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CALIFORNIA HOSPITAL ASSOCIATION



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ACHD ASSOCIATION OF CALIFORNIA HEALTHCARE DISTRICTS



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## UPDATED JOB KILLER

April 1, 2022

TO: Members, Senate Committee on Appropriations

SUBJECT: **SB 1044 (DURAZO) STATE OF EMERGENCY: RETALIATION  
OPPOSE/JOB KILLER- AS AMENDED MARCH 23, 2022**

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE** your **SB 1044**, which has been labeled as a **JOB KILLER**. If **SB 1044** were in effect right now, any employed Californian could refuse to show up to work today, regardless of the health and safety precautions taken by their employers. The breadth of the bill would cripple emergency response, ignores existing protections, and undermines Cal/OSHA's current health and safety procedures.

**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.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> Specific industries like hospitals or those dealing with electrical equipment 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.<sup>4</sup> They are also protected from retaliation for reporting such conduct.<sup>5</sup> 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.<sup>6</sup>

**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, they have little impact. Specifically, because the determination of whether a state of emergency or emergency condition is “imminent and ongoing” is left to the employee's subjective standards, the bill still renders these existing regulations meaningless.

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 might 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.

**SB 1044 Would Cripple Emergency Response and Actually Reduce Workplace Safety**

Essential workers are labeled essential for a reason. Their work is vital to a functioning society, especially in times of emergency. Police, firefighters, healthcare workers, couriers, food service workers, agriculture workers and more all provide essential services that others depend on and aid emergency response. Some sectors or professions even have legally mandated staffing ratio requirements, such as hospitals. **SB 1044** contains no exceptions for those industries. By failing to consider the safety consequences of allowing emergency response personnel to walk-off the job, **SB 1044** fails to take into account the safety of the public.

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<sup>1</sup> See, e.g., Labor Code Sections 6400, *et seq.*

<sup>2</sup> See 8 CCR 3220; 8 CCR 3221; 8 CCR 3203.

<sup>3</sup> 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)

<sup>4</sup> California Labor Code Section 6311; CFR 1977.12.

<sup>5</sup> Labor Code Sections 1102.5, 6310; CFR 1977.12.

<sup>6</sup> Labor Code Section 6311.5.

Further, its broad applicability raises safety concerns for other employees in the workplace. For example, **SB 1044** undermines employers' evacuation plans (under which employees fulfill critical roles in ensuring the safe departure of other employees during a true emergency) by potentially removing key personnel from emergency response procedures.

In addition, a blanket prohibition on employers' ability to restrict use of personal cell phones is also problematic. During an emergency or evacuation, it is often necessary to limit use of cell phones to carry out certain functions or disseminate emergency instructions. An employer may need to place some limitations on the use of cell phones to ensure duties are carried out and that emergency communications can be promptly disseminated.

### **"State of Emergency" is Broadly Defined to Encompass States of Emergency That Last for Years**

**SB 1044** permits employees to not show up for work or to leave unannounced if they "feel unsafe" during a "state of emergency" or "emergency condition". The March 23, 2022 amendments do not sufficiently limit the definition of "state of emergency." "State of emergency" includes any state of emergency, local emergency, or presidential proclamation of major disaster or emergency caused by natural forces in the county where the worker lives or works. However, many states of emergency are statewide and therefore affect every county.

States of emergency often remain in effect for significant periods of time, long past the time of a pressing emergency. For example, on December 23, 2019, Governor Newsom terminated more than 70 *ongoing* states of emergency that had been declared at various times over the last decade, from January 27, 2011 to November 30, 2018. Just last month, on February 25, 2022, the Governor issued an executive order terminating twelve ongoing states of emergency, some dating back to 2015. Those states of emergency ranged from heat waves to civil unrest to fires to gas leaks.

The March 23 amendments provide that "[t]his section is not intended to apply when an official state of emergency remains in place but emergency conditions that pose an imminent and ongoing risk of harm to the workplace, the worker, or the worker's home have ceased." The issue is that it is up to the employee to subjectively decide what is imminent and ongoing. A fire that is largely under control may still be producing smoke. Regardless of whether Cal/OSHA has deemed it safe to work in a specific AQI, the employee could refuse to report to work.

The March 4, 2020, COVID-19 State of Emergency provides an important example of how **SB 1044** would operate once a state of emergency is declared. That state of emergency remains in place after two years - despite considerable improvement in California's COVID-19 status. Presently, we are at the lowest COVID-19 positivity rate since Summer 2021. The California Department of Public Health and Governor have deemed it safe for both adults and children to forego masks, regardless of vaccination status. We have a vaccination rate of 74.5%<sup>7</sup>, with some cities above 90%. Despite these improvements, under **SB 1044**, every single employee in California would have the right to walk out of work or stay home indefinitely simply because the March 4th state of emergency is still in place or because the employee subjectively believes that it qualifies as an "emergency condition". All they have to do is say they feel unsafe. *Nothing else is needed*. It is irrelevant whether the employer is following all rules set forth by Cal/OSHA or the Labor Code to address the cause of the state of emergency or emergency condition, whether personnel are needed to provide emergency services to the public, or even if the employer has even gone above and beyond those requirements.

Further complicating matters – as explained above, employers would face a retaliation claim if they try to replace that worker or change their duties as a result of their departure. Even if it was unreasonable for the employee to claim they feel unsafe, it would cost the employer thousands of dollars to prove that in court.

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<sup>7</sup> This reflects the percentage of the population that is eligible for vaccination and is vaccinated.



**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.<sup>8</sup> If DOSH issues a citation or takes action, no lawsuit may proceed. If not, the employee may proceed with the lawsuit. This ensures that DOSH is kept aware of all workplace safety issues and unsafe employers are swiftly issued a citation. 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 court 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 acknowledges, 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).<sup>9</sup> 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  
Allied Managed Care  
American Composites Manufactures Association  
Anaheim Chamber of Commerce  
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 Assisted Living Association  
California Association for Health Services at Home  
California Association of Health Facilities  
California Attractions and Parks Association  
California Chamber of Commerce

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<sup>8</sup> Labor Code Section 2699.3(b).

<sup>9</sup> 2019 Budget Change Proposal, *PAGA Unit Staffing Alignment*, 7350-110-BCP-2019-MR

California Farm Bureau Federation  
California Farm Labor Contractor Association  
California Grocers Association  
California Hispanic Chambers of Commerce  
California Hmong Chamber of Commerce  
California Hospital Association  
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  
Carlsbad Chamber of Commerce  
Chino Valley Chamber of Commerce  
Coalition of Small and Disabled Veteran Businesses  
Construction Employers' Association  
Corona Chamber of Commerce  
CAWA - Representing the Automotive Parts Industry and Auto Care Association  
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  
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 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  
Rancho Cordova Chamber of Commerce  
Roseville Area Chamber of Commerce  
San Jose Chamber of Commerce  
San Marcos Chamber of Commerce  
San Ramon Chamber of Commerce  
Santa Clarita Valley Chamber of Commerce  
Santa Maria Valley Chamber of Commerce

Simi Valley Chamber of Commerce  
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  
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Fernando Ramirez, Office of Senator Durazo  
Cory Botts, Senate Republican Caucus

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