FLOOR ALERT

JOB KILLER

August 25, 2014

TO: Members, California State Assembly

FROM: California Chamber of Commerce
Acclamation Insurance Management Services
Allied Managed Care
California Apartment Association
California Association of Health Facilities
California Bankers Association
California Chapter of American Fence Association
California Employment Law Council
California Farm Bureau Federation
California Fence Contractor's Association
California Grocers Association
California Hospital Association
California Manufacturers and Technology Association
California New Car Dealers Association

California Restaurant Association
California Retailers Association
California Citizens Against Lawsuit Abuse
Civil Justice Association of California
Coalition of Small and Disabled Veteran Business
Cooperative of American Physicians
Flasher Barricade Association
Marin Builders Association
National Federation of Independent Business
Torrance Area Chamber of Commerce
Western Growers Association

SUBJECT: AB 2617 (WEBER) CIVIL RIGHTS: WAIVER OF RIGHTS
OPPOSE/NON-CONCURRENCE – JOB KILLER

The California Chamber of Commerce and other organizations listed above **OPPOSE AB 2617** (Weber), as amended July 3, 2014, which has been tagged a **JOB KILLER.** This bill unfairly prohibits arbitration agreements and settlement agreements regarding alleged violations of civil rights.

AB 2617 Interferes with the California and Federal Arbitration Acts and is Likely Preempted:

The Federal Arbitration Act (FAA) and the California Arbitration Act (CAA) evidence a strong preference for enforcement of arbitration agreements, so long as the underlying contract is fair. The FAA generally prohibits state laws that restrict enforcement of arbitration agreements. *See Armanderiz v. Foundation Health Psychcare Services, Inc*. 24 Cal.4th 83 (2000) ("California law, like federal law, favors enforcement of valid arbitration agreements."); *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109 (2013) (agreeing that FAA preempts state law that seeks to limit the waiver of administrative hearing in arbitration agreement, as it interferes with arbitration goals of providing "'streamlined proceedings and expeditious results'"); *and AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) (holding that the FAA prohibits states from conditioning the enforceability of an arbitration agreement on the availability of class wide arbitration procedures, as such a requirement would be inconsistent with the intent of the FAA).

Despite consistent authority from both the United States Supreme Court and California Supreme Court regarding the inclination to promote arbitration and limit any statutes or common law that interfere with arbitration, **AB 2617** seeks to do just that. Specifically, **AB 2617** prohibits any contract that requires a waiver of the right to pursue a civil action for the violation of any alleged civil rights under the Civil Code or Fair Employment and Housing Act. Given that all valid arbitration agreements for goods and services require both parties to waive their rights to pursue a civil action, **AB 2617** directly interferes with the FAA and CAA.

Courts Already Provide Adequate Protection for Arbitration Agreements:

Although both federal and California courts certainly recognize the benefits of arbitration and seek to enforce arbitration agreements where appropriate, the courts in California have imposed certain safety requirements that such agreements must include in order to be enforceable. For example, in *Armanderiz v. Foundation Health Psychcare Services, Inc*. 24 Cal.4th 83 (2000), the California Supreme Court held that, for employment arbitration agreements that encompass unwaivable statutory rights, the following protections must be included: (1) provide for a neutral arbitrator; (2) no limitation of remedies; (3) adequate opportunity to conduct discovery; (4) written arbitration award and judicial review of the award; and, (5) no requirement for the employee to pay unreasonable costs that they would not incur in litigation or arbitration fees.

Recently, in *Wherry v. Award, Inc*., 192 Cal.App.4th 1242 (2011), a court deemed an independent contractor arbitration agreement unconscionable where it expanded the right to attorney's fees for FEHA violations to the company, and reduced the time to file a FEHA claim from one year to 180 days. *See also Ajamian v. CantorCO2e, L.P*., 203 Cal.App.4th 771 (2012) (denying arbitration where terms that required California independent contractor to pay upfront costs, arbitrate in New York, and waived

statutory rights was substantively unconscionable); *and Trivedi v. Curexo Technology Corp*., 189 Cal.App.4th 387 (2010) (refusing to enforce arbitration agreement that provided a prevailing party attorney's fee award without imposing limitation of recovery under FEHA).

Arbitration Provides an Effective and Efficient Means to Resolve Claims:

Given the protections courts have imposed in arbitration, there is existing evidence that proves arbitration is equally effective and more efficient than the judiciary system to resolve claims. According to the U.S. District Court Judicial Caseload Profiler, there were 278,442 civil cases filed in 2012, which was approximately three percent lower than the previous year. Over thirty thousand of those cases were filed in California. As of September 2012, California had over 25,000 civil cases pending, approximately 8,000 of which have been pending for over a year. Of those 8,000 cases, approximately 2,000 of them have been pending for over three years.

Comparatively, in 2007 the American Arbitration Association produced a study titled "AAA Arbitration Roadmap" that provided the following statistics: for cases involving a claim of up to $75,000, the median time for a final resolution was 175 days; for claims between $75,000 and $499,999, the median time for final resolution was 297 days; and, for claims between $500,000 and $999,999, the median time for final resolution was 356 days. Similarly, a 2004 report issued by the California Dispute Resolution Institute found that the average arbitration from the date of filing until the date of resolution was 116 days. Also, a 2003 article in the New York University School of Law legal journal authored by Theodore Eisenberg and Elizabeth Hill regarding employment arbitration found that arbitration was resolved within a year, while litigation usually lasted over two years.

Not only is arbitration more efficient, but also it is less costly for employers/businesses, as well as financially beneficial to consumers/employees. A 2006 study by Mark Fellows, Legal Counsel at the National Arbitration Forum, titled "The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes," concluded that consumers and employees actually fare better in arbitration than in court. Fellows specifically analyzed data from California and found that consumers prevail in arbitration 65.5% of the time, as compared to 61% of the time in court. Additionally, California businesses paid an average of $149.50 in arbitration fees whereas consumers only paid an average of $46.63. A recent report in July 2013 published by the Heritage Foundation titled "The Unfair Attack on Arbitration: Harming Consumers by Eliminating a Proven Dispute Resolution System," supported these findings by Fellows, concluding that “[a]rbitration is generally faster, cheaper, and more effective than the litigation system. It is not affected by cutbacks in judicial budgets or the increases in court dockets that significantly delay justice."

AB 2617 Potentially Prohibits Pre-Litigation Settlement Agreements:

In addition to prohibiting arbitration agreements, **AB 2617** also appears to ban pre-litigation settlement agreements as well. Specifically, section 51.7(b)(7) of the bill states that the provisions of **AB 2617** do not apply "after a legal claim has arisen." To the extent this section refers to claims that have actually been filed in civil court, **AB 2617** would restrict pre-litigation settlement agreements as well. There are certainly numerous situations where two parties are able to come to a resolution regarding a dispute before litigation is filed. **AB 2617** would remove this opportunity and force the parties to actually file a claim in civil court before they could proceed with a settlement agreement that include a waiver of all claims.

For all of these reasons, we **OPPOSE AB 2617** as a **JOB KILLER** and respectfully request your “No” vote and that you **NON-CONCUR** with Senate amendments when it comes before you for consideration.

cc: The Honorable Shirley Weber
June Clark, Office of the Governor
Terry Mast, Assembly Republican Caucus
District Offices, Members, California State Assembly