

WORKPLACE RETALIATION IS AGAINST THE LAW

FACT SHEET



Civil Rights
Department
STATE OF CALIFORNIA

California law protects the right of most employees and job applicants to oppose discrimination, harassment, and other types of illegal activity at work without fear of job-related consequences.¹

This fact sheet provides an overview of legal protections against workplace retaliation and describes the steps an employee can take if they experience it. The protections described here apply to public and private employers with five or more employees.

Proving retaliation

Retaliation is when an employer fires, refuses to hire, disciplines, or otherwise punishes someone because that person engaged in activities that are protected by the Fair Employment and Housing Act (FEHA), such as speaking out against harassment from co-workers.² It requires proving three things, each of which are discussed in more detail below:

1. The person did something they had a legal right to do (called a legally protected activity).
2. The person experienced work-related harm (called an adverse action).
3. The harm happened at least in part because of the legally protected activity.

Examples of workplace retaliation include:

- Firing someone for refusing to obey an order they reasonably believe is discriminatory³
- Passing someone over for a promotion because they complained about sexual harassment
- Taking someone off the schedule because they encouraged their colleague to request a reasonable accommodation for a disability
- Threatening to contact immigration authorities on

a person who speaks out against discrimination based on national origin⁴

- Transferring someone who complains about gender-based differences in pay to a different location
- Refusing to hire a job applicant because they filed a Civil Rights Department (CRD) complaint against their previous employer
- Excluding someone from professional development opportunities because they speak out against discrimination based on religion

Legally protected activities

In order for illegal retaliation to take place, a person first has to do an activity that is protected by law.

Legally protected activities include:

- Seeking advice from, or filing a complaint with, CRD
- Encouraging someone else to file a complaint with CRD
- Speaking out against harassment, discrimination, or another practice the person reasonably believes is illegal
- Participating in an investigation into workplace harassment or discrimination, such as an

¹ Gov. Code § 12940(h). This factsheet discusses laws the Civil Rights Department enforces. Additional protections from workplace retaliation are available under other laws, including those enforced by the Department of Industrial Relations (<https://www.dir.ca.gov/dlse/RetaliationComplaintProcedure.htm>).

² 2 C.C.R. § 11021.

³ *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028.

⁴ 2 C.C.R., § 11028(e).

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- investigation by the employer's human resources office
- Reaching out to a local advocacy organization, nonprofit, or law firm to discuss a potential discrimination or harassment claim
 - Requesting a reasonable accommodation for a disability or an accommodation for a sincerely held religious belief⁵
 - Requesting a reasonable accommodation for safety purposes after the employee or their family is a victim of certain types of violence
 - Requesting leave from work that is protected under FEHA, including the California Family Rights Act (CFRA), Pregnancy Disability Leave (PDL), and other forms of leave⁶
 - Taking time off to appear in court as a witness or in response to a subpoena⁷
 - Taking time off work to get a restraining order or another type of relief after being a victim of a crime⁸

A person is not required to use legal terminology when opposing discrimination, harassment, or other illegal activity at work. They just have to make it clear they believe their employer may have broken the law.⁹

Adverse employment actions

Proving retaliation requires the employee or job applicant to show they experienced some kind of work-related harm. This is called an adverse employment action, or adverse action. Adverse actions include anything that negatively impacts a person's job performance or ability to move forward

in their career.¹⁰ Adverse actions can be legal and justified, but they are illegal when done in response to the employee or job applicant asserting their rights under FEHA. Sometimes the harm is done by a person representing the employer, like a supervisor or human resources person, but it can also be done by a coworker.¹¹

Examples of adverse employment actions include:¹²

- Refusing to hire, promote, or transfer
- Demotion
- Suspension
- Cutting hours
- Firing
- Reducing pay
- Denying a merit salary increase
- Giving someone an undeserved negative evaluation
- Worsening working conditions
- Intensifying harassment
- Denying employment benefits or opportunities
- Excluding someone from job perks or work-related activities
- Changing a person's work assignments
- Reprimanding an employee

A single event can be an adverse action, as can a series of events – even if the events would not individually rise to the level of an adverse action. Whether something is an adverse action is fact-specific and depends on the circumstances.¹³

5 2 C.C.R. § 11062(d), 11068(k).

6 2 C.C.R., § 11021, 11062(d), 11068(k), 11094; Gov. Code §§ 12945.2, 12945, 12945.6, 12945.7.

7 Gov. Code § 12945.8(a)(2).

8 Gov. Code § 12945.8(a)(2).

9 *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1047.

10 *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal.4th at 1054.

11 *Kelley v. The Conco Companies* (2011) 196 Cal. App. 4th 191, 213 [holding that an employer may be held liable for coworkers' retaliatory conduct if the employer knew or should have known of the conduct and either participated and encouraged it, or failed to take reasonable actions to end the retaliatory conduct].

12 Cal. Code Regs., tit. 2, § 11021(a).

13 *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal.4th at 1052.

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Proving a relationship between the harm and the protected activity

An employee or job applicant has to show they experienced the harm or adverse action at least in part because they engaged in a protected activity.¹⁴ This is called causation.

In order for unlawful retaliation to happen, the employer first needs to be aware that the employee has engaged in a legally protected activity. If an employer does not know an employee has engaged in protected activity, the employee will not be able to prove that an adverse action is in retaliation for engaging in that protected activity. For example, if an employer demotes an employee who has a private, unexpressed belief that their supervisor is behaving unlawfully, the employee will not be able to prove they were demoted in retaliation for their belief – because they never shared their belief with anyone.

Both direct and circumstantial evidence can be used to show causation.¹⁵ Direct evidence includes verbal threats or statements made by the employer.¹⁶ Circumstantial evidence includes:

- The timing of events (for example, comparing how they were treated before engaging in the protected activity to how they were treated after)
- The person's job performance, if it would not ordinarily lead to the type of harm they experienced (for example, someone is fired after engaging in protected activity even though they are a top performing employee)
- The person's treatment compared to other workers (for example, similarly situated workers who did not engage in protected activities were not subjected to any adverse action)

When a fact finder like a court or CRD is considering a retaliation claim, and the employee or job applicant has shown they experienced harm because of their participation in a protected activity, the employer can show there was a legitimate, non-retaliatory reason for the adverse action. For example, an employer can show that someone was suspended because of poor attendance records or performance issues, not because they filed a discrimination complaint.¹⁷

However, the non-retaliatory reason must be the real reason for the adverse action.¹⁸ For example, if an employee who filed a discrimination complaint is suspended for poor attendance, but other employees with similar attendance records who did not file complaints are not suspended, the employee may be able to show that the employer's reason for the demotion (poor attendance) is not the real reason.

If you believe you experienced unlawful retaliation, you may file a complaint with CRD. You must file your complaint within three years from the alleged incident(s).

TO FILE A COMPLAINT

Civil Rights Department

calcivilrights.ca.gov

Toll Free: 800.884.1684

TTY: 800.700.2320

CRD can provide reasonable accommodations for people with disabilities during the complaint process.

CRD will investigate your complaint or issue a right-to-sue so you can pursue your case in civil court. You cannot file an employment discrimination lawsuit in court without receiving a right-to-sue from CRD.

¹⁴ *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal.4th at 1042.

¹⁵ *Colarossi v. Coty US Inc* (2002) 97 Cal.App.4th 1142, 1153.

¹⁶ *Colarossi v. Coty US Inc* (2002) 97 Cal.App.4th 1142, 1153.

¹⁷ *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68.

¹⁸ *Morgan v. Regents of University of California*, 88 Cal.App.4th at 68.