JOB KILLER

April 14, 2021

TO: Members, Assembly Committee on Labor and Employment

FROM: California Chamber of Commerce, Ashley Hoffman, Policy Advocate
Airlines for America
Associated General Contractors
Brea Chamber of Commerce

Building Owners and Managers Association
CAWA – Representing the Automotive Parts Industry
California Apartment Association
California Attractions and Parks Association
California Beer and Beverage Distributors
California Builders Alliance
California Business Properties Association
California Farm Bureau

California Food Producers
California Hotel and Lodging Association
California Restaurant Association
California State Council of the Society for Human Resource Management (CalSHRM)
California Travel Association
California Trucking Association
Carlsbad Chamber of Commerce
Commercial Real Estate Development Association – NAIOP
Family Business Association of California
Greater Riverside Chambers of Commerce
Housing Contractors of California
International Council of Shopping Centers
North Orange County Chamber
Official Police Garages Los Angeles
Oxnard Chamber of Commerce
Pleasanton Chamber of Commerce
Sacramento Metropolitan Chamber of Commerce
Sacramento Regional Builders Exchange
San Gabriel Valley Economic Partnership
Santa Ana Chamber of Commerce
Santa Maria Valley Chamber of Commerce
Southwest California Legislative Council
Tri-County Chamber Alliance
Tulare Chamber of Commerce
Western Growers Association

SUBJECT: AB 1192 (KALRA) WORKER METRICS PROGRAM
OPPOSE/JOB KILLER – AS AMENDED APRIL 5, 2021

The California Chamber of Commerce and the organizations listed above respectfully **OPPOSE AB 1192 (Kalra),** which has been labeled as a **JOB KILLER. AB 1192** forces employers to publicly disclose information regarding labor and employment issues for employees across the country that will subject employers to unfair and unwarranted shaming, as well as subject employers to frivolous litigation and the loss of state benefits. 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 1192 Seeks to Publicly Shame Companies Regarding Wage and Benefits Data that Does Not Violate the Law:

AB 1192 requires employers to report data regarding wages, benefits, scheduling, and safety for ***their entire*** United States workforce. The data would be published on the Labor and Workforce Development Agency's website by employer name. As set forth below, this snapshot of data regarding employees across the entire country will unfairly subject employers to unwarranted criticism.

AB 1192 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, or in any way a violation of the law. For example, 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 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

[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

pay differences. Similarly, **AB 1192** 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.

AB 1192 also provides that each company will be sorted into one of 24 industry groups. Companies within the same industry groups are compared to one another. Those 24 industry groups are broad, including categories such as Materials, Capital Goods, Media & Entertainment, and Consumer Services. Each encompasses a wide variety of different types of businesses.

In Media & Entertainment, the data for a production company that regularly uses daily hires or background performers and has unique scheduling needs would look significantly different from an advertising agency. In Capital Goods, companies engaged in aerospace and defense will look far different from those that manufacturer smaller, more specific products like electrical wires or trading companies. Under this bill, those companies could have state benefits or contracts withheld from them based on the apples-to-oranges comparisons that will result from these metrics.

While **AB 1192** 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 provides lower pay to women than men or Company B has a high percentage of independent contractors. Publicly shaming companies is not the way in which 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 1192 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, 12 weeks of paid parental leave, or 12 weeks of paid caregiving leave. **None of those leaves is required under California law**. The California Family Rights Act (CFRA) requires 12-weeks of unpaid leave per year for certain qualifying reasons, including an employee's own medical conditions, caregiving, or baby bonding. Leave for caregiving is limited to certain family members. **AB 1192** would publicly shame employers that do not offer far more than what is required by state law.

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 1192 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

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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).

of the seven race/ethnicity categories, using — in this order — current employment records, other reliable records or information**, or observer perception**."

AB 1192 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 1192 Subjects Employers to Frivolous Litigation:

AB 1209 from 2017 would have required the publication of data from employers on mean wage differentials between male and female employees. 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.*
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> *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.*
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> *"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.*

AB 1192 similarly requires an employer to report pay data and information about promotions that will give the false impression of pay disparity where none exists. Once the data is made public, a plaintiff's attorney would simply have to review the companies with reported pay disparities or disparities in promotions and send a settlement demand or threaten litigation. 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.

Governor Brown Vetoed a Prior Public Shaming Bill Because Plaintiff's Attorneys Confirmed They Would Use the Data to File Lawsuits:

In 2017, Governor Brown vetoed AB 1209, which would have made similar pay data public. In his veto message he stated, "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. The DFEH may only publish that data in the aggregate, not data associated with specific companies.

Thus, publicly shaming companies for conduct that is not unlawful is simply unfair, will discourage growth in California and expose employers to costs associated with defending against meritless litigation.

AB 1192 Threatens Employers with Loss of State Benefits:

AB 1192 provides that the Legislature intends to establish a certification program that will allocate state contracts, tax benefits, and 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 benefits or contracts it may have otherwise been awarded.

Employers Already Have Reporting Mandates Regarding Wage and Safety Information That Is Not Subject to Public Shaming:

Just last year, California passed SB 973. SB 973 requires all California employers with 100 or more employees to report pay data by sex, race, ethnicity, and job category to the DFEH. Employers must also already comply with the federal Employer Information Report, otherwise known as the EEO-1 Report that also requires employers to report pay data according to sex, race, ethnicity, and job category. Not all data required under SB 973 is included on the EEO-1 reports, so employers must file both. Regarding safety, employers must already provide information about recordable injuries and fatalities to OSHA. Other companies such as those with federal or state contracts or in other specific industries also have their own special reporting requirements. These reports are for data purposes only, meaning they are sent to the state or federal government agencies, which then publishes the data in the aggregate. Any data published by OSHA is minimal and published years after it is reported. Comparatively, **AB 1192** proposes to publish data according to employer for the purpose of publicly shaming companies.

AB 1192 May Violate the Commerce Clause By Imposing Labor Requirements on Out-of-State Workers:

AB 1192 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 benefits 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 1192** 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 1192** as a **JOB KILLER.**

cc: Stuart Thompson, Office of the Governor
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Lauren Prichard, Assembly Republican Caucus