SB 399 (WAHAB) – OPPOSE/JOB KILLER

JOB KILLER

June 17, 2024

TO: Members, Assembly Appropriations Committee

SUBJECT: SB 399 (WAHAB) EMPLOYER COMMUNICATION: INTIMIDATION
OPPOSE/JOB KILLER – AS AMENDED MAY 2, 2023

The California Chamber of Commerce and the organizations listed below **OPPOSE SB 399 (Wahab)** as a **JOB KILLER**. **SB 399**'s overbroad provisions effectively prohibit any discussion of political matters in the workplace and are unnecessary in light of existing California and federal laws that protect employees from any coercion related to their political beliefs or activities outside the workplace. Further, the bill both violates the First Amendment and is preempted by the National Labor Relations Act (NLRA).

SB 399 Will Effectively Have a Chilling Effect on Any Speech Related to Political Matters

SB 399 effectively prohibits discussions regarding political matters in the workplace. Specifically, it prevents employers from requiring employees to attend "an employer-sponsored meeting" or "participate in, receive, or listen to any communications with the employer" where the purpose is to communicate the employer's opinion "about" political matters. It appears the intent of **SB 399** is to effectively chill any communications by the employer or in the workplace about political matters. There is no clarity in the bill about what qualifies as an "employer-sponsored" meeting or participating in, receiving, or listening to any communications with the employer, which will cause employers to overcorrect and likely not speak on these matters at all. If an employee drives up to work every day and passes a political sign that the employer has out front, is this a communication? Can they request it to be taken down? If the employer does not do so or tries to assign the worker to a different facility so they do not pass the sign, would that be retaliation? What if the employer is hosting a political event and an employee refuses to work at the event? If the employer does not schedule them next time there is a similar event, can the employee try to claim an adverse action based on reduced hours? If an employer sends out communications saying they are supporting a legislative proposal and some employees request to opt out of those communications because they dislike the legislation, how would the employer ensure that employee never again saw any communication on that issue? Recent amendments also *expanded* the bill by removing the exception for managerial or supervisory employees.

Further, **SB 399** will lead to significant consequences. Under **SB 399**, employers could not stop an employee from refusing to participate in meetings or communications regarding pending legislation or regulations. As we saw during the COVID-19 pandemic, it is often crucial that employers be able to communicate with their workers on pending new rules and what it would mean for the workplace. Similarly, if there is legislation pending that would have either a positive impact or detrimental impact on the business or workers' job security, this is something workers would want to know about. This bill will chill that speech and is sure to make companies fearful of weighing in support of or opposition to legislation, candidates, ballot measures, and more.

SB 399 also puts employers in a difficult place regarding restricting individual employees' speech. Under the NLRA, for example, the employer cannot stop an employee from discussing the merits of unionization or from talking to coworkers about how they support a candidate that wants to increase minimum wage. How can an employer simultaneously allow that speech while also ensuring that they are not violating **SB 399**?

The exceptions in the bill are also vague. A "political organization" is undefined, meaning its applicability will be tested through litigation. Similarly, allowing the employer to communicate to employees information "necessary for those employees to perform their job duties" is also sure to be tested through litigation regarding what is "necessary".

Because **SB 399** creates a new section of the Labor Code, any good faith error in interpreting the bill or its exceptions creates liability under the Private Attorneys General Act (PAGA), which carries significant penalties of $100 to $200 per employee per pay period. Because trial attorneys walk away as the winners under PAGA by taking at least one third of the total settlement or court award while workers often get mere pennies, **SB 399** creates an enticing new cause of action for lawyers to manipulate for financial gain.

Existing California and Federal Laws Already Provide Employee Protections

California and federal law already protect against employer coercion related to political matters. For example, the NLRA prohibits employers from making any threats to employees, interfering with or restraining exercise of their rights, coercing employees, or promising benefits to employees for voting a certain way in a union election. *See, e.g.*, NLRA Sections 8(a)(1); 29 U.S.C. §§ 158(a)(1), (c).

Regarding political matters, Labor Code Sections 1101 and 1102 protect employees who engage in political activities and prohibit employers from attempting to coerce or influence employees' political activities. Those sections also prohibit an employer from establishing or enforcing rules that prevent employees from participating in politics or that control or tend to control employees' political affiliations. Further, pursuant to Labor Code Section 96, an employer also cannot discipline or terminate an employee for participating in lawful conduct outside of the workplace. **Therefore, any employer who is coercing an employee to vote a certain way, attend a political rally, support or oppose certain legislation, or to vote for or against a union is already breaking the law**.

SB 399 Violates the First Amendment

SB 399 violates the First Amendment. **SB 399** is a content-based restriction on speech. For example, an employer could require its employees to listen to communications about its opinion on a local sports team, but not about pending legislation. Content-based restrictions on speech are presumptively unconstitutional. The government must show 1) a compelling interest and 2) that the proposal is the least restrictive means of accomplishing that interest. This is a difficult test to meet. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

Even if California could show a compelling interest, **SB 399** is not the most restrictive means of effectuating that interest, as shown by existing laws that already protect employee political activity as described above. **SB 399's** broad sweep is also problematic here. By covering anything "about" politics or religion, it would prohibit entirely innocuous speech. *ACLU of Nevada v. Heller*, 378 F.3d 979, 981 (9th Cir. 2004). The definition of political matters is also extremely broad. In *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), the U.S. Supreme Court ruled a Minnesota law prohibiting people from wearing "political insignia" at polling places was unconstitutional because the definition of political was "unmoored." The Court was particularly troubled that insignia reading only the word "Vote!" would violate the law. The same ambiguity exists here.

SB 399 also effectively prohibits employers from providing a forum for discussion, debate and expressing their opinions regarding matters of public concern, which is protected under the First Amendment. That holds true whether the speaker is an individual or a corporation. *First Nat. Bank of Boston v. Belloti*, 435 U.S. 765 (1978).

Further, it is clear that the motive behind **SB 399**'s prohibition on employers discussing their opinions about unionization or pending bills is the assumption that employers will talk to their employees about the downsides of unionization and union-sponsored efforts, which the proponents of this bill disagree with. That is clear viewpoint-based discrimination, which also runs afoul of the First Amendment.

Finally, proponents claim there is a First Amendment right not to listen to speech. Some limitations may apply to unique circumstances, but there is no general First Amendment right not to listen to speech one doesn't like. *See Berger v. City of Seattle*, 569 F.3d 1029, 1053-55 (9th Cir. 2009) (discussing cases). Employees are already protected by law against coercion, discrimination, retaliation, and hostile

environment harassment. Within those boundaries, employers have the same First Amendment right as any person, natural or corporate, to state their views.

SB 399's Prohibition Against Employers Speaking About Unionization is Preempted by the NLRA

SB 399 forbids employers from requiring employees to attend "an employer-sponsored meeting" or "participate in any communications with the employer" where the purpose is to communicate the employer's opinion about the decision to join or support a labor organization.

That provision is preempted by the NLRA. The NLRA comprehensively regulates labor matters in the United States. *See, e.g.*, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 241 (1959); *Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp. Rels. Comm'n* ("Machinists"), 427 U.S. 132, 144 (1976). State law is preempted by the NLRA where it interferes with the NLRB's interpretation and enforcement of the NLRA, regulates activity that the NLRA protects, prohibits, or arguably protects or prohibits, or regulates conduct that Congress intended to be left to the "free play of economic forces". *Id*.

Employers have the right to express their views and opinions regarding labor organizations. NLRA Section 8(c) following the enactment of that section, the NLRB stated that Congress had intended for both employers and unions to be free to influence employees as long as the speech is noncoercive. The United States Supreme Court also held that Section 8(c) of the NLRA has been interpreted as implementing the First Amendment for employers and as congressional intent to encourage free debate on issues between labor and management, rebuking the position that employer meetings on this topic should be banned as inherently coercive. *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008); *See also Healthcare Ass'n of New York State, Inc. v. Pataki*, 471 F.3d 87, 98 (2d Cir. 2006). (Section 8(c) "not only protects constitutional speech rights, but also serves a labor law function of allowing employers to present an alternative view and information that a union would not present.") The Court also interpreted Section 8(c) as precluding the regulation of speech about organizing as long as the speech does not violate other provisions of the NLRA, such as containing threats or promising benefits for voting or not voting for the union. *Brown*, 554 U.S. at 68. It characterized the NLRA as a whole as favoring robust, uninhibited debate in labor disputes. *Id*.

Based on the above, it is evident that the NLRA protects the employer's right to require employee attendance in meetings or participation in communications regarding its opinion on union organizing. Further, Section 8(c) was intended to create the "free play of economic forces" by encouraging debate on the issue of unionization. **SB 399**'s prohibition on employers' rights and interference with free debate over the issue of labor organizing means it is clearly preempted by the NLRA.

Similar laws have been enacted four times in other states. One was struck down, one was repealed because the state *agreed* that the provision was preempted by the NLRA, one lawsuit was dismissed solely based on a ripeness issue, and the fourth is presently in litigation.

In striking down a Milwaukee ordinance containing a similar provision, the Seventh Circuit stated:

> [T]he ordinance [requires] that "no employee, individually or in a group, shall be required to attend a meeting or event that is intended to influence his or her decision in selecting or not selecting a bargaining representative." § 31.02(f)(7). **Federal labor law allows employers to require their employees to attend meetings, on the employer's premises and during working time, in which the employer expresses his opposition to unionization**. *Beverly California Corp. v. NLRB*, 227 F.3d 817, 846 (7th Cir. 2000); *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 406 (1953) . . . . the employer could never require any of its employees to attend a meeting at which it expressed opposition to unionization. This would give the union a leg up to organize the company's entire workforce even if the vast majority of the employees' time was devoted to the employer's private contracts. That is the kind of favoritism that the National Labor Relations Act anathematizes.

Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County, 431 F.3d 277, 280 (7th Cir. 2005) (emphasis added).

When Wisconsin passed a similar statute in 2009, it was also challenged on preemption grounds. Notably, **the state agreed that the law was preempted by the NLRA** and signed a joint stipulation with the plaintiff requesting the court to enter a judgment to that effect. *See* Stipulation, *Metropolitan Milwaukee Ass'n of Commerce et al. v. Doyle et al.*, No. 2:10-cv-00760 (E.D. Wi. Nov. 4, 2010).

Oregon's law was also challenged, but the court never reached the merits of the case because it was dismissed on ripeness grounds. Connecticut's law is currently in litigation. **A prior version of the Connecticut law failed because Connecticut's then Attorney General issued an opinion that the bill was likely preempted by the NLRA.** *See* Preemption of House Bill 5473, 2018 WL 2215260 (Conn. A.G. Apr. 26, 2018).

For these and other reasons, we are **OPPOSED** to **SB 399** as a **JOB KILLER**.

Sincerely,

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Torrance Area Chamber of Commerce, Donna Duperron
Tri County Chamber Alliance, Jim Dantona
Tulare Chamber of Commerce, Donnette Silva Carter
Vacaville Chamber of Commerce, Debbie Egidio
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Western Electrical Contractors Association (WECA), Rex Hime
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