April 18, 2023

TO: Members of the House Committee on Rules

FR: Derek Sangston, Oregon Business & Industry

RE: Opposition to HB 3568

Chair Fahey, Vice-Chair Breese Iverson, members of the House Committee on Rules. For the record, I am Derek Sangston, policy director and counsel for Oregon Business & Industry (OBI)

OBI is a statewide association representing businesses from a wide variety of industries and from each of Oregon's 36 counties. In addition to being the statewide chamber of commerce, OBI is the state affiliate for the National Association of Manufacturers and the National Retail Federation. Our 1,600 member companies, more than 80% of which are small businesses, employ more than 250,000 Oregonians. Oregon's private sector businesses help drive a healthy, prosperous economy for the benefit of everyone.

Background:

HB 3568 starts with a false premise – that workplace performance metrics are inherently unsafe and correlated with workplace injuries. Our members take workplace safety seriously but cannot operate without estimates for the output of any given employee or facility. Indeed, most jobs, across all industries, have some type of performance or production measurement to assist the employer in meeting the goals and obligations of the business to customers and business partners. There is nothing inherently nefarious about the use of such performance measures, in logistics or any other industry.

Importantly, an employer that implements a quota that forces employees to flout existing health and safety laws is already in violation of the Oregon Safe Employment Act. Oregon already requires all employers to provide a safe workplace, develop and update an Injury and Illness Prevention Program, inspect the workplace to correct any unsafe or hazardous conditions, and much more; warehouse employers are not exempt from such requirements. An employee who believes their employer is not following these long-established laws may report that violation and already has protections from retaliation for doing so.

Nor are productivity metrics inherently punitive in nature, as assumed by HB 3568. Productivity metrics are generally set based on past performance of employees and not through an arbitrary, impossible standard set by the employer. Moreover, an employer has no incentive to set unreachable, high standards or terminate large numbers of employees for missing a quota. First – unreachable standards lead to inaccurate workflow projections, leading to logistical errors and embarrassing failures. Second – setting unreachable standards would result in widespread discipline of good employees, reduced morale, and increased turnover, which are counterproductive and expensive. A 2017 study by the Work Institute estimates that the cost of

employee turnover is equivalent to about 33% of an employee's annual earnings. Employee turnover also negatively affects productivity, institutional knowledge, volume of product being moved in a facility, not to mention employee morale and motivation. Put simply - it does not make financial sense for a company to impose performance metrics that lead to high rates of injury as suggested by this bill.

In line with these incentives, our members generally set such performance metrics based on the historical performance of the vast majority of their workforce (after accounting for training and onboarding) – meaning such metrics are designed to parallel the performance of the vast majority of workers.

With that foundation in mind, we can turn to the actual provisions of HB 3568.

HB 3568 Creates New Attorney General Enforcement Mechanism.

HB 3568 includes a host of new requirements and prohibitions for warehouse employers[1] (discussed below), and then relies on the Attorney General to enforce its terms. Notably, this new enforcement means critical warehouses across our state – transporting food, medical supplies, and household goods – would face litigation based on HB 3568's new requirements.

HB 3568 Creates a Presumption of Retaliation That Is Potentially Never-Ending.

HB 3568 includes a presumption of retaliation if an employer takes any adverse action within 90 days of an employee "exercising any right under this part." This is extremely problematic, as it could create a never-ending presumption of retaliation. For example, under HB 3568, an employee is entitled to, and can request data related to the performance metrics applicable to their position. As an initial matter, it appears that the compulsory notice to the employee might trigger this presumption automatically on a near-daily basis, meaning that every employee at the facility would be constantly protected by a rebuttable presumption.

Putting that notice aside, an employee could easily voluntarily trigger a never-ending presumption pursuant to Section 8. If an employee makes such a request every three months – which can be done orally – that employee would have a perpetual presumption that any disciplinary action taken was retaliatory. In the event of serious misconduct and termination, the employer would then be forced to either pay the cost of retaining attorneys to demonstrate that discipline/termination was not retaliatory, and/or to pay to settle any such allegations by the employee. This presumption creates a constant bargaining chip for the employee and against the employer regardless of whether any actual retaliation occurred.

[1] To be clear, HB 3568 applies beyond just the logistics industry into agriculture, retail, and other sectors where goods must be sorted and transported. The bill defines "warehouse distribution center[s]" using the following North American Industry Classification System (NAICS) codes:

(1) 493110 for General Warehousing and Storage.
(2) 423 for Merchant Wholesalers, Durable Goods.
(3) 424 for Merchant Wholesalers, Nondurable Goods.
(4) 454110 for Electronic Shopping and Mail-Order Houses.
(5) 492110 for Couriers and Express Delivery Services.

In addition, the focus of HB 3568 – speed of work, generally speaking – is categorically different than many other areas where the legislature provided extra protections for workers – such as protected classes like gender, race, or age – because it is actually based on the quality of the employee's work. In other words – here we would be creating a presumption of retaliation that is not based on a protected classification, but on the work itself. And if we are considering judging a worker on the quality of their work as retaliatory or discriminatory, what is left as proper grounds for discipline?

HB 3568 Creates a Host of New Notice and Disclosure Requirements That Would Not Increase Safety.

HB 3568 also creates new obligations for employers to provide an array of notices at hiring. If an employer fails to provide these real-time notices, then the employee cannot be disciplined for their performance related to their working speed.

Simply put, HB 3568's disclosure requirements are logistically infeasible for many warehouse operations. In the warehouse context, employees are generally paid on an hourly basis. Performance measures establish planning goals to meet the requirements of the work that needs to be performed. Some workers may have individualized metrics they try to achieve, some may have metrics assigned to their entire team or their shift, or some may have no metrics at all. The variety here is considerable – making a one-size-fits-all notice requirement infeasible.

Where metrics are used to monitor productivity, they can also vary significantly depending on the product, facility, time of day, and even a specific workstation (which may change frequently). Some metrics fluctuate throughout the day. Employees often switch between tasks during their shift. As a result, an employer cannot necessarily provide the notice that HB 3568 requires – and even if the data is readily accessible, the logistics of constantly distributing notices to employees as their shifts or stations change poses another major feasibility challenge.

Further, as noted above, any discipline related to such provisions (if an employer could not provide the required notice) would be enforceable.

HB 3568 Creates Potential Regulations Aimed at the Unprecedented Goal of Controlling Exactly How Quickly a Warehouse May Function.

HB 3568 provides the Labor Commissioner the opportunity to prepare and to propose a new regulatory standard specific to warehouses. HB 3568 requires the regulation to be based on work activity levels, measurement of production quotas, and safety data. In simple terms – HB 3568 is drafted to force the Labor Commissioner to define production quotas for warehouse employers, which is unprecedented. The Labor Commissioner has never before been given authority to reach into a workplace and define the rate of work to that degree.

HB 3568 Would Not Help Workers and Would Harm Employers:

Under HB 3568, many employers would be forced to issue a stream of notices depending on the day, shift, and position of every individual worker. Moreover, its provisions would not create any new protections for workers, who already must be provided with a safe workplace and who cannot be retaliated against for asserting health and safety violations. Finally, HB 3568 would create litigation for employers through AG enforcement, and an all-encompassing presumption of retaliation.

Particularly now, as Oregon's economy struggles and warehouses are essential to the distribution of necessary goods, such burdens on workplaces without any appreciable benefit just do not make sense.

For these reasons, OBI is opposed to HB 3568.