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TO: Members, Senate Committee on Labor, Public Employment and Retirement

FROM: Ashley Hoffman, Policy Advocate, California Chamber of Commerce
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California Manufacturing and Technology Association
California Retailers Association
Carlsbad Chamber of Commerce
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Garden Grove Chamber of Commerce
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Redondo Beach Chamber of Commerce
San Gabriel Valley Economic Partnership
Simi Valley Chamber of Commerce
South Bay Association of Chambers of Commerce
Southwest California Legislative Council
Tulare Chamber of Commerce
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SUBJECT: **SB 62 (DURAZO) EMPLOYMENT: GARMENT MANUFACTURING**
OPPOSE

The California Chamber of Commerce and the organizations listed above must respectfully **OPPOSE SB 62**, as this bill places enormous burdens on employers in the clothing industry, presumes that entities with no control over garment workers are liable for an employee's entire wage claim, and includes punitive enforcement measures. The bill does all of this without addressing the root cause of the problems that exist in the garment industry: the need for increased enforcement of existing laws and education of workers and employers about California's labor laws. **SB 62** will put employers in this industry, who are already suffering from the financial crisis of this pandemic, out of business or force them to move operations outside of California.

Presently, all businesses engaged in garment manufacturing must register with the California Labor Commissioner and pay a registration fee. Those fees go towards processing garment worker wage claims and to a restitution fund called the Garment Manufacturers Special Account (GMSA) to pay wage claims where the Labor Commissioner is unable to collect from a business. Manufacturers are jointly liable for the wages of the employees of garment contractors with whom they directly enter into contracts, just like other companies who exercise control over an employee's working conditions. **SB 62** seeks to significantly broaden that joint liability by instituting a presumption that any company involved in a laundry list of garment-related activity in California is liable for all wages and associated penalties sought by a garment workers, even if that company has **no control** over those workers.

The Conduct SB 62 Seeks to Prevent is Already Illegal

Supporters of **SB 62** purport that the need for this bill arises from the fact that garment workers are not paid minimum wage or overtime and are not provided a safe working environment. California's robust Labor Code and related statutes already outlaw all of this conduct, including some rules specific to the garment industry. Those laws include, but are not limited to:

- Labor Code §§ 1194, 1197 – Employees must be paid no less than the applicable minimum wage
- Labor Code § 226 – Wage Statements must identify all wages earned and the applicable hourly rate, including the number of piece rate units earned and any applicable piece rate
- Labor Code § 226.2 – Employees who receive piece-rate compensation must be compensated for all non-productive time and rest breaks at no less than the applicable minimum wage
- Labor Code § 2673 – Garment manufacturers are required to keep the following records for three years: 1) names and addresses of all employees, 2) daily hours worked, 3) daily production sheets, including piece rates, 4) wages paid each payroll period, 5) contract worksheets indicating the price per unit agreed to between the contractor and manufacturer, 6) ages of any minor employees, and 7) any other conditions of employment
- Labor Code § 2810.5 – At the time of hire, employees must be provided a written notice containing: 1) rates of pay (including piece rate) applicable to employment, 2) allowances, if any, claimed as part of the minimum wage, 3) the regular payday designated by the employer, 4) the name of the employer and any "doing business as" names, 5) the physical address of the employer's main office and mailing address, 6) the employer's telephone number, 7) the name, address, and telephone number of the employer's workers' compensation carrier, and 8) an employee's right to paid sick leave and that an employee may not be retaliated against or terminated for using sick leave
- Labor Code § 2673.1 – All garment manufacturers are jointly liable for the wages of their contractor's employees
- Labor Code § 2675 – All person engaged in the business of garment manufacturing must register with the Labor Commissioner and pay a registration fee
- Labor Code § 6400 – Employers must provide place of employment that is safe and healthful
- Labor Code § 6401.7 – Employers must implement and maintain a written injury prevention program
- CalOSHA Emergency Temporary Standard – Regulates workplace safety specifically as to COVID-19, including compliance with applicable health guidelines, training requirements for employees on safety protocols and COVID-19, physical distancing requirements, and handwashing and other sanitation requirements

Nothing in **SB 62** will address the problem of underground, bad actors in the garment industry evading the law. Instead, **SB 62** simply eliminates piece rate work and allows those bad actors to continue to operate with business as usual while passing the buck to companies that have no control over these workers. To eliminate the bad actors that presently operate outside of the law in this industry, the Legislature should look to its existing enforcement mechanisms and educating workers about their rights.

The Business Community Has Already Worked to Provide the Labor Commissioner with Enforcement Mechanisms to Stop Bad Actors:

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 the tools to penalize and prosecute bad actors, including those in the garment manufacturing industry. The additional burdens imposed by **SB 62** are unnecessary given the authority provided under SB 588.

In fact, when asked during a recent Budget Subcommittee 5 hearing what the Labor Commissioner recommended to ensure that the GMSA remained solvent, her recommendations were to 1) fill outstanding vacancies in the Labor Commissioner's office to improve enforcement and 2) educate workers about their rights under California law and the existence of the Labor Commissioner's office. Neither of these solutions involve instituting a presumption that companies with no control over workers must pay for all of a workers' outstanding wage claims.

Further, the Department of Industrial Relations (DIR) has multiple funds that are presently funneled into the General Fund that could be used for unpaid wage claims or increased enforcement. For example, the DIR fund consisting of unclaimed wages has a balance transferred to the General Fund each year in amounts of up to almost $7 million dollars. In 2020, DIR requested that it be allowed to restructure the garment funds and be allowed to transfer money from the unclaimed wages fund into the GMSA each year to offset cash shortages. This was ultimately not included in the Budget. Similarly, penalties levied against garment manufacturers by the Bureau of Filed Enforcement (BOFE) go into the General Fund rather than to the GMSA or towards garment enforcement. In a report on the BOFE's investigations from 2017-2018, only 69 out of 2,058 inspections were in the garment industry.

Filling vacancies, educating workers and employers about the Labor Code, and providing the Labor Commissioner with the ability to reallocate some of these funds should be considered before imposing liability on entities with no control over workers.

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

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, any company that licenses its brand to other entities, and small and large retailers that produce, dye, affix labels to, or otherwise alter clothing in California. Even worse, the bill authorizes the Labor Commissioner to expand this and other definition at her discretion in the future, which is an improper delegation of regulatory authority.

In addition to manufacturers jointly liable for wages under Labor Code section 2673.1, 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 62 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 and may not even be aware that garments have been handled by these bad actors through subcontracting.

AB 5 (Gonzalez) has already had a chilling effect on contracting in the California economy. **SB 62** 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 62 further creates an unfair playing field in this industry, by changing the evidentiary standards for a wage claim. **SB 62** 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. A worker could come forward with one clothing item and that company would be presumed liable for the full amount of the worker's claimed unpaid wages during their employment. Additionally, **SB 62** 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.

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.

SB 62 Expands PAGA Litigation:

By amending the Labor Code, **SB 62** 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 62** 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 62 also imposes a broad document retention policy that does not clearly identify the documents an employer must retain. Given the significant threat of enforcement **SB 62** carries, employers should be provided with a clear, objective list of documents they are required to retain then **SB 62** provides.

For these reasons, we are **OPPOSED** to your **SB 62**.

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

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