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ADELANTO • APPLE VALLEY • HESPERIA • VICTORVILLE
Coalition of Small & Disabled Veteran Businesses
The Chamber
Long Beach Area Chamber of Commerce
California Business Properties Association
CMTA
CALIFORNIA MANUFACTURERS & TECHNOLOGY ASSOCIATION
California Business Roundtable
alforests
California Forestry Association
los angeles
latino chamber of commerce
WECA
Western Electrical Contractors Association Inc.
A Chapter of Independent Electrical Contractors Inc.
Agricultural Council of California
CNCDA
California New Car Dealers Association
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ORANGE COUNTY HISPANIC CHAMBER OF COMMERCE
FAMILY WINEMAKERS of CALIFORNIA
paso robles
CHAMBER of COMMERCE
Los Angeles Area Chamber of Commerce
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WINE INSTITUTE
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CALIFORNIA
STATE COUNCIL OF SHRM
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BUSINESS & INDUSTRIAL ALLIANCE
GREATER COACHELLA VALLEY CHAMBER
CALIFORNIA HOTEL & LODGING ASSOCIATION
SANTA ANA CHAMBER OF COMMERCE

JOB KILLER

July 1, 2022

TO: Members, Assembly Appropriations Committee

SUBJECT: SB 1162 (LIMON) SALARIES AND WAGES
OPPOSE/ JOB KILLER – AS AMENDED JUNE 14, 2022

The California Chamber of Commerce and the organizations listed respectfully **OPPOSE** your **SB 1162 (Limon)** as a **JOB KILLER. SB 1162** would encourage new, burdensome litigation against employers based on the publication of broad, unreliable data collected by the state. Further, this bill undermines employers' ability to hire and subjects employers to a private right of action and penalties under the Private Attorneys General Act (PAGA). The additional burdens and costs this proposal would create will limit an employer's ability to offer higher wages and benefits to new or existing employees and discourage growth or expansion in California.

Attorneys Confirm They Will Use Public Pay Data to "Hammer Companies" by Filing Lawsuits, Which Caused Governor Brown to Veto a Similar Prior Bill:

Just one year after SB 973 (Jackson) took effect, **SB 1162** seeks to publish all annual DFEH pay data reports by company name. SB 973 intentionally stated those reports were to be kept and used by the DFEH and DIR alone. Annual DFEH reports do not show *per se* evidence of unlawful conduct. Yet, that is exactly how they will be used if published.

Similar to what is proposed in **SB 1162**, AB 1209 (Gonzalez) from 2017 would have required the publication of data from employers on mean wage differentials between male and female employees. In an article that year by Scott Rodd titled "Employer attorney concerned about lawsuits as wage data bill passes Legislature," published in the *Sacramento Business Journal* on September 13, 2017, a member of the plaintiff's bar stated:

> ***"By posting this on the Secretary of State's website, the government is basically giving us (plaintiff lawyers) the data we need to go in there and hammer companies," said Galen T. Shimoda, attorney owner at Shimoda Law Corp.***

By making public the reports required under SB 973 (Jackson), **SB 1162** will similarly open businesses up to litigation. Once the data is made public, a plaintiff's attorney would simply have to review the companies with perceived pay disparities, use the report to advertise to find one plaintiff, and send a settlement demand or threaten litigation.

The May 2 amendments providing that the report alone is insufficient to state a cause of action under FEHA or the Equal Pay Act will have no practical effect. First, this is easy to circumvent. A plaintiff simply needs to include a line in the complaint stating, "upon information and belief I was being discriminated against in my pay" or provide an example of a time their supervisor allegedly treated them differently. Further, even if a defendant tried to challenge the sufficiency of the complaint, which many do not because of the thousands of dollars in fees and costs, the court will always grant leave to amend at least once. This amendment also does not address a common tactic used in employment litigation: demand letters. Many law firms send pre-litigation demand letters threatening litigation to leverage an early settlement. Because of the costs of litigation, they are able to get a settlement regardless of whether the claims are meritorious. It also does not address the fact that these reports will be used to justify discovery fishing expeditions or their prejudicial use in motions or before a jury. As Mr. Shimoda notes:

> ***Although the wage data cannot form the sole basis of a lawsuit, he believes the database will help set him "on the right track." And while the purpose of the bill is not to spark litigation against large companies, Shimoda believes the government understands that litigation is a part of the corrective force needed to address wage disparity.***

> ***"With AB 1209 providing true statistics, it's almost like the government is saying, 'Here's the basis, litigators — go for it, start filing,'" he said.***

Governor Brown vetoed AB 1209 due to this exact concern about litigation:

"While transparency is often the first step to addressing an identified problem, it is unclear that the bill as written, given its ambiguous wording, will provide data that will meaningfully contribute to efforts to close the gender wage gap. **Indeed, I am worried that this ambiguity could be exploited to encourage more litigation than pay equity**."

SB 973 intentionally did not include a publication provision and provided these reports to the state's enforcement arm.[1] The DFEH presently may only publish that data in the aggregate, not data associated with specific companies. Undoing that agreement just two years later will discourage growth in California and expose employers to costs associated with defending against meritless litigation.

SB 1162 Seeks to Publicly Criticize Companies Based on Broad Data That the EEOC Has Acknowledged Does Not Accurately Compare Pay Between Similarly Situated Workers:

SB 973 requires all California employers with 100 or more employees to report pay data by sex, race, ethnicity, and job category to the Department of Fair Employment and Housing (DFEH). 2021 was the first year this information was reported. DFEH is permitted to use those reports to publish aggregate data regarding the workforce as a whole. SB 973 specified that those reports are confidential and not subject to Public Records Act requests.

The reports were modeled after the proposed federal EEO-1 form. Employers must categorize employees within ten job categories and identify the number of employees that fall within twelve pay bands. The job categories are exceptionally broad. For example, a multitude of various job titles would fall under the broad category of "professionals".

In responding to concerns about the usefulness of the reports, the EEOC explicitly stated that these reports are not useful for identifying disparities in pay between two similarly situated workers:

> **The EEOC does not intend or expect that this data will identify specific, similarly situated comparators or that it will establish pay discrimination as a legal matter. Therefore, it is not critical that each EEO–1 pay band include only the same or similar occupations.[2]**

These reports ultimately show broad swaths of data by job category, not according to whether the jobs are "substantially similar" for purposes of comparison under the Equal Pay Act or the Fair Employment and Housing Act.

After only one year of this reporting requirement, **SB 1162** seeks to publicize all of this data identifiable by individual companies and add average wages for each job category by race and gender under the pretense that it would reveal gender and race-based pay disparities. As explained above, this data was never designed to show such disparities. Publicizing the data to target employers is a cynical and disingenuous manipulation of what the EEOC itself has acknowledged is not a reliable measure of pay disparities between similarly situated employees**.**

Even if it did show such comparisons, as Labor Code Section 1197.5 recognizes, there are numerous, lawful, bona fide factors as to why wage disparities may exist between employees performing substantially similar work, such as: (1) different educational or training backgrounds amongst employees; (2) different career experience; (3) varying levels of seniority or longevity with the employer; (4) objective, merit-based system of the employer; (5) a compensation system that measures earning by quantity or quality of

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[1] A prior version of SB 973, SB 1284 (Jackson) in 2018, that would have publicized these reports was amended to make the reports confidential. All subsequent versions of that bill specified that the reports are to be kept confidential.
[2] FR-2016-07-14.pdf (thefederalregister.org)

production; (6) geographical differences that impact the cost of living and job market; and, (7) shift differentials. The California Chamber of Commerce and other members of the business community supported SB 358 (Jackson) (2015), which strengthened the Equal Pay Act and created a balanced approach that benefited both workers and employers. By publishing broad categories of data based on job classifications and titles, **SB 1162** seeks to set up employers for public criticism with incomplete, uncontextualized reports and create a false impression of wage discrimination where none may exist.

Indeed, these reports are surely also to be used to develop future legislation. Just this year, there were several bills pending in the Legislature that would use this data as if it does in fact provide proof of discrimination. The bill also proposes adding a report in which employers must publicly identify any labor contractors that they contract with, again with the intent of criticizing employers who use contractors, which is not unlawful. Further, the client businesses often do not set those workers' pay – their employer does. Yet, those workers would be reported under the client business's name. Publicizing this data is a ploy to enable fishing expeditions in support of litigation or public relations campaigns.

SB 1162 Undermines the Balanced Approach Enacted in 2017 Permitting Job Applicants to Request Pay Scales for Job Openings:

In 2016 and 2017, the Legislature passed a series of bills that prohibited employers from seeking or relying on applicants' salary history for employment. At the time, discussions surrounding salary information included the issue of disclosure of pay scales for job openings. Several concerns were raised by the employer community.

Employers in competitive industries do not advertise salaries in order to utilize their pay structure as a way in which to lure talented employees. Not having a pay range listed benefits workers in those instances. In industries where everyone makes the same lock-step wages, employees tend to lose out because there is no opportunity for growth based on performance or experience. Further, an employer may assume a pay scale accurately captures the current market for a specific position yet could be wrong. Employers need flexibility to adjust to the market.

On top of the financial devastation caused by COVID-19, a staggering 98% of small businesses have said that the labor shortage has negatively affected their financial situations.[3] This bill unfairly penalizes smaller businesses that are unable to compete in the market against larger businesses or those with higher profit margins because disclosing a pay scale is likely to artificially limit an applicant's interest in a position. Workers are likely then to skip right over their job postings without further consideration of other types of benefits the employer may offer or the type of working environment it offers.

Finally, it is unlikely that posting salary ranges will provide much benefit. Employers determine the appropriate wage and salary to pay an applicant based upon various factors, including skill, education, and prior experience, as well as the funding available for the job. Employers will feel compelled to enlarge the pay scale in order to create sufficient room to adjust that rate depending on the various factors and varied candidates for the job. Such a broad pay scale will not assist an applicant in negotiations.

In light of these concerns, a balance was struck between stakeholders that resulted in what is now existing law: applicants may request the pay scale after an initial interview. This provides applicants with pay scale information but also ensures that employers have flexibility regarding hiring and are not disclosing pay scales to competitors. **SB 1162** undermines this balance and is unlikely to provide much benefit to applicants. Indeed, public sector salaries have long been publicly available and pay disparities still exist. In a *Sacramento Bee* article from several years ago, the article detailed findings that, despite disclosing actual compensation of all employees, women staff in the California Legislature make less then male staff.[4] The bill is also overreaching in that it is not limited to positions to be performed in California.

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[3] Survey: Small Businesses on the Brink, Goldman Sachs, available at: https://www.goldmansachs.com/citizenship/10000-small-businesses/US/infographics/small-businesses-on-the-brink/index.html

[4] How staff pay for men and women compares in California Legislature | The Sacramento Bee (sacbee.com)

SB 1162 Includes A Private Right of Action and Allows Any Employee, Including One Who Never Had Any Intention of Applying for a Position, to Sue for Penalties Under PAGA:

Section of **SB 1162** contains a private right of action. Because it amends the Labor Code, it also exposes employers to lawsuits under PAGA. This includes liability for conduct over which the employer has no control. Proposed section 432.3(c)(2) requires third parties that an employer contracts with to provide the pay scale in all job postings. It then holds the employer liable under a statutory private right of action and PAGA if the third party fails to do this regardless of the fact that it is impossible to monitor the third party at all times. While proponents argue that the private right of action is limited to "injunctive relief," in reality this will be used to extort a monetary settlement with PAGA penalties.

Most significantly, one of the biggest issues with the overreach of **SB 1162** and PAGA is that a plaintiff need not show harm to bring a PAGA claim.[5] This means that any employee, even one who was not interested in the open job position at issue, could bring a claim under PAGA for a violation of these sections. PAGA lawsuits have increased over 1,000% since the law took effect in 2004. The data demonstrates that PAGA benefits the plaintiffs' bar, not workers. The current average payment that a worker receives from a PAGA case filed in court is $1,300, compared to $5,700 for cases adjudicated by the state's enforcement agency. Even though workers are receiving higher awards in state-adjudicated cases, employers are paying out 29% less per award. This is likely because of the high attorney's fees in PAGA cases filed in court. Attorneys usually demand a minimum of 33% of the workers' total recovery, or $372,000 on average, no matter how much legal work was actually performed. In addition to receiving lower average recoveries in PAGA cases, workers also wait almost twice as long for their owed wages. The average wait time for a PAGA court case is 23 months compared to 12 months for the state-decided cases.

For these and other reasons, we respectfully **OPPOSE** your **SB 1162** as a **JOB KILLER**.

Sincerely,

Ashley Hoffman
Policy Advocate
California Chamber of Commerce

Allied Managed Care (AMC)
American Property Casualty Insurance Association
Antelope Valley Chambers of Commerce
Associated General Contractors (AGC)
California Association for Health Services at Home
California Bankers Association
California Beer and Beverage Distributors
California Building Industry Association
California Business and Industrial Alliance
California Business Properties Association
California Business Roundtable
California Chamber of Commerce
California Craft Brewers Association
California Credit Union League
California Employment Law Council
California Farm Bureau
California Forestry Association
California Grocers Association

[5] Proposed Section 432.3(d)(1) simply says the plaintiff must be "aggrieved", not that they must show any injury. Even if did use such language, under PAGA courts have held that a plaintiff need not show harm because they are standing in the shoes of the state. *See*, *e.g.*, *Lopez v. Friant & Associates, LLC,* 15 Cal. App. 5th 773 (2017)

California Hospital Association
California Hotel and Lodging Association
California Landscape Contractors Association
California League of Food Producers
California Manufactures & Technology Association
California New Car Dealers Association
California Railroads
California Restaurant Association
California Retailers Association
California State Council of the Society for Human Resource Management (CalSHRM)
California Taxpayers Association (CalTax)
California Travel Association (CalTravel)
Carlsbad Chamber of Commerce
Citrus Heights Chamber of Commerce
Civil Justice Association of California
Coalition of Small and Disabled Veteran Businesses
Corona Chamber of Commerce
Construction Employers' Association
Danville Area Chamber of Commerce
Family Business Association of California
Family Winemakers of California
Flasher Barricade Association (FBA)
Fresno Chamber of Commerce
Greater Coachella Valley Chamber of Commerce
Greater High Desert Chamber of Commerce
Housing Contractors of California
Imperial Valley Regional Chamber of Commerce
Job Creators for Workplace Fairness
La Cañada Flintridge Chamber of Commerce
Laguna Niguel Chamber of Commerce
Lake Elsinore Valley Chamber of Commerce
Lodi Chamber of Commerce
Long Beach Area Chamber of Commerce
Los Angeles Area Chamber of Commerce
Los Angeles Latino Chamber of Commerce
Murrieta/Wildomar Chamber of Commerce
National Federation of Independent Business
Oceanside Chamber of Commerce
Orange County Business Council
Orange County Hispanic Chamber of Commerce
Paso Robles Chamber of Commerce
Santa Ana Chamber of Commerce
Santa Maria Valley Chamber of Commerce
Santee Chamber of Commerce
Simi Valley Chamber of Commerce
Southwest California Legislative Council
TechNet
Tri County Chamber Alliance
True Blue
Valley Industry & Commerce Association
Visalia Chamber of Commerce
West Ventura County Business Alliance
Western Electrical Contractors Association
Western Growers Association
Wine Institute

cc: Legislative Affairs, Office of the Governor
Jimmy Wittrock, Office of Assemblymember Limón
Mariana Sabeniano, Office of Assemblymember Limón
Irene Ho, Assembly Appropriations Committee
Joe Shinstock, Assembly Republican Caucus

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