May 8, 2020

The Honorable Hannah-Beth Jackson
California State Senate
State Capitol, Room 2032
Sacramento, CA 95814

SUBJECT: SB 973 (JACKSON) EMPLOYERS: ANNUAL REPORT: PAY DATA
OPPOSE – AS INTRODUCED FEBRUARY 11, 2020

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE** your **SB 973 (Jackson)**, which will burden employers by requiring them to turn over pay data information that could give the false impression of pay disparity where none may exist.

SB 973 Relies Upon Job Titles and Classifications to Compare Jobs, Which Undermines the Intent of SB 358 to Compare "Substantially Similar" Positions and, as Such, Will Provide a False Impression of Wage Discrimination When None May Exist.

SB 973 requires employers to collect pay data in the aggregate. Doing so will likely demonstrate wage disparity amongst employees in the different job classifications or titles according to gender. However, a disparity in wages does not automatically translate into wage discrimination or a violation of Labor Code Section 1197.5 (as amended by SB 358). Specifically, **SB 973** seeks to collect pay data according to job title, not according to whether the jobs are "substantially similar" for purposes of comparison.

Job titles are not determinative of whether two jobs are substantially similar for purposes of equal pay under Labor Code Section 1197.5 or the federal Equal Pay Law. *See Brennan v. Prince William Hospital Corp.*, 503 F.2d 282, 288 (4th Cir. 1974) (stating "[j]ob descriptions and titles, however, are not decisive. Actual job requirements and performance are controlling."); *Ingram v. Brink's, Inc.*, 414 F.2d 222, 231 (1st Cir. 2005) (stating "[t]he EPA is more concerned with substance than title"); *Chapman v. Pacific Tel. & Tel. Co.*, 456 F.Supp. 65, 69 (N.D. Cal. 1978) (holding "[t]he regulations and cases make it clear that it is actual job content, not job titles or descriptions which is controlling."); and, *EEOC Compliance Manual Compensation Discrimination* ("job titles and formal job descriptions are helpful in making this determination, but because jobs involving similar work may have different titles and descriptions, these things are not controlling.")

The term "substantially similar" was adopted in Labor Code Section 1197.5 to capture the intent of equal pay – meaning that employees who, with minor deviations, perform the same work according to a composite of skill, responsibility and effort, should be paid the same wage rate, unless a bona fide factor for the disparity exists. The example utilized in the legislative debate of this bill compared a housekeeper at a hotel who cleaned hotel rooms versus a janitor who cleaned the lobby. While a housekeeper and janitor may be "substantially similar" based upon the skill, responsibility and effort required, it is unlikely that employees will have the same job title.

Comparatively, two in-house attorneys may have the same job title, but may **not** actually have substantially similar job duties for purposes of comparison. As the court recognized in *E.E.O.C. v. Port Authority of New York and New Jersey*, 768 F.3d 247, 256-258 (2nd Cir. 2014), an attorney and another attorney are not the same just based on title, but rather a "successful EPA claim depends on a comparison of actual job content; broad generalizations drawn from job titles, classification, or divisions, and conclusory assertions of sex discrimination, cannot suffice; in order for jobs compared to be 'substantially equal,' a plaintiff must establish that the jobs compared entail common duties or consent, and do not simply overlap in titles or classifications." Due to the fact that **SB 973** is completely reliant on job classifications and titles, it will create a false impression of wage discrimination or unequal pay where none may exist.

SB 973 Fails to Take into Consideration an Employer's Objective, Non-Discriminatory, "Bona Fide Factors" for the Wage Disparity and, Therefore, Undermines the Balance Provided by Labor Code Section 1197.5.

As previously discussed, Labor Code Section 1197.5 recognizes there are objective, non-discriminatory reasons for employees to have a wage differential. Aggregate data as proposed in **SB 973** fail to take these valid, non-discriminatory, reasons into consideration and will create a false impression of wage discrimination where none may exist. For example, there could be a disparity in the mean of salaries between two exempt employees because one employee has only worked for the employer for 6 months, whereas the other employee has been with the employer for 10 years. Or, one employee negotiated a higher salary while the other negotiated more flexible hours. These examples would not be effectively captured in the aggregate data under **SB 973** and, therefore, will create the impression of an equal pay violation where none actually exists.

SB 973 Utilizes Data That May Be Impacted by Employee Choices.

SB 973 requires employers to provide pay data regarding an employee's total earnings as shown on the Internal Revenue Service's Form W-2. However, a W-2 form does not take into account an employee's own decisions and actions that can also create wage disparity that has nothing to do with discriminatory intent of an employer.

For example, an employee who requests to work part-time, reduced hours, or only on specific shifts that pay a lesser rate than others will impact the wages he or she earns. *Per Diem* employees may only work one shift per month, at the employee's own request. Moreover, if the employee is a "sales worker" or performing another job where the employee receives commissions or bonuses based upon his or her performance, this will create a wage disparity. Even though all employees in the substantially similar position are working under the same commission or bonus plan, the employee's own actions and performance will dictate what the employee actually earns.

Finally, a wage disparity can also be created by an employee's personal choices as to pre-tax payroll deductions. One employee may "max-out" all pre-tax deductions for a 401(k), dependent child reimbursement, medical expense reimbursement, college savings, etc., while another employee may not request any such deductions be made to his or her paycheck. None of these employee choices and actions will be captured or reflected in the data collected pursuant to **SB 973** to justify a potential wage disparity. Again, this omission on the report will create the false impression of wage discrimination where none may exist.

SB 973 Creates Confusion by Authorizing DFEH to Enforce Equal Pay Act Claims

California Equal Pay Act claims are currently enforced by the Division of Labor Standards Enforcement (DLSE) or by civil action. This bill proposes to allow the Department of Fair Employment and Housing (DFEH) to investigate and prosecute such claims.

While the bill states that the DLSE and DFEH shall adopt procedures to ensure that only one of the departments investigates or takes action to the same operative facts, this is unclear and could still lead to situations where two different state agencies are enforcing the same body of law. These two state agencies could have inconsistent interpretations of the law, which could lead to inconsistent and confusing enforcement.

For these reasons, we respectfully **OPPOSE SB 973**.

Sincerely,

Ben Ebbink
California Chamber of Commerce

Acclamation Insurance Management Services
Allied Managed Care
Associated General Contractors
Auto Care Association
California Association for Health Services at Home
California Association of Winegrape Growers
California Bankers Association
California Construction and Industrial Materials Association
California Farm Bureau Federation
California Food Producers
California Grocers Association
California Hotel and Lodging Association
California Manufacturers and Technology Association
California Professional Association of Specialty Contractors
California Restaurant Association
California Retailers Association
CAWA – Representing the Automotive Parts Industry
Civil Justice Association of California
Computing Technology Industry Association - CompTIA
National Federation of Independent Business
Western Growers Association

cc: Che Salinas, Office of the Governor
Lisa Gardiner, Office of Senator Jackson
LC:ll