



## JOB KILLER

August 31, 2024

The Honorable Gavin Newsom  
Governor, State of California  
1021 O Street, Suite 9000  
Sacramento, CA 95814

**SUBJECT: SB 399 (WAHAB) EMPLOYER COMMUNICATION: INTIMIDATION  
REQUEST FOR VETO**

Dear Governor Newsom:

The California Chamber of Commerce and the organizations listed respectfully urge you to **VETO SB 399 (Wahab)**, which has been labeled a **JOB KILLER**. **SB 399**'s overbroad provisions and narrow exemptions effectively prohibit *any* discussion or communications regarding political matters by an employer and expose companies of all sizes to liability for hosting or supporting political events. Its broad scope is why Democratic Governor Jared Polis of Colorado vetoed a nearly identical bill in May 2024, noting that the overbroad language of the law would put employers in the "impossible position" of determining whether any speech could be deemed "political," and the exemptions were so narrow that they were "unworkable."

California already has strong laws in its Labor Code that protect workers from coercion relating to political beliefs or activities and the National Labor Relations Act (NLRA) provides workers with strong protections surrounding their right to organize. **SB 399** is therefore unnecessary, and its unintended consequences outweigh any perceived benefit. **Because of the significant liability risk presented by SB 399, our members have expressed hesitancy to host fundraisers, invite elected officials or candidates to their locations, or support legislation if SB 399 is signed.**

Finally, the bill also runs afoul of the First Amendment and is preempted by the NLRA. Similar legislation is being challenged in other states and Wisconsin's Attorney General *agreed* in the Wisconsin lawsuit that provisions were preempted by the 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.

**SB 399** will effectively chill any communications by an employer 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 to support a local candidate, 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 or new laws that do not specifically contain a training requirement. 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".

A nearly identical Colorado bill was vetoed this May because of many of these same concerns regarding unintended consequences and putting employers "in the impossible position of determining when any form of speech or communication is legally protected political or religious speech."<sup>1</sup>

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 a private right of action that includes penalties, punitive damages, and attorney's fees, as well as under the Private Attorneys General Act (PAGA). **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**

Proponents' examples of the need for **SB 399** include scenarios that are already illegal under current law. 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). An employer who is making their workers sit in meetings for days on end to intimidate them against unionizing is already acting illegally.

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(k), 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

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<sup>1</sup> See Veto message of House Bill 24-1260, which is attached.

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 and Minnesota's laws are 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 respectfully **REQUEST** your **VETO** of **SB 399** as a **JOB KILLER**.

Sincerely,



Ashley Hoffman  
Senior Policy Advocate  
California Chamber of Commerce

Acclamation Insurance Management Services (AIMS)  
Agricultural Council of California  
Allied Managed Care (AMC)  
Associated Equipment Distributors

Associated General Contractors of California  
Associated General Contractors San Diego  
Association of California Healthcare Districts (ACHD)  
Bay Area Council  
Brea Chamber of Commerce  
California Apartment Association  
California Association for Health Services at Home  
California Association of Collectors CAC  
California Association of Sheet Metal and Air Conditioning Contractors National Association  
California Association of Winegrape Growers  
California Attractions and Parks Association  
California Bankers Association  
California Beer and Beverage Distributor  
California Business Properties Association (CBPA)  
California Business Roundtable  
California Chamber of Commerce  
California Credit Union League  
California Employment Law Council  
California Farm Bureau  
California Fuels and Convenience Alliance  
California Grocers Association  
California Hospital Association  
California Hotel & Lodging Association  
California Landscape Contractors Association  
California League of Food Producers  
California Lodging Industry Association  
California Manufactures & Technology Association (CMTA)  
California Restaurant Association  
California Retailers Association  
California State Council of the Society for Human Resource Management  
California Trucking Association  
Carlsbad Chamber of Commerce  
Chino Valley Chamber of Commerce  
Coalition of California Chambers – Orange County  
Coalition of Small and Disabled Veteran Businesses  
Construction Employers' Association  
Corona Chamber of Commerce  
Danville Area Chamber of Commerce  
El Dorado County Chamber of Commerce, Laurel Brent-Bumb  
El Dorado Hills Chamber of Commerce  
El Dorado County Chamber of Commerce, Laurel Brent-Bumb  
El Dorado Hills Chamber of Commerce  
Family Business Association of California  
Family Winemakers of California  
Flasher Barricade Association (FBA)  
Folsom Chamber of Commerce  
Fontana Chamber of Commerce  
Fresno Chamber of Commerce  
Gilroy Chamber of Commerce  
Glendora Chamber of Commerce  
Greater Coachella Valley Chamber of Commerce  
Greater High Desert Chamber of Commerce  
Greater San Fernando Valley Chamber of Commerce  
Hollywood Chamber of Commerce  
Housing Contractors of California  
Independent Lodging Industry Association

Inland Empire Chamber Alliance  
International Warehouse Logistics Association (IWLA)  
La Cañada Flintridge Chamber of Commerce  
Laguna Niguel Chamber of Commerce  
Lincoln Area Chamber of Commerce  
Lodi District Chamber of Commerce  
Murrieta/Wildomar Chamber of Commerce  
National Federation for Independent Business (NFIB)  
Oceanside Chamber of Commerce  
Official Police Garages Association of Los Angeles  
Pacific Association of Building Service Contractors (PABSCO)  
Palos Verdes Peninsula Chamber of Commerce  
Paso Robles Chamber of Commerce  
Plumbing-Heating-Cooling Contractors Association of California (CAPHCC)  
Rancho Cordova Chamber of Commerce  
Rocklin Chamber of Commerce  
Roseville Area Chamber of Commerce  
San Juan Capistrano Chamber of Commerce  
San Ramon Chamber of Commerce  
Santa Ana Chamber of Commerce  
Santa Clarita Valley Chamber of Commerce  
Santee Chamber of Commerce  
Shingle Springs/Cameron Park Chamber of Commerce  
Silicon Valley Leadership Group  
Simi Valley Chamber of Commerce  
South County Chambers of Commerce  
Southwest California Legislative Council  
Templeton Chamber of Commerce  
Torrance Area Chamber of Commerce  
Tri County Chamber Alliance  
Tulare Chamber of Commerce  
United Chamber Advocacy Network  
Vacaville Chamber of Commerce  
Vista Chamber of Commerce  
Western Electrical Contractors Association (WECA)  
Western Growers Association  
Yorba Linda Chamber of Commerce  
Yuba-Sutter Chamber of Commerce