"FLOOR ALERT"

May 26, 2021

TO: Members, California State Assembly

SUBJECT: AB 701 (GONZALEZ) WAREHOUSE DISTRIBUTION CENTERS
OPPOSE/JOB KILLER – AS AMENDED MAY 17, 2021

The California Chamber of Commerce and the organizations listed below are **OPPOSED** to **AB 701 (Gonzalez)** as a **JOB KILLER,** as amended on May 17, 2021, because it will harm warehouse employers across California without appreciable benefits to safety. Put simply, **AB 701** will incentivize frivolous litigation based on vague standards, as it creates a new private right of action, increases PAGA litigation, creates a never-ending presumption of retaliation, and creates a duplicative regulation on an area Cal/OSHA has already covered. These are profound policy mistakes which we object to broadly – and in greater detail below.

Background:

Broadly speaking, warehouses are included in a range of industries – from agriculture to retail to manufacturing to logistics – and **AB 701** will hit all of these industries. Across these industries, workplaces commonly use performance metrics and estimates to project when products will be processed and ready to move. Contrary to this norm, **AB 701** starts with a false premise and presumes that performance metrics are inherently unsafe and correlated with workplace injuries. To be clear, our members take workplace safety seriously but cannot operate without estimates for the output of employees or facilities.

In any of these industries, if an employer implements a quota that forces employees to flout existing health and safety laws or denies meal and rest breaks, they are *already in violation of California law*. California *already* requires all employers to provide a safe workplace, develop and update an Injury and Illness Prevention Program, inspect the workplace to correct any unsafe or hazardous conditions, and much more; warehouse employers are not exempt from such requirements. An employee who believes their employer is not following these long-established laws may report that violation and already has protections from retaliation for doing so.

Nor are productivity metrics inherently punitive, as assumed by **AB 701**. Productivity metrics are generally set based on past performance of employees in the aggregate – not an arbitrary, impossible standard set by the employer. Moreover, an employer has no incentive to set unreachably high standards or terminate large numbers of employees for missing a quota. First, unsafe work speeds lead to increased injuries and

related workers' compensation costs, which no employer wants. Second, at a logistical level, unreachable standards lead to inaccurate workflow projections, leading to logistical errors and embarrassing failures. Third, setting unreachable standards would result in widespread discipline of good employees, reduced morale, and increased turnover, which are all counterproductive and expensive. A 2017 study by the Work Institute estimates that the cost of employee turnover is equivalent to about 33% of an employee's annual earnings. Employee turnover also negatively affects productivity, institutional knowledge, volume of product being moved in a facility, not to mention employee morale and motivation. Put simply - it does not make financial sense for a company to impose performance metrics that lead to high rates of injury as suggested by this bill.

In line with these incentives, our coalition's members generally set such performance metrics based on the historical performance of the vast majority of their workforce (after accounting for training and onboarding) – meaning such metrics are designed to parallel the performance of the vast majority of workers. With that foundation in mind, we can turn to the actual provisions of **AB 701**.

AB 701 Creates a New Private Right of Action and PAGA Enforcement for Its Vague Standards.

AB 701 includes a host of new requirements and prohibitions for warehouse employers[1] (discussed below), and then relies on a combination of the Labor Code Private Attorneys General Act (PAGA) and a new, independent private right of action to enforce its terms.[2] These new litigation risks are all the more problematic because they are based on such a vague standard – whether a work speed "prevents compliance with . . . health and safety laws."

To illustrate this problem – compliance with all "health and safety laws" is an incredibly broad topic, which presumably includes everything from washing hands periodically to restroom breaks to compliance with every safety-related regulation and statute. Exactly how much time does each of those activities take, for every employee, on a daily basis? It is hard to determine objectively, even for just one workplace.[3] As a result, this will lead to costly litigation, forcing employers to defend legitimate practices against ambiguous standards or settle to avoid the costs of litigation. The employer, knowing the litigation itself is costly, will be forced to spend money on frivolous claims to either settle or defend itself – neither one of which is fair or reasonable – because the requirements of **AB 701** regarding setting acceptable quotas are simply not clear in their application.

AB 701 Includes a Presumption of Retaliation That Is Potentially Never-Ending.

AB 701 includes a presumption of retaliation if an employer takes any adverse action within 90 days of an employee "[r]equesting information about a quota . . ." (*See* Section 2105(a)). This is problematic, as all presumptions of retaliation are, because they lead to litigation even when discipline is appropriate. However, this presumption is more troubling because it could create a never-ending presumption of retaliation. If an employee makes such a request every three months, then that employee would have a perpetual presumption that any disciplinary action taken was retaliatory. This presumption creates a constant bargaining chip for the employee to leverage a costly settlement from the employer *regardless of whether any actual retaliation occurred*.

In addition, the focus of **AB 701** – speed of work, generally speaking – is categorically different than many other areas where the Legislature provided extra protections for workers – such as protected classes like gender, race, or age – because it is *actually based on the quality of the employee's work.* In other words – here we would be creating a presumption of retaliation that is not based on a protected classification, but

[1] To be clear, **AB 701** applies beyond just the logistics industry into agriculture, retail, and other sectors where goods must be sorted and transported. The bill defines "warehouse distribution center[s]" using the following North American Industry Classification System (NAICS) codes:
"(1) 493110 for General Warehousing and Storage.
(2) 423 for Merchant Wholesalers, Durable Goods.
(3) 424 for Merchant Wholesalers, Nondurable Goods.
(4) 454110 for Electronic Shopping and Mail-Order Houses."

[2] As discussed below, there is additional enforcement by the Labor Commissioner and Cal/OSHA.

[3] As discussed above, for many warehouse employers, daily performance metrics are set based on average past performance (including time necessary for safety compliance), and therefore, as a matter of mathematics, inherently include the time necessary on average for compliance with such safety-related activities.

on the work itself. And if we are considering judging a worker on the quality of their work as retaliatory or discriminatory … what is left as proper grounds for discipline?

AB 701 Creates Two New Regulations Aimed at the Unprecedented Goal of Controlling Exactly How Quickly a Warehouse May Function.

AB 701 requires Cal/OSHA staff to prepare and to propose a new regulatory standard specific to warehouses by January 2023.[4] (See Section 6726). **AB 701** requires the regulation to be "based on work activity levels," measurement of production quotas, and safety data. In simple terms – **AB 701** is drafted to force Cal/OSHA to define production quotas for warehouse employers, which is unprecedented. Neither Cal/OSHA, nor the Labor Commissioner has ever before been given authority to reach into a workplace and define the rate of work to that degree. [5]

AB 701 simultaneously requires the Labor Commissioner to enforce its provisions and permits a regulation to do so (Section 2110), leading to the potential of two competing regulations on this topic. This is particularly bizarre given that Cal/OSHA *already* has an applicable regulation which would apply to the type of musculoskeletal injuries specified in **AB 701**.[6] As a result, warehouse employers will be faced with *three* potential regulations, two of which may take the unprecedented step of governing exactly how quickly the logistics of private employers may operate.

AB 701 Will Not Help Workers and Will Harm Employers.

Under **AB 701**, many employers will be forced to issue a stream of notices depending on the day, shift, and position of every individual worker. Moreover, its provisions will not create any new protections for workers, who already must be provided with a safe workplace and who cannot be retaliated against for asserting health and safety violations. Finally, **AB 701** will create litigation for employers via its PAGA enforcement, a private right of action, and an all-encompassing presumption of retaliation.

Particularly now, as California's economy struggles and warehouses are essential to the distribution of necessary goods, such burdens on workplaces without any appreciable benefit just do not make sense.

For these reasons, we are **OPPOSED** to **AB 701 (Gonzalez)** as a **JOB KILLER.**

Sincerely,

Robert Moutrie
Policy Advocate
California Chamber of Commerce
on behalf of

Auto Care Association
California Beer and Beverage Distributors
California Business Properties Association
California Chamber of Commerce
California Farm Bureau
California Framing Contractors Association
California Grocers Association
California League of Food Producers

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[4] Though not the primary concern of the coalition, we should note that Cal/OSHA's workload may make that timeline unreasonable for drafting on the part of Cal/OSHA's Division of Occupational Safety and Health ("the Division"). The Division handles drafting and enforcement for Cal/OSHA, and is presently (and should remain) fully-focused on COVID-19, and will continue to be so focused until the virus is completely under control, which will likely occur around the end of 2021. Then Cal/OSHA has a backlog of other regulatory matters to work on, including the proposed indoor heat regulation, the workplace violence regulation, and others, which are, in our opinion, not less important than the illusory concerns raised by this bill.

[5] Notably, this attempt is very similar to the early text of last year's AB 3056 (Gonzalez), which sought to have the Labor Commissioner set workplace quotas. (*See* the May 4, 2020 text of the bill – available here: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB3056).
This provision was subsequently amended out in later drafts. (*See* May 11, 2020 amends – available here: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB3056).

[6] Specifically, Cal/OSHA's Repetitive Motion Injuries standard – 8 CCR §5110, available at: https://www.dir.ca.gov/title8/5110.html

California Manufacturers & Technology Association
California Retailers Association
California Trucking Association
CAWA – Representing the Automotive Parts Industry
Civil Justice Association of California
Greater Riverside Chamber of Commerce
International Council of Shopping Centers
International Warehouse Logistics Association
Long Beach Area Chamber of Commerce
NAIOP, The Commercial Real Estate Development Association
Western Growers Association

cc: Legislative Affairs, Office of the Governor
Shubhangi Domokos, Office of Assemblymember Gonzalez
Martin Vindiola, Assembly Labor and Employment Committee
Lauren Prichard, Assembly Republican Caucus

RM:ldl