BARSAMIAN & MOODY
A Professional Corporation
Attorneys at Law
1141 West Shaw Avenue, Suite 104
Fresno, California 93711-3704
Tel: (559) 248-2360 E-mail: laborlaw@theemployerslawfirm.com Fax: (559) 248-2370

October 29, 2021

Via U.S. Mail and Email: Santiago.Avila-Gomez@alrb.ca.gov

Santiago Avila-Gomez
Executive Secretary
Agricultural Labor Relations Board
1325 J Street, Suite 1900-B
Sacramento, CA 95814

RE: Pre-Rulemaking Written Comment

Dear Mr. Secretary:

I am writing in response to the Agricultural Labor Relations Board ("ALRB" or "Board") regulation subcommittee's ("subcommittee") request for public comment in response to the subcommittee's proposed regulatory changes. These comments should be considered by the subcommittee in preparing its reports before the Board's December 14, 2021 public meeting.

We respectfully request that the following changes and comments be considered in respect to the September 22, 2021 subcommittee reports on proposed regulatory changes including "Cannabis," "Mandatory Mediation and Conciliation," "Filing and Service Regulations," "Procedural Provisions and Unfair Labor Practices," and "Representation Proceedings (Elections)."

Cannabis:

Creating a new ground for an unfair labor practice, in this case, violating a labor peace agreement, should be determined legislatively rather than through regulation. If the ALRB determines that regulation is how they intend to implement labor peace agreement requirements, then cannabis growers and industry groups should be consulted to ensure that the actual implementation is practical.

Mandatory Mediation and Conciliation:

Proposed changes to 20410(a)(2) require that "before requesting referral to supplemental mediation, a party must communicate its intention to do so to the other party at least five (5) days before submitting such a request to the Board…." We note that the

term "communicate" is unclear. The proposed language should provide a clear definition for the appropriate manner by which a party may "communicate" its intention (U.S. Mail, Certified Mail, telephone call, etc.). It is also questionable what the purpose of the advance notice is. If the intention is to allow time to cure or reach a stipulation or other means of resolution prior to engaging in supplemental mediation, the time proposed is obviously not long enough.

Likewise, there is ambiguity as to the proper service by the party requesting supplemental mediation and the timeline for service and answer. If service is the same as "service" as proposed in the amended section 20169(b) then five (5) days for an answer to be filed is severely deficient. Furthermore, given the amount of details required in the notice and the nuanced and complex issues to which an answer will need to respond, a more extended notice period is necessary. We suggest a 15-day notice period instead of the 5-day notice. Finally, it is important that there be clarity as to whether additional time applies based upon the method of "service."

We request clarification regarding what "other provisions" may be affected by the items that are part of the request for supplemental mediation as referenced in the proposed revisions to section 20410(a)(3). We believe the Board or its subcommittee should indicate which "other provisions" are being referred to.

The proposed revisions to section 20410(e)(3) which allows a mediator to proceed with issuing a mediation report if a party "fails to appear" is inappropriate and vague. How is the failure to appear determined? Is the failure to appear akin to a *Hess* refusal or any failure regardless of whether good cause exists? Further clarification, and exception for good cause must be included if a failure to appear amendment is implemented.

Lastly, we object to the allowance of off the record discussions as proposed in section 20410(e)(4) unless **both** parties agree.

Filing and Service Regulations:

The requirement for electronic filing as proposed in section 20160(b) is unnecessary and restrictive. This requirement allows for paper filing for unrepresented parties, but fails to acknowledge that some representatives may not have the ability to file electrically and therefore creates a barrier to the representation which results in a denial of a party's rights. There is insufficient evidence to support a requirement that represented parties be forced to electronically file, despite the years of evidence that paper filing was efficient and effective.

Similarly, the amendments to section 20164 and 20166 which allow service to be effectuated on only "one address of an unrepresented party or an attorney or representative of a party and to only one attorney or representative of each party" are not adequate if electronic service is the only means of service as proposed in the amended version of section 20160(b). If electronic service is the primary or exclusive means of service under the proposed regulations, then all party representatives who wish to be served should be served. To avoid arguments on whether service was proper, we suggest phrasing the amended as follows: "A party may designate the electronic mailing address for each party or representative upon who service is requested in a matter, and the other

party is directed to serve each designated representative by way of the electronic mailing address, however, proof of service need only be made at one address."

The proposed amendments to section 20169(a) which requires electronic service for parties represented by counsel or other representatives is similarly unnecessary and restrictive. Until electronic service becomes the standard requirement across all litigation, the ALRB should not require it as a standard. Many firms do not consent to electronic service as a matter of practice. Furthermore, as a practical matter, spam filters may weed out correspondence from unexpected contacts including union representatives and ALRB staff members. Electronic service should not be mandated, but instead should be one of several options available to parties upon agreement.

The request for electronic bookmarking "when possible" as proposed in section 20169(a)(3) is illogical. While it is always possible to implement bookmarking, the requirement to implement it is unnecessary. Furthermore, the addition of the phrase "when possible" allows parties to avoid implementing bookmarking either because they do not know how (which is even more reason not to require electronic service as proposed in section 20169(a) and 20160(b)) or for timesaving purposes, and will simply argue that it was not possible to comply with the bookmarking requirements.

We request clarification of section 20169(d) which requires permission from the executive secretary or ALJ to file and serve documents using non-electronic means if electronic filing is not feasible due to file size or technical problems. This section does not outline how permission is to be obtained, via phone call, email, written request, etc. Furthermore, there is no information as to how the filing party will evidence that they received permission to non-electronically file, including any requirement for the appropriate language on the proof of service. Lastly, this section does not make clear what "non-electronic means" are available in this situation. Further clarification is required if this section is to be implemented.

The proposed amendments to Section 20170(d) result in ambiguity which must be resolved in advance of implementation by the ALRB. Section 20170(d) provides: "Except as provided in section 20169(a)(2), documents required to be filed with the Board must be received by the Board by 5:00 p.m. on the last day of the time period…" However, the reference to 20169(a)(2) as an exception is vague given the provisions of section 20169(a)(2) which provides that "Parties may file documents electronically at any time. However, documents electronically filed after 5:00 p.m. on a business day, or at any time on a nonbusiness day, will be deemed filed on the next regular business day." If documents must be filed with the board by 5:00 p.m. on the last day of the period, then the reference to 20169(a)(2) as an exception is wrong because anything filed after 5:00 p.m. is deemed filed the following day making it late. For example, a filing due on October 5, if electronically filed by email on October 5 at 5:25 p.m., would not be deemed filed until October 6 and would therefore be late. We suggest that the word "except" be removed from section 20170(d).

Finally, clarification as to the revisions of section 20393(a) is needed: "Such requests shall be filed ~~in accordance with the provisions set forth in section 20160(a)(2)~~, and served in accordance with the provisions set forth in sections 20160 through ~~20166, 20168 and 20169~~." Was section 20169 stricken in error?

Procedural Provisions and Unfair Labor Practices:

Section 20192(b) provides that requests for extensions shall be filed "in the same manner as motions for continuances..." Therefore, for the sake of efficiency and consistency, proposed amendments to section 20192(b) should reference section 20190(c)(2) which lists the same requirements, rather than relist the requirements.

The proposals of section 20202(b) results in an absolute violation of due process. First, an improper legal presumption is being made that an employer will retaliate against a charging party (and commit a ULP in doing so). The General Counsel is required under Section 1149 of the Act to perform her duties "in an impartial manner without prejudice toward any party." Allowing the General Counsel the authority to preemptively adjudge the employer as being retaliatory toward its employees violates the General Counsel's required impartiality. Second, it will be impossible for an employer to investigate, respond to general counsel's requests for information, interrogatories or subpoenas, or respond to a charge if the employer is not provided the information relating to the identity of the charging party. Furthermore, to make the Regional Director's decision to perform such redactions nonreviewable, strips away a party's rights. Given the requirement that the charging party must state to the Regional Director that there is a reasonable fear of retaliation and the lack of rights available to the employer, then proper measures must be put in place to ensure that there is a real basis for the alleged fear of retaliation, otherwise all employee charging parties will claim there is a fear so as to avoid being subject to the investigation into the charge. If redaction is allowed, which it emphatically should not be, there should be safeguards, such as the charging party must be required to make such a claim, and substantiate it with evidence, under penalty of perjury.

Section 20216(b) allows the Regional Director to propound written interrogatories, which is entirely unnecessary and provides the General Counsel with additional power in an area that has never before been an issue to the ALRB. However, if adopted, then it must be amended to provide the same right to the charged party. The charged party should be granted the right to propound interrogatories on the General Counsel or charging party representative. The failure to allow the charged party the right to propound written interrogatories, while also acting to withhold information from the charged party is a violation of the charged party's due process rights. Furthermore, the ALRB should follow the time limits as established by the California Civil Discovery Act which applies to interrogatories. The amount of time established in the Civil Discovery Act has been determined to be a reasonable time for responses and therefore will streamline the process and allow for suitable time for parties to respond to investigatory interrogatories.

The provisions of section 20216(c), which bar a party from disputing any matters that were the subject of interrogatories if that party failed to respond to the interrogatories is punitive and excessive, and a violation of due process. A party which would be subject to this provision should at the least be given an opportunity to dispute such sanction. However, following the provision of the Civil Discovery Act would be more appropriate – especially given the amendments of 20217(d), 20236(c) and 20250(f) requiring a privilege log in accordance with the Civil Discovery Act.

Section 20219(b) provides the General Counsel with authority to review a Regional Director's dismissal when the charging party is an agricultural employee. Allowing the

General Counsel to breathe life back into dismissed cases, and then be the judge and jury as to the decision to dismiss, investigate or issue a complaint on a charge brought by an agricultural employee results in a clear conflict of interest within the administrative structure. There are numerous ways that an agricultural employee may have their dismissed ULP charge reviewed, therefore no new authority or policy is required. This is a clear attempt of the General Counsel to gain more control over unfair labor practices filed by agricultural employees, where such control is unnecessary. Additionally, given the more than adequate nature of the current policy over the 46 years since its enactment, this is a shameless power grab by the current General Counsel who formerly spent 17-plus years working for California Rural Legal Assistance where she represented agricultural workers in litigation against their agricultural employers.

If this proposed amendment is to be adopted, it should at least be tempered by including a provision that limits the General Counsel's authority to review dismissals to situations where the charging party is an unrepresented agricultural employee. Further, the amendment should clarify that the General Counsel's review of the dismissal does not extend the one-year requirement regarding the ULP's pre-complaint.

As discussed in the comment on section 20219(b), the proposed revisions to section 20219(c) and (d) present a clear conflict. If the General Counsel has the authority to review a dismissal and is also given the authority to grant or deny a party's extension to file an opposition, it is impossible for the General Counsel to remain neutral.

In our final comment on proposals for section 20219, we address the continual apparent conflict which is presented in allowing the General Counsel authority to review dismissals. The General Counsel's ability to grant *sua sponte* review, and then require the Regional Director to present to the General Counsel the reasoning for the dismissal eliminates the Regional Director's discretion in every single case where the charging party is an agricultural employee. Furthermore, if the proposed amended 20202(b) is enacted and the charging party's identity remains redacted at the time of dismissal pursuant to, it would be impossible for the Regional Director to present any oral presentation to the General Counsel that would require the affirmation of the decision. Equally alarming is that there are no limitations on what the General Counsel must consider, can consider, or is prohibited from considering, in its review of the Regional Director's decision. Further clarification as to issues to be considered by the General Counsel should be outlined in this section. The oral presentation by the parties as proposed in Section 20219(e) may be tantamount to a mini trial, resulting in the Regional Director getting a second bite at the apple after being given the opportunity to see the employer's opposition which undoubtably identifies the specific information the employer has to support its defenses to the claim. Again, authorizing the General Counsel to review dismissals is a clear conflict and results in a clear disregard for the due process rights of the purported charged party. The proposed language in Section 20219 should not be adopted, or if adopted, should be significantly modified to address the concerns addressed above.

Please provide the authority that the ALRB has to grant immunity as proposed in section 20217(f).

Please clarify whether the Board can give authority to a charged party (employer) to seek enforcement under sections 20250(k) and 20217(g).

The proposed language for section 20220(c) seeks to impose a one-year time limit for the issuance of a complaint based on the filing of an ULP charge. This issue has come up countless times and is a much needed amendment. The issuance of a complaint *years* after the filing of a charge is an enormous disservice to agricultural employers, employees, and unions. Reasonable time limits for issuing a complaint are essential to the fair and effective administration of the Act. In this regard, 12 months is the maximum time limit that should be set given the seasonal nature of agricultural employment. Too often employers *and* employees are unable to locate and present witnesses in support of their positions because witnesses are no longer able to be located. Inordinate delay between the filing of a charge and the issuance of a complaint is disfavored by all parties.

Furthermore, a one-time extension of 60 days for "extraordinary circumstances" demonstrated by the General Counsel's office would refute any argument that the one-year limit was too restrictive or otherwise prevented investigation and settlement possibilities. However, if adopted, we request that the "extraordinary circumstances" be defined so that there is no question as to what facts should be considered when reviewing a request for an extension. Appropriate facts should be limited to evidence of some delay which was outside the General Counsel's control or evidence that the charged party has effectively impeded the General Counsel's timely investigation.

We do not agree that the Board would be creating a defense of laches by adopting a one-year time limit for issuing a complaint. The defense of laches is an equitable doctrine that can be asserted as an affirmative defense against one party's delay in asserting a legal right. As one court put it, the "question of whether a litigant is guilty of laches is a question of fact for the trial court." (*Piscioneri v. City of Ontario* (2002) 95 Cal.App.4th 1037, 1046.) On the other hand, the Board's adoption of a regulation imposing a bright line time limit on the issuance of a complaint is something entirely different. The General Counsel's failure to act promptly to investigate and take action on charges hurts agricultural employees and employers alike. Further, inordinate delay in the administration of the Act erodes public (again, both employers' and employees') confidence and faith in the effectiveness of the Act. We strongly support this amendment.

Representation Proceedings (Elections):

There are already extensive and adequate methods for service of a Petition in representative proceedings. Therefore, the proposed amendments to section 20300(e) which allow service on a security guard are inappropriate and unnecessary. A security guard is not a proper agent of service for most, if not all, entities. Service of a petition provided only to a security guard does not guarantee that the petition will make it to the correct authority, especially where many security guards are not direct employees of the company that is subject to the election petition. The ALRB can point to no valid reason upon which the existing methods of service are inappropriate or insufficient. Furthermore, if such an amendment is adopted by the subcommittee, then there should also be an amendment to require the petitioner to include a copy of the petition, and evidence of personal service, when providing electronic or overnight "notice" as proposed in the amendments.

The proposed amendments to section 20300(i)(4)(B) invite frivolous charges from rival unions at the employer's expense. The impounding of ballots results in unnecessary

delay and prevents the effective resolution of matters. For example, if Union A seeks to block an election concerning Union B on grounds that the employer assisted Union B, then it would be pertinent to reach an early determination as to whether Union B ultimately even received sufficient votes to get certified.

Likewise, section 20360(c) places strict timelines on the maximum duration that ballots can be impounded. Such policy should be applied across the board in all situations, including after a complaint has been issued. Again, a speedy and efficient ballot counting will result in efficient processing of complaints, charges, and elections.

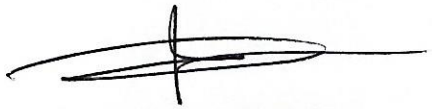
Finally, section 20310(e) and (f) require superfluous, unnecessary and in many cases impossible information. Many employees do not have email addresses nor do they have landlines, some do not even have individual cell phones. To the extent that employees have multiple phone lines or email addresses, many are resistant to providing that information to their employer. Employees do not want their employer, let alone a grower for whom they performed work for only a short time, emailing them or calling them on their land line or family shared cell phone. Many will outright refuse to provide that information or will provide made up answers when providing such information. Furthermore, an employer's ability to obtain and maintain the list of extensive information as proposed in section 20310, from labor contractor workers assigned to a grower/contractor is excessive and penalizing. It is even more punitive to penalize an employer by invoking presumptions against the employer for the employee's refusal to have or provide such information. Section 20310 should be eliminated entirely. Should section 20310 be implemented, there must be an exception provided to employers which precludes a finding of "substantially inadequate" records based on the failure to provide email addresses, cell phone numbers and land line numbers for purposes of employee eligibility presumptions under proposed modified section 20310(f)(1)(C).

Conclusion:

Thank you for consideration of our requests for clarification and views. If we can answer any questions or provide additional information on the subcommittees reports or the proposed revisions, please do not hesitate to contact my office.

Resperctfully,

BARSAMIAN & MOODY
A Professional Corporation



Ronald H. Barsamian