



San Jose Chamber of Commerce



GREATER RIVERSIDE CHAMBERS OF COMMERCE





UPDATED

JOB KILLER

March 21, 2022

The Honorable Maria Elena Durazo
 California State Senate
 1021 O St., Ste. 7530
 Sacramento, CA 95814

**SUBJECT: SB 1044 (DURAZO) STATE OF EMERGENCY: RETALIATION
 OPPOSE/JOB KILLER- AS AMENDED MARCH 15, 2022**

Dear Senator Durazo:

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE** your **SB 1044**, which has been labeled as a **JOB KILLER**. If **SB 1044** were in effect right now, any employed Californian could refuse to show up to work today, regardless of the health and safety precautions taken by their employers. The breadth of the bill would cripple emergency response, ignores existing protections, and undermines Cal/OSHA's existing health and safety procedures.

Existing Cal/OSHA Regulations and State and Federal Laws Include Substantial Safety Protections, Provide Employees the Right to a Safe Workplace, and Protect Employees from Retaliation If Those Laws Are Violated

Workers have significant protections under current law, including a right to refuse dangerous work. All California employers have a legal duty to ensure that the place of employment is safe and healthful. Employers may not require workers to be at a location that is not safe or healthful and must do everything reasonably necessary to protect the life, safety, and health of employees.¹ Across industries and workplaces, employers must at a minimum have 1) an Emergency Action Plan, 2) Fire Prevention Plan, and 3) Injury and Illness Prevention Program.²

¹ See, e.g., Labor Code Sections 6400, *et seq.*

² See 8 CCR 3220; 8 CCR 3221; 8 CCR 3203.

In addition, Cal/OSHA has many hazard-specific regulations which address the issues underlying recent states of emergency in California, including: wildfire smoke, outdoor heat, COVID-19, and Cal/OSHA will soon be issuing regulations specific to indoor heat.³ Specific industries like hospitals or those dealing with electrical equipment are subject to their own additional health and safety standards. These standards were prepared by Cal/OSHA's workplace safety experts in consultation with affected stakeholders. More importantly – these regulations *address the underlying workplace hazards*, meaning that an employee is *already protected from these hazards* in all but the most extreme cases. If an employee reasonably believes that their employer has violated any safety laws and that the work creates a real and apparent safety hazard or there is imminent danger of death or serious injury and the employer fails to eliminate the danger, under both California and federal law they can refuse to work.⁴ They are also protected from retaliation for reporting such conduct.⁵ Cal/OSHA or a court will evaluate whether there were legal violations or evidence of an unsafe workplace. Further, in 2020, the Legislature made it a crime to require an employee to remain in their place of work if there was a notice to evacuate or leave.⁶

SB 1044 completely ignores the protections that these regulations already provide in making long-term emergency topics – such as wildfire and heat – safer for California's workplaces. Instead, this bill just allows workers to walk away regardless of how outdated the state of emergency is or how distant it is from the workplace.

Moreover, any actions taken by the employer would lead to legal perils. An employer who disciplines an employee for leaving the workplace would be subject to a lawsuit and penalties under the Private Attorneys General Act (PAGA). And any employer who replaces the worker in order to keep the workplace functioning or to provide time sensitive services might could face a retaliation suit. In other words – **SB 1044** gives such broad discretion to employees that if they walk away from a completely safe workplace, the employer could do little in response without risking litigation.

SB 1044 Would Cripple Emergency Response and Actually Reduce Workplace Safety

Essential workers are labeled essential for a reason. Their work is vital to a functioning society, especially in times of emergency. Police, firefighters, healthcare workers, couriers, food service workers, agriculture workers and more all provide essential services that others depend on. Some sectors or professions even have legally mandated staffing ratio requirements, such as hospitals. **SB 1044** contains no exceptions for those industries. By failing to consider the safety consequences of allowing emergency response personnel to walk-off the job, **SB 1044** fails to take into account the safety of the public.

Further, its broad applicability raises safety concerns for other employees in the workplace. **SB 1044** does not require workers to give any sort of notice to the employer if they leave or choose not to show up and does not require workers to consider the safety of others in their workplace. In many industries, it is imperative that workers not be left alone while conducting hazardous operations. However, **SB 1044's** lack of notice and consideration for interdependent roles in the workplace will reduce workplace safety. As another example – **SB 1044** undermines employers' evacuation plans (under which employees fulfill critical roles in ensuring the safe departure of others employees during a true emergency) by potentially removing key personnel from emergency response procedures without any notice to the employer.

In addition, a blanket prohibition on employers' ability to restrict use of personal cell phones is also problematic. During an emergency or evacuation, it is often necessary to limit use of cell phones to carry out certain functions or disseminate emergency instructions. An employer may need to place some limitations on the use of cell phones to ensure duties are carried out and that emergency communications can be promptly disseminated.

³ See 8 CCR 5141.1; 8 CCR 3395, 8 CCR 3205-3205.4; [Heat Illness Prevention Indoors - Advisory Meetings \(ca.gov\)](https://www.dir.ca.gov/HeatIllnessPreventionIndoorsAdvisoryMeetings.htm)

⁴ California Labor Code Section 6311; CFR 1977.12.

⁵ Labor Code Sections 1102.5, 6310; CFR 1977.12.

⁶ Labor Code Section 6311.5.

“State of Emergency” is Broadly Defined to Encompass States of Emergency That Last for Years

SB 1044 permits employees to not show up for work or to leave unannounced if they “feel unsafe” during a “state of emergency”. The breadth of the scope of the bill is problematic. “State of emergency” is defined so broadly that it includes any state of emergency, local emergency, or presidential proclamation of major disaster or emergency caused by natural forces. This would encompass essentially every state of emergency.

The issue is that state of emergencies often remain in effect for significant periods of time, long past the time of a pressing emergency. For example, on December 23, 2019, Governor Newsom terminated more than 70 *ongoing* states of emergency that had been declared at various times over the last decade, from January 27, 2011 to November 30, 2018. Just last month, on February 25, 2022, the Governor issued an executive order terminating twelve ongoing states of emergency, some dating back to 2015. Those states of emergency ranged from heat waves to civil unrest to fires to gas leaks.

The March 4, 2020, COVID-19 State of Emergency provides an important example of how **SB 1044** would operate if in effect today. That state of emergency remains in place - despite considerable improvement in California’s COVID-19 status. Presently, we are at the lowest COVID-19 positivity rate since Summer 2021. The California Department of Public Health and Governor have deemed it safe for both adults and children to forego masks, regardless of vaccination status. We have a vaccination rate of 70%, with some cities above 90%. Despite these improvements, under **SB 1044**, every single employee in California would have the right to walk out of work or stay home *indefinitely* simply because the March 4th state of emergency is still in place. All they have to do is say they feel unsafe. *Nothing else is needed*. It is irrelevant whether the employer is following all rules set forth by Cal/OSHA or the Labor Code to address the cause of the state of emergency, whether personnel are needed to provide emergency services to the public, or even if the employer has even gone above and beyond those requirements.

Further complicating matters – as explained above, employers would face a retaliation claim if they try to replace that worker or change their duties as a result of their departure. Even if it was unreasonable for the employee to claim they feel unsafe, it would cost the employer thousands of dollars to prove that in court.

SB 1044 Undermines DOSH’s Scope of Enforcement and Delays Resolution Because It Bypasses PAGA Procedures for Alleged Violations of Workplace Safety Laws

A PAGA plaintiff alleging a violation of a health and safety statute under any provision of Division 5 of the Labor Code must first give notice to the Division of Occupational Health and Safety (DOSH), which is then required to investigate the allegations within a matter of days.⁷ If DOSH issues a citation or takes action, no lawsuit may proceed. If not, the employee may proceed with the lawsuit. This ensures that DOSH is kept aware of all workplace safety issues and unsafe employers are swiftly issued a citation. Importantly, that process is different than the notice process for all other PAGA claims. For any other Labor Code violation, notice is provided only to the Labor Workforce and Development Agency (LWDA). The LWDA is not required to investigate, so plaintiffs usually promptly file a court case.

Because **SB 1044** adds a section to Division 2 of the Labor Code, it bypasses the DOSH notice and investigation process – despite **SB 1044** being focused on workplace safety. This undermines the Legislature’s intent that DOSH enforce health and safety standards and that a citation promptly be issued rather than pursuing a lengthy court case. Instead, **SB 1044** allows private attorneys to profit by bringing a court case without investigation of the claims and *delays* correction of the safety issue.

Data demonstrates that workers are worse off when they pursue a PAGA claim instead of state enforcement. Instead of an immediate citation being issued against the employer, the average PAGA

⁷ Labor Code Section 2699.3(b).

plaintiff waits 18 months for resolution of their case. Private attorneys commonly walk away with 33% of the total agreed-to settlement, while workers and the state get very little. As the LWDA itself has acknowledged, seventy-five percent of PAGA settlements “receive[] a grade of fail or marginal pass, *reflecting the failure of many private plaintiffs’ attorneys to fully protect the interests of the aggrieved employees and the state.*” (emphasis added).⁸ For that reason, **SB 1044** should not bring PAGA into workplace safety, where the legislature has instead intended claims be first investigated by DOSH.

For these and other reasons, we respectfully **OPPOSE** your **SB 1044** as a **Job Killer**.

Sincerely,



Ashley Hoffman
Policy Advocate
California Chamber of Commerce

Acclamation Insurance Management Services
Allied Managed Care
Anaheim Chamber of Commerce
Association of California Healthcare Districts
Auburn Chamber of Commerce
Brea Chamber of Commerce
California Assisted Living Association
California Association of Health Facilities
California Association for Health Services at Home
California Attractions and Parks Association
California Farm Bureau Federation
California Farm Labor Contractor Association
California Grocers Association
California Hispanic Chambers of Commerce
California Hospital Association
California Lodging Industry Association
California Manufacturers and Technology Association
California Restaurant Association
California Special Districts Association
California State Association of Counties
Coalition of Small and Disabled Veteran Businesses
Construction Employers’ Association
Corona Chamber of Commerce
CAWA - Representing the Automotive Parts Industry and Auto Care Association
El Dorado County Chamber of Commerce
Elk Grove Chamber of Commerce
Flasher Barricade Association
Fountain Valley Chamber of Commerce
Fremont Chamber of Commerce
Fresno Chamber of Commerce
Glendora Chamber of Commerce
Greater Coachella Valley Chamber
Greater High Desert Chamber of Commerce
Greater Riverside Chambers of Commerce
Greater Stockton Chamber of Commerce
La Cañada Flintridge Chamber of Commerce
League of California Cities

⁸ 2019 Budget Change Proposal, *PAGA Unit Staffing Alignment*, 7350-110-BCP-2019-MR

Lodi Chamber of Commerce
Long Beach Area Chamber of Commerce
Los Gatos Chamber of Commerce
Modesto Chamber of Commerce
Murrieta/ Wildomar Chamber of Commerce
National Federation of Independent Business
Newport Beach Chamber of Commerce
Oceanside Chamber of Commerce
Orange County Business Council
Orange County Hispanic Chamber of Commerce
Palos Verdes Peninsula Chamber of Commerce
Roseville Area Chamber of Commerce
San Jose Chamber of Commerce
San Marcos Chamber of Commerce
San Ramon Chamber of Commerce
Santa Clarita Valley Chamber of Commerce
Santa Maria Valley Chamber of Commerce
Simi Valley Chamber of Commerce
Tulare Chamber of Commerce
Valley Industry & Commerce Association
West Ventura County Business Alliance
Western Electrical Contractors Association
Western Growers Association
Wine Institute

cc: Legislative Affairs, Office of the Governor

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