



**Reporting Licensing and Other
Violations in California Child
Care Programs:**

An Employee's Right



**Child Care Employee Project
A Program of the Child Care Staff Education Project**



Reporting Licensing and Other Violations in California Child Care Programs:

An Employee's Right

Prepared by Peyton Nattinger & Staff of the Child Care Employee Project,
with special thanks to The Child Care Law Center
Jan Brown, Arlyce Currie, Mike Marsh

*This project was made possible through funding from the S. H. Cowell Founda-
tion and a Membership Action Grant from the National Association for the
Education of Young Children.*



Introduction

On January 1, 1985 "Remedies for Employer Discrimination" (California Health and Safety Code Sections 1596.880-1596.883) became law. Often referred to as the child care "whistle blowing law", this statute protects employees of child care programs from employer retaliation when the employee reports licensing violations. This anti-retaliation law is modeled after other anti-retaliation laws such as those which protect workers complaining about unsafe working conditions.¹

This pamphlet will assist child care providers in understanding their rights and responsibilities under this law. The effectiveness of this statute depends in large part on all concerned parties being familiar both with their rights, and the Department of Social Services (DSS) licensing standards for child care facilities. The following topics are addressed:

- Why this law is necessary
- What kind of protection the law provides
- Who is protected
- What violations are appropriate to report
- What to do if you think your employer has violated the anti-retaliation law
- The hearing process
- Additional resources

1. California Labor Code Secs. 6310, 6312 & 98.7

Why Is This Law Necessary?

With the exception of child abuse,² California does not mandate the reporting of violations of licensing or other laws in child care programs. However, anyone *may* report such violations.³ Center staff are often the only witnesses to such violations; thus, in many cases, the only method for curing the problem if the center administrator is nonresponsive is for the staff member to report the violation. For example, a teacher may be the only person who knows that not maintaining legal adult/child ratios is a recurring problem in her program. Regrettably, concern for the safety and well-being of children may be in conflict with the child care worker's job security. It is of paramount importance to the child care field that workers be able to maintain safe environments for children without fear of loss of employment or reputation through employer retaliation.

All of those involved in the child care profession are interested in providing safe and healthy environments for young children. Strong and enforceable licensing regulations are an essential ingredient in quality child care. When all members of a staff have equal access to the enforcement of regulations, responsibility is also shared. Employees who show no hesitation in alerting directors and owners to violations in their centers provide significant assistance in maintaining legal and professional standards.

Conflicts between employer and employee do arise concerning licensing issues. However, where rights and procedures are clearly delineated, roles and responsibilities can then be clarified. Staff who are familiar with the regulations governing operation of a center will be better able to determine when a complaint is internal and nonreportable and when it is not.

Hostility and discomfort may well occur in the workplace when licensing violations are reported or employees pursue the remedies this law provides. However unpleasant, these conditions are preferable to jeopardizing children through continued unreported violations or punishing responsible workers for their efforts to uphold professional and legal standards.

Child care providers currently seek improved working conditions and professional recognition. Self-regulation, which is encouraged by this anti-retaliation measure, should have a positive impact on public perception of the child care field.

2. Under the California Child Abuse Reporting Act, all child care providers, as "mandated reporters", must report any instances of suspected child abuse to the proper authorities. The Child Care Law Center's booklet *Reporting Child Abuse*, (see ADDITIONAL RESOURCES) explains providers' rights and responsibilities under this law.

3. California Health and Safety Code Sec. 1596.853



What Kind of Protection Does This Anti-Retaliation Law Provide?

Child care employees are protected from being:

- discharged
- demoted
- suspended
- discriminated against, or
- threatened with any of the above in *retaliation* for reporting a violation of licensing or other laws.

Who Is Protected?

Employers are prohibited from retaliating against any employee who:

1. Makes a *good faith* oral or written complaint of a violation to the responsible agency, or to the employer or her representative.
2. Initiates or causes to be initiated a proceeding against the employer in relation to the violation of any licensing or other laws.
3. Is, or will be, a witness or will testify in a proceeding in relation to the violation of licensing or other laws.
4. Refuses to perform work in violation of a licensing law or regulation after notifying the employer of the violation.

Following are some examples of how individuals would be protected:

- A licensed family day care operator could not discharge an assistant who complains regarding the lack of sufficient seat belts or car seats for children going on a field trip (California Vehicle Code sec. 27360).
- A center owner could not demote the center director who complains about unsafe shelves in a classroom, and, after receiving no response, files a written complaint with the Department of Social Services.
- A center director could not reassign an assistant teacher to a split shift in retaliation for making a child abuse report to Child Protective Services resulting in a full investigation of the center.
- A center administrator could not suspend a teacher who complains to the Department of Social Services about the center's failure to comply with child/staff ratio requirements resulting in a licensing review of the center.
- An administrator could not pass over a teacher's scheduled salary increase as punishment for her testifying at a Division of Labor Standards hearing regarding the employer's retaliation against another employee in violation of the California Health and Safety Code.
- A director could not suspend a teacher who refuses a request to supervise children on outdoor play equipment where there are licensing violations (for example, broken glass, dangerous climbing equipment, etc.) and who notifies the director of these violations, meanwhile preventing children from playing until they are corrected.
- An employer could not threaten an employee with discharge because the employee has agreed to testify against her employer at an administrative hearing where the employer is challenging an assessment of civil penalties.

What Is Appropriate to Report?

Violations of "licensing and other laws" are appropriate for reporting. In other words, what is reported should be a violation of laws designed to protect children such as the licensing laws and regulations found in the California Health and Safety Code and Title 22 of the California Administrative Code, the Child Abuse Reporting Act, California Vehicle Code, local fire and sanitation codes, etc. Local enforcement agencies should be contacted to confirm the regulations in question. For further information, see the **ADDITIONAL RESOURCES** section of this pamphlet.

Other anti-retaliation laws exist to cover the reporting of circumstances regarding the safety and rights of workers. For example:

- Wage and hour claims—Labor Code sec. 98.6
- Unsafe working conditions—Labor Code sec. 6312
- Workers' compensation—Labor Code sec. 132a
- Race, sex, physical handicap, marital status, etc. discrimination—Fair Employment and Housing Act

"Good faith" complaints are those which are legitimate and not intended to be malicious or to harass the employer. Efforts to notify supervisors of the problem and utilize internal grievance or complaint mechanisms show evidence of a good faith attempt to solve the problem or correct the violation before seeking outside help. Sincere effort should also be made to determine which complaints have their basis in personality conflicts, center politics and career frustrations and are, therefore, not appropriate for reporting. In assessing the legitimacy of a complaint, employees are encouraged to consult relevant codes and laws.

In all cases, any employee preparing to file a complaint is urged to maintain careful notes and documentation concerning the violation in question. Specific instances of each violation should be noted along with time, date and other adults present. It is advisable to carefully document any steps taken in attempt to correct the situation, such as notifying a supervisor or raising the subject in a staff meeting.

Posting of Licensing Information

State law requires each licensed facility to post information which:

- Identifies the licensing agency and how licensing regulations can be obtained.
- Gives local telephone numbers where complaints may be made.

- Contains the non-retaliation provision of this law.

Employers are also required to make their copy of current licensing regulations available to employees and parents.

Legitimate Complaints which are not Violations of the Law

Many complaints arising in child care centers, however distressing to those involved, do not result from the violation of any public law. For example:

Violations of center policy when that policy is in addition to public law or regulation. The diaper changing procedure in one infant center requires strapping infants to the changing table for safety. Complaints of staff violating this procedure were dismissed by a DLSE hearing officer because this particular safety measure is not required by licensing.

Professional issues. While DSS licensing regulations protect the health and safety of young children by prohibiting child care providers from using corporal punishment, humiliating discipline or mental abuse, no specific discipline methods are required or endorsed. Thus, a discipline practice such as the frequent use of a "time out chair" might give rise to strong disagreement among providers, but would, nevertheless, not be appropriate for reporting. Likewise, curriculum content and instructional methods are not specified by licensing regulations, vary widely, and are often in dispute. As in other professions, standards of teacher or caregiver conduct are defined by professional associations such as the National Association for the Education of Young Children and its local chapters.

Personnel policies. California and federal labor laws guarantee basic employment rights such as minimum wage, overtime pay, and workers' compensation. Certain aspects of personnel matters such as salary schedules, promotions, benefits, etc., while part of any good collective bargaining agreement or contract, may not be regulated by law. Thus, for example, complaints about a center failing to honor its stated policy of filling positions through "in-house" promotions would not be appropriate for reporting to any regulatory agency. Complaints in many of these areas may be appropriate for pursuing through a center's collective bargaining agreement or other existing policies. The Child Care Law Center or the Child Care Employee Project (CCEP) may be able to assist in determining which complaints pertain to existing laws. Outside agencies such as CCEP may be able to provide direct assistance or resources for resolving complaints not pertaining to the law.

What Do You Do If You Think Your Employer Has Violated The Anti-Retaliation Law?

Where collective bargaining agreements exist, employees should consult grievance procedures or contact union representatives to pursue internal resolution of conflicts through existing means.

Where no collective bargaining exists, and the initial violation (the one the employee reported, etc.) falls under a regulation other than DSS licensing, employees should check the anti-retaliation provision of the regulation in question. Anti-retaliation regulations which have been in operation longer may provide better protection. For example, conditions which make child care centers unsafe for workers violate the California Labor Code and the reporting of such violations is protected by provisions of that code (secs. 6312, 98.7).

If the initial violation falls under Department of Social Services regulations, the employee must seek the protection of Health and Safety Code child care anti-retaliation provisions by:

1. Filing a claim with the employer within 30 days of the retaliatory action. Although not required by law, written claims or records of the complaint are useful for documentation. It is best to send claims to the employer by Certified Mail and request a return receipt to provide further safeguard.
and
2. Filing a written claim with the Division of Labor Standards Enforcement within 60 days of the retaliatory action. Claims may be submitted on or attached to an "Initial Claim of Complaint" form (DLSE #1), available at the nearest DLSE office. As this form was not designed for this specific type of complaint, many questions may not apply and may be disregarded. However, the following information should be included:
 - What act of employer retaliation occurred, and when did it occur?
 - What was the initial complaint concerning licensing or other violations and when was it made? To whom?
 - Was the employer notified concerning this retaliation charge? When and how?
 - What settlement is desired? Specify reinstatement, back wages, "all appropriate relief," etc.
 - That this claim is being filed under the anti-retaliation provision of the California Health and Safety Code (secs. 1596.880-11596.883).

The Hearing Process

Within 30 days, the Division of Labor Standards Enforcement will review the facts and conduct an investigation.

The DLSE may decide that this claim is not within their jurisdiction, and will notify the parties involved. If the claim is found to be within the DLSE's jurisdiction and the necessary information was submitted in the claim, one of two things will occur:

1. A hearing date will be set.

or


2. A decision will be issued by the DLSE based on the information already submitted.

What is a Hearing?

Hearings are informal inquiries conducted by a Deputy Labor Commissioner with both employee and employer present. The DLSE has the power to subpoena witnesses whose testimony might be relevant, or both sides may bring their own witnesses. Anyone testifying in such a hearing is protected by the same anti-retaliation measure. The employee, whose burden it is to prove the retaliation charge, is allowed to present her case first and question her witnesses. This is followed by the employer's case and witnesses. Both sides have the opportunity to cross-examine witnesses. It is important to avoid arguments at this time; both sides will have the opportunity to rebut previous testimony later in the hearing.

Either party may be represented by an attorney or consult one in preparation for the hearing. The Child Care Law Center may be able to provide legal assistance or referrals to those in need. For those preparing for a hearing without the assistance of an attorney, the following steps are suggested:

1. **Reconstruct the chain of events.** What happened and when did it happen? Assemble and review your documentation (notes, memos, correspondence, etc.) of the events.
2. **Think through the facts from the hearing officer's point of view.** Remember she/he knows nothing about you, the center, or the facts of this particular situation. What information will be necessary for someone else to understand your argument?
3. **Make an outline.** Include points you wish to make and the documentation and witnesses whose testimony supports each point.

- 
4. **Plan for your witnesses.** What did they witness and what can they say about it? What questions will you have to ask to get this information out in the hearing? Write out the questions.
 5. **Prepare the witnesses.** Go over the questions with them and have them practice their answers. Try to anticipate the questions your employer will ask them on cross-examination.
 6. **Think about what the other side of the story will be.** Who might their witnesses be? Think of the questions you will ask them on cross-examination.

What happens after a hearing?

The hearing officer will issue a decision and, when necessary, bring appropriate court action to enforce its decision. An employer might, for example, be ordered to reinstate or rehire the employee to her former position with all back pay and benefits, or the employee's claim might be found invalid. If an employer refuses to abide by the division's decision, the DLSE will initiate court action and represent the employee. Employers who refuse to abide by the court's ruling are guilty of a misdemeanor. If the decision is in favor of the employer, and the employee wants to appeal, she must hire a lawyer to institute court action.

Additional Resources

Child Care Employee Project

P.O. Box 5603
Berkeley, CA 94705
(415) 653-9889

Information regarding the following individual handouts and other publications may be obtained by sending a self-addressed, stamped envelope to the Child Care Employee Project:

- Employment Rights, Wages and Hours Laws in California
- Payroll Taxes
- Workers' Compensation Benefits
- Writing Personnel Policies
- Staff Relations
- Grievance Procedures
- Shared Decision Making
- Staff-Staff Relations

Child Care Law Center

625 Market Street
San Francisco, CA 94105
(415) 495-5498

Publications include:

- Reporting Child Abuse
- Child Care Transportation: A Review of California Requirements

List of additional publications is also available upon request.

Division of Labor Standards Enforcement

- 525 Golden Gate Avenue, Room 101, San Francisco, CA 94102
- 107 South Broadway, Room 5015, Los Angeles, CA 90012
- 2422 Arden Way, Suite 50, Sacramento, CA 95825
- 1111 Jackson Street, Room 3023, Oakland, CA 94607



National Association for the Education of Young Children

1834 Connecticut Ave., NW

Washington, DC 20009

1 (800) 424-2460

Write for information about local chapters and publications.

Division of Occupational Safety and Health

(CAL/OSHA Consultation Services)

525 Golden Gate Avenue

San Francisco, CA 94102

(415) 557-2870

(415) 557-2237 (for publications)

Outside San Francisco, call toll-free (800) 652-1476 or look in your telephone directory for: California, State of, Department of Industrial Relations, Division of Occupational Safety and Health, or CAL/OSHA Consultation Services.