



Employees' Rights When Complaining About Smoking at the Workplace

Protection Against Employee Retaliation in California

This document is intended for employees who have questions about their legal rights when an employer has retaliated against them because they have complained about smoking in the workplace. Employees may wish to share this with their legal advisors.

Q. My employer allows smoking in the workplace. Is this against the law?

A. Yes, probably. California law prohibits smoking in any “enclosed space” at a place of employment. (California Labor Code § 6404.5.) This law prohibits smoking in most workplaces, including offices, restaurants, bars, and gaming clubs. There are a few exceptions to the law. For example, the law may not apply to unenclosed workplaces, retail tobacco shops, and employers with five or fewer employees (other than bars and gaming clubs) who can legally refuse to allow minors on their premises. The law also allows smoking in specially designated and ventilated break rooms.

Q. What can I do if my employer is allowing smoking?

A. You should document the problem by writing down each time and place you have been exposed to tobacco smoke and each step you take to resolve the problem (like talking to your supervisor or employer). If you are a union member, talk with your union representative. If your employer does not resolve the problem, contact your county health department’s tobacco control or tobacco education program (search the web for their contact information). The health department will either follow up on your complaint itself or direct you to the local agency responsible for enforcing the state law. You may be asked to file a formal written complaint with the enforcement agency. If you do this, you may ask to remain anonymous. For additional information, see the “Enforcement” resources on the website for BREATH, the California Smoke-Free Bars, Workplaces and Communities Program, available at: http://breathglobal.org/html/work_index.html.

Q. I am concerned I might lose my job if I complain directly to my employer that someone is smoking in the workplace. Is it legal for my employer to fire me for complaining about smoking?

A. No. Under California law, an employer is prohibited from discharging or discriminating against an employee for making a good faith complaint about working conditions or practices that the employee reasonably believes to be unsafe. (California Labor Code § 6310(b).) This includes

an employee's complaint about hazardous working conditions caused by other employees smoking in the workplace. (See *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290 (1982).)

Q. What if I file a formal complaint that my employer is violating the law? Is it legal for my employer to punish me for reporting a violation of state law?

- A. No. Under state law, an employer may not retaliate against an employee for reporting a violation of a state or federal *regulation to a government or law enforcement agency* (California Labor Code §1102.5(b).) This would include a complaint to your county health department. If the government agency finds a violation of the law, the employer can be punished by imprisonment for one year or less, or a fine of \$1,000 or less. An employer that is a corporation can be fined up to \$5,000. (California Labor Code §1103.) This law does not protect an employee who reports his or her suspicions directly to an employer (see the question above for more on this). You may need an attorney to enforce your legal protection against retaliation.

Q. What can I do if I think my employer is punishing me for my complaint?

- A. An employee may file a complaint with the California Division of Labor Standards Enforcement (DLSE), within six months of the employer's act of retaliation, by filling out a complaint form. More information, including the form, is available at www.dir.ca.gov/dlse. Click on "File a retaliation or discrimination claim" on the left hand side of the page. Your local DLSE office can be found in the telephone directory in the government listings under "California State of, Industrial Relations Department, Labor Standards Enforcement," or at www.dir.ca.gov/dlse/DistrictOffices.htm.

An employee who is fired also may want to bring a lawsuit against the employer for wrongful discharge. See the final question of this fact sheet for advice on how to find a lawyer to do this. Keep in mind that if a lawsuit is filed, you may be required to prove that you were not fired for a reason other than in retaliation for your complaint about smoking.

Q. What will I have to show to prove that my employer is punishing me for my complaint about smoking?

- A. An employee may be required to prove in court that the employer was subject to Labor Code section 6404.5, and that the employee was not fired for other, legally permissible reasons. You could do this by showing that your complaint was made in good faith and your employer's harmful action was in response to that complaint. Circumstantial evidence can help establish that the employer's motive was retaliatory. For example, showing that your employer knew of your complaint and soon thereafter fired or retaliated against you would help create the link between your employer's act and your complaint. (See *Morgan v. Regents of University of Cal.*, 88 Cal. 3d 4th 52 (2000).) Putting your complaint in writing (rather than just telling the employer about it) can help document when your complaint was made.

Q. If I think I have a valid retaliation claim against my employer, how can I find an attorney to represent me in court?

- A. An attorney who specializes in employment law would be most helpful to you. One option is to find an attorney through a local chapter of the State Bar of California Certified Lawyer Referral Services. These local referral agencies will, for a nominal fee (about \$30), arrange a half-hour consultation with an attorney, if one is available and willing to meet with you.

After the half-hour consultation, it is up to you and the attorney to decide whether to bring a case and to arrange future payments for attorney services. To find your local lawyer referral service, see: www.changelabsolutions.org/tobacco-control/resources-tenants. In addition, the California Employment Lawyers Association posts membership contact information on their website at www.celaweb.org. If an attorney is willing to take your case, s/he may do so by charging an hourly fee or by providing legal services on a “contingency fee” basis, which means that the lawyer would only receive a fee if your case is successful (usually a percentage of your award).

Q. What happens if I win my case?

- A. No one can predict in advance exactly what remedies you will receive if you win your case. However, if your complaint with the Division of Labor Standards Enforcement is successful, you *may* be awarded reinstatement to your job, and back pay but not attorney’s fees. If you prevail in court, you *may* be awarded the same remedies, with the possible addition of attorney’s fees and damages for emotional distress and punitive damages.

Q. What happens if I lose my case?

- A. You would not be entitled to your job back or money damages. Additionally, if you have hired a private attorney, you may be required to pay his/her fees, depending on the fee arrangement you have worked out with that attorney.

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