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CalChamber

ALERT

Bill Exposes Employers to Costly Labor Litigation

A California Chamber of Commerce-led coalition is **strongly opposing** a job killer bill that expands employer exposure to lawsuits for adverse employment decisions.

AB 524 (Wicks; D-Oakland) exposes employers to costly litigation under the Fair Employment and Housing Act (FEHA) by creating a new protected class of employees under California employment rights laws — the employee's family caregiver status — which is broadly defined to include any employee who contributes to the care of any person of their choosing, and creates a *de facto* accommodation requirement that will burden small businesses.

The bill was sent to the Senate Appropriations Committee Suspense File when legislators returned from the summer break on August 14 and is among hundreds of bills awaiting action today when the committee reviews proposals on the Suspense File.

The coalition — made up of groups representing employers from multiple industries and many local chambers of commerce — has emphasized to legislators that, if passed, AB 524 will increase the cost of doing business in California and the costs of goods and services. The bill is a significant expansion of FEHA and the provisions in it have been rejected by the Legislature for the last two years.

AB 524's broad definition of the protected class of employees would encom-

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Coalition Opposes Air District Proposal to Cap Cargo at LA, Long Beach Ports

The South Coast Air Quality Management District (SCAQMD) is considering a detrimental rule that would limit the import and export of goods from the ports of Los Angeles and Long Beach, hurt California jobs and have a devastating effect on the Southern California economy.

A large coalition of more than 100 organizations, which include the California Chamber of Commerce and groups representing sectors involved in all aspects of goods movement, is urging the mayors of Los Angeles and Long Beach to reject SCAQMD's proposed rulemaking.

Proposed Cap on Cargo

The SCAQMD, a regional air quality agency representing Los Angeles, Orange, Riverside and San Bernardino counties, is seeking to enact a Port Indirect Source Rule (ISR) for the ports of Los Angeles and Long Beach by December 2023. This rule would cap cargo volumes at the nation's busiest container gateway.

The agency is not mandating specific equipment upgrades or technology enhancements, nor is it setting emission limits for individual supply chain elements, as the California Air Resources

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Emissions Tracking Mandate Will Increase Business, Consumer Costs

The California Chamber of Commerce and a broad coalition of organizations are urging legislators to reject an onerous emissions tracking and paperwork requirement that will increase costs on California businesses and consumers, as well as hand market advantage to out-of-state and foreign companies.

CalChamber-**opposed SB 253 (Wiener D-San Francisco)** imposes mandatory climate emissions tracking and auditing that will fall heavily on California businesses, affecting competitiveness and increasing costs.

The Assembly Appropriations Committee is expected to act on SB 253 today when it considers bills it put on the Suspense File earlier this month.

Does Not Reduce Emissions

To be clear: This bill will not reduce emissions. It is a costly reporting requirement that does not help the state meet its climate goals.

How costly? As the CalChamber pointed out in an opposition letter sent to legislators, initial estimates show that each company will have to pay more than $600,000 per report, annually. Beyond

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Inside

Cal/OSHA Corner

Portable Toilet: Conditions for Using When Regular Facilities Offline

Mel Davis
Workplace Safety Expert

Our business is located in an area that can be plagued with occasional disruptions of our water supply. We can provide drinking water but our toilet facilities are rendered inoperable. Can we provide portable facilities if the water is going to be off for an extended length of time?

The General Industry Safety Orders, Article 9, Sanitation, contains the requirements for toilet facilities and lavatories. Nowhere in the regulation does it state that the facilities are to be permanently affixed in a specific manner.

Therefore, it can be assumed that if the facility meets the stated criteria for privacy, cleanliness, waste storage, and sanitary supply issues, then a portable toilet facility is permissible. The portable toilet will require a lockable door and the interior, exterior and environs of the structure shall be cleaned and maintained in such condition as will not give rise to harmful exposure.

As with indoor facilities, lavatories are to be provided and maintained in good working order. The lavatory can be an integral unit with the porta potty or it can be a free-standing unit convenient to the facility with controlled drainage to capture the waste water.

Each lavatory will be provided with running water and suitable cleansing agents. The water temperature can be ambient except in those instances where employees are working with substances that are regulated as carcinogens in these orders or skin contact may occur with a substance designated skin (S) in Section 5155, airborne contaminants, such as diazinon. The required water temperature then is at least 85 degrees Fahrenheit.

These requirements may be subject to variants by local health departments enforcing more stringent standards contained in the Health and Safety Code for food handlers.

Column based on questions asked by callers on the Labor Law Helpline, a service to California Chamber of Commerce preferred members and above. For expert explanations of labor laws and Cal/OSHA regulations, not legal counsel for specific situations, call (800) 348-2262 or submit your question at www.hrcalifornia.com.

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More information at ***www.calchamber.com/events***.

Labor and Employment

HR Boot Camp 2 Half-Day Virtual Seminar. CalChamber. September 7–8: SOLD OUT, Online. (800) 331-8877.

Effective Strategies for Handling Discipline and Termination in the Workplace. CalChamber. September 14, Online. (800) 331-8877.

Leaves of Absence: Making Sense of It All Virtual Seminar. CalChamber. September 21–22: SOLD OUT, Online. (800) 331-8877.

International Trade

2023 Taiwan Trade Shows. Taiwan Trade Center, San Francisco. March 6–November 8, Taiwan and Online. (408) 988-5018.

The Green Expo 2023. The Green Expo and International Environmental Congress of the Consejo Nacional de Industriales Ecologistas (CONIECO). September 5–7, Mexico City. 55-1087-1650.

Discover Global Markets: Europe/Eurasia. U.S. Department of Commerce. September 7, San Bruno. *douglas.wallace@trade.gov*.

Strategies for Success in Asia (4th of Six Part Webinar Series). U.S. Commercial Service. September 7, Online. *Frances.Selema@trade.gov*.

Access Africa Now: Ethiopia (last of webinar series). U.S. Commercial

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CalChamber Calendar

Water Committee:
September 7, Laguna Niguel

ChamberPAC Advisory Committee:
September 7, Laguna Niguel

Board of Directors:
September 7–8, Laguna Niguel

International Trade Breakfast:
September 8, Laguna Niguel

ChamberPAC Legislative Roundtable:
September 8, Laguna Niguel

Public Affairs Conference:
October 24–25, Laguna Niguel

Next Alert: September 15

The Workplace

Recent NLRB Ruling Affects Workplace Rules, Employee Handbooks

In Episode 183 of The Workplace podcast, CalChamber employment law experts Matthew Roberts and James Ward discuss the National Labor Relations Board (NLRB) ruling in *Stericycle, Inc. and Teamsters Local 628*, and how it affects California employers' workplace rules and handbooks.

Stericycle, Inc.

In 2014, Teamsters Local 628 challenged Stericycle, Inc.'s workplace rules before the NLRB, alleging that the employer's rules chilled collective bargaining rights under the National Labor Relations Act (NLRA), Ward explains.

On August 2, 2023, the NLRB issued its decision in *Stericycle, Inc.* and adopted a new legal standard for evaluating whether an employer's work rules are lawful. This affects work policies that many employers already have in their handbooks, such as personal conduct policies, conflict of interest policies, etc., Roberts says.

In *Stericycle*, the NLRB is reversing the approach of the 2017 *Boeing* case, which created a categorical framework for analyzing workplace rules, and weighed both the impact of the rules on employee rights and the employer's justification of those rules, Ward says.

In the eyes of the current board, *Boeing* gave too little consideration to the chilling effect that workplace rules can have on employees' rights, Ward explains. Under the new standard, an employer's rule is presumptively invalid if the general counsel can show that the rule has a reasonable tendency to chill employees from exercising their rights.

"This new standard sets a very low bar, because the board said its interpretation of a rule will be from the context of an employee who is dependent on the employer and who is also contemplating engaging in protected activity," Ward says. "…from the Board's perspective, this employee is going to be thinking about engaging in activity, and it's going to be thinking about whether this rule has a coercive effect on their ability to do that."

If an employee could reasonably interpret the rule to have a coercive meaning, the rule is presumed unlawful, even if there's another non-coercive interpretation that is reasonable, he said. This means that an ambiguous rule or an overbroad one will always be found to be unlawful. And once that bar is met, the Board will weigh business interests.

This, however, will be very difficult for employers.

"…once the rule is shown to be ambiguous, or overbroad in the first step, it's going to be incredibly difficult to show that the rule is narrow enough," Ward says.

Practical Applications

So, what does this decision mean for the policies California employers have in their handbooks?

Roberts says that in California there are certain policies that employers are required to have, such as harassment, discrimination and retaliation prevention, lactation accommodation, and family and medical leave policies. Because these policies are required, they will be subject to the NLRB's new standard.

Ward recommends that employers take a look at their policies and ensure they are narrowly tailored to the requirements of the law.

Other than those legally required policies, many employers have other policies in their handbooks. What kind of common policies are at risk under the new standard, Roberts asks Ward?

Ward replies that any policy that in any way restricts employee speech, communication and conduct is at risk of running afoul of the new standard.

"Think codes of conduct policies, electronic communications, confidential information policies that restrict what employees are allowed to disclose, social media policies, and employer use—all those kinds of things are going to need to be re-examined under this new standard," he says.

Employers should also review policies that place broad restrictions, such as causing disruptions in the workplace or making offensive comments. When reviewing these policies, employers should use clear and specific language about the exact type of conduct they want to prohibit, Ward stresses. For example, instead of saying a word like "disruption," employers should consider saying "physical altercations in the workplace."

Employers will need to consult with legal counsel and ensure they are narrowly tailoring their rules, and thoroughly tie them to the legitimate and substantial business interests that they're putting forward, Ward says.

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pass essentially every worker and create an automatic basis for an individual in that new classification to challenge any adverse employment action, the coalition said.

Further, the new classification could be used to require employers, including small businesses, to accommodate all caregiving needs beyond what is already required under existing law or else they may face a discrimination claim, depending on how courts interpret the term "special" accommodation.

AB 524 was amended in the Senate Judiciary Committee to say an employer is not required to provide "special" accommodation, but it remains unclear what "special" means. If an employee requests a schedule change or time off that is denied and they subsequently violate an attendance policy or are terminated for refusing to work a different schedule, they could surely sue, alleging discrimination.

Subjective Determination

Because whether an employee "contributes" to the care of another is a subjective determination, the employer has no ability to dispute an employee designating themselves as having family caregiver status. Any dispute would open the employer to costly litigation.

Further, adding this broad new classification to the FEHA list would limit any employer's ability to enforce policies, including attendance policies. Any action taken by the employer could be challenged as discrimination based on the employee's "family caregiver status."

That possibility will significantly limit an employer's ability to address discipline issues in the workplace, maintain stability, and eradicate any issues without costly litigation.

Existing Leave Laws

Many existing laws have parameters that provide employees time to act as a caregiver. Examples include leave for situations where a school or childcare center is unavailable; leave to care for a family member or other designated person of the employee's choice; and "kin care" laws that allow the use of sick time to care for someone else.

The California Family Rights Act was broadened just this year to include "designated persons" (nonfamily members) in the list of people for whom the employee can take time off.

Any employer who retaliates against an employee for using these leaves is liable for unlawful retaliation.

If the Legislature finds these leaves insufficient, rather than imposing new burdens on employers, it should provide more flexible work options to workers by revising California's overly rigid wage and hour laws that prohibit workplace flexibility.

Private Right of Action

AB 524 exposes employers, including small businesses, to costly litigation because FEHA includes a private right of action for any alleged discrimination against a protected classification. Liability includes compensatory damages, injunctive relief, declaratory relief, punitive damages, and attorney fees.

A 2017 study by insurance provider Hiscox estimated that the cost for a small to mid-size employer to defend and settle a single plaintiff discrimination claim was approximately $160,000, which was a $35,000 increase from Hiscox's study just two years earlier. This amount, especially for a small employer, reflects the financial risk associated with defending a lawsuit under FEHA.

In 2016, Hiscox found that U.S. companies had a 10.5% chance of having an employment charge filed against them. For California, that percentage was 56.5%. According to two annual reports of the Civil Rights Department (formerly the Department of Fair Employment and Housing), thousands of complaints are filed every year, with more than 70% of those employees choosing to immediately pursue civil litigation instead of having the department investigate their claim.

CalChamber-Sponsored Seminars/Trade Shows

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Service. September 13, Online. (512) 936-0039.

2023 ASEAN Outbound Mission to Thailand. Western U.S. Agricultural Trade Association and U.S. Department of Agriculture Foreign Agricultural Service. October 2–6, Bangkok. *michelle.silva@isda.idaho.gov*.

Discover the Taste of Future: B2B Agrifood Matchmaking Event. Enterprise Greece and Enterprise Europe Network Hellas. October 8–10, Cologne, Germany. (415) 775-2102.

2023 Taiwan Innotech Expo. Taiwan External Trade Development Council (TAITRA) and Industrial Technology Research Institute (ITRI). October 12–14, Taiwan. (415) 362-7680.

EXIM 2023 Annual Conference. Export-Import Bank of the U.S. October 19–20, Washington, D.C. (800) 565-3946.

Build Expo Greece. Rota Exhibitions Greece. October 19–22, Athens, Greece. (415) 775-2102.

Canada Hot Sauce Mission and Trade Show. Western U.S. Agricultural Trade Association. October 22–26, Toronto, Canada. *export@wusata.org*.

Smart City Expo World Congress (SCEWC). Smart City Expo World Congress. November 7–9, Barcelona, Spain. (704) 248-6875.

MEDICA CEO Program. Governor's Office of Business and Economic Development (GO-Biz). November 13–16, Düsseldorf. *patricia.utterback@gobiz.ca.gov*.

APEC CEO Summit 2023. National Center for APEC (Asia-Pacific Economic Cooperation). November 15–16, San Francisco. (206) 441-9022.

2023 Cosmoprof Asia. Governor's Office of Business and Economic Development (GO-Biz). November 15–17, Hong Kong. (916) 447-7946.

Arab Health. Governor's Office of Business and Economic Development (GO-Biz). January 9–February 1, 2024. *patricia.utterback@gobiz.ca.gov*.

California Pavilion at the Singapore Airshow. Governor's Office of Business and Economic Development (GO-Biz). February 20–25, 2024, Singapore. (916) 447-7946.

Hannover Messe: California Pavilion. Governor's Office of Business and Economic Development (GO-Biz). April 22–26, 2024, Hannover, Germany. *patricia.utterback@gobiz.ca.gov*.

Farnborough International Air Show: California Pavilion. Governor's Office of Business and Economic Development. July 18–22, 2024, Farnborough, United Kingdom. *patricia.utterback@gobiz.ca.gov*.

Proposal to Cap Cargo at LA, Long Beach Ports Will Hurt Jobs

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Board has done in the past. Instead, SCAQMD is setting hard target dates for total emission reductions on all supply chain components and making those reductions the responsibility of the ports and terminal operators, regardless of whether they have a contractual relationship with those entities.

In addition, the ISR would extend the jurisdictional boundaries of emission reduction to 40 nautical miles for ocean vessels, the first place of rest for cargo moving by truck, and to Banning, California, for cargo moving by rail, all of which would become the responsibility of the port or terminal.

Impact on Economy, Essential Goods

In an opposition letter, the coalition pointed out that the rulemaking's volume cap on port activities will restrict the delivery of critical imported goods, including essential construction, manufacturing and automobile components, as well as medical supplies, and halt the export of California's manufactured goods and agricultural products to foreign markets.

The proposed ISR would also affect port jobs and revenues, the coalition warns. The Port of Long Beach alone supports $11.9 billion in federal, state and local taxes. The Port of Los Angeles estimates that 1 in 12 jobs in Los Angeles and Long Beach, as well as 1 in 9 jobs in the counties of Los Angeles, Orange, Riverside, San Bernardino and Ventura are connected to the ports, and as many as 3 million jobs nationwide.

"The Ports are among the best sources of high-paying, secure jobs and our local communities, schools, hospitals and small businesses depend on the jobs that our vibrant port complex produces," the coalition said.

Hurts Emission Reductions

The coalition also warned that the proposed ISR is counterproductive to additional zero-emission reduction efforts and will actually increase greenhouse gas (GHG) emissions by forcing the diversion of cargo to other, less environmentally conscious, North American trade gateways.

In a commentary for the *Journal of Commerce*, Pacific Merchant Shipping Association President John McLaurin pointed out that multiple studies have shown that GHG emissions increase when cargo from the Far East moves through East and Gulf coast ports instead of landing on the West Coast.

The ISR would also inhibit the ability of the local supply chain to finance the equipment and infrastructure upgrades necessary to transition to zero-emission infrastructure, defeating the purpose of California's zero-emission strategies and the ports' Clean Air Action Plan (CAAP), the coalition said.

Furthermore, many of the gateways referred to above are in states that compete directly with California economically, but do not share California's goals. The shifting of supply chains and the economic vitality that follows, from San Pedro Bay to other gateways, will undoubtedly have numerous unintended consequences.

"We urge the cities of Los Angeles and Long Beach to carefully analyze and oppose SCAQMD's proposed ISR and provide federal, state, and local elected officials with critical information about the operation and widespread negative impacts of the proposed ISR," the coalition said.

In his commentary, McLaurin pointed out that efforts in California have already resulted in impressive emissions reductions across all segments of the supply chain, and, as a result, California ports are the cleanest in the world.

"The ports and the private sector are experimenting with alternative fuels, battery electric and hydrogen terminal and truck equipment, and new operational standards and technologies. This progress will continue, but future success will require well thought out policy directives," McLaurin said.

In contrast, the proposed ISR would only hurt California's GHG reduction efforts, and drive imports and exports — and tens of thousands of jobs — elsewhere, he said.

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that, each company could pay three times to file the same report.

"Ultimately, these are costs that will end up being passed on to the consumer and will lead to lost revenue for the State," the CalChamber said.

Impact on Businesses Located in California

SB 253 requires that businesses that meet a specified financial threshold annually report greenhouse gas (GHG) emissions data from throughout the entire supply chain, regardless of who in the supply chain produces the emissions.

This requirement will be particularly tough on small businesses as they typically are under resourced and will struggle to accurately measure their GHG emissions. This may result in large businesses ceasing their partnerships with small and medium-sized businesses, leaving these companies without the contracts that enable them to grow and employ more workers, the CalChamber said.

Moreover, SB 253 would apply to businesses located in California, as the state does not have the authority to regulate emissions beyond the California border. This means that out-of-state and international companies can opt to simply ignore SB 253's requirements.

Therefore, the burden of this bill will fall squarely on California-based companies, giving out-of-state and foreign companies a market advantage, driving production out-of-state and increasing the cost of goods for California residents, the CalChamber warned.

'Scope 3' Emissions Guidelines

Another problematic aspect of this bill is its "Scope 3" emissions guidelines.

In the definitions, SB 253 sets out three types of emissions: Scope 1, which is defined as direct emissions from sources owned, operated, or directly controlled by the company; Scope 2, which are indirect emissions from any electricity purchased by a company; and Scope 3, which is very broad and includes all "indirect [GHG] emissions, other than Scope 2 emissions, from sources that the reporting entity does not own or directly control and may include, but are not limited to, purchased goods and services, business travel, employee commutes, and processing and use of sold products."

The CalChamber explained that due to the likelihood of double counting, assessing Scope 3 emissions data with any degree of accuracy is not yet possible. This is mainly due to the protocol's reliance on secondary data, or industry averages, when calculating Scope 3 emissions.

Secondary data is inherently flawed and unreliable, nor does it paint an accurate picture. For example, financial accounting standards rely on a company to report the actual invoiced cost of a raw material rather than base it on an industry average. Similarly, tax authorities demand that companies report on their actual profit margins, rather than the industry average.

This flawed method of calculating Scope 3 emissions means that virtually every reporting entity could be subject to a violation. And, naturally, those reporting entities will look for ways to mitigate the risk associated with a penalty, the CalChamber pointed out. This will only add to the cost of goods and services in California as that risk mitigation makes its way through the supply chain and eventually back to the consumer.

Staff Contact: Brady Van Engelen