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New California Law Makes It Easier for Employees to Establish Retaliation Claims for Alleged Labor Code Violations

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On October 8, 2023, California Governor Gavin Newsom signed into law Senate Bill No. 497, the "Equal Pay and Anti-Retaliation Protection Act." The new law amends California Labor Code sections 98.6, 1102.5, and 1197.5 to create a "rebuttable presumption of retaliation" 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 January 1, 2024, also entitles a prevailing plaintiff civil penalties for each violation.

Section 98.6 concerns the exercise of employee rights afforded under the 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 (PAGA), and filing a claim or participating in a proceeding relating to employee rights that are under the jurisdiction of the Labor Commissioner. Section 1102.5 concerns certain 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

Senator Lola Smallwood-Cuevas (D-Los Angeles) introduced SB 497 on February 14, 2023. Prior to her election, Smallwood-Cuevas had worked for the UCLA Labor Center from 2004 to 2022, serving as its Project Director for 15 years.[1] Senator Smallwood-Cuevas ran on a campaign platform promising the expansion of workplace anti-discrimination protections.[2]

In advocating the adoption of SB 497, Senator Smallwood-Cuevas claimed that, "the fear of retaliation is still one of the main reasons workers are afraid to report labor violations."[3] She went on to argue that, many retaliation claims are dismissed in large part due to the fact that the worker currently has the burden of proof.[4] The Senator also claimed that the burden of proof is "extremely challenging for a worker who does not have the same level of access to information as the employer. [This bill] would shift the burden of proof from the worker to the employer."[5]

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."[6]

Existing Retaliation Law

Under existing law, retaliation claims center around an allegation that the employer subjected the employee to an adverse

employment action because the employee engaged in protected activities. Historically, where a retaliation claim is brought based on allegations of retaliation for engaging in protected activities under the Labor Code, courts apply a three-step burden-shifting analysis.

First, the plaintiff bears the burden of establishing a *prima facie* case of retaliation by demonstrating that (a) the employee engaged in protected activity; (b) the employee experienced an adverse employment action (e.g., separation, demotion, suspension, etc.); and (c) 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. And finally, 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

SB 497 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 activity protected under any of the Labor Code provisions specified above. The new law essentially codifies the notion that the timing of an allegedly adverse employment action following the employee's engagement in the specified protected activity obviates the traditional burden-shifting analysis. Instead, it squarely places the burden of proof on the employer to establish that the adverse employment action within that 90-day window was based on a legitimate non-retaliatory reason(s), effectively eliminating the plaintiff's need to establish a *prima facie* case by automatically starting the burden-shifting analysis at the second

step.

SB 497 further provides that if an employer is found to have retaliated against an employee for Section 1102.5 protected activity, in addition to the other available remedies under the Labor Code, the employer may also 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.

Impact of the New Law

SB 497 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 resumption, the employer may still articulate a legitimate non-retaliatory reason or reasons 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, SB 497 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.

What's Next

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 SB 497 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.

FOOTNOTES

[1] https://dailybruin.com/2023/03/14/labor-center-celebrates-lola-smallwood-cuevas-election-to-state-senate

[2] https://lolaforca.com/campaign-issues/

[3] https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240SB497#

[4] *Id.*

[5] *Id.*

[6] *Id*.

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