April 22, 2024

TO: Members, Assembly Appropriations Committee

SUBJECT: AB 2421 (LOW) EMPLOYER-EMPLOYEE RELATIONS: CONFIDENTIAL COMMUNICATIONS
OPPOSE – AS INTRODUCED FEBRUARY 13, 2024

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE AB 2421 (Low).**

The Scope of AB 2421 Is Problematic

We are deeply concerned about **AB 2421**'s scope. While the proposed amendments to the Government and Public Utilities Codes only address the employer's ability to "question" an employee or representative, the bill explicitly states that it intends to supersede *American Airlines, Inc. v. Superior Court*, 114 Cal. App. 4th 881 (2003) and to create a privilege akin to that which currently exists between a client and their attorney.

In *American Airlines*, an employer sought to compel deposition testimony from a union representative during civil litigation. The question at issue in that case was whether existing California statutes should be read as creating a privilege between a union and its members. The Court held no such privilege existed. By superseding that decision, **AB 2421** clearly intends to create a union-worker privilege that functions in civil litigation as well as in other situations.

Further, **AB 2421**'s language states that it applies to communications between an employee and an "employee representative." It is not limited to a union representative.[1] Therefore, **AB 2421** effectively creates a new privilege between an employee and *any person* who represents the employee and could apply in workplace investigations, administrative proceedings, and civil litigation, among other situations.

Not only does **AB 2421** create a new, broad privilege for public employees, but also it does so without limitation on how the privilege functions. For example, other privileges were developed with concrete rules surrounding their applicability, who can assert the privilege, what qualifies as a confidential communication, any applicable exceptions, etc. On the other hand, **AB 2421** has no such guardrails. It appears here that both the representative and the represented employee are holders of the privilege.

This bill would make such a privilege unique in comparison to other evidentiary privileges currently in effect, such as the attorney-client privilege or physician-patient privilege, where the individual is the holder of the privilege. As the joint holder of the privilege, a union agent or other employee representative would be able to preclude an unrepresented employee from disclosing information by asserting the privilege. This could be significantly problematic with regard to workplace investigations for alleged harassment or other misconduct, as the union agent or employee representative could potentially prevent an employer from

[1] Public employees are allowed to choose their own representative for certain administrative proceedings and hearings. Because the language specifically says "employee representative," not "union" or "employee organization representative," we understand the privilege to extend to a coworker, friend, or family member.

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completing a comprehensive investigation. While this bill is limited to public employees, we are concerned about the precedent of creating this type of privilege.

The Unique Position Between Employee Representatives and Workers

Existing non-familial privileges generally are between a professional and their client or patient. For example, attorneys, physicians, and other medical professionals have supervisory bodies able to subject them to discipline for malpractice and have legally mandated education and training requirements that are specific to these issues. On the other hand, union representatives or coworkers who may serve as an employee's representative have no such governing body or requirements.

Furthermore, a union representative does not only represent one worker, but also, they represent the bargaining unit as a whole. What happens when there is a conflict between two workers or one worker is accused of harassing behavior towards another worker? What if an employee asks a coworker to represent them in an administrative proceeding and a dispute later arises between the two workers or one of them is accused of misconduct? Attorneys, for example, have clear conflict of interest rules to ensure that their representation of one client is not adverse to the interests of an existing or potential client. Again, no such rules exist for union agents or fellow coworkers.

The above issues were raised in committee hearings when the Legislature last debated similar legislation in 2019 in AB 418 (Kalra). Those concerns remain and **AB 2421** does nothing to address them. Indeed, Governor Jerry Brown vetoed a similar measure, echoing these concerns in the following veto message:

To the Members of the California State Assembly:

I am returning Assembly Bill 729 without my signature.

This bill would establish an evidentiary privilege to prohibit the disclosure of confidential communications between represented employees and their union agents.

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.

Sincerely,

Edmund G. Brown Jr.

AB 2421 Jeopardizes Workplace Investigations

Evidentiary privileges are limited and narrowly tailored because they suppress relevant facts in investigations, hearings, and trials. Public policy does not favor expansion of these types of privileges. As explained by the United States Supreme Court, privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974). Our concern is that creating this privilege would impact an employer's ability to effectively investigate workplace complaints or misconduct, especially in situations where employers have a legal obligation to perform investigations such as in situations of alleged harassment or workplace violence.

The union's ability to refuse disclosure of pertinent information during employment investigations was discussed in a federal court decision entitled, *Cook Paint and Varnish Co. v. N. L. R. B.*, 648 F.2d 712 (1981). In *Cook*, an employee refused to participate in an investigatory interview and the employer threatened disciplinary action, which resulted in an unfair labor practice claim filed by the union. The Court determined that it was not an unfair practice and that essentially both the union/employees and the employer have an obligation to furnish relevant information to a proceeding, including conducting employee interviews. If any questioning of the union steward would infringe on protected activity, that may be covered under the NLRA, however there was no blanket rule against such questioning. **AB 4241** would also create an unlevel playing field by allowing a union agent, coworker, and/or represented employee to refuse

disclosure of pertinent information and facts during an investigation, yet still compel management to disclose information.

For these and other reasons, we respectfully **OPPOSE AB 2421.**
Sincerely,

Ashley Hoffman
Senior Policy Advocate
California Chamber of Commerce

Acclamation Insurance Management Services (AIMS)
Allied Managed Care (AMC)
California Association of Health Facilities (CAHF)
California Association of Winegrape Growers (CAWG)
California Chamber of Commerce
California Farm Bureau
Coalition of Small and Disabled Veteran Businesses
Civil Justice Association of California (CJAC)
Flasher Barricade Association (FBA)
National Federation of Independent Business (NFIB)

cc: Legislative Affairs, Office of the Governor
Mao Yang, Office of Assemblymember Low
Consultant, Assembly Appropriations Committee
Joe Shinstock, Assembly Republican Caucus

AH:am