)). The new law amends California Labor Code sections 98.6, 1102.5, and 1197.5 to create a rebuttable presumption of retaliation ([www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/preventing-workplace-retaliation-california.aspx?\\_ga=2.142927349.1722927491.1701018686-1994856535.1686338393](http://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/preventing-workplace-retaliation-california.aspx?_ga=2.142927349.1722927491.1701018686-1994856535.1686338393)) if an employee experiences an adverse employment action within 90 days of engaging in any protected activity covered by the specified sections.

This new law, which will become effective on Jan. 1, 2024, also entitles a prevailing plaintiff to civil penalties for each violation.

Section 98.6 concerns the exercise of employee rights afforded under the state Labor Code, including engaging in protected conduct related to wage claims, claims arising from violations of the employee's political and civic rights, claims for recovery via the Private Attorneys General Act ([www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/california-paga-questions.aspx](http://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/california-paga-questions.aspx)) (PAGA), and filing a claim or participating in a proceeding relating to employee rights that are under the jurisdiction of the Labor Commissioner.

Feedback

Section 1102.5 concerns whistleblower activity and an employee's right to refuse to participate in conduct that would result in a violation of state or federal laws or regulations. Section 1197.5 concerns protected activity related to California's Equal Pay Act.

## Background

State Senator Lola Smallwood-Cuevas introduced the bill in February. She claimed that the fear of retaliation is still one of the main reasons workers are afraid to report labor violations. She said many retaliation claims were dismissed in large part because the worker had the burden of proof.

In opposition, a coalition of employer organizations, including the California Chamber of Commerce, argued that courts, "already take timing into account when evaluating a retaliation claim ... and should be allowed to consider other factors relevant to the specific case. Creating a presumption simply allows claims to proceed that should not be moving forward, which wastes valuable court and litigant resources."

Retaliation claims center around an allegation that the employer subjected the employee to an adverse employment action because the employee engaged in legally protected activities. Historically, courts applied a three-step burden-shifting analysis.

First, the plaintiff bears the burden of establishing a prima facie case of retaliation by demonstrating that:

- The employee engaged in protected activity.
- The employee experienced an adverse employment action (e.g., separation, demotion, suspension, etc.)
- A causal nexus exists between the protected activity and the alleged adverse action.



Second, if the plaintiff establishes a *prima facie* case, the employer may rebut that presumption by identifying a legitimate, non-retaliatory reason for the adverse employment action. If the employer establishes a legitimate, non-retaliatory motive, the employee must offer evidence to establish that the employer's non-retaliatory reason was pretextual in nature.

#### Changes to the Burden of Proof

The new law creates a rebuttable presumption that an employer has retaliated against an employee if the employee experiences an adverse employment action within 90 days of the employee engaging in protected activity. The new law codifies the notion that the timing of an allegedly adverse employment action following the employee's protected activity obviates the traditional burden-shifting analysis. Instead, the law squarely places the burden of proof on the employer to establish that the adverse employment action was based on a legitimate, non-retaliatory reason, effectively eliminating the plaintiff's need to establish a *prima facie* case by automatically starting the burden-shifting analysis at the second step.

The new law provides that, if an employer retaliated against an employee for Section 1102.5 protected activity, in addition to the other available remedies under the Labor Code, the employer also may be liable for a civil penalty not exceeding \$10,000 per employee for each violation. This civil penalty is already available for Section 98.6 protected activity.

#### Ramifications for Employers

The new law will make it easier for an employee to pursue a claim for retaliation where the employee experiences an adverse employment action within 90 days of engaging in certain protected activities. However, because this is merely a rebuttable presumption, the employer may still articulate a legitimate, non-retaliatory reason for the decision. For example, if an employee complains to her supervisor that she is being underpaid as compared to her male employees, and then two months later the employee's at-will employment is terminated and she brings a Labor Commissioner complaint of retaliation, the Labor Commissioner will presume that the employer engaged in unlawful retaliation, unless and until the employer provides evidence to establish non-retaliatory reasons for the termination. Moreover, the new law does not relieve an employee of the obligation to ultimately offer evidence to establish that the employer's non-retaliatory reason was pretextual in nature.

Time will tell how the new rebuttable presumption standard, along with the new civil penalties, will impact Labor Commissioner hearings and potential PAGA litigation, as well as an employer's ability to dismiss retaliation claims on summary judgment. What is clear is that the new law is another important reminder to employers in the Golden State that they must take employee complaints regarding wages and potential Labor Code violations very seriously and avoid any actions against an employee that could rise to the level of unlawful retaliation. Additionally, the law further serves to remind employers of the importance of documenting legitimate workplace performance issues.

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