



**UPDATED
JOB KILLER**

June 7, 2023

TO: Members, Assembly Judiciary Committee

**SUBJECT: SB 365 (WIENER) CIVIL PROCEDURE: ARBITRATION
OPPOSE/JOB KILLER – AS AMENDED MAY 18, 2023**

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE SB 365 (Wiener)** which has been labeled as a **JOB KILLER**. It is clear that the true motive behind **SB 365** is an attempt to severely restrict the use of arbitration agreements altogether. **SB 365** incorrectly assumes that all appeals related to arbitration are meritless. Moreover, the motive behind **SB 365** is to deter arbitration and single out arbitration from other types of proceedings. This will ultimately result in a finding that the bill is preempted by the Federal Arbitration Act (FAA), as the Ninth Circuit recently did by striking down another

attempt at limiting arbitration – AB 51 (Gonzalez) from 2019. Allowing a court the discretion to continue with the underlying trial while an appeal regarding a motion to compel arbitration is pending eliminates the entire purpose of arbitration and runs afoul of the FAA. **SB 365** would also incentivize forum shopping even more than what occurs now, with trial attorneys filing claims in venues where they believe there will be judges more inclined to deny current law’s requirement to stay a case during an appeal regarding the enforceability of an arbitration agreement. **SB 365** will lead to additional litigation and more money in the pockets of trial attorneys, which will increase the cost of doing business in California and exacerbate the ongoing affordability crisis we are facing.

SB 365 Will Increase Litigation to the Detriment of Consumers, Employees, and Businesses

The motive behind **SB 365** and its likely result is to increase civil litigation. The stakeholder that generally profits from civil litigation is the plaintiff’s attorney, not the consumer or worker.¹ For example, consumers and employees typically receive higher awards and have their claims resolved more quickly in arbitration than litigation.² The same holds true when one looks at data from California’s own agencies regarding outcomes in litigation versus agency enforcement. In the case of the Private Attorneys General Act (PAGA), the current average payment that a worker receives from a PAGA case filed in court is \$1,300, compared to \$5,700 for cases adjudicated by the state’s enforcement agency. Attorneys on average recover a minimum of 33% of the workers’ total recovery (and often rising to 40%), or \$372,000 on average in litigation. In addition to receiving lower average recoveries in PAGA cases, workers also wait almost twice as long for their owed wages. Resolving disputes outside of litigation is better for all parties and ensures the consumer and worker are made whole more quickly rather than increasing fees and payments for trial attorneys.

SB 365 Is Based on the False Assumption that All Appeals Are Frivolous

SB 365 erroneously assumes that every single appeal of a denial to compel arbitration is meritless. According to the author the stated motive behind **SB 365** is to “reign in” arbitration by allowing all trial court proceedings to continue during an appeal of “obviously invalid or inapplicable forced arbitration clauses”.³ In reality, **SB 365** is not so limited. It does not simply apply to situations where there has been a determination that an appeal is frivolous or the arbitration clause is “obviously invalid”. Rather, it applies to *every single appeal* of a ruling denying a motion to compel arbitration.

To enact **SB 365** is to assume that no trial court is ever wrong, which is simply untrue. Indeed, in a case currently pending before the United States Supreme Court on the very issue of whether proceedings should be stayed during appeal, both district courts that made the rulings at issue *specifically acknowledged that they may be overturned on appeal*. One stated “reasonable minds may differ” over the denial on the motion to compel arbitration and the other stated “I could see a different legal set of minds looking at this factual pattern and saying I was wrong” and that it was “really hesitating” because “if I’m wrong, then you’ll go forward in arbitration, but the parties will have spent a lot of time and money dealing with things that you would not have otherwise had to deal with if I’m wrong.”⁴ To appeal decisions like these is certainly not meritless. It does not make sense that **SB 365** would not allow an automatic stay of proceedings in situations like these.

¹ [Coalition Letter on a Hearing Related to Arbitration in Financial Service Products | U.S. Chamber of Commerce \(uschamber.com\)](#); [Why the CFPB’s Anti-Arbitration Bias Is Bad for Consumers | U.S. Chamber of Commerce \(uschamber.com\)](#)

² [FINAL-ndp-Consumer-and-Employment-Arbitration-Paper-2022.pdf \(institutelegalreform.com\)](#)

³ [Senator Wiener Introduces Legislation To Stop Corporate Arbitration Abuse | Senator Scott Wiener \(ca.gov\)](#)

⁴ Joint Petition for a Writ of Certiorari in *Coinbase, Inc. v. Bielski*, available at:

[https://www.supremecourt.gov/DocketPDF/22/22-](https://www.supremecourt.gov/DocketPDF/22/22-105/232231/20220729160525276_Coinbase%20Joint%20Cert%20Petition%207-29-22%20Final.pdf)

[105/232231/20220729160525276_Coinbase%20Joint%20Cert%20Petition%207-29-22%20Final.pdf](https://www.supremecourt.gov/DocketPDF/22/22-105/232231/20220729160525276_Coinbase%20Joint%20Cert%20Petition%207-29-22%20Final.pdf)

SB 365 Undermines the Intent of Code of Civil Procedure Section 916 and Will Lead to Forum Shopping

Under California Code of Civil Procedure Section 916, if an appeal is filed it stays the trial court proceedings for all matters related to the appeal. To determine if Section 916 applies, the court looks not only at whether the appeal would be rendered moot if trial court proceedings moved forward, but also whether continuing trial court proceedings would be “irreconcilable” with the appeal outcome. An example of this is where “*the very purpose of the appeal is to avoid the need for the proceeding*”. *Varian Medical Systems, Inc. v. Delfino*, 35 Cal. 4th 180, 190 (2005) (emphasis added).

The purpose of Section 916 “is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. The [automatic stay] *prevents the trial court from rendering an appeal futile* by altering the appealed judgment or order by conducting other proceedings that may affect it.” *Id.* at 189 (cleaned up) (emphasis added). In essence, trial proceedings should be stayed if the result on appeal may void the need to have the trial altogether. A stay under section 916 should be granted even if the trial court judge believes the appeal will fail. *See Daly v. San Bernadino County Board of Supervisors*, 11 Cal. 5th 1030, 1051 (2021).

Courts have repeatedly held that an appeal from a denial of a motion to compel arbitration falls squarely within the exact issue that Section 916 was enacted to address: that allowing trial to move forward would be irreconcilable with an outcome on appeal if the trial court is reversed. *Id.* at 190; *Prudential-Bache Securities, Inc. v. Superior Court*, 201 Cal. App. 3d 925 (1988). If the appeal is successful, the parties and court will have wasted tremendous costs and resources on a proceeding that should never have happened in the first place. **SB 365** discriminates against arbitration by saying that Section 916 should never apply with regard to appeals related to a motion to compel arbitration.

It should also be noted that **SB 365** goes one step further in its undermining of existing procedure. Not only does it remove arbitration from the purview of Section 916, but also it allows the court the discretion to continue with the underlying trial eliminating the purpose for arbitration. Presently, trial courts have the inherent power to grant a discretionary stay if it serves the interests of justice and judicial efficiency. *See OTO, LLC v. Kho*, 8 Cal. 5th 111, 141 (“the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants”) (internal citations omitted). **SB 365** completely upends this existing procedure, leading to increased forum shopping with trial attorneys filing claims in jurisdictions and venues where they believe there will be more lenient judges who will allow the underlying case to continue.

SB 365 Is Likely Preempted by the Federal Arbitration Act (FAA):

The United States Supreme Court has consistently and unequivocally declared a national policy favoring arbitration of claims. As the Ninth Circuit recently noted when striking down yet another California arbitration law:

The Court has “repeatedly described the Act as ‘embod[ying] [a] national policy favoring arbitration,’ and ‘a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.’” *Id.* at 346, 131 S.Ct. 1740 (citations omitted). In enacting the FAA, Congress intended to combat the longstanding “hostility towards arbitration” that “had manifested itself in a great variety of devices and formulas declaring arbitration against public policy.” *Id.* at 342, 131 S.Ct. 1740 (citation and quotation marks omitted). We have gone further, stating that “the FAA’s purpose is to give preference (instead of mere equality) to arbitration provisions.” *Mortensen v. Bresnan Commc’ns, LLC*, 722 F.3d 1151, 1160 (9th Cir. 2013).

Chamber of Commerce of the United States of America v. Bonta, 2023 WL 2013326 at *6 (9th Cir. 2023) (holding AB 51 (Gonzalez) (2019) is preempted by the FAA).

Based on the purpose of the FAA, the Supreme Court has established an “equal-treatment principle”, which requires arbitration agreements to be on equal footing with all other contracts. *Id.* A state law will be struck

down if it discriminates against arbitration on its face, has a disproportionate impact on arbitration agreements, stands as an obstacle to the objectives of the FAA, or disfavors arbitration agreements. *Id.* at *6-*7; *AT&T v. Concepcion*, 563 U.S. 333, 352 (2011). Courts have consistently invalidated California laws relating to arbitration as preempted by the FAA for these reasons and many others have been vetoed. See *Chamber of Commerce*, 2023 WL 2013326 at *2-*3 (citing examples).

By requiring litigation to continue during the appeal of a denial of a motion to compel arbitration, **SB 365** undercuts the benefits of arbitration in providing a speedier, less costly forum in which to resolve disputes. Similar to the Ninth Circuit's analysis of AB 51, it is clear that the intent behind **SB 365** and its impact of forcing litigation where an appeal is pending is to have a deterrent effect on a company's willingness to enter into arbitration agreements.⁵ That is "antithetical" to the "liberal federal policy favoring arbitration agreements." *Id.* at *10 (citations omitted). A state law "evinced hostility toward arbitration" is in direct conflict with the equal-treatment principle. *Id.* (citations omitted).

Further, **SB 365** "singles out arbitration provisions as an exception" to the law. It does so by removing appeals related to the denial of a motion to compel arbitration from the purview of Code of Civil Procedure Section 916 as well as eliminating a trial court's inherent power to grant an automatic, discretionary stay in that circumstance only. *Id.* at *10. **SB 365 is clearly preempted by the FAA.**

If Enacted, SB 365 Would Be a Significant Departure from Federal Procedure

The United States Supreme Court is set to rule this year in *Coinbase, Inc. v. Bielski*. The issue in *Coinbase* is for the Court to settle a circuit split regarding whether an appeal of a denial of a motion to compel arbitration ousts a district court's jurisdiction to proceed with litigation pending appeal. Most circuits have said "yes," requiring district court proceedings to be stayed while the appeal is pending. Other circuits, including the Ninth Circuit, have held that the district court has discretion over whether to stay the proceedings pending appeal.

With either outcome, **SB 365** would represent a significant departure from federal procedure on this issue. **SB 365** prohibits any automatic stay whatsoever, even if the trial court thinks it prudent, while federally either the district court would be mandated to stay proceedings or would at least have the discretion to do so. Further, if **SB 365** is enacted, many parties may choose to have FAA procedure apply to their arbitration agreements and therefore instead follow the result reached in *Coinbase*. The California Supreme Court has held that parties to an arbitration agreement can contract to require that FAA procedure apply. See *Cronus Investments, Inc. v. Concierge Services*, 35 Cal. 4th 376 (2005).

For these reasons, we are **OPPOSED** to your **SB 365** as a **JOB KILLER**.

Sincerely,



Courtney Jensen, Fernandez Cervantes Government Affairs
On behalf of California Chamber of Commerce

Acclamation Insurance Management Services (AIMS)
Allied Managed Care (AMC)

⁵ See Press Release on introduction of SB 365: "Forced arbitration clauses have become a common feature of consumer transactions and employment relationships. More than half of America's workforce has been bound by forced arbitration clauses as a condition of employment, and they are a common feature of consumer agreements as well. Under these clauses, consumers and workers whose rights have been violated cannot pursue their claims in court or with a state agency. Instead, they must submit their claims in a private arbitration proceeding that overwhelmingly favors businesses and employers." [Senator Wiener Introduces Legislation To Stop Corporate Arbitration Abuse | Senator Scott Wiener \(ca.gov\)](#)

Anaheim Chamber of Commerce
CalBroadband
California Apartment Association
California Association for Health Services at Home
California Association of Health Facilities
California Attractions and Parks Association
California Bankers Association
California Beer and Beverage Distributors
California Business Properties Association (CBPA)
California Chamber of Commerce
California Credit Union League
California Farm Bureau
California Hotel & Lodging Association
California League of Food Producers
California Lodging Industry Association
California New Car Dealers Association
California Restaurant Association
California Retailers Association
California Trucking Association
Carlsbad Chamber of Commerce
Chino Valley Chamber of Commerce
Civil Justice Association of California
Coalition of California Chambers – Orange County
Coalition of Small and Disabled Veteran Businesses
Construction Employers' Association
Corona Chamber of Commerce
Elk Grove Chamber of Commerce
Flasher Barricade Association (FBA)
Fontana Chamber of Commerce
Fresno Chamber of Commerce
Gilroy Chamber of Commerce
Glendora Chamber of Commerce
Greater Coachella Valley Chamber of Commerce
Greater High Desert Chamber of Commerce
Greater Riverside Chambers of Commerce
Hollywood Chamber of Commerce
Housing Contractors of California
Independent Lodging Industry Association
La Cañada Flintridge Chamber of Commerce
La Verne Chamber of Commerce
Laguna Niguel Chamber of Commerce
Murrieta/Wildomar Chamber of Commerce
Norwalk Chamber of Commerce
Official Police Garages Association of Los Angeles
Orange County Business Council
Palos Verdes Peninsula Chamber of Commerce
Paso Robles Chamber of Commerce
Rancho Cordova Area Chamber of Commerce
Roseville Area Chamber of Commerce
San Diego Regional Chamber of Commerce
San Juan Capistrano Chamber of Commerce
Santa Barbara South Coast Chamber of Commerce
Santa Clarita Valley Chamber of Commerce
Santa Maria Valley Chamber of Commerce
Santee Chamber of Commerce
Securities Industry and Financial Markets Association (SIFMA)

Simi Valley Chamber of Commerce
South County Chambers of Commerce
Templeton Chamber of Commerce
Tri County Chamber Alliance
Tulare Chamber of Commerce
Vista Chamber of Commerce
Walnut Creek Chamber of Commerce
West Ventura County Business Alliance
Western Electrical Contractors Association (WECA)
Western Growers Association

cc: Legislative Affairs, Office of the Governor
Stella Fontus, Office of Senator Weiner
Manuela Boucher, Assembly Judiciary Committee
Daryl Thomas, Assembly Republican Caucus

CJ:am