September 3, 2024

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Submitted electronically: EBerg@dir.ca.gov

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

Dear Deputy Chief Berg:

The California Chamber of Commerce and the undersigned organizations submit 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, the California Chamber of Commerce and other coalition groups were heavily involved in the negotiations and discussions around SB 553 and appreciate the opportunity to share our comments on this important issue.

As an initial matter, we are concerned with the blurring of the line between workplace hazards – that are created at the workplace – and externally-created hazards which enter the workplace. We believe that workplace violence may fall into either category, depending on the factual circumstances surrounding the violence, and believe it is important to separate the two as we move forward in drafting the Proposed Regulation.

With that concern in mind, we appreciate the opportunity to provide comments on the Workplace Violence General Industry Draft, dated July 15, 2024 (the "Proposed Regulation").

Comments Regarding Changes from Labor Code Section 3343.

1) **The Proposed Regulation considerably broadens the scope of coverage by improperly striking "at any given time" regarding the threshold number of employees for a covered business. ((a)(1))**

We are concerned that the deletion of "at any given time" from the limitation on scope to workplaces with 10 employees will considerably broaden the scope of small businesses covered by the regulation. For example: a small restaurant or family-run shop may have 10 *total* employees, but many of them may be part-time ... because the business cannot afford full-time staff at that level. The store may have, for example, 2-3 people working at any given time. That business cannot afford compliance with this regulation – and should not be forced to create a workplace violence plan, conduct regular training and inspections, and meet the significant recordkeeping obligations of the Proposed Regulation.

To resolve this concern, we would urge one of the two following solutions:

- Option (a) That the Proposed Regulation maintain the standard set legislatively in SB 553 of 10 employees working at the place *at any given time*.
- Option (b) If a total number of employees is to be utilized (regardless of presence in the workplace at any given time), then the Proposed Regulation should match the more commonly used legislative thresholds of either 25 or 50 employees for designating a small business, and exempt workplaces with less employees.[1]

[1] Notably, many California leave laws – including childcare leave, crime victims' leave, and COVID-19 sick leave utilize the 25-employee threshold. Alternatively, the federal Family and Medical Leave Act (FMLA) utilizes a 50-employee standard.

2) **The Proposed Regulation's communications procedures create concerns related to the confidentiality obligations and recordkeeping obligations. ((c)(6))**

We are concerned that the addition of employee representatives to the parties who must be informed of the results of any investigation and corrective actions makes it harder to: (1) maintain the confidentiality of the reporting employee pursuant to (6)(A); and (2) complete a privileged internal investigation with the help of counsel, given that the material must be shared.

Speaking broadly, we are also concerned with difficulties posed by the Proposed Regulation's text vis-à-vis current law for smaller employers. Though larger companies – with in-house legal teams or long-term contract attorneys – may find additional recordkeeping and communications burdensome, smaller employers will find them simply infeasible. That concern carries through many of SB 553 and the Proposed Regulation's provisions – but is particularly important for all areas of new obligations, such as those posed by subsection (c)(6).

Also, we believe there is a typographical error in subsection (c)(6)(B), where the word "representative" was omitted. Specifically, the proposed final sentence should read "… a record of investigations into employee and authorized employee *representative* concerns."

3) **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.

4) **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.

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 …"

5) 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."[2] Then, the Proposed Regulation requires that employers maintain effective procedures to "correct workplace violence hazards".[3] 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. A convenience store clerk may, inherently, work alone at times. While we would acknowledge that being alone may be a *factor to consider* in assessing whether the overall circumstances constitute 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"*** - Certain jobs will, inherently, involve the presence of money or valuable goods. Every cash register in a retailer, restaurant, or bank 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 restaurant, retailer, tourist destination, winery, community event center, or school is, under this definition, creating a workplace violence hazard.
- **7. "Working late at night or early morning"** – Here as well, the so-called hazard is an inherent part of commerce in California. Certain businesses operate later at night (for example, a drive-in movie theater, or gas station convenience store for travelers, or a bar/club) - 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.

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

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 ..."

6) 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. CalChamber (and others) 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 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.

7) **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).

8) **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, 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 small bar or restaurant might need 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.[4] 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.

9) **The Proposed Regulation should minimize changes in light of the obligations of re-training that such changes will create. ((e))**

Employers across California have already worked with counsel to come into compliance with SB 553's terms. These obligations are considerable, including providing training to their employees pursuant to SB 553's requirements. To the extent that the Proposed Regulation changes the requirements for employers, it creates considerable costs for those employers to create new trainings with counsel and re-train their employees.

Therefore, we ask that changes be minimized – particularly as to training obligations – so as to not necessitate re-training for less consequential differences. Alternatively, we would ask for the Proposed Regulation's final version to allow training changes to be incorporated beginning in the following year, so that re-training waste is minimized.

[4] *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/;

10) The Proposed Regulation should clarify that "interactive" training is consistent with the other regulations and allows slightly delayed question responses. ((e)(1)(F))

The Proposed Regulation provides that training shall include "[a]n opportunity for interactive questions and answers with a person knowledgeable about the employer's workplace violence prevention plan." We are concerned that this appears to require an expert to be present at all training sessions, which is both inconsistent with other similar regulations, and infeasible. Moreover, this lack of precision is confusing for employers in attempting to comply with the Proposed Regulation – and many of the signatories have already received questions from members regarding whether a recorded training video can be used for compliance with SB 553.

As to infeasibility: training must be conducted at establishment of the plan (where hopefully most of the workforce is present). For large employers, having an expert on the workplace violence plan present for that initial training is likely feasible. But consider the number of follow-up trainings: (1) individuals who missed the main training need their own training; (2) new hires need additional trainings as they join the workplace; (3) if there is a skeleton crew or portion of the workforce who works remotely or on a different shift, they will need a separate training. Simply put – it may not be feasible for an employer to have a person knowledgeable on the plan be available for live questions during every training – particularly for small- or mid-sized employers.

That is why electronic trainings (which may just be a recording of the primary training meeting) are a critical tool for small/medium-sized employers. They allow for cost-efficient training which can be viewed when convenient for each employee, and from any location.

Therefore, we ask that the Proposed Regulation take an approach similar to the healthcare-focused provisions of 8 CCE 3342(f)(1)(C) ("… shall provide for interactive questions to be answered within one business day by a person knowledgeable …") or in sexual harassment prevention training regs, found in 2 CCR 11024(a)(2) ("…shall provide a link or directions on how to contact a trainer who shall be available to answer questions … within a reasonable period of time after the employee asks the question, but no more than two business days …"). These provisions provide both clarity for the employer (on whether electronic training is legally acceptable), and also ensure that questions are responded to promptly.

When comparing the two, we believe that the timeline of two business days is more appropriate for the broad swath of employers covered by the Proposed Regulation … whereas the one business day timeline applicable to hospitals simply would not be feasible for the smaller businesses covered by the Proposed Regulation.

To resolve this issue, we suggest the following language in (e)(1)(F):

An opportunity for interactive questions and answers with a person knowledgeable about the employer's workplace violence prevention plan. Where a person knowledgeable about the employer's workplace violence prevention plan is not present for such training, an opportunity for interactive questions and answers may be provided by including in the training a link or directions on how to contact the knowledgeable person, and ensuring responses to any questions are provided within two business days.

Conclusion:

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

Sincerely,

Robert Moutrie
Senior Policy Advocate
California Chamber of Commerce
on behalf of

African American Farmers of California
American Petroleum and Convenience Store Association
American Pistachio Growers
Associated Roofing Contractors of the Bay Area Counties
California Association of Sheet Metal and Air Conditioning Contractors National Association
California Attractions and Parks Association
California Chamber of Commerce
California Cotton Ginners and Growers Association
California Craft Brewers Association
California Farm Bureau
California Framing Contractors Association
California Fresh Fruit Association
California Hotel & Lodging Association
California League of Food Producers
Construction Employers' Association
Housing Contractors of California
Nisei Farmers League
Plumbing-Heating-Cooling Contractors Association of California
Residential Contractors Association
Society for Human Resource Management
Western Agricultural Processors Association
Western Electrical Contractors Association, Inc.
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