SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 497 (Smallwood-Cuevas)
Version: February 14, 2023
Hearing Date: April 25, 2023
Fiscal: No
Urgency: No
ME

SUBJECT

Protected employee conduct

DIGEST

This bill establishes that the penalty assessed against an employer for retaliating against a whistleblower employee does in fact go to the employee, as specified. The bill creates a 90 day rebuttable presumption of retaliation for a negative employment action taken against the employee when the employee exercises a right under Labor Code section 98.6 and the Equal Pay Act (Labor Code Section 1197.5)

EXECUTIVE SUMMARY

As explained by the California Supreme Court, Section 1102.5 of the Labor Code reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation. (*Green v. Ralee Engineering Co.* (1998) 19 Cal. 4th 66). Under current law, penalties up to $10,000 can be assessed against an employer that is an LLC or corporation when the employer retaliates against an employee who was a whistleblower. Under existing law, the penalty does not go to the whistleblower. This bill would require that the penalty go to the whistleblower. The author also seeks to reinforce worker protections by creating a rebuttable presumption that the employer's motivation was retaliatory, if the employer takes any negative employment action against the employee within 90 days of the employee exercising a right under the Equal Pay Act (Labor Code § 1197.5) or Labor Code § 98.6. This bill is sponsored by the California Coalition for Worker Power and supported by employee organizations, including the California Labor Federation. The bill is opposed by employer organizations, including the California Chamber of Commerce. This bill passed the Senate Labor, Public Employment and Retirement Committee with a vote of 4 to 1.

PROPOSED CHANGES TO THE LAW

Existing law prohibits employers and any person acting on behalf of the employer from making, adopting, or enforcing a rule, regulation, or policy preventing an employee from disclosing information to certain entities or from providing information to, or

testifying before, any public body conducting an investigation, hearing, or inquiry if the employee has reasonable cause to believe that the information discloses a violation of a law, as specified. (Labor Code sec. 1102.5 (a).)

Existing law also prohibits an employer or any person acting on behalf of the employer from retaliating against an employee for various reasons, including disclosing information to a government or law enforcement agency, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, as specified. (Labor Code § 1102.5 (b) & (c).)

Existing law provides that in addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding $10,000 for each violation of this provision. (Labor Code § 1102.5 (f).)

This bill establishes that in addition to other remedies, an employer is liable for a civil penalty not exceeding $10,000 per employee for each violation of this provision, to be awarded to the employee or employees who suffered the violation.

Existing law prohibits an employer from retaliating against an applicant or employee because the applicant or employee exercised a right afforded them under the Labor Code. "A person shall not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for employment ... because of the exercise by the employee or applicant for employment on behalf of himself, herself, or others of any rights afforded him or her." (Labor Code § 98.6 (a).) The phrase "any rights" refers to rights provided under the Labor Code. (See *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72, 87, 14 Cal.Rptr.3d 893.)

Existing law provides that an employee who is discharged, threatened with discharge, demoted, suspended, retaliated against, subjected to adverse action, or in any other manner discriminated against in the terms and conditions of their employment because among other things, the employee engaged in protected conduct, as specified, is entitled to reinstatement and reimbursement for lost wages and work benefits caused by those acts of the employer. (Labor Code § 98.6 (b).)

This bill creates a rebuttable presumption in favor of the employee's claim if an employer engages in any action prohibited by this provision within 90 days of the protected activity specified in this provision.

Existing law prohibits an employer from paying an employee at wage rates less than the rates paid to an employee of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except upon a specified demonstration by the employer. (Labor Code § 1197.5 (a) & (b).)

Existing law prohibits an employer from prohibiting an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise these and other rights. (Labor Code § 1197.5 (k)(1).)

Existing law prohibits an employer from discharging or discriminating or retaliating against an employee because of an action taken by the employee to invoke these and other provisions. (Labor Code § 1197.5 (k)(1).)

This bill creates a rebuttable presumption in favor of the employee's claim if an employer engages in any action prohibited by this provision within 90 days of the protected activity specified in this provision.

COMMENTS

1. According to the author

> In today's workplace, the fear of retaliation is still one of the main reasons workers are afraid to report labor violations. This is especially true for Black and Latinx workers who are more likely to experience retaliation. The Department of Industrial Relation's most recent report of retaliation complaints filed with the Labor Commissioner's Office found that just over 90% of retaliation claims were dismissed. In large part this is because when a complaint is filed with the Labor Commissioner's office, the worker currently has the burden of proving that they were retaliated against because they were exercising their rights under the Labor Code. This burden of proof is extremely challenging for a worker who does not have the same level of access to information as the employer. SB 497 would shift the burden of proof from the worker to the employer if the worker is retaliated against within 90 days of engaging in any protected activity under the Labor Code. In this case, the employer would have to prove that any adverse action taken against the employee was because of a legitimate, non-retaliatory reason.

The California Coalition of Worker Power, sponsors of the bill, explain:

> In California, every worker is entitled to safety and dignity on the job. Our strong workplace protections are meaningless if workers are too afraid to speak up when their rights are violated. Retaliation occurs when an employer punishes a worker for exercising their rights, such as by firing or demoting them. For example, an employer illegally retaliates by cutting a worker's hours (and pay) in response to the worker complaining to their supervisor or a government agency that they didn't receive overtime compensation. [. . .]
>
> The Labor Commissioner is unable to prosecute many retaliation claims because it is difficult for workers to show the employer's motivation for taking

negative action was because the worker exercised their rights. The current law creates a perverse incentive for employers to stall instead of cooperating with investigations: they know that workers lack access to the evidence needed to prove retaliation. Our ineffective tools to address retaliation are helping employers keep abuse and exploitation under wraps.

This bill will amend Labor Code Section 98.6 to allow the Labor Commissioner to identify retaliation more quickly and prevent lawbreaking employers from avoiding accountability. If a worker files a retaliation complaint with the Labor Commissioner and shows that their employer took a negative action against them within 90 days after exercising rights under the Labor Code, the employer must prove a legitimate reason for taking that negative action. Similarly, this bill will amend Labor Code Section 1197.5 to add a similar "rebuttable presumption" for any retaliation complaint under the Equal Pay Act. This kind of "rebuttable presumption" of retaliation already exists in other parts of the Labor Code, and is working well in protecting workers from immigration-related retaliation, such as threats of deportation, and retaliation for use of paid sick leave.

The bill would also strengthen Labor Code Section 1102.5, the California Whistleblower Protection Act, by providing some financial relief to whistleblowers who are brave enough to report retaliation. Existing law requires some employers to pay a penalty of up to $10,000 to the State. The bill would make sure that money goes directly to the worker victimized by illegal retaliation. The bill would also amend the law so that employers can't use other corporate forms, such as limited liability partnerships, to evade paying penalties.

2. <u>The problem the author is trying to fix</u>

The author introduced this bill to ensure more consistent retaliation protections for California workers. A recent report found that over 40% of workers indicate that their fear of being fired or disciplined has kept them from pushing for improvements in the workplace.[1] This percentage is higher for Black workers (55%) and Latinx workers (46%). Although 38% of California workers experienced a workplace violation, 10% of those workers actually reported the violation to a government agency. And, 47% did not report the violations to anyone at all. Alarmingly, more than 50% of the workers who reported violations to their employer or to a government agency reported experiencing retaliation by the employer. The report also noted that 51% of working Californians reported that their decision to report a workplace violation in the future would be influenced by concerns about employer retaliation.

[1] National Employment Law Project in concert with the California Coalition for Worker Power, *How California Can Lead on Retaliation Reforms to Dismantle Workplace Inequality.* [date/link]

3. The solution: creating a temporary rebuttable presumption of retaliation for negative employment action taken against the employee when the employee exercises a right under Labor Code § 98.6 and the Equal Pay Act (Labor Code § 1197.5)

To reinforce worker protections, this bill creates a rebuttable presumption that the employer's motivation was retaliatory, if the employer takes any negative employment action against the employee within 90 days of the employee exercising a right under the Equal Pay Act (Labor Code § 1197.5) or Labor Code § 98.6.

A rebuttable presumption of this nature ascribes motivation to the adverse action without the need for evidence of it, at least until the employer offers a different, non-retaliatory basis for its action. Absent the rebuttable presumption, the employee would bear the initial burden of convincing the court that there is a causal link between the employee exercising their right and the adverse action taken; something that will often be difficult to show. The idea behind shifting the burden to the employer is to force the employer to approach taking adverse action with extra care to make sure that there is a valid, non-retaliatory basis for taking the adverse action.

A worker "caught stealing" the day after exercising a right under the Equal Pay Act would be covered by the rebuttable presumption of retaliation, but if the worker was indeed caught stealing, the employer need not hesitate to fire that worker because the rebuttable presumption can easily be refuted in such a case. The rebuttable presumption is not intended to operate, and would not serve, to protect a worker actually caught stealing.

The purpose behind the rebuttable presumption is to make it more difficult to invent a pretext to fire a worker who has just filed a complaint under Labor Code § 98.6 or under the Equal Pay Act, thereby getting rid of the worker who is deemed as a problem for exercising a right under the Equal Pay Act. Temporarily shifting the burden of proof to the employer does not prevent firing workers who misbehave; it just requires that the employer demonstrate that the misbehavior is the genuine reason for the firing.

Opponents of rebuttable presumptions of retaliation often make the argument that such presumptions give bad employees impunity to run wild in the workplace. Yet, it is to account for such situations that the presumption is *rebuttable*. The rebuttable presumption forces the employer to back up its story with valid evidence that the worker truly did something wrong. In other words, temporarily shifting the burden of proof to the employer does not prevent firing workers who misbehave; it just requires that the employer to produce evidence that they had a legitimate reason for an adverse action they took against the employee. Once the employer meets this burden of production (articulating a legitimate reason for taking the challenged adverse employment action), the burden shifts back to the employee to demonstrate that the employer's proffered legitimate reason is a pretext for the retaliation.

Without a rebuttable presumption: in an action in which the plaintiff claims they were terminated for a retaliatory reason, (1) the plaintiff must establish a prima facie case of retaliation, (2) the defendant must then articulate a legitimate nonretaliatory explanation for its acts, and (3) the plaintiff must show that the defendant's proffered explanation is merely a pretext for the illegal termination. To establish a prima facie case, the plaintiff must show that they engaged in a protected activity, the employer subjected them to adverse employment action, and there is a causal link between the protected activity and the employer's action. Pretext may be inferred from the timing of the company's termination decision, by the identity of the person making the decision, and by the terminated employee's job performance before termination. (*Sada v. Robert F. Kennedy Med. Ctr.* (Cal. App. 2d Dist. July 1, 1997), 56 Cal. App. 4th 138.)

Specifically, while the existing protections and burden-shifting framework set forth above would remain in place generally, if this bill were enacted, for cases alleging acts of retaliation taken within 90 days of the time that the employer engaged in a protected activity, the only prima facie case that plaintiffs would have to make is that: (1) the employer knew of the protected activity, and (2) the employer took adverse action against the employee. No causal link would have be shown; the causal link would be presumed due to the proximity in time between when the employer learned that the employee engaged in the protected activity and when the employer took adverse action.

Put another way, if this bill were enacted, the existing burden shifting framework described here would continue to operate generally. However, as to adverse action taken in the first 90 days after the employer learned that the employee engaged in a protected activity, the employee would no longer have to show that engaging in the protected activity was a contributing factor in the employer's decision to take adverse action. The causal connection would be presumed based on the timing, and the employer would then be called upon to rebut it.

This bill creates a 90-day window in the wake of an employee exercising a right under equal pay statutes and Labor Code section 98.6 in which the law would presume a causal link between an employee exercising these rights and the employer taking adverse action against the employee, thus shifting the burden of production to the employer to show a legitimate business reason for having taken the adverse action.

Rebuttable presumptions exist in other provisions of the Labor Code. An example is for whistleblowers. (Labor Code § 1102.5.) There is a rebuttable presumption of retaliation where an employer took an adverse action against an employee within 90 days of the employee blowing the whistle. In the whistleblower context, there is not only a rebuttable presumption but there the employer has the burden of proof to demonstrate by *clear and convincing evidence* that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5. Rebuttable presumption exist in other provisions of the Labor Code (see e.g., Labor code § 246.5; § 432.3; § 1019; § 2105.).

4. Determines that the victim of the wrongdoer is entitled to penalties that are assessed against employers who retaliated against whistleblowers

As explained by the California Supreme Court, Section 1102.5 reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation. (*Green v. Ralee Engineering Co.* (1998) 19 Cal. 4th 66, 77 and 78. Under current law, penalties up to $10,000 can be assessed against an employer when the employer retaliates against an employee who was a whistleblower. When the Labor Commissioner assesses the amount of this penalty, the Labor Commissioner is required to consider respondent's arguments that "the appropriate penalty is below the statutory maximum…[T]he Labor Commissioner shall consider the nature and seriousness of the violation based on the evidence obtained during the course of the investigation. Consideration of the nature and seriousness of the violation will include, but is not limited to, the type of violation, the economic or mental harm suffered, and the chilling effect on the exercise of employment rights in the workplace, and shall be considered to the extent evidence obtained during the investigation concerned any of these or other relevant factors." (8 CCR §13900; 8 CCR §13902.)

This bill does not change what the Labor Commissioner must consider in order to arrive at the amount of civil penalties the wrongdoer must pay for retaliating against the victim. The bill changes who receives the penalty. The bill requires the penalty to go to the employee instead of the General Fund. The bill also expands who must pay penalties for their wrongdoing. Under current law, the penalty can only be assessed against an employer that is a corporation or limited liability company. This bill establishes that the penalty can be assessed against an employer, even if that employer is not a corporation or limited liability company. Staff is unaware of a policy justification for holding an LLC and corporation accountable for retaliating against a whistleblower while not holding other employers accountable for the same type of retaliation.

Whistleblower statutes exist to ensure that employees are not punished by their employers or fear punishment by their employers for letting regulatory entities know about violations of law that employers are engaging in. For example, a worker cannot be fired for letting the Labor Commissioner or OSHA know that the workplace is unsafe. Blowing the whistle can ensure that an environment where workers can be killed is brought to the attention of regulators. This can save lives and limbs.

The author has agreed to an amendment to clarify that the employee who was retaliated against is the person who is to be awarded the civil penalty. The amendment also codifies what the Labor Commission must consider in order to determine the civil penalty amount.

Amendment

(f) (1) In addition to other penalties an employer is liable for a civil penalty not exceeding ten thousand ($10,000) for each violation of this section to be awarded to the employee who was retaliated against.
(2) In assessing this penalty the Labor Commissioner shall consider the nature and seriousness of the violation based on the evidence obtained during the course of the investigation. Consideration of the nature and seriousness of the violation will include, but is not limited to, the type of violation, the economic or mental harm suffered, and the chilling effect on the exercise of employment rights in the workplace, and shall be considered to the extent evidence obtained during the investigation concerned any of these or other relevant factors.

5. Opposition

A coalition, including the California Chamber of Commerce, writes in opposition to the rebuttable presumptions in the bill:

> SB 497 creates a presumption in favor of an employee retaliation claim under Labor Code sections 98.6 and 1197.5 where the alleged adverse action took place within 90 days of the alleged protected activity. Courts already take timing into account when evaluating a retaliation claim. *See Garcia-Bower v. Premier Automotive Imports of CA, LLC*, 55 Cal. App. 5th 961 (2020). While sometimes 90 days may be sufficient to show retaliatory motive, that is not always the case. Depending on the facts of the case, courts have found that 90 days is not sufficient to infer causation. *See, e.g.*, *Clark County Sch. Dist. v. Breeden,* 532 U.S. 268, 273 (2001) (citing cases for the proposition that a three-month time lapse is insufficient to infer causation). For example, a period of 90 days or less may not be sufficient where there has been a positive event between the alleged protected activity and the alleged adverse action, such as a pay raise or promotion. *See Manatt v. Bank of America, NA*, 339 F. 3d 792, 802 (9th Cir. 2003); *Larkin v. Home Depot, Inc.*, No. 13-CV-02868-LB, 2014 WL 7221136, at *15 (N.D. Cal. Dec. 18, 2014).
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> There is no justification for creating a presumption in these two code sections. Courts already take temporal proximity into account when evaluating retaliation claims and the courts 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.

SUPPORT

California Coalition for Worker Power (sponsor)
National Employment Law Project (sponsor)

American Federation of State, County and Municipal Employees
Alphabet Workers Union-CWA Local 9009
Asian Law Alliance
Bet Tzedek
California Conference of the Amalgamated Transit Union
California Conference of Machinists
California Employment Lawyers Association
California Food and Farming Network
California Immigrant Policy Center
California Labor Federation
California Rural Legal Assistance Foundation, INC.
California Nurses Association
California Teachers Association
California Teamsters Public Affairs Council
California Work and Family Coalition
California Women's Law Center
Caring Across Generations
Central California Environmental Justice Network
Central Coast Alliance United for a Sustainable Economy
Center for Workers' Rights
Center on Policy Initiatives
Centro Legal De La Raza
Chinese Progressive Association
CLEAN Carwash Campaign
Consumer Attorneys of California
East Bay Alliance for a Sustainable Economy
Economic Policy Institute
Engineers and Scientists of California, IFPTE Local 20, AFL-CIO
Equal Rights Advocates
GRACE – End Child Poverty in California
Jobs with Justice San Francisco
Koreatown Immigrant Worker Alliance
Lawyers' Committee for Civil Rights of the San Francisco Bay Area
Los Angeles Alliance for a New Economy
Los Angeles County Federation of Labor
Mujeres Unidas y Activas
National Council of Jewish Women-California
National Domestic Workers Alliance
National Employment Law Project
Parent Voices, California
Pesticide Action Network North America
PowerSwitch Action
Santa Clara County Wage Theft Coalition
Santa Clara Wage Theft Coalition
SEIU California

SEIU 721
SEIU-USWW (United State Workers West)
South Bay Labor Council
Southern California Coalition for Occupational Safety and Health
TechEquity Collaborative
UCLA Labor Center
UFCW 770
UFCW Western States Council
UNITE HERE, AFL-CIO
United for Respect
Utility Workers of America
Warehouse Workers Resource Center
Worksafe: Safety, Health, and Justice for Workers

OPPOSITION

Acclamation Insurance Management Services
Allied Managed Care
Associated General Contractors of California
Associated General Contractors San Diego
California Apartment Association
California Association for Health Services at Home
California Association of Sheet Metal and Air Conditioning Contractors National Association
California Association of Winegrape Growers
California Attractions and Parks Association
California Business Roundtable
California Chamber of Commerce
California Farm Bureau
California Hotel & Lodging Association
California League of Food Producers
California Lodging Industry Association
California Manufacturers and Technology Association
California Restaurant Association
California Retailers Association
Coalition of Small and Disabled Veteran Businesses
Construction Employers' Association
Family Business Association of California
Flasher Barricade Association
Housing Contractors of California
Independent Lodging Industry Association
National Federation for Independent Business
Western Growers Association

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 666 (Steinberg, Ch. 577, Stats. 2013) provides for a suspension or revocation of an employer's business license for retaliation against employees on the basis of citizenship and immigration status and established a civil penalty of up to $10,000 per violation.

AB 2990 (Assembly Committee on Labor and Employment, 2001) would have created a rebuttable presumption that if a person discharges, demotes, suspends, or reduces the hours of work or pay of an employee within 90 days after the employee exercised rights enumerated under the Labor Code, the person's action was retaliatory. The bill was vetoed by Governor Gray Davis.

PRIOR VOTES:

Labor, Public Employees and Retirement Committee (Ayes 4, Noes 1)

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