June 7, 2024

The Honorable Lola Smallwood-Cuevas
Chair, Senate Committee on Labor, Public Employment and Retirement
1021 O St. Ste. 6740
Sacramento, CA 95814

RE: **AB 2421 (Low) Employer-Employee Relations: Confidential Communications.**
OPPOSE *(As Introduced 02/13/24)*

Dear Senator Smallwood-Cuevas,

The League of California Cities (Cal Cities), California State Association of Counties (CSAC), California Special Districts Association (CSDA), Rural County Representatives of California (RCRC), Urban Counties of California (UCC), the Association of California Healthcare Districts (ACHD), Public Risk Innovation, Solutions, and Management (PRISM), California Association of Joint Powers Authorities (CAJPA), Community College League of California, the California Association of Recreation and Park Districts (CARPD), the Association of California School Administrators (ACSA), and the California School Boards Association (CSBA), write to inform you of our respectful opposition to Assembly Bill (AB) 2421 (Low). This bill would restrict an employer's ability to conduct internal investigations to the detriment of employees' and the public's safety and well-being. The bill also states its intent to establish an employee-union representative privilege in the context of California public employment and to supersede *American Airlines, Inc. v. Superior Court*, 114 Cal.App.4th 881 (2003).

Previous Legislation and Previous Veto

Our concerns with AB 2421 are consistent with the issues raised in response to similar legislation (AB 418 (Kalra, 2019)) and reflected in the veto message to AB 729 (Hernandez, 2013)). *"I don't believe it is appropriate to put communications with a union agent on equal footing with communications with one's spouse, priest, physician or attorney. Moreover, this bill could compromise the ability of employers to conduct investigations into workplace safety, harassment and other allegations." – Governor Jerry Brown*

Limits the Ability for Local Agencies to Conduct Thorough Internal Investigations

In order to conduct proper investigations that uphold the public's trust and ensure the safety and well-being of both public employees and the public, it is critical that a public employer has the ability to interview all potential parties and witnesses to ascertain the facts and understand the matter fully. AB 2421 interferes with the ability to interview witnesses because it would prohibit public agencies from questioning any employee or employee representative regarding communications made between an employee and an "employee representative." In doing so, this bill would permit the silencing of employees who wish to voluntarily report an incident or testify in front of necessary employer investigations into misconduct. I would also limit the ability of employers to conduct investigations into workplace safety, harassment, and other allegations.

Under this bill, the employee or the "employee representative" could at will decide to apply privilege over virtually any work-related communication. This could be problematic regarding workplace investigations for alleged harassment or other misconduct; as the employee representative could potentially prevent an employer from completing a comprehensive investigation. This is especially problematic because a union representative does not only represent one worker, but the bargaining unit as a whole. AB 2421 lacks guardrails to prevent potential conflicts of interest that could arise during employee conflicts.

Further, the bill may impede the ability of law enforcement agencies to investigate and correct misconduct. The bill's findings and declarations state that although it does not apply to criminal investigations, it prohibits agencies from compelling disclosure. Ordering employees to testify in an internal investigation is a practice that has allowed law enforcement agencies to timely investigate misconduct that may have criminal implications, while protecting the employee against the use of such compelled statements in a criminal proceeding. Without the ability to compel disclosure, the unlawful conduct may be allowed to continue, unabated, in the workplace.

Expansion of New One-Sided Privilege Standard

The bill's comparison between the proposed employee-union representative privilege and the attorney-client privilege is misplaced. The attorney-client relationship is carefully defined by state law. Privilege is by design narrow in scope to protect the confidentiality and integrity of relationships, both professional and familiar in nature, where highly sensitive and deeply personal information is exchanged. AB 2421 fails to recognize this well-established threshold and instead would create a new, broad privilege for public employees, without limitation on how the privilege functions.

Additionally, the "privilege" under AB 2421 would apply to any employee, and anyone designated as the "employee representative," a term that is not defined in the bill. This means that AB 2421 could be interpreted to not only apply to a union representative but also to a coworker, friend, or family member in certain workplace investigations, administrative proceedings, and civil litigation.

Unlike other privileges that apply to both sides of the litigation or proceedings such as the attorney-client privilege, AB 2421 does not equally protect the management-employee communication, or communications between members of management regarding labor union disputes or grievance issues. Consequently, in labor related proceedings such as California Public Employment Relations Board hearings, an employer would be forced to disclose all related communications, while the employee representative or employee could pick and choose which communications they wanted to disclose which may result in unjust rulings or decisions made against the public agency regarding labor related proceedings.

Additionally, the bill would impede a public employer's ability to defend itself in litigation and conduct fact-finding in other adversarial processes. It would create a significant advantage to employees in the context of disciplinary and grievance proceedings, significantly limiting an employer from investigating, prosecuting, or defending against such actions.

Workplace Safety and Government Operations

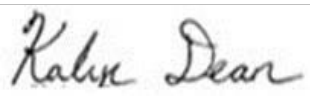
AB 2421 would interfere with the public employer's responsibility to provide a safe workplace, free from unlawful discrimination, harassment, or retaliation, by impeding a public employer's ability to communicate with employees to learn about, investigate and respond to such concerns. AB 2421 could also decrease workplace safety if public employers are limited in their ability to investigate threats of violence within the workforce. Employers are legally required to promptly investigate complaints of unlawful discrimination, harassment, retaliation, and other types of unlawful workplace conduct. If the employer is limited in its communications with employees, it will make it much more difficult to comply with these legal obligations, which were imposed by the legislature to create safer workplaces, free from unlawful discrimination and harassment.

In the context of the recent pandemic, the bill could have also compromised the ability of public employers to investigate outbreaks and implement public health orders or regulations.

Given the overly broad nature of the bill, it could be read to prohibit employers from communicating with employees about anything from day-to-day activities to matters that are important for government operations. Employers may not even know they are violating the bill by communicating with staff, because only the employee or their representative would know or could decide when a communication was made "in confidence." Lastly, the bill could even decrease public agency transparency and accountability due to the potential increased difficulty in investigating accusations of public corruption, or misuse of public funds.

For the aforementioned reasons, the organizations listed below respectfully oppose AB 2421. If you have any questions, please do not hesitate to contact our organizations' representatives directly.

Sincerely,

 Johnnie Piña Legislative Affairs, Lobbyist League of California Cities jpina@calcities.org	 Kalyn Dean Legislative Advocate California State Association of Counties kdean@counties.org
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CC:

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Honorable Members, Senate Committee on Labor, Public Employment and Retirement
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