JOB KILLER

May 20, 2020

TO: Members, Senate Committee on Appropriations

FROM: Jennifer Barrera
Executive Vice President
California Chamber of Commerce

Brea Chamber of Commerce
California Retailers Association
California Business Properties Association
California Manufacturers and Technology Association
Carlsbad Chamber of Commerce
Gilroy Chamber of Commerce
Los Angeles Area Chamber of Commerce
National Federation of Independent Business
North Orange County Chamber
Rancho Cordova Chamber of Commerce
Oceanside Chamber of Commerce
Orange County Business Council
Oxnard Chamber of Commerce
Pleasanton Chamber of Commerce
San Gabriel Economic Partnership
Santa Maria Valley Chamber of Commerce
Southwest California Legislative Council
Torrance Area Chamber of Commerce

SUBJECT: **SB 1399 (DURAZO) EMPLOYMENT: GARMENT MANUFACTURING**
OPPOSE/JOB KILLER

The California Chamber of Commerce and the organizations listed above are **OPPOSED** to **SB 1399**, as amended May 19, 2020, which has been labeled as a **JOB KILLER**, as this bill places enormous burdens on non-unionized employers in the clothing industry, punitive enforcement measures, and unrealistic bond requirements. **SB 1399** will put employers in this industry, who are already suffering from the financial crisis of this pandemic, out of business.

There are over 30 million people seeking unemployment. Now is not the time to impose the type of burdens proposed in **SB 1399** on employers, especially when it has nothing to do with addressing COVID-19 or improving the economy. We would urge the committee and author to delay consideration of this proposal until businesses have had a chance to recover from this crisis.

The Business Community Has Already Worked to Address/Prevent Wage Theft:

We are not interested in protecting bad actor employers, who deliberately cheat workers from wages. In 2015 we worked together with then Pro Tem De Leon and labor, to provide the Labor Commissioner with unprecedented tools and authority to address wage theft. Specifically, SB 588 allows the Labor Commissioner to engage in the following actions against bad actor employers:

(1) Labor Commissioner can place a lien on any of the employer's property in California to satisfy wages owed to an employee – the lien lasts for up to 10 years;
(2) Requires an employer to post a surety bond if they haven't paid a final judgment within 10 days
(3) Allows the Labor Commissioner to issue a stop order if any employer operates without a bond;
(4) Allows the Labor Commissioner to impose successor liability for unpaid wages, so that an employer cannot shut down and reopen as a different company to avoid liability
(5) Creates joint and several liability for listed employers;
(6) Imposes personal liability for managing agents of employers

The Labor Commissioner has to the tools to penalize and prosecute bad actors, including those in the garment manufacturing industry. The additional burdens imposed by **SB 1399** are unnecessary given the authority provided under SB 588.

Collective Bargaining Agreement Exemption Is Improper and Creates Inconsistent Standards:

This bill imposes significant burdens and liability onto any employer or contractor in the garment manufacturing industry, including a new category of companies defined as "brand guarantors," which basically includes any person or entity in the clothing industry, including dry cleaners, small and large retailers, second hand retailers, personal shoppers, online personal shoppers, and more. But interestingly, **SB 1399** provides a blanket exemption to nearly all of these laws if employees are covered by a "bona fide collective bargaining agreement." If these proposed changes are appropriate for non-unionized workforces, then they should be appropriate for unionized workforces too.

We have both unionized and non-unionized employer members. Employees who want to unionize and vote to do so, have that right and opportunity. However, proposed laws like **SB 1399** that force higher and unreasonable standards onto non-unionized employers while eliminating those requirements for unionized workforces, creates unfair leverage and punishes employees and employers who do not choose/vote to unionize.

Such inconsistent standards are also potentially preempted by the National Labor Relations Act, due to the interference it causes in the labor/management negotiating process.

Elimination of Piece-Rate Compensation Is Unnecessary and Could Harm Workers:

This bill proposes to eliminate piece rate compensation for any employee engaged in the performance of garment manufacturing. Eliminating this form of payment is unnecessary given that California law already ensures that all time is compensated at no less than minimum wage. Even when a worker is not performing "productive work" for purposes of earning piece rate compensation, the employee is still entitled to no less than minimum wage.

Piece rate compensation can be beneficial for employees, as it provides an opportunity to earn a higher income. This issue was debated in 2016 in AB 1513 (Williams) after the decision in *Gonzalez v. Downtown LA Motors* was issued. Given the benefits to employees, the Legislature allowed this form of compensation to continue, clarifying the payment for non-productive time.

This section of the bill provides a collective bargaining exemption, meaning it does not apply to unionized workers. Employees who do not choose to be unionized should not be punished by eliminating the opportunity to earn income through a piece rate model that can provide higher wages.

Unfairly Imposes Liability for Labor Violations onto Companies Who Have No Control Over the Workforce:

Current law already provides liability for wage and hour claims when a third party exerts control over the working conditions of the contractor's employees. *See Bradley v. California Dept. of Corrections and Rehabilitation*,158 Cal.App.4th 1612 (2008) (state agency exerted sufficient control over individual to be considered employer for purposes of FEHA); *see State ex rel. Dept. of California Highway Patrol v. Superior Court*, 60 Cal.4th 1002, 1008, fn. 2, 1012–1015, 184 Cal.Rptr.3d 354, 343 P.3d 415 (2015); *Martinez v. Combs*, 49Cal.4th 35 (2010) (stating that, for joint employer liability, employee must prove the third party exerted control over the working conditions of the employee); *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989) ("the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired"); *Torres v. Air to Ground Services, Inc*., 300 F.R.D. 386 (C.D. Cal. 2014) (confirming that California's application of joint employer liability is easier to satisfy than the federal standard).

SB 1399 imposes joint and several liability on any company that contracts with another person for the performance of garment manufacturing or who contracts with a "brand guarantor" as defined, for the minimum wages, overtime, break premiums, liquidated damages, penalties, attorney's fees, and worker's compensation coverage. Basically, any person or entity that contracts in the apparel industry could be on the hook and liable for the wage and hour violations, penalties, attorney's fees, etc. even though that person or entity exercised **no control** over the workers.

AB 5 (Gonzalez) has already had a chilling effect on contracting in the California economy. **SB 1399** will eliminate contracting in the apparel industry in California, as no company will take on the potential liability of having to pay for wage and hour violations it did not commit or paying the attorney's fees for another company's litigation.

Unfairly Changes Evidentiary Standards and Limits a Company's Right to Due Process:

SB 1399 further creates an unfair playing field in this industry - by changing the evidentiary standards for a wage claim. **SB 1399** creates a "presumption" that a claim for wages is valid against a company if the employee provides the Labor Commissioner with a label "or equivalent thereto" of a brand. Additionally, **SB 1399** eliminates a company's opportunity to defend themselves - by stating that witness declarations are insufficient to overcome a presumption, and that any evidence presented by a company must be "compelling and reliable written evidence," accurate and contemporaneous. The Labor Commissioner already has authority to make evidentiary determinations, including whether evidence is reliable, compelling, or if a witness is credible. These higher standards simply eliminate a company's right to due process by drastically reducing the evidence they can submit to avoid being held liable.

SB 1399 Expands PAGA Litigation:

By amending the Labor Code, **SB 1399** also significantly expands the representative actions that can be pursued through Labor Code Private Attorneys General Act (PAGA). PAGA has plagued the employer community for years, with trial attorneys utilizing the law to leverage costly settlements for claims that lack merit. **SB 1399** impose numerous new requirements that will expand the threat of PAGA litigation on employers at a time when they can least afford it.

Broad Documentation Retention Requirement:

SB 1399 also imposes a broad document retention policy that does not clearly identify the documents an employer must retain. Specifically, **SB 1399** requires an employer to keep "any other documentation pursuant to which work was, or is being, performed." Given the significant threat of enforcement **SB 1399** carries, employers should be provided with a clear, objective list of documents they are required to retain then **SB 1399** provides.

For these reasons, we are **OPPOSED** to **SB 1399** as a **JOB KILLER.**

cc: Stuart Thompson, Office of the Governor
Jennifer Richard, Office of Senator Durazo
Robert Ingenito, Senate Committee on Appropriations
Cory Botts, Senate Republican Caucus
Scott Seekatz, Senate Republican Caucus

JB:ll