SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2019-2020 Regular Session

AB 1947 (Kalra)
Version: January 17, 2020
Hearing Date: July 30, 2020
Fiscal: Yes
Urgency: No
TSG

SUBJECT

Employment violation complaints: requirements: time

DIGEST

This bill extends the time that workers have to file a claim with the California Labor Commissioner if their employer retaliates against them for exercising their workplace rights under the Labor Code. The bill also authorizes an attorneys' fee award to a worker who prevails on a whistleblower claim.

EXECUTIVE SUMMARY

This bill would make two simple yet significant changes to California law governing workplace retaliation scenarios. The first change involves the amount of time that workers have to file a claim with the Labor Commissioner if their employer fires, demotes, or otherwise retaliates against them for exercising their rights under the Labor Code. Existing law gives workers just six months to file such a claim. In many instances, such a short period does not give workers adequate time and meritorious claims may go unaddressed as a result. This bill would extend the filing deadline to one year. The second change proposed by the bill would authorize an award of attorney fees to a worker who prevails on a claim of retaliation for blowing the whistle on workplace legal violations. Since such an award is not contemplated under the existing statute, the change would generally make it easier for workers with meritorious claims to obtain legal counsel in whistleblower cases such as these.

The bill is sponsored by the California Employment Lawyers Association, the Coalition for Humane Immigrant Rights, the Santa Clara County Wage Theft Coalition, and Service Employees International Union California. Support is from organized labor and workers' rights advocates. Opposition comes from employer and business trade associations, who contend that the current filing deadline is adequate and that the attorneys' fees provision will incentivize attorneys to bring increased litigation.

PROPOSED CHANGES TO THE LAW

Existing state law:

1) Prohibits an employer, or any person acting on behalf of the employer, from discharging or otherwise discriminating, retaliating against, or taking any adverse action against any employee because the employee engaged in certain protected conduct. Allows employees who believe that they been discharged or otherwise discriminated against in violation of any law under the jurisdiction of the Labor Commission to file a complaint with the Division of Labor Standards Enforcement (DLSE) within six months of the occurrence of the violation. (Lab. Code § 98.7.)

2) Prohibits an employer, or any person acting on behalf of the employer, from discharging, retaliating against, and taking any other adverse action against an employee who discloses information about a violation to law enforcement, a government agency, or any supervisor or any other person, including another employee, with authority to investigate the violation. (Lab. Code § 1102.5.)

This bill:

1) Extends the filing period with the DLSE to one year for complaints based on a person's belief that they have been discharged or discriminated against by an employer in violation of any law under the jurisdiction of the Labor Commissioner.

2) Authorizes a court to award reasonable attorneys' fees to an employee plaintiff who brings a successful action for a violation of their right to disclose information that the plaintiff has reasonable cause to believe concerns a violation by the employer of, among other things, a state or federal statute.

COMMENTS

1. Background on workplace anti-retaliation laws and this bill

Workplace anti-retaliation laws are the bedrock upon which all other workplace rights rest. As a practical matter, employees have no real right to minimum wage, overtime, rest breaks, worksite safety, or to be free from harassment if, upon attempting to exercise those rights, they can be fired immediately.

The California Labor Code contains two key workplace anti-retaliation laws. This bill proposes to fortify both of them, each in slightly different ways.

Labor Code Section 98.7 empowers workers to file retaliation claims with the California Labor Commissioner. Such a claim triggers an administrative investigation which, if it bears out the claim, can lead to penalties against the employer and reinstatement of the worker, among other potential remedies. Under existing law, workers must file their

claim of retaliation under Labor Code Section 98.7 within six months of whatever adverse action was taken against them. This bill would extend that deadline to one year.

Labor Code Section 1102.5 is a whistleblower law, providing protection to workers who, in good faith, come forward to disclose legal violations taking place in the workplace. Under existing law, workers who prevail in lawsuits alleging that their employer violated these protections may obtain damages, but they will still be stuck paying their own attorneys' fees, unless they can find another way to convince the judge to make the employer pay. This bill would alter that dynamic by authorizing courts to award reasonable attorneys' fees to a worker than prevails on a claim of retaliation for blowing the whistle on legal misconduct at their workplace.

2. Similar bill last session and Governor's veto

This bill is a narrower version of AB 403 (Kalra, 2019). Whereas this bill would extend the deadline for filing a retaliation claim with the Labor Commissioner from six months to one year, AB 403 proposed to extend the deadline all the way out to two years from the time of the retaliatory act. This Committee approved AB 403 on a 7-1 vote and the bill eventually cleared both houses of the Legislature. AB 403 was then vetoed by Governor Newsom. In rejecting AB 403, however, the Governor strongly suggested he would approve of the narrower approach taken by this bill. In his veto message, the Governor wrote:

> The Legislature has recognized that swift enforcement action by the Labor Commissioner is one of the most effective tools to combat retaliation and mitigate against its chilling effect on the rights of workers. I urge the Legislature to consider an approach that is consistent with other anti-retaliation statute of limitations in the Labor Code which are set to one year.

3. Policy considerations behind extending the administrative filing deadline

This bill's proposed change to Labor Code Section 98.7 is, in effect, an extension of the administrative statute of limitations for making retaliation claims before the Labor Commissioner.

Statutes of limitation serve a variety of purposes. Legal scholars Tyler Ochoa and Andrew Wistrich have explained that, in broad strokes, these legal deadlines promote legal repose, minimize the deterioration of evidence, reward diligence, encourage prompt enforcement of substantive law, avoid retroactive application of contemporary standards, and reduce the overall volume of litigation.[1] On the other hand, short

[1] Tyler T. Ochoa and Andrew Wistrich, The Puzzling Purposes of Statutes of Limitation, 28 Pac.L.J. 453 (1997).

statutes of limitation run contrary to other fundamental public policy concerns. Most notably, public policy favors adjudicating legal claims on their merits, rather than on arbitrary deadlines.[2] This policy consideration may be especially important in the context of protecting people from retaliation for exercising their legal rights. Unlike a contract dispute or personal injury matter, upholding civil rights is not merely a matter of private concern and assessing relative liability between parties. Businesses that play by the rules and the general public have an interest in assuring that people are able to exercise their legal rights freely, as well. For example, if one worker is successfully fired from their job for denouncing dangerous conditions at the jobsite, all of the remaining workers will be imperiled as a result. If the dangerous condition could impact the broader public – by facilitating the spread of an illness, say – then everyone has a stake in ensuring the worker is not silenced by the threat of retaliation.

Apart from the usual considerations associated with determining the appropriate statute of limitation for any legal violation, there may be particular reasons why longer statutes of limitations are appropriate in the context of the workplace where shorter statutes of limitation make sense for other types of claims. Specifically, workers must take their livelihood into account when deciding whether and when to file formal legal allegations against their employer. A worker who wants to denounce their employer immediately upon discovering a violation might rationally wait to do so until they have lined up alternative employment. Even if the aggrieved employee quits immediately after enduring the violation, that employee might nonetheless wait to file a formal complaint against the employer in the hope of maintaining decent relations – and thus decent job references – at least until the aggrieved employee lands a new job. In short, rational financial calculus could, in many instances, lead an employee to wait to file a legal claim with the Labor Commissioner, rather than doing so immediately.

4. Comparison with other statutes of limitation

The author and proponents of this bill contend that the existing six-month window for workers to file retaliation claims under Labor Code Section 98.7 is quite short by comparison with the statutes of limitation for many other legal claims. Several causes of action have one-year statutes of limitation, including defamation (Code Civ. Proc. Sec. 340(c)) and professional malpractice (Code Civ. Proc. Secs. 340.5 and 340.6). Workplace discrimination, harassment, and civil rights-related retaliation claims must be filed within one year under the Fair Employment and Housing Act (FEHA). (Gov. Code § 12960(d).) For most civil causes of action, however, the deadline to file is longer. For example, California law gives people two years to file an action for personal injury (Code Civ. Proc. Sec. 335.1), three years to submit a case for fraud (Code Civ. Proc. Sec. 338(d).), and four years for breach of a written contract. (Code Civ. Proc. Sec. 337.)

[2] *Ibid.*

Proponents of the bill also point out that the current six month filing deadline under Labor Code Section 98.7 is an administrative deadline only; workers have the option of filing a civil claim in court instead, in which case they have a full two years to do so.

In contrast, opponents of the bill point to the Government Tort Claims Act which, like the existing version of Labor Code Section 98.7, requires aggrieved parties to file their claim against a public entity within six months of the incident giving rise to the claim, or lose the opportunity to seek redress. (Gov. Code § 911.2(a).)

5. Policy considerations behind fee-shifting provisions

Ordinarily, under the so-called "American Rule," each party to a lawsuit must bear its own attorneys' fees, regardless of the outcome. (Code of Civ. Proc. § 1021; *Musaelian v. Adams* (2009) 45 Cal.4th 512.) However, the American Rule can be altered by contract or statute. (*Ibid*.) Such changes to the American Rule are known as "fee-shifting provisions."

Fee-shifting provisions may be one-way or two-way. A two-way fee shifting provision entitles the winning party to have its attorney's fees covered by the losing party. A one-way fee-shifting provision only allows one side in a case, usually the plaintiff, to recover attorney's fees, if that side prevails. One-way fee shifting provisions are generally used to help litigants obtain counsel where they might not otherwise be able to afford one. (*Flannery v. Prentice* (2001) 26 Cal.4th 572.) One-way fee-shifting provisions can also be employed to encourage private enforcement of a public policy aim.[3]

This bill proposes a one-way fee shifting provision. If a whistleblower prevails on a retaliation claim, that worker could, under this bill, make the employer pay the whistleblowers attorney fees.

The author and proponents of this bill argue, consistent with the policy considerations just outlined, that the one-way fee shifting provision for whistleblower actions proposed by the bill will give workers who cannot afford to pay an attorney a better chance of obtaining legal representation, thereby increasing access to justice and promoting private enforcement of the public interest in workplaces that are free of retaliation. The fact that low-income workers are often the most vulnerable to workplace retaliation further supports the policy.

In opposition, the California Chamber of Commerce and others see the fee-shifting statute as an incentive for lawyers to engage in ever greater amounts of litigation, to the detriment and distraction of business. It is likely true that, seeing a chance of getting paid for their work through an attorney fees award, some lawyers may take on cases

[3] *See* Krent, *Explaining One Way Fee Shifting* (November 1993) 79 Va. L. Rev. 2039, 2044.

that they otherwise would not. Indeed, as mentioned, creating greater access to legal representation, particularly for low-income workers, is part of the point behind the bill. At the same time, the proposed one-way fee-shifting provision is unlikely to lead to an increase in weak or meritless claims. The prospect of obtaining an attorney fee award will only tempt an economically-rational lawyer to take a case if there is a good chance of winning it. In general, however, the one-way fee shifting provision would likely increase the settlement value of retaliation claims with potential merit, since employers face greater downside risk, in the form of the attorneys fee award against them, if the worker prevails.

Still, if there is to be any fee-shifting in the bill, the Chamber contends that it should at least be a two-way shift. A two-way fee shift would likely have the opposite of the author's intended policy effect, however. Workers with meritorious claims might be dissuaded from bringing them out of fear that something will go wrong and they will wind up with the bill for their employer's legal fees. A more reasonable ask – one not currently made by the Chamber – might be a clause along the lines of those frequently encountered in relation to one-way fee shifting statutes: that the defendant is not entitled to an award of attorneys' fees, even if the defendant prevails in the action, unless the court determines that the plaintiff's case was utterly meritless from the outset, or that the plaintiff continued to litigate the matter even after it became clear that it was meritless. Such a clause at least partially avoids the chilling effect associated with a two-way fee shift, while offering defendants protection against any truly extortionate litigants.

6. Application of the bill to pre-existing claims

The bill is silent about its effect on pre-existing claims. In the absence of clear legislative intent to the contrary, a statute is presumed to operate only prospectively. (*Aetna Cas. & Sur. Co. v. Industrial Acc. Commission* (1947) 30 Cal.2d 388, 393.) In the specific context of legislation, like this bill, that extends a statute of limitation, the California Supreme Court has written that:

> The Legislature has authority to establish—and to enlarge—limitations periods. . . . [H]owever, legislative enlargement of a limitations period does not revive lapsed claims in the absence of express language of revival. This rule of construction grows out of an understanding of the difference between prospective and retroactive application of statutes. . . . As long as the former limitations period has not expired, an enlarged limitations period ordinarily applies and is said to apply prospectively to govern cases that are pending when, or instituted after, the enactment took effect. This is true even though the underlying conduct that is the subject of the litigation occurred prior to the new enactment. . . . However, when it comes to applying amendments that enlarge the limitations

> period to claims as to which the limitations period has expired before the amendment became law—that is, claims that have lapsed—the analysis is different. Once a claim has lapsed (under the formerly applicable statute of limitations), revival of the claim is seen as a retroactive application of the law under an enlarged statute of limitations. Lapsed claims will not be considered revived without express language of revival. (*Quarry v. Doe I* (*Quarry*) (2012) 53 Cal.4th 945, 955-957, internal citations omitted.)

Applying these rules to this bill, it would automatically extend the time to file for incidents that occurred before the effective date of the change in law, but for which the limitations period has not expired. On the other hand, claims based on incidents for which the existing period has expired, or will expire prior to enactment of this bill, would not be revived.

7. Arguments in support of the bill

According to the author:

> Workers who have faced retaliation, especially in the extreme forms of termination or violence, need more time to gather their resources and seek assistance. Without income, they often have to address immediate financial issues, such as finding another job or making arrangements for their family before being able to file a claim. Extending the statute of limitations for filing a worker retaliation claim will give people the opportunity to consider their livelihood and then their next steps for recourse.
>
> Additionally, these workers, often low-wage, have difficulty seeking legal counsel because state law does not allow for attorney's fees for prevailing parties in a claim under Labor Code 1102.5. As a result, few attorneys can offer pro bono services for these whistleblowers who come forward. Three years ago, the Legislature adopted and the Governor signed SB 96 (Chapter 28, Statutes of 2017) into law, which provided the Department of Labor Standards and Enforcement the right to reasonable attorney's fees from the employer if the Labor Commissioner prevails. By providing this same right to private attorneys, AB 1947 will bring parity between public, private, and non-profit attorneys and help low-wage workers obtain legal representation.

As sponsor of the bill, the California Employment Lawyers Association writes:

> […] AB 1947 […] addresses a fundamental equal access to justice problem. Under current law, workers may pursue two avenues to enforce their rights if they are retaliated against for engaging in protected activity. First, the worker could pursue a civil action and would have two years to file a claim. […] The second route a worker could pursue is through the state's Labor Commissioner's office. Here, the worker has only six months to file a claim and is often unrepresented by an attorney. […]
>
> So, which workers are able to access the court system, have a longer period to file their claim, and begin discussions with the employer right away and which workers have only months to file their claim, just to have those claims languish for years before an investigation even begins? Typically, low-wage workers, those who are the most vulnerable to abuse and in need of legal representation, are the ones whose claims get lost or languish in our justice system.
>
> AB 1947 will help address this inequity in our justice system […].

As another sponsor of the bill, the Coalition for Human Immigrant Rights writes:

> Whistleblower protections have always been regarded as one of the most important laws for exposing waste, fraud, abuse by public and private entities, by ensuring that workers are protected when they blow the whistle or participate in investigations involving violations of law. Workers are often the ones who discover these violations, and thus, robust protections for those workers are imperative. […] Two of the biggest barriers workers face when threatened with retaliation is the relatively short timeline for filing a retaliation claim and the difficulty in securing an attorney who can help them navigate the legal process […]. AB 1947 will help address these significant barriers […].

8. Arguments in opposition to the bill

In opposition to the bill, the California Chamber of Commerce and 46 co-signatory organizations write:

> California is already widely perceived as having a hostile litigation environment for employers. One factor that contributes to this negative perception is high damage awards and the threat of attorney's fees in civil litigation that often dwarf the financial recovery the plaintiff actually receives. We do not believe attorney's

> fees should be added; however, if they are added, they should not be one-sided.
>
> Instead, a two-way attorney's fee-shifting provision provides a level playing field for litigation that will help deter any frivolous cases from being filed due to concern that the litigant could ultimately pay for the costs of litigation, including attorney's fees. […]
>
> Both parties should have some financial risk in pursuing litigation in order to minimize frivolous lawsuits that overburden the courts' dockets and preclude valid claims from being resolved on a timely basis.

SUPPORT

California Employment Lawyers Association (sponsor)
Coalition for Humane Immigrant Rights (sponsor)
Santa Clara County Wage Theft Coalition (sponsor)
Service Employees International Union California (sponsor)

9 to 5
Alliance of Californians for Community Empowerment
American Association of University Women
American Civil Liberties Union of California
American Federation of State, County and Municipal Employees
California Asset Building Coalition
California Childcare Resource and Referral Network
California Domestic Workers Coalition
California Employment Lawyers Association
California Federation of Teachers
California Immigrant Policy Center
California Labor Federation
California Latinas for Reproductive Justice
California Partnership
California Rural Legal Assistance Foundation, Inc.
California Women's Law Center
California Work and Family Coalition
Career Ladders Project
The Center for Popular Democracy
Center for Workers' Rights
Child Care Law Center
Church State Council
Communication Workers of America, AFL-CIO District 9
Community Legal Services of East Palo Alto

Consumer Attorneys of California
Disability Rights California
End Hunger!
Equal Rights Advocates
Koreatown Immigrant Workers' Alliance
Legal Aid at Work
Mujeres Unidas y Activas
National Council of Jewish Women
National Employment Law Project
Opportunity Institute
Parent Voices
Public Counsel
Raising California Together
Stronger California Advocates Network
Tradeswomen, Inc.
United Food and Commercial Workers, Western States Council
Voices for Progress
Western Center on Law and Poverty
The Women's Foundation of California
Work Equity
Worksafe

OPPOSITION

Acclamation Insurance Management Services
Agricultural Council of California
Allied Managed Care
Associated General Contractors
Associated General Contractors of California
Brea Chamber of Commerce
California Apartment Association
California Association for Health Services at Home
California Association of Boutique and Breakfast Inns
California Association of Joint Powers Authorities
California Association of Winegrape Growers
California Building Industry Association
California Chamber of Commerce
California Employment Law Council
California Farm Bureau Federation
California Food Producers
California Grocers Association
California Hotel & Lodging Association
California Landscape Contractors Association
California Manufacturers and Technology Association

California Professional Association of Specialty Contractors
California Restaurant Association
California Retailers Association
California Special Districts Association
California State Council of the Society for Human Resource Management
Civil Justice Association of California
Coalition of Small and Disabled Veteran Businesses
Cook Brown, LLP
CSAC Excess Insurance Authority
Flasher Barricade Association
Greater Coachella Valley Chamber of Commerce
Hospitality Santa Barbara
Hotel Association of Los Angeles
Lake Elsinore Valley Chamber of Commerce
League of California Cities
Long Beach Hospitality Alliance
Menifee Valley Chamber of Commerce
Murrieta/Wildomar Chamber of Commerce
National Federation of Independent Business (NFIB)
Official Police Garage Association of Los Angeles
Official Police Garages of Los Angeles
Santa Maria Valley Chamber of Commerce
Society for Human Resource Management
Southwest California Legislative Council
Temecula Valley Chamber of Commerce
Torrance Area Chamber of Commerce
Tulare Chamber of Commerce
Western Electrical Contractors Association
Western Growers Association

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 9 (Reyes, Ch. 709, Stats. 2019) extended the deadline for filing a claim of workplace harassment, discrimination, or civil rights-related retaliation with the Department of Fair Employment and Housing (DFEH) from one to three years.

AB 403 (Kalra, 2019) would have extended the statute of limitations for complaints alleging retaliation for reporting workplace Labor Code violations from six months to two years. In his message vetoing the measure, Governor Newsom wrote: "The Legislature has recognized that swift enforcement action by the Labor Commissioner is one of the most effective tools to combat retaliation and mitigate against its chilling

effect on the rights of workers. I urge the Legislature to consider an approach that is consistent with other anti-retaliation statute of limitations in the Labor Code which are set to one year."

AB 1870 (Reyes, 2018) would have extended the deadline for filing a claim of workplace harassment, discrimination, or civil rights-related retaliation with DFEH from one to three years. In his message vetoing AB 1870, Governor Brown wrote that: "Employees who have experienced harassment or discrimination in the workplace should have every opportunity to have their complaints investigated. I believe, however, that the current filing deadline--which has been in place since 1963--not only encourages prompt resolution while memories and evidence are fresh, but also ensures that unwelcome behavior is promptly reported and halted."

AB 2946 (Kalra, 2018) would have extended the filing period with DLSE to three years for complaints of workplace retaliation for exercising a right under the jurisdiction of the Labor Commissioner. AB 2946 failed passage on the Assembly Floor.

SB 96 (Committee on Budget and Fiscal Review, Ch. 28, Stats. 2017) authorized a court to award reasonable attorneys' fees to the Labor Commissioner if the Labor Commissioner prevails on behalf of a worker in a whistleblower action under Labor Code Section 1102.5.

SB 306 (Hertzberg, Ch. 460, Stats. 2017) authorized the Labor Commissioner to seek an immediate and temporary injunction when workers face retaliation for asserting their rights under the law and gave the Labor Commissioner authority to issue citations and penalties directly to enforce retaliation claims, rather than exclusively through the courts. It also authorized an employee who is bringing a civil action for a retaliation claim to seek injunctive relief from the court.

PRIOR VOTES:

Assembly Floor (Ayes 46, Noes 23)
Assembly Appropriations Committee (Ayes 12, Noes 5)
Assembly Labor and Employment Committee (Ayes 5, Noes 2)

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