

Date of Hearing: June 28, 2023

ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT

Ash Kalra, Chair

SB 399 (Wahab) – As Amended May 2, 2023

**SENATE VOTE:** 26-7

**SUBJECT:** Employer communications: intimidation

**SUMMARY:** Prohibits an employer, as specified, from subjecting, or threatening to subject, an employee to discharge, discrimination, retaliation, or any other adverse action because the employee declines to attend an employer-sponsored meeting or affirmatively declines to participate in, receive, or listen to any communications with the employer, the purpose of which is to communicate the employer's opinion about religious or political matters. Specifically, **this bill:**

- 1) Defines “employer” to mean any individual, partnership, association, corporation, or any agent, representative, designee, or person or group of persons acting directly or indirectly on behalf of or in the interest of an employer with the employer's consent. “Employer” includes 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.
- 2) Defines “political matters” to mean 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.
- 3) Defines “religious matters” to mean matters relating to religious affiliation and practice and the decision to join or support any religious organization or association.
- 4) Prohibits an employer, except as provided in 8) and 9) below, from subjecting, or threatening to subject, an employee to discharge, discrimination, retaliation, or any other adverse action because of the following:
  - a) The employee declines to attend an employer-sponsored meeting.
  - b) The employee affirmatively declines to participate in, receive, or listen to any communications with the employer or its agents or representatives, the purpose of which is to communicate the employer's opinion about religious or political matters.
- 5) Requires, upon the filing of a complaint by an employee, the Division of Labor Standards Enforcement to enforce this section.
- 6) Authorizes as an alternative to 5) above, any 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 to bring a civil

action in a court of competent jurisdiction for damages caused by that adverse action, including punitive damages.

- 7) Authorizes, in any civil action brought pursuant to 6) above, an employee or their exclusive representative to petition the superior court in any county wherein the violation in question is alleged to have occurred, or wherein the person resides or transacts business, for appropriate temporary or preliminary injunctive relief.
- 8) States that the bill does not prohibit any of the following:
  - a) An employer from 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) An employer from communicating to its employees any information that is necessary for those employees to perform their job duties.
  - c) An institution of higher education, or any agent, representative, or designee of that institution, 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.
- 9) States that the bill does not apply to any of the following:
  - 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 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.
    - (i) Excepted from this is a religious corporation or association with respect to persons employed by it to perform duties, other than religious duties, at a specified health care facility.
  - b) A political organization or party requiring its employees to attend an employer-sponsored meeting or to participate in any communications with the employer, 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 at the institution.
- 10) Provides that the provisions of the bill are severable.

#### **EXISTING LAW:**

- 1) Provides that no employer shall make, adopt, or enforce 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.
- 2) Provides that no employer shall coerce or influence or attempt to coerce or influence their employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity. Labor Code § 1102.

**FISCAL EFFECT:** According to the Senate Committee on Appropriations,

The Department of Industrial Relations (DIR) indicates that it would incur first-year enforcement costs of \$334,000, and \$323,000 annually thereafter, to implement the provisions of the bill (Labor Enforcement Compliance Fund).

Administrative costs to the Department of Justice (DOJ) have yet to be identified.

**COMMENTS:** Note: This measure is double referred to the Assembly Judiciary Committee upon passage out of this Committee.

Employer political speech when delivered during a mandatory meeting can be particularly coercive. Employer speech comes from a source of authority, carrying “a different weight than that of any other participant in political debates [.]”<sup>1</sup> The unequal power dynamic between an employer and its employees creates a setting ripe for intimidation. Some workers may feel compelled to adopt an employer’s view on a political matter because “people need their jobs, and many will sacrifice their rights as citizens to continue to provide for themselves and their families. Consequently, an employer that tries to use its financial muscle to control employees’ political behavior will often succeed.”<sup>2</sup>

In the case of a workplace where employees are engaging in a unionization campaign, captive audience meetings can be particularly damaging. A review of employer tactics during union elections over a five year period found that in addition to utilizing a number of other anti-union tactics, 89% of employers used captive audience meetings while holding an average of 10 meetings during the campaign.<sup>3</sup> Researchers conclude that this type of coercive employer behavior has led, under federal labor law, to less workers winning representation and fewer first time contracts.<sup>4</sup>

According to the author, “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.

It is important that workers of all religions and political perspectives are free to go to work without feeling coerced or enduring a hostile work environment.

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<sup>1</sup> Secunda, Paul M., “Addressing Political Captive Audience Workplace Meetings in the Post-Citizens United Environment,” 120 Yale L.J. Online 17 (2010), p. 23.

<sup>2</sup> *Ibid.* at 20.

<sup>3</sup> Bronfenbrenner, Kate, EPI Briefing Paper, “No Holds Barred: The Intensification of Employer Opposition to Organizing,” 2009, p. 10.

<sup>4</sup> *Ibid.* at 3.

SB 399 prohibits employers from engaging in coercive conduct that requires workers to attend meetings on their views on political matters, religious matters, or constitutionally protected rights. This bill does not infringe on free speech rights and employers are still free to discuss their religious, political, and anti-union views with workers; so long as they do not coerce or force them to listen against their will.”

The author further states that “SB 399 promotes workers’ rights, especially those of marginalized communities, by protecting their right to advocate for themselves and opt out of conversations about politics or religion that have nothing to do with their ability to properly execute their job. By giving people the choice to listen to the political or religious views of their employer, we are ensuring that the most marginalized workers are not taken advantage of by their employers.”

### The issue of NLRA preemption

Opponents of SB 399 argue, among other things, that the bill is preempted by the NLRA. The NLRA goes to the heart of federal labor law and governs the rights of private sector employees to organize, elect a representative of their own choosing, and collectively bargain. Contrary to opposition’s argument for preemption, federal labor law does not bar states from enacting legislation prohibiting employers from requiring their employees to listen to speech unrelated to job performance with the threat of termination or other disciplinary action.

As recognized by the United States Supreme Court, “The NLRA contains no express pre-emption provision.”<sup>5</sup> Moreover, “consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.”<sup>6</sup> Specifically, “the Court has recognized that it ‘cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States.’”<sup>7</sup>

The Court has consistently ruled that the states have the authority to establish and regulate minimum working conditions. Here, the bill would establish a baseline protection for workers to be free from the threat of adverse action for declining to attend meetings on political or religious matters. The Supreme Court has made clear that “[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.”<sup>8</sup> Such protective measures include “child labor laws, minimum and other wage laws, [and] laws affecting occupational health and safety...”<sup>9</sup> “[T]here is no suggestion in the legislative history of the [National Labor Relations] Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards.”<sup>10</sup>

### Similar legislation in other states

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<sup>5</sup> Building & Construction Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. 218, 224 (1993).

<sup>6</sup> *Ibid.* (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)).

<sup>7</sup> Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 757 (1985) (quoting Motor Coach Employees v. Lockridge, 403 U.S. 274, 289 (1971)).

<sup>8</sup> Metropolitan Life Ins., 471 U.S. at 756 (quoting DeCanas v. Bica, 424 U.S. 351, 356 (1976)).

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

The state of Oregon was first to pass a similar measure to SB 399 in 2009. That law has withstood a number of legal challenges. More recently, Connecticut passed and Governor Ned Lamont signed a ban on captive audience meetings just last year.<sup>11</sup> As of early June of this year, a similar measure had passed both houses of the New York State Legislature.<sup>12</sup>

### **Arguments in Support**

The California Labor Federation, a co-sponsor of the bill, states, “The bill clarifies that workers have the freedom to leave a mandatory meeting about their employers’ views on religious or political matters, including support or opposition of political parties or unions.

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 through mandatory meetings. These meetings are referred to as “captive audience meetings” because workers are not permitted to leave and are forced to listen to their employers’ non-job-related views on politics or religion, or on reasons not to advocate for their own rights as workers.

The use of captive audience meetings is widespread and designed to intimidate and scare workers. An Economic Policy Institute study found that 63% of employers interrogate workers in one-on-one captive audience meetings and 54% of employers threaten workers in such meetings. These meetings are designed to deter workers from enforcing their rights on the job—whether it is reporting wage and hour violations, discrimination, sexual harassment, or forming a union to negotiate better wages and safer working conditions.”

### **Arguments in Opposition**

A coalition of employer organizations, including the California Chamber of Commerce, are opposed on a number of grounds, including federal preemption, and state, “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

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<sup>11</sup> Senate Bill 163 (Horn) of 2022.

<sup>12</sup> Senate Bill 4982 (Ramos) of 2023.

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.”

## **REGISTERED SUPPORT / OPPOSITION:**

### **Support**

California Labor Federation (Co-Sponsor)  
California Teamsters Public Affairs Council (Co-Sponsor)  
AFSCME  
Alameda Labor Council  
American Federation of Labor and Congress of Industrial Unions  
California Conference Board of The Amalgamated Transit Union  
California Conference of Machinists  
California Faculty Association  
California Federation of Teachers  
California IATSE Council  
California Nurses Association  
California Professional Firefighters  
California Rural Legal Assistance Foundation  
California School Employees Association  
California State Legislative Board, Sheet Metal, Air, Rail and Transportation Workers - TD  
California Teachers Association  
California Work & Family Coalition  
Center on Policy Initiatives  
Central Coast Labor Council  
Clergy and Laity United for Economic Justice  
Contra Costa Central Labor Council  
Elevator Constructors Local 8  
Engineers and Scientists of California, IFPTE Local 20  
Hadassah  
Ironworkers Local 433  
Jewish Center for Justice  
Jewish Community Relations Council of Sacramento  
Jewish Democratic Club of Silicon Valley  
Jewish Family & Children's Service of Long Beach and Orange County  
Jewish Family Service San Diego  
Jewish Family Services of Silicon Valley  
Jewish Federation of The Greater San Gabriel and Pomona Valleys  
Jewish Federation of The Sacramento Region  
Jewish Long Beach  
Jewish Public Affairs Committee  
Jewish Silicon Valley  
Jobs to Move America  
JVS SoCal  
North Bay Labor Council  
Pillars of The Community

Progressive Zionists of California  
Sacramento Central Labor Council  
San Diego Black Workers Center  
State Building and Construction Trades Council of CA  
Techequity Collaborative  
UAW Region 6  
Unemployed Workers United  
Unite Here International Union  
Unite-HERE  
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

### **Oppose**

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  
Brea Chamber of Commerce  
California Apartment Association  
California Association for Health Services At Home  
California Association of Recreation & Park Districts  
California Association of Sheet Metal & Air Conditioning Contractors, National Association  
California Association of Winegrape Growers  
California Attractions and Parks Association  
California Bankers Association  
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 Landscape Contractors Association  
California League of Food Producers  
California Lodging Industry Association  
California Manufactures & Technology Association  
California Restaurant Association  
California Retailers Association  
California Special Districts Association  
California State Association of Counties  
California State Council of The Society for Human Resource Management (CALSHRM)  
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  
Family Business Association of California  
Flasher Barricade Association  
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.  
La Canada Flintridge Chamber of Commerce  
League of California Cities  
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  
Rural County Representatives of California (RCRC)  
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  
Urban Counties of California (UCC)  
California Legislative Conference of the Plumbing Heating and Piping Industry  
National Electrical Contractors Association  
Southern California Contractors Association  
United Contractors  
Vacaville Chamber of Commerce  
Vista Chamber of Commerce  
Western Growers Association  
Yorba Linda Chamber of Commerce



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