SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 2421 (Low)
Version: June 17, 2024
Hearing Date: July 2, 2024
Fiscal: Yes
Urgency: No
ID

SUBJECT

Employer-employee relations: confidential communications

DIGEST

This bill prohibits specified public employers from questioning employees and employee representatives about communications between employees and employee representatives related to the representative's representation, with an exception as specified.

EXECUTIVE SUMMARY

The inviolability of the employee-union representative relationship is essential to an employee's representation and to the guarding of an employee's rights to self-organization and collective bargaining. In the context of public employees, the Public Employment Relations Board (PERB) has found that communications between an employee and their employee representative are protected from disclosure to an employer in some circumstances. However, case law and statute so far has not provided an employee and employee representative with an evidentiary privilege, in which the communication cannot be compelled to be disclosed or used as evidence in a court proceeding, for their communications. This bill proposes to prohibit certain public employers from questioning their employees regarding communications between an employee and an employee representative regarding a matter within the scope of that representation. This bill provides an exception to this prohibition that specifies that such communications are not confidential if the employee representative was a witness, or a party to, an event that is the basis for a potential disciplinary or criminal investigation. This bill is sponsored by the Peace Officers Research Association of California, and is supported by a variety of employee associations. It is opposed by the California Chamber of Commerce, a number of public entity and school associations, the League of California Cities, and business groups. This bill passed out of the Senate Labor, Public Employment and Retirement Committee on a vote of 5 to 0.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Establishes the Meyers-Milias-Brown Act of 1968 to establish collective bargaining rights for municipal, county, and local special district employers and employees. Provides that public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. (Gov. Code § 3500 et seq.)

2) Establishes the Public Employment Relations Board (PERB) and provides it with the powers to: determine and approve appropriate bargaining units; determine whether a particular item is within the scope of representation; arrange for and supervise representation elections by secret ballot; certify the results of elections; establish lists of persons to be available to serve as mediators, arbitrators, or factfinders; establish appropriate procedures for reviewing bargaining unit determinations; conduct studies relating to employer-employee relations; adopt rules and regulations; hold hearings, subpoena witnesses, administer oaths and take testimony or deposition of any person; to investigate unfair practice charges and take any action and make any determinations on such charges; bring an action in court to enforce its orders, rulings, and subpoenas; delegate its powers to any member of the board or person appointed by the board to perform its functions; decide contested matters regarding the certification or decertification of employee organizations; consider and decide issues relating to the rights, privileges, and duties of an employee organization; and to take any other action the board deems necessary to discharge its powers and duties. (Gov. Code § 3540 et seq.)

3) Makes it unlawful for governmental subdivisions, districts, public and quasi-public corporations, public agency, and every town, city, county, city and county, and municipal corporations from doing any of the following:

    a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise interfere with their exercise of their labor rights;
    b) Deny an employee organization any labor rights;
    c) Refuse or fail to meet and negotiate in good faith with a recognized employee organization;
    d) Dominate or interfere with the formation or administration of an employee organization, contribute financial or other support to any employee organization, or encourage employees to join any organization in preference over another; and to
    e) Refuse to participate in good faith in an impasse procedure. (Gov. Code § 3506.5.)

4) Makes it unlawful for the state to do any of the following:
    a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise interfere with their exercise of their labor rights;
    b) Deny an employee organization any labor rights;
    c) Refuse or fail to meet and confer in good faith with a recognized employee organization;
    d) Dominate or interfere with the formation or administration of an employee organization, contribute financial or other support to any employee organization, or encourage employees to join any organization in preference over another; and to
    e) Refuse to participate in good faith in a mediation procedure. (Gov. Code § 3519.)

5) Makes it unlawful for Judicial Council to do any of the following:
    a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise interfere with their exercise of their labor rights;
    b) Deny an employee organization any labor rights;
    c) Refuse or fail to meet and confer in good faith with a recognized employee organization;
    d) Dominate or interfere with the formation or administration of an employee organization, contribute financial or other support to any employee organization, or encourage employees to join any organization in preference over another; and to
    e) Refuse to participate in good faith in a mediation procedure. (Gov. Code § 3524.71.)

6) Makes it unlawful for a public school employer to do any of the following:
    a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise interfere with their exercise of their labor rights;
    b) Deny an employee organization any labor rights;
    c) Refuse or fail to meet and confer in good faith with an exclusive employee organization, or knowingly provide the exclusive representative with inaccurate information;
    d) Dominate or interfere with the formation or administration of an employee organization, contribute financial or other support to any employee organization, or encourage employees to join any organization in preference over another; and to
    e) Refuse to participate in good faith in an impasse procedure. (Gov. Code § 3543.5.)

7) Makes it unlawful for an institution of higher education to do any of the following:

a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise interfere with their exercise of their labor rights;
b) Deny an employee organization any labor rights;
c) Refuse or fail to meet and confer in good faith with an exclusive representative;
d) Dominate or interfere with the formation or administration of an employee organization, contribute financial or other support to any employee organization, or encourage employees to join any organization in preference over another;
e) Refuse to participate in good faith in an impasse procedure; and to
f) Consult with any academic, professional, or staff advisory group on a matter within the scope of representation for employees who are represented by an exclusive representative. (Gov. Code § 3571.)

8) Makes it unlawful for the San Francisco Bay Area Rapid Transit District to do any of the following:
    a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise interfere with their exercise of their labor rights;
    b) Deny an employee organization any labor rights;
    c) Refuse or fail to meet and confer in good faith with an exclusive representative, or knowingly provide an exclusive representative with inaccurate information;
    d) Dominate or interfere with the formation or administration of an employee organization, contribute financial or other support to any employee organization, or encourage employees to join any organization in preference over another;
    e) Refuse to participate in good faith in mutually agreed upon impasse procedures. (Pub. Utilities Code § 28858.)

9) Makes it unlawful for the Santa Cruz Metropolitan Transit District to do any of the following:
    a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise interfere with their exercise of their labor rights;
    b) Deny an employee organization any labor rights;
    c) Refuse or fail to meet and confer in good faith with an exclusive representative, or knowingly provide an exclusive representative with inaccurate information;
    d) Dominate or interfere with the formation or administration of an employee organization, contribute financial or other support to any employee organization, or encourage employees to join any organization in preference over another;

e) Refuse to participate in good faith in mutually agreed upon impasse procedures. (Pub. Utilities Code § 98169.)

10) Makes it unlawful for a public transit district employer to do any of the following:
    a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise interfere with their exercise of their labor rights;
    b) Deny an employee organization any labor rights;
    c) Refuse or fail to meet and confer in good faith with an exclusive representative;
    d) Dominate or interfere with the formation or administration of an employee organization, contribute financial or other support to any employee organization, or encourage employees to join any organization in preference over another;
    e) Refuse to participate in good faith in an impasse procedure, as specified. (Pub. Utilities Code § 99563.7.)

11) Makes it unlawful for the Sacramento Regional Transit District to do any of the following:
    a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise interfere with their exercise of their labor rights;
    b) Deny an employee organization any labor rights;
    c) Refuse or fail to meet and confer in good faith with an exclusive representative;
    d) Dominate or interfere with the formation or administration of an employee organization, contribute financial or other support to any employee organization, or encourage employees to join any organization in preference over another;
    e) Refuse to participate in good faith in mutually agreed upon impasse procedures. (Pub. Utilities Code § 102406.)

This bill:

1) Makes numerous Legislative findings and declarations:
    a) That it is the intent of the Legislature, in enacting this bill, to prohibit public employers from questioning any employee or employee representative regarding communications made in confidence between an employee and an employee representative in connection with representation relating to any matter within the scope of the recognized employee organization's representation;
    b) That there is a strong interest in encouraging union members to communicate fully and frankly with their union representative, in order to receive accurate information and advice. The expectation of

confidentiality is critical to employee-union representation, and without confidentiality, union members would be hesitant to be fully forthcoming with their representatives, detrimentally impacting a union representative's ability to advise and represent union members with questions or problems within the scope of representation.

c) That this confidentiality does not extend to criminal investigations.
d) That this bill does not create an evidentiary privilege, though confidentiality protections prohibit public employers, their agents, and those acting on their behalf from compelling the disclosure of confidential communications, including to third parties.

2) Prohibits any of the public employers identified in (3) through (11), above, to question any employee or employee representative regarding communications made in confidence between an employee and employee representative in connection with representation that is within the scope of the recognized employee organization's representation. Specifies that communications between an employee and their representative are not confidential if, at any time, the representative was a witness or a party to any event that forms the basis of a potential administrative disciplinary or criminal investigation.

3) Specifies that the bill's provisions do not supersede provisions relating to the interrogation procedures of a public safety officer under investigation.

COMMENTS

1. Author's statement

According to the author:

> Many employees presume that discussions concerning their employment with their union representative are confidential and shielded from disclosure to their employer. However, existing law lacks explicit prohibition against employers compelling employees or their representatives to divulge such discussions. AB 2421 aims to classify any effort by an employer to enforce disclosure as an unfair labor practice, thereby protecting these communications and fostering an environment where employees feel secure confiding in their union representatives.

2. Evidentiary privileges and confidentiality protections

California and federal law recognizes in various contexts that the importance of certain relationships requires that those relationships and communications made pursuant to them be protected from forced disclosure. For example, for the attorney-client relationship, the law generally recognizes the need for the client to be free to speak

candidly with their attorney, and thus rules of professional conduct and evidence preclude an attorney from disclosing or being required to disclose things that their client has told them in the course of representation. This protection typically takes two forms: a guarantee in the confidentiality of the communication, and a protection against compelled disclosure in a judicial proceeding.

The second form is what is called an evidentiary privilege, and it generally prohibits a court from compelling any person to disclose or testify about communications covered by the privilege. Thus, an evidentiary privilege is a protection of the communications under the privilege being used against one of the parties to the privilege in court, thereby excluding the evidence contained in the communication from the proceeding. The exclusion is irrelevant to the reliability or importance of the privileged information, and is generally absolute. California has created a number of statutory evidentiary privileges, including: the attorney-client privilege; lawyer referral service-client privilege; spousal privilege; physician-patient privilege; clergyman-penitent privilege; sexual assault counselor-victim privilege; and the privilege against self-incrimination. (Ev. Code § 930 et seq.)

The differences between an evidentiary privilege and a guarantee of confidentiality are important. Privileges generally prevent the introduction of certain communications or testimony in court. Rules guaranteeing confidentiality, however, do not. Thus, while a court cannot compel a witness to testify about privileged information, it may compel testimony of confidential communications, in certain circumstances. Moreover, if the confidential information is obtained by a third-party in another way, it may be disclosed to another party and in court. Thus, a duty of confidentiality is far less broad and can be subject to various exceptions.

3. AB 2421 prohibits certain public employers from questioning employees and employee representatives about their communications

AB 2421 proposes to create a rule ensuring the confidentiality of communications between an employee and their employee representative. It would specifically prohibit a public employer, the state, and various other specified state entities from questioning an employee or their employee representative regarding communications made in confidence between an employee and an employee representative in connection with the representation. AB 2421 specifically creates this prohibition for: any public agency; the state; Judicial Council; a public school employer; a public higher education employer; the San Francisco Bay Area Rapid Transit District; the Santa Cruz Metropolitan Transit District; a transit district employer; and the Sacramento Regional Transit District.

AB 2421's prohibitions are not absolute. Rather, it applies narrowly: it only applies to communications made in confidence, between the employee and their representative, and the communication must be in connection to the union's representation. It does not

prohibit other entities from questioning an employee or their representative about the confidential communications, such as a third-party or a court. Thus, a court may still require an employee or their employer to testify in court about their communications. Additionally, AB 2421 provides an exception to its prohibition for any communications when the representative was a witness or party to any event that is the basis of a potential administrative disciplinary or criminal investigation. Under this exception, a public employer may still question the employee or their union representative, though arguably this only applies to questioning regarding the event underlying the disciplinary or criminal investigation.

By prohibiting an employer from questioning an employee or employee representative, AB 2421 creates an unlawful employment practice for any covered public employer to violate that prohibition. Because the public employees covered by AB 2421 all fall within the Public Employment Relations Board's (PERB) jurisdiction, an employee would not be able to file a civil action in court for a violation of AB 2421's provisions; their exclusive remedy would be before PERB. Thus, an aggrieved employee could allege an unlawful employment practice with the PERB, or raise it in any pending action before the board, when their employer attempts to question them contrary to the prohibitions created by AB 2421. If an employee is discharged for refusing to answer an employer's questions that violate this section, the employee could also file an unlawful employment practice charge with PERB based on that discharge.

4. Judicial decisions regarding whether communications between an employee and union representative

The existence of confidentiality between an employee and their employee representative is not an entirely new concept. In *American Airlines, Inc. v. Superior Court* (2003) 114 Cal.App.4th 881, the court held that California law does not impliedly provide for an employee-union representative privilege, but that, instead, the creation of evidentiary privileges is "the province of the Legislature." (*American Airlines, Inc. v. Superior Court* (2003) 114 Cal.App 4th 881, 890.) Yet that case only dealt with the question of whether an evidentiary privilege existed, and not with the question of whether an employer can compel an employee to answer questions about communications between employee and their union representative. In *Cook Paint v. Varnish Co.*, the National Labor Relations Board (NLRB) recognized that allowing an employer to compel disclosure "manifestly restrains employees in their willingness to candidly discuss matters with their chosen, statutory representatives" and "inhibits [union] stewards in obtaining needed information from employees" for their representation. (*Cook Paint v. Varnish Co.* (1981) 258 N.L.R.B. 1230, 1232.) Thus, the NLRB found that, when an employer compels disclosure of conversations between an employee and their union steward, it interferes with the employee's right to engage in concerted activities and collectively bargain. (*Id.*)

While *Cook Paint* related to the National Labor Relations Act (NLRA) and not state labor law, its reasoning has also been applied in the context of public employees in California as well. In *California School Employees Association v. William S. Hart Union High School District*, PERB cited to *Cook Paint* to find that a public school district impermissibly questioned a union representative about the substance of conversations she had with employee members of the bargaining unit under the Educational Employment Relations Act. (*California School Employees Association v. William S. Hart Union High School District* (2018) PERB Decision No. 2595, p. 7.) In that case, PERB determined that the harm to employees' protected labor rights outweighed the interest the employer had to investigate an alleged improper relationship between an employee and the union representative. In another case, PERB adopted a three-part test of the NLRB for determining when an employer's questions of an employee or union representative during a deposition interfere with the protected labor rights of public employees under PERB-administered statutes. (*Victor Valley Teachers Association v. Victor Valley Union High School District* (2022) PERB Decision No. 2822.) The standard adopted by PERB in that case provides that questioning in a deposition may be permissible if: the questioning is relevant; the questioning does not have an illegal objective; and if the employer's interest in obtaining the information outweighs the employees' protected rights. (*Id*., p. 11.)

These PERB cases recognize the importance of the employee-employee representative relationship, as well as the risk that the questioning of an employee or employee representative about communications between the employee and representative pose to an employee's rights to engage in self-organization and collective bargaining. However, they do not create an evidentiary privilege for employee-employee representative communications, and they also do not create a strict rule of confidentiality. Instead, they allow an employer to question an employee or employee representative in a variety of instances, based on the employer's need for the information and a balancing test between that need and the employee's rights.

AB 2421 provides a more robust guarantee of confidentiality. However, it also includes exceptions for the purposes of ensuring that an employer can still question the employee or employee representative when the representative was a witness or party to an event that is the cause of a disciplinary or criminal investigation. Thus, where an employer has a significant interest in obtaining information from the employee representative for the purposes of a disciplinary or criminal investigation, it may still do so.

5. <u>Other attempts to create an employee-employee representative privilege</u>

There have been a number of previous attempts in the Legislature to provide more protections for the communications between an employee and their employee representative. In 2019, AB 418 (Kalra, 2019) was introduced to establish an evidentiary privilege for communications between a union agent and a represented public

employee or former employee. While AB 418 passed this Committee, it died on the Senate floor. A year before, AB 3121 (Kalra, 2018) attempted to do the same thing. AB 3121 also passed this Committee before dying on the Senate floor. In 2013, the Legislature passed a bill creating such a privilege – AB 729 (Hernández, 2013). However, AB 729 was vetoed by the Governor. As previously noted, this bill does not go as far as these previous attempts, as it does not create an evidentiary privilege. Thus, while it provides employees and their representatives some protection from coerced testimony to an employer, it does not provide them the absolute protections that an evidentiary privilege would.

6. Arguments in support

According to the Peace Officers Research Association of California, which is the sponsor of AB 2421:

> [AB 2421] would essentially codify existing decisions of the California Public Employment Relations Board which prohibit public employers from coercing union representatives and interfering in the representation of union members by questioning union representatives and members regarding communications made in confidence between an employee and an employee representative in connection with representation relating to any matter within the scope of the recognized employee organization's representation. The prohibition on such questioning is limited to public employers, so it would not affect criminal investigations conducted by separate and independent third parties, but employers could not compel disclosure of communications or order disclosure to third parties connected to or acting on behalf of the public employer.
>
> This bill amends the MMBA and similar state collective bargaining statutes to make clear that public employers and those acting on their behalf commit an unfair labor practice by questioning union members or their labor representatives about communications between represented employees and their union representatives about matters within the scope of union representation. In short, this bill would recognize the confidentiality of those communications and preclude public employers from interfering with union representation, which benefits every public sector union and public employee in California.
>
> The bill would also provide that communications between an employee and their employee representative would not be confidential if the representative was a witness or party to any of the events forming the basis of a potential administrative disciplinary or criminal investigation. This exception is limited to disciplinary investigations and criminal investigations and is consistent with the peace officer and firefighter bill of rights. This exception does not apply to representation in grievances and unfair practice cases.

> The bill does not create a privilege equal to attorney/client or doctor/patient privileges. No privilege would exist in a civil or criminal proceeding where someone other than the employing agency or its agents sought evidence regarding those communications. For example, if an employee brought a sexual harassment lawsuit, this prohibition against employer interrogations would not prevent the plaintiff from being able to force the union representative to testify to their communications. The bill also does not preclude public employers from questioning union representatives about things they personally observed as percipient witnesses when those observations are distinct from confidential communications with union members about union representation and union matters.
>
> Our bill is modest and balanced. It prevents public agencies from interfering in union representation matters and communications in a host of circumstances, but it does not create a statutory privilege. In fact, the prohibited conduct would merely constitute an unfair labor practice to be adjudicated by PERB.

7. Arguments in opposition

According to the California Chamber of Commerce, which is opposed to AB 2421:

> While the June 17 amendments state the intent is not to create an evidentiary privilege, our understanding is that the proponents do anticipate this limitation on questioning to apply in civil litigation. Communications between an employee and employee representative would be considered confidential and could not be asked about in a deposition or trial by the employer. Nothing has changed in the language to indicate otherwise and the bill would therefore still function as a privilege. Moreover, the bill is one-sided in that the employee or non-employer party in a lawsuit could seek discovery about communications that took place between another employee and a representative, but the employer never could. If they can seek discovery on that issue, it is only fair that the employer party can as well.
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> Further, AB 2421's language states that it applies to communications between an employee and an "employee representative." It is not limited to a union representative.1 Therefore, AB 2421 effectively creates a new privilege between an employee and any person who represents the employee and could apply in workplace investigations, administrative proceedings, and civil litigation, among other situations. It is also unclear for which time period this applies. Is it limited to individuals whom the union or employee designated as a representative before the communication occurred? If the representative is themselves an employee, is there any delineation between their role as coworker and representative?

Existing non-familial privileges generally are between a professional and their client or patient. The client or patient chooses what to disclose and may unilaterally end that professional relationship at any time. Attorneys, physicians, and other medical professionals have supervisory bodies able to subject them to discipline for malpractice and have legally mandated education and training requirements that are specific to these issues. On the other hand, union representatives or coworkers who may serve as an employee's representative have no such governing body or requirements. Those privileges also have exceptions related to safety or criminal activity, which does not exist here.

Furthermore, a union representative does not only represent one worker, but they also represent the bargaining unit as a whole. What happens when there is a conflict between two workers or one worker is accused of harassing behavior towards another worker? What if an employee asks a coworker to represent them in an administrative proceeding and a dispute later arises between the two workers or one of them is accused of misconduct? Attorneys, for example, have clear conflict of interest rules to ensure that their representation of one client is not adverse to the interests of an existing or potential client. Attorneys are also subject to ethical rules regarding the confidentiality of communications with their client. Again, no such rules exist for union agents or fellow coworkers.

The above issues were raised in committee hearings when the Legislature last debated similar legislation in 2019 in AB 418 (Kalra). Those concerns remain and AB 2421 does nothing to address them. […]

[The June 17 amendments] create narrow exceptions for when the communications are not considered confidential: where the "representative was a witness or party to any of the events forming the basis of a potential administrative disciplinary or criminal investigation." The exception does not apply where the employee was a witness or party. If one employee witnessed criminal activity and told a representative about it, it is in the public interest that the employer or its agent be able to thoroughly investigate such a serious matter.

SUPPORT

Peace Officers Research Association of California (sponsor)
California Association of Highway Patrolmen (co-sponsor)
Association of Orange County Deputy Sheriffs
California Association of Professional Scientists
California Association of Psychiatric Technicians
California School Employees Association
California Statewide Law Enforcement Association
California Teachers Association
Fraternal Order of Police

Long Beach Police Officers Association
Orange County Employees Association
Professional Engineers in California Government
Riverside Sheriffs' Association
Sacramento County Deputy Sheriffs' Association
San Bernardino County Sheriff's Employees' Benefit Association
Service Employees International Union California

OPPOSITION

Acclamation Insurance Management Services
Allied Managed Care
Association of California School Administrators
Association of California Healthcare Districts (ACHD)
California Association of Health Facilities
California Association of Joint Powers Authorities (CAJPA)
California Association of Recreation & Park Districts
California Association of Winegrape Growers
California Chamber of Commerce
California Farm Bureau
California School Boards Association
California Special Districts Association
California State Association of Counties (CSAC)
Civil Justice Association of California
Coalition of Small and Disabled Veteran Businesses
Community College League of California
Flasher Barricade Association
League of California Cities
National Federation of Independent Business
Public Risk Innovation, Solutions, and Management (PRISM)
Rural County Representatives of California (RCRC)
Small School Districts' Association
Urban Counties of California (UCC)

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 418 (Kalra, 2019) established an evidentiary privilege from disclosure for communications between a union agent and a represented employee or represented former employee. AB 418 died on the Senate inactive file.

AB 3121 (Kalra, 2018) established an evidentiary privilege from disclosure for communications between a union agent and a represented employee or represented former employee. AB 3121 died on the Senate inactive file.

AB 729 (Hernández, 2013) provided a union agent, as defined, and a represented employee or represented former employee a privilege of refusing to disclose any confidential communication between the employee or former employee and the union agent while the union agent is acting in their representative capacity, except as specified.

PRIOR VOTES:

Senate Labor, Public Employment, and Retirement Committee (Ayes 5, Noes 0)
Assembly Floor (Ayes 61, Noes 0)
Assembly Appropriations Committee (Ayes 11, Noes 2)
Assembly Public Employment and Retirement Committee (Ayes 5, Noes 0)
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