September 3, 2024

Chair David Thomas and Board Members
Occupational Safety & Health Standards Board
Department of Industrial Relations, State of California
2520 Venture Oaks Way
Suite 350
Sacramento, CA 95833

Submitted electronically: oshsb@dir.ca.gov

RE: PROPOSED REGULATION FOR PROPOSED SB 553 IMPLEMENTATION REGARDING WORKPLACE VIOLENCE

Dear Chair Thomas and Members of the Board:

The California Retailers Association (Cal Retailers) submits this letter to comment on the proposed regulation interpreting the workplace violence regulatory mandate of Senate Bill 553 (Cortese) ("SB 553"), passed in 2023, codified into Labor Code Section 3343. Notably, Cal Retailers was heavily involved in the negotiations and discussions around SB 553 and appreciate the opportunity to share our comments on this important issue.

We will provide comments both on the Workplace Violence General Industry Draft, dated July 15, 2024 (the "Proposed Regulation") and on general concerns related to employers' obligations surrounding workplace violence.

Comments Regarding Changes from Labor Code Section 3343.

1.) "Engineering controls" and "Work practice controls" definitions are too specific and do not reflect the intrinsic differences between business and workplaces creating onerous regulatory obligations that will be impossible for industry to meet and the state to enforce.

The California Retailers Association recommends editing these definitions to emphasize that the definitions in these regulations are simply providing examples for industry to follow.

Accordingly, the following sentence in the "Engineering controls" definition would go from:

- For purposes of reducing workplace violence hazards, engineering controls include, but are not limited to:

Rewritten as follows:

- Examples of engineering controls related to reducing workplace violence hazards include, but are not limited to:

This same edit would then be made in the "Work practice controls" definition.

Additionally, each of these two definitions – "engineering controls" and "work practice controls" – should include language that the examples provided are simply illustrative and individual workplaces need to determine what types of controls are appropriate for their specific environment and workforce.

2.) Intention behind Engineering Controls and Administrative Controls in draft regulations remains unclear.

The draft regulation requires employers implement engineering controls and work practice (a/k/a "administrative") controls appropriate for the workplace to eliminate or minimize employee exposure to identified workplace violence hazards. This approach is consistent with occupational safety hazards and existing CalOSHA (and Federal OSHA) regulations.

The draft regulation then goes on to define engineering controls to include:

> *electronic or mechanical access controls to employee occupied areas; weapon detectors (installed or handheld); enclosed workstations with shatter-resistant glass; deep service counters; spaces configured to optimize employee access to exits, escape routes, and alarms; separate rooms or areas for high risk persons; locks on doors; furniture affixed to the floor; opaque glass (protects privacy, but allows employees to see where potential risks are); improving lighting in dark areas, sight-aids, improving visibility, and removing sight barriers; video monitoring and recording; and personal and workplace alarms.*

Work practice controls would be defined as including:

> *appropriate staffing levels; provision of dedicated security personnel; an effective means to alert employees of the presence, location, and nature of a security threat; control of visitor entry; methods and procedures to prevent unauthorized firearms and weapons in the workplace; employee training on workplace violence prevention methods; and employee training on procedures to follow in the event of a workplace violence incident or emergency.*

If the intention is to list these as *possible* (not required) mitigations, then fine. Otherwise, similar to defining hazards, the employer should determine what mitigations are appropriate. Otherwise, this proposed regulatory language could require an employer to deploy weapons-detection systems as one example.

3.) Identification of all employees involved in an incident is an unnecessary administrative burden for retailers.

Identifying all employees involved in the incident (names and other PII cannot be included in the written investigation report) is an administrative burden as retailers currently have the ability and already require their Unit Risk & Compliance and Safety & Security teams to document incidents in the global incident reporting system, which (for the U.S.) includes identifying all persons involved. Under this new proposed requirement, a separate investigation report would have to be prepared.

4.) Wording on page 6 C.11B regarding "written investigation report" is incorrect.

The highlighted wording ("written investigation report") is incorrect and should be changed to "Violent Incident Log". Retailers' written investigation reports use personal information to fill in the necessary sections of the Violent incident log. See section page 7 (d)(1), which tells business to omit any elements of personal identifying information from logged incidents.

> *1) Effective Procedures for post-incident response and investigation including:*
> - *(A) Providing immediate medical care or first aid to employees who have been injured in the incident;*
> - *(B) Identifying all employees involved in the incident (names, and other personal identifiable information as described in subsection (d)(1) shall not be included in the written investigation report);*
> - *(C)……..*

Page 7: (D)1 tells business to omit any elements of personal identifying information from logged incidents.

> *(d) Violent Incident Log. The employer shall record information in a violent incident log (Log) for every workplace violence incident.*

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(1) Information that is recorded in the log for each incident shall be based on information solicited from the employees who experienced the workplace violence, on witness statements, and on investigation findings. The employer shall omit any element of personal identifying information sufficient to allow identification of any person involved in a violent incident, such as the person's name, address, electronic mail address, telephone number, social security number, or other information that, alone or in combination with other publicly available information, reveals the person's identity. The log shall be reviewed during the periodic reviews of the plan required in subsection (c)(12)subparagraph (L) of paragraph (2) of subdivision (c).

Personal identifiable information is contained in retailer incident reports, but that information does not get entered onto the violent incident log.

5.) The Proposed Regulation adds a vague new obligation for additional inspections that is unnecessary and an enforcement "gotcha." (c)(9)

The Proposed Regulation adds a new obligation for inspections that was specifically rejected in the legislative discussions around SB 553: an obligation to inspect "when new substances, processes, and procedures or equipment are introduced to the workplace that represent a new hazard, . . ." Notably, this new inspection requirement appears largely duplicative of the clause that follows it, which also requires an inspection "whenever the employer is made aware of a new or previously unrecognized hazard."

Though we understand the intent of this new language, we believe it was properly rejected legislatively because the standard included in SB 553 (at establishment, upon every incident, and "whenever the employer is made aware of a new or previously unrecognized hazard") captures the core issue (changes to the workplace creating new hazards), while also ensuring the employer was *aware of the change*, and thus properly should be held liable.

Without such recognition, it appears this language is being added solely to issue a "gotcha" citation after an event occurs, with the additional allegation that "a new substance, process, or procedure was introduced, and you failed to inspect appropriately after it was introduced."

To resolve this concern, we would not add the new proposed language to (c)(9) relating to additional inspections ("... when new substances ... are introduced into the workplace that represent a new hazard ...") because we believe that it overlaps with existing language, while simultaneously creating liability for situations which the employer is totally unaware of.

6.) The Proposed Regulation should not list "staffing levels" as a work practice control, because they do not affect workplace violence. (b)(7)

Because additional staff will not change workplace violence – particularly because such staff is prohibited from taking any action to confront workplace violence – staffing levels do not make sense as a work practice control in the Proposed Regulation.

To give this context: we are not aware of any industries or employers (aside from law enforcement) which urge or require their staff to physically prevent or challenge those committing crimes of threatening violence. For example, industry best practices in retail are to keep distance and record/observe to report to police, with some employers utilizing polite inquiry of "May I help you?" to determine the intent of the individual in potential shoplifting situations. Any physical confrontation simply poses too much liability. So, even under current practices, requiring employers to hire additional staff – *when their policies already provide that staff should not attempt to intercede in such an event* – will not change the hazard.

Moreover, the Proposed Regulation would further diminish the value of any staffing by broadly prohibiting any "confront[ation]" by employees. If employees cannot even *speak* to any suspected criminal or potential workplace violence actor (see #6 below), then what is the utility of suggesting employers hire more staff? By way of metaphor – in a fall protection regulation, if employees were forbidden from using a harness, we would not expect "additional harnesses" to be identified among the relevant controls.

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Notably, the list of identified work practice controls already includes "dedicated safety personnel", and a range of other practices that *could actually alter/prevent* workplace violence. However, we do not see compelling a staffing ratio to be an appropriate "work practice control," given that both existing practice and the text of the Proposed Regulation prevent them from interceding in a workplace violence situation.

To address this issue, we would request the following correction to (b)(7):

". . . but are not limited to: ~~appropriate staffing levels;~~ provision of dedicated security personnel, an effective means to alert employees of the presence, location, and nature of a security threat …"

7.) The language in the Proposed Regulation around corrective measures (c)(10)(D) is vague, onerous and unrealistic resulting in the opposite of what the regulation seeks to accomplish.

In (c)(10)(D), it states, "Employers shall keep a record of correction measures considered or implemented to address workplace violence hazards." The use of the work "considered" is vague. At what point was a correction measure considered? Does someone just need to mention the idea and therefore a record must now be kept about it? This is onerous and unrealistic and could result in companies limiting what they "consider" or brainstorm as they may not want to keep a record of it. The words "considered or" from this section need to be removed.

8.) Further defining "Workplace violence hazards" is excessive. (A)

The existing SB553 requirements of having "…*Procedures to identify and evaluate workplace violence hazards, including but not limited to, scheduled periodic inspections to identify unsafe conditions….*" are more than sufficient.

These new "workplace violence hazards" are fine as examples that *could* be identified on a workplace violence hazard assessment (*if* this is the true intention), but hazard definition must be up to the employer to identify – not the state.

"*Frequent or regular contact with the public*" is one example of excessiveness because retailers are a business open to the public. By this definition, all retail business open to the public in California is a workplace violence hazard. That assumes that workplace violence is limited to contact with the public, yet it makes no mention of employee-on-employee incidents/violence. This section needs to be removed or rendered silent.

9.) The Proposed Regulation requires employers to "correct" certain defined "hazards" that are inherent in certain workplaces and uncorrectable. (c)(9)/(10)

The Proposed Regulation identifies a range of general conditions as "hazards," which range from "working alone" and the "presence of money" to "selling, distributing, or providing alcohol, marijuana, or pharmaceutical drugs."[1] Then, the Proposed Regulation requires that employers maintain effective procedures to "correct workplace violence hazards".[2] Notably, some of these situations *are* correctable in some workplaces. For example, lighting can be added to "areas with poor illumination."

However, many of the identified "workplace hazards" *cannot be corrected*, and therefore the Proposed Regulation will create an ambiguous and unfair compliance obligation. Some examples are discussed below, and referenced by their proposed subsection under (c)(9):

- **1. *"...[W]orking alone or in locations isolated from other employees..."*** - Certain jobs will inherently involve working alone or in isolated locations. A maintenance worker may travel independently to maintain certain pieces of distant equipment. While we would acknowledge that being alone may be a *factor to consider* in assessing whether the overall circumstances constitute

[1]See Proposed Regulation, subsection (c)(9)(A).
[2] *Id.* At subsection (c)(10).

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a workplace violence hazard, we do not believe that working alone, *by itself,* should be termed a workplace hazard. As written, the Proposed Regulation leads to the absurd conclusion that an employer must remedy the hazard (working alone) by ensuring that *no worker ever works alone.*

- **5. *"Presence of money or valuable goods"*** - How is this being defined in the Proposed Regulation? Certain jobs will, inherently, involve the presence of money or valuable goods. Every cash register in a retail store will, potentially, involve money. Many retail locations will, similarly, have on premises "valuable goods." While we would acknowledge that these may constitute a *factor to consider* in assessing whether the overall circumstances constitute a workplace violence hazard, we do not believe that their presence alone constitutes such a hazard. As written, the Proposed Regulation leads to the absurd conclusion that the money or valuable goods *are the hazard*, and that an employer has a duty to "correct" said hazard, by somehow ensuring that no items of value are ever present in the workplace.
- **6. "Frequent or regular contact with the public"** - Here as well, the so-called hazard is an inherent part of much of the commerce in the state. Every retailer is, under this definition, creating a workplace violence hazard.
- **7. "Working late at night or early morning"** – How is this being defined in the Proposed Regulation? Here as well, the so-called hazard is an inherent part of commerce in California. Certain businesses operate later at night and cannot avoid operating at night. However, the Proposed Regulation would term that necessary element a hazard and would seem to require that it be changed.

Though subsection (c)(10)(A) seems intended to address the impossible obligation to "correct" discussed above, it does not resolve the concern. That subsection specifies that "[e]ngineering and work practice controls appropriate for the workplace shall be implemented to eliminate or minimize employee exposure to identified workplace violence hazards." Applying this language to "frequent or regular contact with the public": the employer is obligated to utilize controls to eliminate or minimize employee exposure to "frequent or regular contact with the public." How is a retail location supposed to comply (and minimize public contact) while continuing to function?

Again – we do not disagree that some of the identified situations or conditions may be *part* of a circumstance that is a workplace violence hazard, but we do not believe the Proposed Regulation should specifically identify each of these circumstances *as constituting workplace violence hazards*.

To resolve this textual conflict, we would request the following correction to (c)(9)(A):

"Factors to consider in identifying ~~W~~workplace violence hazards shall include ..."

10.) The Proposed Regulation's Prohibition on "confront[ing]" suspected criminals or workplace violence offenders is unworkable and was rejected by the Legislature. (c)(10)(B)

During the extensive policy discussions that took place during the development of SB 553, no issue was more discussed than that of shoplifting, and what an employer should be allowed to do in response to it. In fact, labor representatives specifically advocated for a similar prohibition on any "confrontation" to the text of the Proposed Regulation. Cal Retailers raised great concerns over the feasibility and clarity of such a requirement. Ultimately, this specific requirement was *removed* from SB 553 before its final passage. We are troubled to see language that was specifically removed by the Legislature being re-added into the Proposed Regulation.

Prohibiting any policies that require or encourage an employee to "confront" suspected criminals or workplace violence offenders presents multiple problems as written, mainly stemming from the ambiguity of "confrontation". A few examples are provided below.

a) **Prohibiting any "confrontation" with "persons suspected of engaging in workplace violence" is overbroad and would prevent even reasonable conduct.** "Persons suspected of engaging in workplace violence" is an incredibly broad term. It covers everyone from someone who workers believe *may* have yelled a threat at someone else in the store, to an armed shooter entering the workplace. Obviously, these situations merit very different responses. Employees should be able to speak to individuals whose conduct is only verbal to ask them to leave the store. This is

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common practice and is to the benefit of all involved by resolving the situation with as little escalation as possible, and minimizing police involvement where it is not necessary. In contrast, the Proposed Regulation would prohibit any employee from speaking to that person, as even a polite "Sir, can we help you?" spoken from a safe distance (for example, 30 feet) could still generate liability as a "confrontation".

b) **Prohibiting any "confrontation" with "persons suspected of committing a criminal act" will only encourage the shoplifting epidemic across California.** At a policy level, we have great concern that the overbroad prohibition on any "confrontation" – including a polite verbal question of "how can we help you?" or a notification that "Sir, the police have been called." – will only encourage and embolden the epidemic of shoplifting and retail theft that has rocked California and made national news in recent years. Should a potential shoplifter become aware that a California regulation *affirmatively prohibits any staff member from even speaking to you* if they suspect that you are shoplifting (let alone actually physically detaining you), we believe this will greatly embolden these thieves.

To address these concerns, we request that this prohibition be removed from the regulation. If it is not removed, we would request that "confrontation" be defined so as to limit it to physical confrontation, and not prohibit speech. We also would request the removal of the word "encourage" in 10.B. - (B) Employers shall not require or encourage employees to confront persons suspected of committing a criminal act or persons suspected of engaging in workplace violence.

11.) The Proposed Regulation creates difficult confidentiality obligations by requiring that identities be kept confidential, while also requiring much of the covered information to be made public. (c)/(d)

The Proposed Regulation requires employers to, as part of their post-incident response and investigation, "identify[] all employees involved in the incident" and "solicit[]from employees . . . their opinions regarding the cause of the incident . . .". ((c)(11)(B)/(G).) Then, in preparing their post-incident written investigation report, they are required to include a "description of how they complied with those obligations (identifying employees and seeking their feedback), as well as recording all information received from those conversations, and recommendations based on the investigation. ((c)(11)(H).)

Moreover, this concern is particularly significant for smaller businesses and less well-funded employers, whose legal and human resources staff are smaller (or non-existent).

12.) Clarification is needed regarding trauma counseling requirements for employers with more than 25 employees. (c)(11)(C)

In (c)(11)(C), the draft regulation states, "For employers with more than 25 employees, making available individual trauma counseling to employees affected by the incident". Clarity is needed as to whether or not a company's EAP program suffices to meet this requirement? If not, further information is needed as to what is required in the regulations.

13.) The Proposed Regulation's requirement of individual trauma counseling is already covered by the Workers Compensation system and was also specifically rejected by the Legislature. ((c)(11)(C))

During the legislative debates regarding SB 553, the issue of post-incident counseling being provided on an individual basis was also discussed repeatedly – and was also removed from the bill before its final passage and signature by the Governor. We strongly oppose its re-introduction here in the Proposed Regulation.

First and foremost – counseling is *already provided* as part of the workers compensation system for employees who need it after an incident. Requiring employers to provide such counseling to all "employees affected by the incident" is duplicative of that system. Moreover, utilizing the workers compensation system addresses some of the vagueness issues inherent in the Proposed Regulation's text. For example: who is "affected" by the incident? If employees who did not work that day, but heard mention of it seek therapy,

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are employers required to provide it? Remember that this obligation is written to apply to every sort of workplace violence incident, including a single verbal threat. In that context, the scope of the obligation is absurd: the owner of a retail store needs to provide individualized therapy to every employee merely because a threat was spoken on a Friday night.

Furthermore, California is already in a shortage of mental health workers.[3] Compelling their usage for workers who were not involved in any workplace violence event, and for events that did not involve any physical harm is a misallocation of scarce mental health resources.

To resolve this issue, we request that counseling be provided via the workers compensation system, and (c)(11)(C) be struck. In the event that (c)(11)(C) is maintained, it should be limited to therapy for those who are present at the workplace violence event and limited to events involving physical violence.

Conclusion:

We appreciate the opportunity to provide comment and look forward to participating in the advisory committee process.

Sincerely,

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[3] *See generally "Unanswered cries: Why California faces a shortage of mental health workers",* CalMatters, published September 8, 2022. Available at: https://calmatters.org/health/2022/09/california-shortage-mental-health-workers/;

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