





JOB KILLER

March 23, 2022

TO: Members, Assembly Committee on Labor & Employment

**SUBJECT: AB 2095 (KALRA) WORKER METRICS PROGRAM
OPPOSE/JOB KILLER – AS AMENDED MARCH 21, 2022**

The California Chamber of Commerce and the organizations listed respectfully **OPPOSE AB 2095 (Kalra)** which has been labeled as a **JOB KILLER**. **AB 2095** forces employers to publicly disclose information regarding labor and employment issues for employees across the entire company. That information will unfairly be used to label employers as “high road” or “low road” and subject them to a loss of state opportunities and incentives, and to frivolous litigation. This measure is a shameless ploy to use the power of the State to force companies to develop an extensive database to enable fishing expeditions in support of litigation or public relations campaigns.

AB 2095 Seeks to Label Companies as “Low Road Employers” to Deny Them State Opportunities and Incentives Using Data on Wages and Benefits that Do Not Violate the Law:

AB 2095 requires employers to report data regarding wages, benefits, scheduling, and safety for *their entire* United States workforce. The vast majority of the data would be published on the Labor and Workforce Development Agency’s website by employer name. **AB 2095** provides that the Legislature intends to establish a certification program that will allocate state contracts, tax incentives, and workforce development funding to those companies the LWDA deems as “high road employers” based on the data reported.

Even if a company is operating lawfully and treating its employees well, the broad, ambiguous, and overall unhelpful data required by this bill will determine whether a company loses access to incentives or contracts it may have otherwise been awarded. For example, **AB 2095** requires employers to report wage and hour data according to race, ethnicity, and gender. There is no question that this data will show differences in compensation according to these categories, but that does not mean that such differences are discriminatory, unequal, immoral, or in any way a violation of the law. An employer with a majority of its employees in states with lower minimum wage laws or areas with lower costs of living, will have lower median pay. And, if those states have a higher number of women or racial minorities in its workforce than another area of the country, it will impact the data reported. Additionally, the equal pay laws in all states are not the same. California’s equal pay law allows pay differences for bona fide reasons, such as seniority and experience.¹ Other states have different standards or justifications for pay differences. Similarly, **AB 2095** requires employers to identify the number of independent contractors it uses. Employers with a large workforce in California subject to AB 5 are likely to have different statistics than in a state that follows federal law or has a different standard. Even for those in California, whether the company uses independent contractors or not is likely determined by whether its industry was lucky enough to be included in one of the 100-plus exemptions to AB 5.

While **AB 2095** states that employers can basically provide footnotes for any discrepancies in pay or benefits to justify the differences, these footnotes will be lost in the headlines that Company A has a high percentage of, for example, independent contractors. Unfair and arbitrary denials of state opportunities and public criticism is not the way to achieve higher, better paying jobs in California. Rather, it provides a significant incentive for employers to reduce their workforce to avoid this punitive mandate.

AB 2095 Gives Control Over the Certification Program to Outside Organizations That Do Not Include Employer Representatives

Even more troubling is that **AB 2095** mandates that LWDA use outside organizations to develop a “scoring methodology” by which to judge the companies’ data. Those designated “stakeholders” noticeably include labor unions and academics but not employer representatives. Further, AB 2095 permits LWDA to delegate running this certification program to private organizations. Not only are companies being unfairly judged by data that fails to provide an accurate snapshot of them as an employer, but this entire program will be developed and run by private entities with no representation from the employer community.

AB 2095 Requires Employers to Provide Data Regarding Benefits Not Required by Law to Further Shame Companies:

Three of the metrics employers would be required to report are the percentage of workers who are offered 12 weeks of short-term disability insurance or paid medical leave, which is not required under California law. The California Family Rights Act (CFRA) requires 12-weeks of unpaid leave per year for certain

¹ Perceived wage disparities or disparities in promotional decisions do not automatically equate to discrimination or a violation of law. As Labor Code Section 1197.5 and the Fair Employment and Housing Act (FEHA) recognize, there are numerous, lawful, bona fide factors as to why wage disparities may exist between employees, including those 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 production; (6) geographical differences that impact the cost of living and job market; and, (7) shift differentials. See also Government Code Section 12940 (discrimination under FEHA does not include employment decisions based on a bona fide occupational qualification).

qualifying reasons, including an employee's own medical conditions, caregiving, or baby bonding. Leave for caregiving is limited to certain family members.

Similarly, one of the metrics concerns how far in advance employees are notified of their work schedules. While some local jurisdictions have predictive scheduling ordinances, there is no statewide requirement regarding how far in advance an employer must notify employees of their schedules. Publishing this data will shame employers that do not offer as much notice as others with no consideration for the varying needs of different businesses and no consideration for the fact that the company's scheduling practices are lawful.

AB 2095 Subjects Employers to Frivolous Litigation:

The motive behind AB 2095 is to publicize the data collected. Prior efforts to publicize similar data have caught the attention of the plaintiff's bar, who stands ready to use that data for litigation. AB 1209 from 2017 would have required the publication of certain pay data by employer. 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.

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 because attorneys confirmed they would use the data to file lawsuits: "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.**" The version of this bill that eventually passed, SB 973 in 2020, intentionally did not include a publication provision.

AB 2095 similarly opens businesses up to litigation. For example, if a company reports high numbers of independent contractors as compared to other companies, an attorney is sure to file a misclassification claim even if the use of contractors is lawful. Data regarding scheduling practices, workplace injuries, and other data categories will also be used to threaten companies with lawsuits. While some data will not be posted directly on the LWDA's website, giving LWDA the ability to contract with outside organizations to review all data submitted means the data will inevitably end up in the hands of attorneys.

AB 2095 Forces Employers to Request Personnel Information that Employees May Not Want to Provide:

The bill also requests information based on personnel data an employer is not allowed to require. An employer cannot require an employee to identify their race or gender. If the bill follows the federal EEO-1 guidance or the Department of Fair Employment and Housing (DFEH)'s SB 973 guidance, then for example where an employee does not disclose their race the employer must still report the information and essentially guess:

"... Employee self-identification is the preferred method of identifying race/ethnicity information. If an employee declines to state their race/ethnicity, employers must still report the employee according to one of the seven race/ethnicity categories, using — in this order — current employment records, other reliable records or information, **or observer perception.**"

AB 2095 Forces Employers to Publicly Report Information that Could Be Misused by Its Competitors:

The information could also be used by competitors. Competitors could use it to determine pay scales for specific companies and information about benefits provided and then use those statistics for recruitment, driving up costs for California employers and impeding their abilities to stay competitive.

AB 2095 May Violate the Commerce Clause By Imposing Labor Requirements on Out-of-State Workers:

AB 2095 raises constitutional concerns. The Dormant Commerce Clause of the United States Constitution forbids states from regulating activity in other states. See *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995) (“[A] statute has extraterritorial reach when it necessarily requires out of-state commerce to be conducted according to in-state terms”); *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989) (“The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.) Here, California is making certain opportunities and incentives contingent on the compensation companies provide to workers in other states. Companies with workers in other states will be pressured to increase pay beyond what is required by minimum wage laws or the applicable cost of living, provide benefits not mandated by law, or reclassify workers as employees even where the use of an independent contractor is lawful. **AB 2095** is essentially trying to impose California’s labor laws on out-of-state employees, which it cannot legally do.

For these and other reasons, we respectfully **OPPOSE AB 2095** as a **JOB KILLER**.

Sincerely,



Ashley Hoffman
Policy Advocate
California Chamber of Commerce

Agricultural Council of California
Airlines for America
Alameda Chamber of Commerce
Alhambra Chamber of Commerce
Antelope Valley Chambers of Commerce
Associated General Contractors
Auto Care Association
Brea Chamber of Commerce
Building Owners and Managers Association
California Apartment Association
California Association of Sheet Metal and Air Conditioning Contractors National Association
California Association of Winegrape Growers
California Attractions and Parks Association
California Bankers Association
California Beer and Beverage Distributors
California Builders Alliance
California Building Industry Association
California Business Properties Association
California Chamber of Commerce
California Farm Bureau
California Farm Labor Contractor Association
California Food Producers
California Framing Contractors Association
California Grocers Association
California Hospital Association
California Hotel and Lodging Association

California Land Title Association
California Manufacturers & Technology Association
California New Car Dealers Association
California Restaurant Association
California Retailers Association
California State Council of the Society for Human Resource Management (CalSHRM)
California Taxpayers Association
California Travel Association
California Trucking Association
Carlsbad Chamber of Commerce
CAWA – Representing the Automotive Parts Industry
Chino Valley Chamber of Commerce
Civil Justice Association of California
Commercial Real Estate Development Association – NAIOP
Corona Chamber of Commerce
Costa Mesa Chamber of Commerce
Elk Grove Chamber of Commerce
Family Business Association of California
Fountain Valley Chamber of Commerce
Fremont Chamber of Commerce
Fresno Chamber of Commerce
Gilroy Chamber of Commerce
Greater Conejo Valley Chamber of Commerce
Greater Escondido Chamber of Commerce
Greater High Desert Chamber of Commerce
Greater Riverside Chambers of Commerce
Greater San Fernando Valley Chamber of Commerce
Hollywood Chamber of Commerce
Housing Contractors of California
Imperial Valley Regional Chamber of Commerce
Industry Business Council
International Council of Shopping Centers
La Cañada Flintridge Chamber of Commerce
Lake Elsinore Valley Chamber of Commerce
Lodi Chamber of Commerce
Lompoc Valley Chamber of Commerce & Visitors Bureau
Long Beach Area Chamber of Commerce
Los Angeles Area Chamber of Commerce
Mission Viejo Chamber of Commerce
Murrieta/Wildomar Chamber of Commerce
Newport Beach Chamber of Commerce
North Orange County Chamber
North San Diego Business Chamber
Official Police Garages Los Angeles
Oceanside Chamber of Commerce
Orange County Business Council
Oroville Area Chamber of Commerce
Pleasanton Chamber of Commerce
Rancho Cordova Area Chamber of Commerce
Rancho Mirage Chamber of Commerce
Sacramento Metropolitan Chamber of Commerce
Sacramento Regional Builders Exchange
San Gabriel Valley Economic Partnership
San Marcos Chamber of Commerce
San Mateo Area Chamber of Commerce
San Ramon Chamber of Commerce
Santa Ana Chamber of Commerce
Santa Maria Chamber of Commerce

Santa Barbara South Coast Chamber of Commerce
Santa Clarita Valley Chamber of Commerce
Santa Maria Valley Chamber of Commerce
Simi Valley Chamber of Commerce
Southern California Black Chamber of Commerce
Southwest California Legislative Council
TechNet
Torrance Area Chamber of Commerce
Tri-County Chamber Alliance
Tulare Chamber of Commerce
West Ventura County Business Alliance
Western Electrical Contractors Association (WECA)
Western Growers Association

cc: Legislative Affairs, Office of the Governor
Erika Ngo, Office of Assemblymember Kalra
Lauren Pritchard, Assembly Republican Caucus

AH:am