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**SENATE COMMITTEE ON LABOR, PUBLIC EMPLOYMENT AND RETIREMENT****Senator Dave Cortese, Chair****2023 - 2024 Regular**

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**Bill No:** SB 399**Hearing Date:** April 12, 2023**Author:** Wahab**Version:** February 9, 2023**Urgency:** No**Fiscal:** Yes**Consultant:** Alma Perez-Schwab**SUBJECT:** Employer communications: intimidation**KEY ISSUES**

Should the Legislature prohibit an employer from requiring its employees to attend an employer-sponsored meeting or any communications, the purpose of which is to communicate the employer's opinion about religious or political matters, or certain rights guaranteed by the United States and California Constitution?

Should employees be authorized to file a complaint or civil action against their employer for alleged violations of these protections?

**ANALYSIS****Existing federal law:**

- 1) Under the National Labor Relations Act (NLRA) makes clear that it is the policy of the United States to encourage collective bargaining by protecting workers' full freedom of association. The NLRA protects workplace democracy by providing employees at private-sector workplaces the fundamental right to seek better working conditions and designation of representation without fear of retaliation. (NLRA or the Act; 29 U.S.C. §§ 151-169)
- 2) Establishes the National Labor Relations Board (NLRB) as an independent federal agency vested with the power to safeguard employees' rights to organize, engage with one another to seek better working conditions, choose whether or not to have a collective bargaining representative negotiate on their behalf with their employer, or refrain from doing so. The NLRB also acts to prevent and remedy unfair labor practices committed by private sector employers and unions, as well as conducts secret-ballot elections regarding union representation. (29 U.S.C. §153)

**Existing state law:**

- 3) Under the Alatorre-Zenovich-Dunlap-Berman Agricultural Labor Relations Act of 1975, provides that it is the policy of the state to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives, self-organization, or

other concerted activities for the purpose of collective bargaining or other mutual aid or protection. (Labor Code §1140-1166.3)

- 4) Provides the Labor Commissioner with authority to be assigned claims for loss of wages that arise from retaliation for lawful conduct occurring during nonworking hours and away from the employer's premises. (Labor Code §96)
- 5) Prohibits an employer from making, adopting, or enforcing any rule, regulation, or policy:
  - a. Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office.
  - b. Controlling or directing, or tending to control or direct the political activities or affiliations of employees.  
(Labor Code §1101)
- 6) Prohibits an employer from coercing, influencing, or attempting to coerce or influence employees through or by means of threat of discharge or loss of employment to adopt or follow, or refrain from adoption or following, any particular course or line of political action or political activity. (Labor Code §1102)
- 7) Establishes within the Department of Industrial Relations (DIR) and under the direction of the Labor Commissioner, the Division of Labor Standards Enforcement (DLSE) tasked with administering and enforcing labor code provisions concerning wages, hours and working conditions. (Labor Code §56)

**This bill:**

- 1) Enacts the "California Worker Freedom from Employer Intimidation Act" to prohibit an employer, except as specified, from requiring its employees to attend an employer-sponsored meeting or participate in any communications with the employer or its agents or representatives, the purpose of which is to communicate the employer's opinion about religious matters, political matters, or rights guaranteed by the First Amendment to the United States Constitution or Section 2, 3, or 4 of Article I of the California Constitution.
- 2) Defines "employer" as any individual, partnership, association, corporation, or any person or group of persons acting directly or indirectly on behalf of or in the interest of an employer with the employer's consent and shall include all branches of state government, or the several counties, cities and counties, and municipalities thereof, or any other political subdivision of the state, or a school district, or any special district, or any authority, commission, or board or any other agency or instrumentality thereof.
- 3) Defines "political matters" as matters relating to elections for political office, political parties, legislation, regulation, and the decision to join or support any political party or political or labor organization.
- 4) Defines "religious matters" as matters relating to religious affiliation and practice and the decision to join or support any religious organization or association.

- 5) Specifies that “rights guaranteed by the First Amendment to the United States Constitution or Section 2, 3, or 4 of Article I of the California Constitution” includes, but is not limited to, the rights of freedom of speech, freedom of association, and freedom of religion.
- 6) Requires the Division of Labor Standards Enforcement to enforce these protections upon the filing of a complaint by an employee.
- 7) Alternatively to filing a complaint with DLSE, an employee who the employer has subjected, or threatened to subject, to discharge, discrimination, retaliation, or any other adverse action on account of the employee’s refusal to attend an employer-sponsored meeting may bring a civil action in a court of competent jurisdiction for damages caused by that adverse action, including punitive damages, and for reasonable attorney’s fees as part of the costs of any such action for damages.
  - a. Specifies that in any such civil action, an employee or their exclusive representative may petition the superior court, as specified, for appropriate temporary or preliminary injunctive relief.
- 8) Provides that these provisions do not prohibit an employer or its agent, representative, or designee from any of the following:
  - a. Communicating to its employees any information that the employer is required by law to communicate, but only to the extent of that legal requirement.
  - b. Communicating to its employees any information that is necessary for those employees to perform their job duties.
  - c. For institutions of higher education, from meeting with or participating in any communications with its employees that are part of coursework, any symposia, or an academic program at that institution.
  - d. A requirement limited to the employer’s managerial and supervisory employees.
- 9) Exempts the following from these provisions:
  - a. A religious corporation, entity, association, educational institution, or society that is exempt from the requirements of Title VII of the Civil Rights Act of 1964, as defined, or is exempt from employment discrimination protections of state law, as specified, with respect to speech on religious matters to employees who perform work connected with the activities undertaken by that religious corporation, entity, association, educational institution, or society.
  - b. A political organization or party requiring its employees to attend an employer-sponsored meeting or to participate in any communications with the employer or its agents or representatives, the purpose of which is to communicate the employer’s political tenets or purposes.
  - c. An educational institution requiring a student or instructor to attend lectures on political or religious matters that are part of the regular coursework.
- 10) Provides that these provisions are severable and if any provision or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

## COMMENTS

### 1. Background: Captive Audience Meetings

Captive audience meetings are mandatory meetings during work hours, organized by an employer where employees are paid for their time attending the meeting and are required to attend or face discipline. Critics of these meetings argue that they are used to intimidate workers and spread the employers' personal views on various issues. Employers argue the practice as being part of freedom of speech.

On April 07, 2022, National Labor Relations Board General Counsel Jennifer Abruzzo issued a memorandum to all field offices announcing that she would be asking the Board to find mandatory meetings in which employees are forced to listen to employer speech concerning the exercise of their statutory labor rights, including captive audience meetings, a violation of the National Labor Relations Act (NLRA). According to General Counsel Abruzzo, in workplaces across America, employers routinely hold mandatory meetings in which employees are forced to listen to employer speech concerning the exercise of their statutory labor rights, especially during organizing campaigns.<sup>1</sup>

General Counsel Abruzzo further explained that “the Board has long-recognized that the Act protects employees’ right to listen to—or refrain from listening to—employer speech concerning their rights to act collectively to improve their workplace. Forcing employees to attend captive audience meetings under threat of discipline discourages employees from exercising their right to refrain from listening to this speech and is therefore inconsistent with the NLRA.”

According to an Economic Policy Institute study, between 1999-2003, 63% of employers interrogated workers in mandatory one-on-one captive audience meetings and 54% of employers threaten workers in such meetings.<sup>2</sup>

### 2. Similar Efforts in Other States:

According the sponsors, SB 399 is modeled on a 2022 bipartisan bill signed into law in Connecticut that regulates the same employer conduct. Connecticut’s Act Protecting Employee Freedom of Speech and Conscience, enacted in May 2022, prohibits an employer from coercing employees into attending or participating in meetings sponsored by the employer concerning the employer's views on political or religious matters. The bill does not prevent employees from agreeing to go to a meeting where their employer argues against unionization, but it does prevent an employer from disciplining or firing employees who choose not to attend that type of event.

The Connecticut Business and Industry Association, the U.S. Chamber of Commerce, the Associated Builders and Contractors, the Associated Builders and Contractors of Connecticut, the National Federation of Independent Business and several other organizations joined in filing a federal lawsuit in November 2022, alleging the captive

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<sup>1</sup> National Labor Relations Board. April 7, 2022. “NLRB General Counsel Jennifer Abruzzo Issues Memo on Captive Audience and Other Mandatory Meetings.” [press release]. NLRB. <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-jennifer-abruzzo-issues-memo-on-captive-audience-and>

<sup>2</sup> Turner, Anna. “EPI Fact Sheet: Labor Day by the Numbers.” *Economic Policy Institute*. September 3, 2010. [https://www.epi.org/publication/labor\\_day\\_by\\_the\\_numbers/](https://www.epi.org/publication/labor_day_by_the_numbers/)

audience law is unconstitutional. The State Defendants moved to dismiss the case and in February 2023, the U.S. Chamber and coalition filed opposition to the State's motion and the case continues under litigation.

Similar laws exist in Oregon and Wisconsin. In 2009, Oregon became the first state to pass such a law. Although the law was challenged by the Associated Oregon Industries and the Chamber of Commerce, the federal District of Oregon upheld it. However, the court never reached the merits of the case, instead disposing of it on standing and ripeness grounds. Wisconsin passed its own captive audience ban in May 2010, but when business groups challenged the law in federal court, the State agreed to a settlement in which it acknowledged that the prohibition on captive audience meetings was preempted by the NLRA. Other states, including Connecticut, West Virginia, New Mexico, Michigan, and Washington, have proposed similar legislation, but none of the bills have passed.

### 3. Need for this bill?

According to the author, "In most workplaces, workers are "at will" and can be fired at any time for almost any reason. That gives employers tremendous power to pressure workers to do as they say. For example, some employers attempt to coerce workers into voting for the employer's preferred candidate or adhering to their religious or ideological beliefs. Often meetings on such topics are mandatory and workers are not permitted to leave or speak out." Furthermore, the author argues, "We live in highly polarized times where political discussions occur all too frequently in the workplace. No worker should be subject to forced indoctrination by their employer on politics, religion, or for exercising their protected rights on the job."

According to the author, "The California Employers Association offers trainings to employers on how to hold captive audience meetings stating that "Now is the time to get up to speed on union awareness and avoidance training efforts."<sup>3</sup> At a 2022 summit of the National Restaurant Association's legal wing, speakers told the audience that "for now, captive audience meetings are fine" and that union avoidance tactics like "old-fashioned captive audience [speeches],"<sup>4</sup> remain the same despite the changing demographics of the workforce."

The author believes that "SB 399 is needed to prevent employers from coercing workers to listen to speech about core matters of individual conscience—politics and religion. It clarifies that workers have the freedom not to listen to their employers' views on religious or political matters including support or opposition of political parties or unions, during mandatory meetings, often called captive audience meetings."

### 4. Proponent Arguments:

According to the sponsors of the measure, the California Labor Federation and the California Teamsters Public Affairs Council, "The effectiveness of captive audience meetings has led to employers using these forced meetings for political and religious purposes. The Royal Dutch

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<sup>3</sup> Gusman, Kim. "Are Unions Knocking on Your Door or Sitting in Your Parking Lot?" *California Employers Association - Avoiding Unions*, 10 May 2022, <http://bit.ly/3DIwit8>

<sup>4</sup> Rock, Julia. "Restaurant Industry Execs Are Very Worried About Food Service Workers Unionizing." *Jacobin*, Jan. 31, 2023, <https://jacobin.com/2023/01/national-restaurant-association-legal-summit-union-busting-strategies>

Shell company invited then-candidate Trump to give a speech at their facility in 2019. The employers sent a memo to workers stating that attendance of the Trump rally was “not mandatory,” but that if they did not clock in to work that day they would lose pay and become ineligible to receive the 16 hours of overtime pay. Workers who attended were told “anything viewed as resistance” would not be tolerated at the event.<sup>5</sup>

These are the most egregious examples of political captive audience meetings, but employers are getting more sophisticated with the help of the Business-Industry Political Action Committee (BIPAC). BIPAC partners with major companies, including Exxon Mobil, Yum Brands, Wendy’s, Halliburton, and many others to advise them on how to “transform your employees into an army of pro-business voters” and “mobilize employees to drive success for your policy priorities.”<sup>2</sup> BIPAC is developing and deploying the tools employers can and will use to force workers to listen to their political agenda and even to participate in it.<sup>6</sup>

Sponsors further argue that other examples of coercion happen when workers advocate for their rights and write, “In California, Amazon workers in Moreno Valley endured multiple captive audience meetings where they were told they would lose their benefits if they unionized. Workers in Davis accused Peet’s Coffee of holding anti-union captive audience meetings, including flying in the president of the company, to unsuccessfully prevent workers from unionizing. Google, REI, Apple Stores, and many more employers have held captive audience meetings after workers began advocating for their rights on the job.”

They conclude by stating that, “This bill does not infringe on free speech rights and employers are still free to discuss their views with workers, so long as they do not coerce or force them to listen against their will. SB 399 is modeled on a 2022 bipartisan bill signed into law in Connecticut that regulates the same employer conduct. Similar laws exist in Oregon and Wisconsin.”

## 5. Opponent Arguments:

A coalition of employers, including the California Chamber of Commerce, are opposed to the measure arguing that it’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. According to the coalition, “It appears the intent of SB 399 is to effectively chill any communications by the employer or in the workplace about political matters.” They write, “for example, even if an employer explicitly says that employees are not required to attend a meeting, an employee could claim that they still felt required to attend because others were attending or some sort of benefit was being provided, like a meal or face time with a manager.”

They additionally argue that, “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 for 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?”

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<sup>5</sup> Haberman, Maggie. “Trump’s Speech was a Paying Gig for the Audience.” *The New York Times*, Aug. 17, 2019. <https://www.nytimes.com/2019/08/17/us/politics/trump-shell-workers.html>

<sup>6</sup> “Our Services,” BIPAC website, accessed April 7, 2023. <https://www.bipac.org/>

Furthermore, they argue, “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.”

The coalition also argues that the bill violates the First Amendment because it 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. They argue, “it is clear that the motive behind SB 399’s prohibition on employers discussing their opinions about unionization is the assumption that employers will talk to their employees about the downsides of unionization, which the proponents of this bill disagree with. That is clear viewpoint-based discrimination, which also runs afoul of the First Amendment.”

Lastly, the coalition believes the bill is preempted by the NLRA arguing, “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.” They also argue, “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.”

## **6. Double Referral:**

This bill has been double referred and if approved by this Committee today, will be sent to Senate Judiciary Committee for a hearing.

## **SUPPORT**

California Labor Federation (Co-Sponsor)  
California Teamsters Public Affairs Council (Co-Sponsor)  
American Federation of State, County and Municipal Employees (AFSCME)  
Alameda Labor Council  
American Federation of Labor and Congress of Industrial Unions, AFL-CIO  
California Conference Board of The Amalgamated Transit Union  
California Conference of Machinists  
California Federation of Teachers, AFL-CIO  
California IATSE Council  
California Nurses Association  
California Professional Firefighters  
California Rural Legal Assistance Foundation, INC.  
California State Legislative Board, Sheet Metal, Air, Rail and Transportation Workers –  
Transportation Division (SMART-TD)  
California Teachers Association  
Center on Policy Initiatives  
Central Coast Labor Council  
Clergy and Laity United for Economic Justice

Contra Costa Central Labor Council  
Engineers and Scientists of California, IFPTE Local 20, AFL-CIO  
Ironworkers Local 433  
Jobs to Move America  
Pillars of The Community  
Sacramento Central Labor Council, AFL-CIO  
San Diego Black Workers Center  
Techequity Collaborative  
UAW Region 6  
Unemployed Workers United  
UNITE HERE, AFL-CIO  
United Food and Commercial Workers, Western States Council  
United Nurses Associations of California/Union of Health Care Professionals  
Utility Workers Union of America  
Warehouse Worker Resource Center  
Worksafe

### **OPPOSITION**

Acclamation Insurance Management Services  
Agricultural Council of California  
Allied Managed Care  
Associated General Contractors of California  
Associated General Contractors San Diego Chapter  
Association of California Healthcare Districts (ACHD)  
Brea Chamber of Commerce  
California Apartment Association  
California Association for Health Services At Home  
California Association of Sheet Metal & Air Conditioning Contractors National Association  
California Association of Winegrape Growers  
California Business Properties Association  
California Business Roundtable  
California Chamber of Commerce  
California Credit Union League  
California Employment Law Council  
California Farm Bureau  
California Grocers Association  
California Hotel & Lodging Association  
California League of Food Producers  
California Lodging Industry Association  
California Manufactures & Technology Association  
California Restaurant Association  
California Retailers Association  
California State Council of The Society for Human Resource Management (CALSHRM)  
Coalition of California Chambers – Orange County  
Coalition of Small and Disabled Veteran Businesses  
Construction Employers' Association  
Corona Chamber of Commerce  
Family Business Association of California



Flasher Barricade Association  
Fontana Chamber of Commerce  
Gilroy 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.  
LA Canada Flintridge Chamber of Commerce  
Murrieta Wildomar Chamber of Commerce  
National Federation of Independent Business  
Oceanside Chamber of Commerce  
Official Police Garage Association of Los Angeles  
Palos Verdes Peninsula Chamber of Commerce  
Paso Robles Chamber of Commerce  
Roseville Area Chamber of Commerce  
San Juan Capistrano Chamber of Commerce  
Santa Clarita Valley Chamber of Commerce  
Santee Chamber of Commerce  
Simi Valley Chamber of Commerce  
South County Chambers of Commerce  
Southwest California Legislative Council  
Templeton Chamber of Commerce  
Torrance Chamber of Commerce  
Tri County Chamber Alliance  
Tulare Chamber of Commerce  
Vacaville Chamber of Commerce  
Vista Chamber of Commerce  
Western Growers Association  
Yorba Linda Chamber of Commerce

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