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CONSENT CALENDAR

October 2, 2012

To: Honorable Mayor and Members of the City Council
From: Councilmember Kriss Worthington

Subject: Letter to California Department of Labor on Whistleblower Program Flaws

RECOMMENDATION

Send the Division of Labor Standards and Enforcements (DLSE) a letter urging the DLSE to conduct thorough investigations into retaliation complaints by “whistleblowers”.

BACKGROUND

According to Worksafe, a “California-based organization dedicated to eliminating all types of workplace hazards,” the federal Occupational and Safety Health Administration’s (OSHA) audit of California’s State Whistleblower Program, which is housed in the DLSE, confirms “what many suspected, and what low-wage workers who object to unsafe, unhealthy working conditions know all too well: that problems with the Division’s handling of employer retaliation complaints, previously identified by Worksafe and others, remain endemic in California workplaces.”

The Federal OSHA found, among many other things, failures by the DLSE to conduct adequate interviews, to obtain and analyze evidence properly, and to investigate worker complaints in a timely fashion. Additionally, there was evidence that DLSE investigators and supervisors lacked official training on investigating whistleblower complaints, including Senior Deputy Labor Commissioners.

The audit contains twenty-three recommendations for the DLSE to ensure the health and safety of California’s workers. Though the DLSE deserves recognition for its recent efforts to educate workers about their rights, the Labor Commissioner and the DLSE must be reminded of their duty and obligation to review and implement the audit’s recommendations in order to conduct more fair and effective investigations.

For more information go to <http://www.worksafe.org/2012/08/audit.html>

FINANCIAL IMPLICATIONS

None.

CONTACT PERSON

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Attachment:

1. Letter to the DLSE
2. Worksafe Summary of Audit Findings

California Division of Labor Standards and Enforcements—Headquarters
c/o Julie Su, Labor Commissioner, State of California
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102

Dear Commissioner Su and the Division of Labor Standards and Enforcements,

The Berkeley City Council requests that the Division of Labor Standards and Enforcements (DLSE) immediately address the recommendations made in the federal Occupational and Safety Health Administration's (OSHA) audit of the California's State Whistleblower Program. Though the DLSE has made great strides in its efforts to educate workers about their rights, instances of retaliation by employers against low-wage workers who object to unjust and unhealthy working conditions continue to go unchecked.

Protections for whistleblowers are guaranteed by the OSHA to give low-income workers the opportunity to identify and report employer abuse and dangerous work environments. The audit evaluated representative DLSE case files from offices in five cities: Long Beach, Sacramento, San Francisco, San Jose, and Van Nuys. It was stated in the OSHA audit that 90% of those cases reviewed were found to be conducted improperly. Furthermore, it was determined that in California, the amount of, "serious, willful, repeat violations in programmed inspections were significantly below the National average." Other major findings include issues related to proper screening, notification of worker's rights to file and appeal, conducting thorough investigations, and securing proper documentation and evidence.

In summary, the twenty-three recommendations in the OSHA's audit must be reviewed and implemented immediately by the DLSE to insure that California's workers, especially those who earn low income, are able to make their living under fair and safe conditions. The Berkeley City Council thanks the DLSE for their consideration, and urges that these recommendations be addressed as soon as possible.

Sincerely,

Berkeley City Council



Summary of Audit Findings

1. Lack of Training

The problems identified are compounded by the fact that DLSE staff has received little training on investigating 6310 and 6311 whistleblower complaints since 2009; neither investigators nor the Senior Deputy Labor Commissioners have attended OSHA's 1420 Basic Whistleblower Investigations course.

2. Poor Quality of Investigations

Among the most problematic findings affecting low-income workers are:

- (1) Cases were not initially screened properly;
- (2) In 90% of cases reviewed, proper interviews of witnesses or parties were not conducted;
- (3) In 67% of cases, investigators failed to test whether the employers' reasons provided for firing or otherwise penalizing workers were potentially discriminatory;
- (4) In 89% of cases, there was insufficient analysis of the four core elements of a whistleblower retaliation case, which are needed to complete a case record for further evaluation. Lack of interview notes or written settlement agreements and sloppy case files were also noted.

3. Delays and Poor Communication:

Staff often failed to notify the worker-complainant at the beginning of the process, hold a closing conference, send a closing letter, or explain their right to appeal. Delays resulted in a 333-day average duration from case filing to closure, rather than the required 90 days. 96% of cases missed the deadline.

What Needs to Be Done:

The audit's 23 recommendations clearly point out what DLSE must do to ensure that workers are protected from health and safety hazards on the job. They include basic investigatory actions:

- Make arrangements to speak with the whistleblower complainant as soon as possible in order to interview and obtain a signed statement detailing their allegation;
- Conduct further interviews with relevant witnesses in all cases;
- Fairly pursue all appropriate leads which develop during the course of the investigation with respect to both the complainant's and respondent's positions;
- Gather and evaluate all relevant evidence, including interviewing whistleblowers, respondent witnesses who have direct involvement in the case, and third parties with relevant information;
- Look for evidence dealing with protected activity, employer knowledge, adverse action, and nexus (including disparate treatment, pretext, animus, and dual motive) at all stages of the investigation; and
- Provide DLSE investigators and Senior Deputy Labor Commissioners with formal basic training for investigating 6310 and 6311 whistleblower retaliation complaints.

Worksafe is committed to working with the Labor Commissioner and DLSE as it begins to address the audit's recommendations.

