



April 17, 2019

TO: Members, Assembly Committee on Labor and Employment

SUBJECT: **AB 673 (CARRILLO) FAILURE TO PAY WAGES: PENALTIES  
OPPOSE – JOB KILLER**

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE AB 673 (Carrillo)**, which has been labeled a **JOB KILLER**, which unfairly penalizes an employer twice for the same Labor Code violation by allowing an employee to recover the same civil penalties through civil litigation that the Labor Commissioner can already recover through an enforcement action.

**AB 673** amends Labor Code Section 210 to create a new private right of action. This bill represents a significant expansion of the law for two reasons: (1) **AB 673** does not remove the Labor Commissioner's authority to recover the same, steep penalties against the employer for the same violation, and (2) the employee would now be able to choose to either file a civil action or a PAGA claim since the bill adds a new private right of action, but does not include a PAGA exemption for the same alleged violation.

**AB 673 Unfairly Punishes the Employer Twice for the Same Labor Code Violation:**

California already has some of the most onerous and complex labor laws in the country. This complexity is exemplified by the duplicative penalty provisions contained in the Labor Code. With this statutory scheme, one, unintentional and minor violation of the Labor Code can result in the threat of financially devastating civil litigation against an employer. One prime example is found in Labor Code Section 210.

Labor Code Section 210 is the penalty provision imposed for late payment of wages. California employers are required to pay their employees by a certain date depending on the employee's pay schedule (e.g., weekly, bi-weekly, or bi-monthly). Per Labor Code Section 210, if an employer does not make its payments on time, the employer is subject to significant liability as set forth below:

[E]very person who fails to pay the wages of each employee . . . shall be subject to a civil penalty as follows:

- (1) For any initial violation, one hundred dollars (\$100) for each failure to pay each employee.
- (2) For each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld.

These penalties continue to accumulate, even for a minor or unintentional violation. Currently, these steep penalties may be recovered by the Labor Commissioner per the procedures set forth in Labor Code Section 210 or by the employee through a Private Attorneys General Act (PAGA) claim. However, if **AB 673** were enacted, the Labor Commissioner *and* the employee would *each* recover, thus punishing the employer twice for the same potentially minor or unintentional violation.

Paying an employee "on time" might seem like a simple requirement; however, it is increasingly difficult to do so in California. In fact, recent cases demonstrate the challenge employers face in determining the appropriate calculation and payment of wages, such as overtime. See *Gonzalez v. Downtown LA Motors, LP*, 215 Cal. App. 4th 36 (2013) (piece-rate-paid employees are entitled to separate hourly pay for "waiting" time, even if other hours were compensated well above the minimum wage); see also *Alvarado v. Dart Container Corporation of California*, 4 Cal. 5th 542 (2018) (when calculating overtime in pay periods in which an employee earns a flat sum bonus, employers must divide the total compensation earned in a pay period by *only* the non-overtime hours worked by an employee). Penalizing the employer twice for failure to pay wages, when it is unclear what the proper calculation of wages may be, can only be described as unfair and overly punitive.

### **The Language of AB 673 Is Simply Confusing:**

The language of **AB 673** is confusing and arguably creates other concerns. While the language states that the employee "may bring an action to recover civil penalties," the actual recovery is "an amount equal to the penalties provided under subdivision (a)." So, is the employee recovering civil penalties, or just an amount equal to the civil penalties recovered by the Labor Commissioner?

Generally, "civil" penalties are only recoverable by the State, while statutory penalties are paid to an individual. See *Caliber Bodyworks, Inc. v. Superior Court*, 134 Cal. App. 4th 365 (2005) and *Dunlap v. Superior Court*, 142 Cal. App. 4th 330 (2006). So, if the employee is recovering a "civil penalty," does the employee just pay it back to the State? And, if so, then why is there need for a private right of action to collect civil penalties when PAGA already exists, as set forth below.

Additionally, if the employee is recovering a civil penalty, then the claim would be subject to a 1-year statute of limitations. See Code Civ. Proc. § 340(a). However, if the court were to interpret this as an "amount equal to" the civil penalty and not an actual civil penalty, then that provision is arguably subject to a 3-year statute of limitations. See Code Civ. Proc. § 338 (a).

This type of confusion will simply lead to additional litigation as these distinctions are interpreted by the courts.

### **AB 673 Potentially Reduces Revenue to the State:**

Per **AB 673**, an employee would now be able to choose to either file a civil action **or** a PAGA claim since the bill adds a new private right of action but does not include a PAGA exemption. Why the need for a new private right of action when PAGA already provides a pathway to court? The most likely answer is to potentially avoid sharing any recovery of penalties with the State.

PAGA allows an individual to pursue a “representative action” on behalf of similarly aggrieved employees for essentially any violation of the Labor Code, without being subject to the strict filing requirements of a class action. The original intent and purpose of PAGA was to supplement the Labor and Workforce Development Agency’s (LWDA) enforcement efforts for Labor Code violations, as the agency’s staffing levels were declining and could not keep up with the growth of the labor market. See *Arias v. Superior Court*, 46 Cal.4th 469 (2009).

PAGA provides employees with the right to enforce these violations, after giving notice to the LWDA, and collecting penalties on behalf of the LWDA. However, any recovery by the aggrieved employee is divided with the State: 25% of the penalties collected to the employee and the remaining 75% allocated to the LWDA.

Currently under the law, if the Labor Commissioner recovers penalties per Labor Code Section 210, then the State has already recovered, and the employee would not be able to file a PAGA action. On the other hand, if the Labor Commissioner has not issued Labor Code Section 210 penalties, the employee would need to provide notice to the LWDA and provide an opportunity for the LWDA to pursue the Labor Code Section 210 penalties. If the LWDA chooses not to pursue an action, then the employee may file a PAGA claim and split the recovery of civil penalties with the State.

However, under **AB 673**, the employee could file a civil action under Labor Code 210 without giving notice to the State of the alleged violation and potentially keeping all of the civil penalties, while not providing any portion to the State.

For these reasons, we respectfully **OPPOSE AB 673** as a **JOB KILLER**.

Sincerely,



Laura Curtis  
Policy Advocate  
California Chamber of Commerce

Associated General Contractors  
Building Owners and Managers Association  
California Ambulance Association  
California Building Industry Association  
California Business Properties Association  
California Construction and Industrial Materials Association  
California Hospital Association  
California League of Food Producers  
California Pool and Spa Association  
California Professional Association of Specialty Contractors  
California Retailers Association  
California Trucking Association  
Civil Justice Association of California  
Construction Employers' Association  
Dana Point Chamber of Commerce  
Family Business Association of California

International Council of Shopping Centers  
Job Creators for Workplace Fairness  
Murrieta/Wildomar Chamber of Commerce  
NAIOP – Commercial Real Estate Development Association  
National Federation of Independent Business  
North Orange County Chamber  
Official Police Garages of Los Angeles  
Oxnard Chamber of Commerce  
Santa Maria Valley Chamber of Commerce  
Wine Institute

cc: Che Salinas, Office of the Governor  
Lauren Prichard, Assembly Republican Caucus

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