





JOB KILLER

July 20, 2022

TO: Members, Assembly Appropriations Committee

SUBJECT: **SB 1044 (DURAZO) STATE OF EMERGENCY: RETALIATION
OPPOSE/JOB KILLER- AS AMENDED JUNE 29, 2022**

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE** your **SB 1044**, which has been labeled as a **JOB KILLER**. **SB 1044** allows workers to refuse to show up to work,

regardless of the health and safety precautions taken by their employers or applicable Cal/OSHA health and safety standards. The breadth of the bill would also undermine emergency response.

Existing Cal/OSHA Regulations and State and Federal Laws Include Substantial Safety Protections, Provide Employees the Right to a Safe Workplace, and Protect Employees from Retaliation If Those Laws Are Violated

Workers have significant protections under current law, including a right to refuse dangerous work. All California employers have a legal duty to ensure that the place of employment is safe and healthful. Employers may not require workers to be at a location that is not safe or healthful and must do everything reasonably necessary to protect the life, safety, and health of employees.¹ Across industries and workplaces, employers must at a minimum have 1) an Emergency Action Plan, 2) Fire Prevention Plan, and 3) Injury and Illness Prevention Program.²

In addition, Cal/OSHA has many hazard-specific regulations which address the issues underlying recent states of emergency in California, including: wildfire smoke, outdoor heat, COVID-19, and Cal/OSHA will soon be issuing regulations specific to indoor heat.³ Specific industries are subject to their own additional health and safety standards. These standards were prepared by Cal/OSHA's workplace safety experts in consultation with affected stakeholders. More importantly – these regulations *address the underlying workplace hazards*, meaning that an employee is *already protected from these hazards* in all but the most extreme cases. If an employee reasonably believes that their employer has violated any safety laws and that the work creates a real and apparent safety hazard or there is imminent danger of death or serious injury and the employer fails to eliminate the danger, under both California and federal law the employee can refuse to work.⁴ They are also protected from retaliation for reporting such conduct.⁵ After such a report, Cal/OSHA or a court will evaluate whether there were legal violations or evidence of an unsafe workplace. Further, in 2020, the Legislature made it a crime to require an employee to remain in their place of work if there was a notice to evacuate or leave.⁶

SB 1044 completely ignores the protections that these regulations already provide in making long-term emergency topics – such as wildfire and heat – safer for California's workplaces. Instead, this bill just allows workers to walk away. While the most recent amendments do attempt to limit the scope of the bill, the bill still renders these existing regulations meaningless because a worker can allege they feel unsafe. A fire that is largely under control may still be producing smoke. Regardless of whether Cal/OSHA permits ongoing work in a specific AQI, the employee could refuse to report to work and the employer would either have to allow it or face costly litigation. Language should be added to the bill presuming a worker would not feel unsafe where existing laws or regulations permit ongoing work under the circumstances.

Moreover, any actions taken by the employer to address an employee leaving the worksite would lead to legal perils. An employer who disciplines an employee for leaving the workplace would be subject to a lawsuit and penalties under the Private Attorneys General Act (PAGA). And any employer who replaces the worker in order to keep the workplace functioning or to provide time sensitive services could face a retaliation suit. In other words – **SB 1044** gives such broad discretion to employees that if they walk away from a completely safe workplace, the employer could do little in response without risking litigation. As a result of the costs of this unanticipated absenteeism, a recent analysis by Encina Advisors, LLC, estimates that more than 20,000 jobs would be lost and there would be a loss of about \$117.5 million in state taxes.

¹ See, e.g., Labor Code Sections 6400, *et seq.*

² See 8 CCR 3220; 8 CCR 3221; 8 CCR 3203.

³ See 8 CCR 5141.1; 8 CCR 3395, 8 CCR 3205-3205.4; [Heat Illness Prevention Indoors - Advisory Meetings \(ca.gov\)](https://www.dir.ca.gov/HeatIllnessPreventionIndoorsAdvisoryMeetings.htm)

⁴ California Labor Code Section 6311; CFR 1977.12.

⁵ Labor Code Sections 1102.5, 6310; CFR 1977.12.

⁶ Labor Code Section 6311.5.

SB 1044 Would Undermine Emergency Response

While recent amendments carve out certain workers from **SB 1044**'s provisions, there are still essential workers that must be carved out so as not to undermine emergency response. Those include personnel necessary to provide the public basic services during an emergency.

SB 1044 Undermines DOSH's Scope of Enforcement and Delays Resolution Because It Bypasses PAGA Procedures for Alleged Violations of Workplace Safety Laws

A PAGA plaintiff alleging a violation of a health and safety statute under any provision of Division 5 of the Labor Code must first give notice to the Division of Occupational Health and Safety (DOSH), which is then required to investigate the allegations within a matter of days.⁷ If DOSH issues a citation or takes action, no lawsuit may proceed. If it does not investigate, the employee may proceed with the lawsuit or the employee may challenge DOSH in court if it investigates but does not issue a citation. This ensures that DOSH is kept aware of all workplace safety issues and unsafe employers are swiftly issued a citation. Such procedures apply to similar health and safety and retaliation statutes, including Labor Code Sections 6310, 6311, 6400, and 6402. Importantly, that process is different than the notice process for all other PAGA claims. For any other Labor Code violation, notice is provided only to the Labor Workforce and Development Agency (LWDA). The LWDA is not required to investigate, so plaintiffs usually promptly file a PAGA case.

Because **SB 1044** adds a section to Division 2 of the Labor Code, it bypasses the DOSH notice and investigation process – despite **SB 1044** being focused on workplace safety. This undermines the Legislature's intent that DOSH enforce health and safety standards and that a citation promptly be issued rather than pursuing a lengthy court case. Instead, **SB 1044** allows private attorneys to profit by bringing a court case without investigation of the claims and *delays* correction of the safety issue.

Data demonstrates that workers are worse off when they pursue a PAGA claim instead of state enforcement. Instead of an immediate citation being issued against the employer, the average PAGA plaintiff waits 18 months for resolution of their case. Private attorneys commonly walk away with 33% of the total agreed-to settlement, while workers and the state get very little. As the LWDA itself has acknowledged, seventy-five percent of PAGA settlements "receive[] a grade of fail or marginal pass, *reflecting the failure of many private plaintiffs' attorneys to fully protect the interests of the aggrieved employees and the state.*" (emphasis added).⁸ For that reason, **SB 1044** should not bring PAGA into workplace safety, where the legislature has instead intended claims be first investigated by DOSH.

For these and other reasons, we respectfully **OPPOSE** your **SB 1044** as a **Job Killer**.

Sincerely,



Ashley Hoffman
Policy Advocate
California Chamber of Commerce

Acclamation Insurance Management Services
Agricultural Council of California
Allied Managed Care
American Composites Manufactures Association
Anaheim Chamber of Commerce
Associated General Contractors (AGC)

⁷ Labor Code Section 2699.3(b).

⁸ 2019 Budget Change Proposal, *PAGA Unit Staffing Alignment*, 7350-110-BCP-2019-MR

Association of California Healthcare Districts
Auburn Chamber of Commerce
Auto Care Association
Beverly Hills Chamber of Commerce
Brea Chamber of Commerce
California Apartment Association
California Association for Health Services at Home
California Association of Health Facilities
California Association of Joint Powers Authorities
California Attractions and Parks Association
California Bankers Association
California Business and Industrial Alliance
California Chamber of Commerce
California Credit Union League
California Farm Bureau Federation
California Farm Labor Contractor Association
California Grocers Association
California Hispanic Chambers of Commerce
California Hmong Chamber of Commerce
California League of Food Producers
California Lodging Industry Association
California Manufacturers and Technology Association
California Railroads
California Restaurant Association
California Retailers Association
California Special Districts Association
California State Association of Counties
California Trucking Association
Carlsbad Chamber of Commerce
CAWA - Representing the Automotive Parts Industry and Auto Care Association
Chino Valley Chamber of Commerce
Coalition of Small and Disabled Veteran Businesses
Construction Employers' Association
Corona Chamber of Commerce
El Dorado County Chamber of Commerce
El Dorado Hills Chamber of Commerce
Elk Grove Chamber of Commerce
Flasher Barricade Association
Folsom Chamber of Commerce
Fountain Valley Chamber of Commerce
Fremont Chamber of Commerce
Fresenius Medical Care North America
Fresno Chamber of Commerce
Glendora Chamber of Commerce
Greater Bakersfield Chamber of Commerce
Greater Coachella Valley Chamber of Commerce
Greater High Desert Chamber of Commerce
Greater Riverside Chambers of Commerce
Greater Stockton Chamber of Commerce
Kern County Hispanic Chamber of Commerce
La Cañada Flintridge Chamber of Commerce
League of California Cities
Lodi Chamber of Commerce
Long Beach Area Chamber of Commerce
Los Angeles Chamber of Commerce
Los Gatos Chamber of Commerce

Modesto Chamber of Commerce
Murrieta/ Wildomar Chamber of Commerce
National Federation of Independent Business
Newport Beach Chamber of Commerce
Oceanside Chamber of Commerce
Orange County Business Council
Orange County Hispanic Chamber of Commerce
Oroville Chamber of Commerce
Palos Verdes Peninsula Chamber of Commerce
Public Risk Innovations, Solutions, and Management (PRISM)
Rancho Cordova Chamber of Commerce
Roseville Area Chamber of Commerce
Rural County Representatives of California
San Jose Chamber of Commerce
San Marcos Chamber of Commerce
San Ramon Chamber of Commerce
Santa Ana Chamber of Commerce
Santa Clarita Valley Chamber of Commerce
Santa Maria Valley Chamber of Commerce
Simi Valley Chamber of Commerce
Southwest Legislative Council
Tulare Chamber of Commerce
United Chamber Advocacy Network
Valley Industry & Commerce Association
West Ventura County Business Alliance
Western Electrical Contractors Association
Western Growers Association
Wine Institute
Yuba Sutter Chamber of Commerce

cc: Legislative Affairs, Office of the Governor
Fernando Ramirez, Office of Senator Durazo
Irene Ho, Assembly Appropriations Committee
Joe Shinstock, Assembly Republican Caucus

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