



JOB KILLER

AB 2416 (STONE)

April 16, 2014

The Honorable Mark Stone
California State Assembly
State Capitol, Room 5155
Sacramento, CA 95814

**SUBJECT: AB 2416 (STONE) LIENS: LABORERS AND EMPLOYEES
OPPOSE – JOB KILLER**

Dear Assembly Member Stone:

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE** your **AB 2416 (Stone)**, that has been labeled as a **JOB KILLER**, as it would cripple California businesses by allowing any employee, governmental agency, or anyone "authorized by the employee to act on the employee's behalf" to record super priority liens on an employer's real property or any property where an employee "performed work" for an alleged, yet unproven, wage claim. This bill would severely disrupt commercial and personal real estate markets in this state as **AB 2416** would allow a wage lien to take precedence over almost all other liens or judgments.

Onerous Wage and Hour Laws in California:

California has some of the most onerous wage and hour laws in the country. Litigation is constantly filed for wage-related disputes, such as whether an employee has been properly classified as exempt versus non-exempt, as an independent contractor versus an employee, or even paid at the appropriate rate for the proper amount of time. See *Harris v. Supreme Court*, 53 Cal.4th 170 (2011); *Arzate v. Bridge Terminal Transport, Inc.* 192 Cal.App.4th 419 (2011). Even the Labor Commissioner, charged with interpreting and enforcing wage and hour laws, disagrees with courts regarding the proper application of California law in this area. See *Reynolds v. Bement*, 36 Cal.4th 1075, 1088 (2005).

Despite the undeniable complexity of wage and hour laws in this state, **AB 2416** would allow any employee, governmental agency, or anyone "authorized by the employee to act on the employee's behalf," to record a lien against the employer's real or personal property simply on the basis that the employee *believes* he or she has a valid wage claim against the employer. At the time of recording the lien, the employee would have **no burden** to provide any actual evidence that the employer violated any wage and hour law. Rather, all the employee would have to do is simply provide: (1) a demand statement of the alleged amount owed; (2) general statement of the work performed; and (3) employer's name and address.

Under **AB 2416**, this lien could be applied for single employee wage claims that amount to several hundred dollars in damages and/or class action and representative wage claims that allege millions of dollars in damages. Employees should not be allowed to interfere with an employer's business or property, or someone else's real property where work was performed, through recording a lien of such significance without first proving the merit of their allegations. To allow otherwise will basically subject employers to constant extortion in order to avoid dealing with a lien on their property.

Not Just Limited to Minimum Wage Violations:

AB 2416 allows a lien to be recorded for all unpaid wages, "other compensation," and related penalties, not just minimum wage violations. The scope of this is quite broad and includes, but is not limited to, the following: overtime pay; meal period; rest periods; vacation pay; commission; tips; piece rate; bonuses; split shift pay; reporting time pay; shift differential pay; on-call pay; stand-by pay; meals and lodging credit violations; expense reimbursements; compensation for tools, uniforms, and equipment; and, compensation for normal wear and tear of uniforms, tools, and equipment,

The list of potential penalties under the Labor Code for which an employee could record a lien under **AB 2416** is equally as broad including, but not limited to: minimum wage violation penalties; waiting time penalties; insufficient paycheck fund penalties; private attorney general act penalties; failure to pay penalties; unlawfully withholding of wages penalties; itemized wage statement penalties; failure to make required withholdings and contributions penalties; improper inquiry into criminal records penalty; industrial welfare commission wage order penalties; unfair immigration practices penalty; lactation accommodation penalty; payroll records penalties; personnel records penalties; worker's compensation penalties; and, occupational health and safety penalties. Accordingly, the type and number of different liens that may be recorded under **AB 2416** are overwhelming.

Non-Employer Third Parties Held Liable for Unpaid Wages:

AB 2416 allows an employee to record a wage lien on any "*real property at which the employee performed work,*" if the employer is (1) related to the property owner, defined as a party who owns or controls more than 50 percent of the power over administration, finances, and operations; (2) employed by a contractor of the property owner; (3) employed by a tenant of the commercial property owner in a high risk industry; or (4) the employee performs "property services" work on a commercial property. This directly allows an employee who performs work to record a wage lien against a third party homeowner or commercial property owner **who had no actual control** over the payment of wages. It is patently unfair to hold an innocent third party liable for the alleged, unproven acts of another.

Notably, the bill states that with regard to the first category, the property owner and employer must be "related," and for the third and fourth category, any lien against a third party shall not apply unless the employee is in a "high risk industry." However, who will ultimately make the determination as to whether the employee's employer and property owner are "related parties" as defined? Who will determine what type of industry in which the employee is engaged? Because the bill allows an employee to record a lien pre-judgment, there is no impartial tribunal to determine whether the lien has been recorded in accordance with these proposed parameters. The only person making that determination under **AB 2416** is the employee, who notably is not even required to identify in the statement for a lien evidence that the property owner and employer are "related," or in what type of industry he/she is employed. Once a lien is improperly recorded, the property owner will then have to spend time and money getting the lien removed by proving the lien should never have been recorded in the first place.

Preclude Any Financing Option for Real Property/Super-Priority Lien:

AB 2416 will also basically destroy commercial investments or lending in California as well as personal home loans. Specifically, **AB 2416** would (1) give a wage lien priority over all other liens recorded after the wage lien, except a tax lien, purchase money mortgage, security interest in personal property, or mechanic's liens/labor liens; and (2) a priority for the first \$50,000 of the wage lien over all other liens, recorded before the wage lien, except a tax lien, government lien, purchase money mortgage, or mechanic's lien. This means it would take precedence over child support liens, alimony, judgment liens, second mortgages on real property or lines of credit.

The direct result of such a super-priority lien for businesses would basically be the end of commercial investment and real estate in California. It is impossible to imagine that a financial lender would provide a mortgage on real property if its interest in that property could be surpassed at any time by a wage lien, even when that interest was asserted first. Moreover, given that **AB 2416** allows an employee to record a lien on any real property "where the employee performed work" when the property owner and employer are "related," this could directly impact personal homeowners as well. The real estate market in California is just recently showing signs of improvement. If **AB 2416** were enacted, it will basically eliminate any opportunity for further recovery, thereby destroying jobs in California.

Force a Violation of the Mortgage Contract:

Granting super lien status, as **AB 2416** proposes to do, will create a number of complications that do not exist under current law where non-tax liens recorded against the residential real property are treated like

judgment liens. Judgment liens take priority based upon the date of their recordation. While the measure excludes liens on purchase money obligations, it does allow an employee to lien against secondary mortgages. As proposed in **AB 2416**, a super lien recorded against the property will cause the employer to violate the terms of their mortgage contract. For example, uniform instruments for a deed of trust provided by the federal government's Fannie Mae and Freddie Mac specifically require the borrower to "pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over" the security instrument. The standard deed of trust also requires the borrower to "promptly discharge any lien which has priority over" the security instrument. Since **AB 2416** causes a super lien to be recorded, the state would be forcing a violation of the mortgage contract.

Freeze Future Financing Options:

This bill will negatively impair an employer's opportunity to seek future financing that is secured against the property. As described earlier from the federal government's uniform instruments, lenders will be unable to provide loans to borrowers if a super lien is attached to the property. This will preclude an employer or third party property owner from being able to refinance their mortgage or secure a home equity line of credit, even in the event of an emergency. The employer or property owner will not be able to expand or hire new employees due to the inability to secure financing to do so. In short, no lender is going to extend a loan to someone with a super-lien placed on their real or personal property.

Violate State and Federal Constitutions:

Article 1, Section 9 of California's Constitution states the following: "A bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed." The Constitution of the United States declares in Article I, Section 10, that "No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any Title of Nobility."

With respect to **AB 2416's** creation and recordation of a super lien for the payment of unpaid wages, the measure creates a violation of the terms of the mortgage or deed of trust for any prospective mortgage contract after the bill's enactment. The measure impairs the obligation of the mortgage contract in violation of the state and federal constitutions.

Increase Neighborhood Blight:

AB 2416 allows the super lien to survive foreclosure. This provision will discourage investors from buying abandoned or foreclosed property since the liability that gave rise to the lien would have to be satisfied. Even an unwitting qualified purchaser, who had nothing to do with the wage dispute, would have to satisfy the lien when purchasing the property.

No Effective Statute of Limitations on Timing to Record Lien:

Under **AB 2416** it states that the employee must record the lien within 180 days after ceasing work for the employer. However, the statement that the employee must file with the county recorder's office or the Secretary of State noticeably does not require the employee to identify his/her last date of work. Accordingly, the lien can be effectively recorded at any time and the employer or third-party property owner would be forced to challenge the validity of the lien through a civil action.

For a third party property owner, the 180 day requirement is essentially meaningless. For example, an employee on his fourth day of employment could allege he/she suffered a wage violation while performing work at a third party's home, yet continue to work for that same employer for the next three years. Under **AB 2416**, that employee could record a lien against the third party property owner 180 days after ceasing work with the employer, which would be over three years from the date the work was performed in the third party's home. This lack of timeliness creates a significant problem for third party property owners who will utterly be caught by surprise to find a lien on their property.

No Limit on the Number of Liens Recorded:

Under **AB 2416**, there is no limit as to the number of liens an employee may record against a property owner. The only limitation is that the lien be recorded within 180 days **after ceasing work with the employer**. During this time period, an employee can assert whatever number of liens he/she wants, thereby constantly subjecting the property owner to endless civil litigation.

Forces Property Owners to Court That Are Already Underfunded:

Under **AB 2416**, if a lien is improperly filed against an employer's property or third party's property, and the employee fails to withdraw the lien but does not necessarily act in bad faith or with the intent to defraud, there is no consequence. Rather, the employer or property owner must petition the court for removal of the lien before being able to fully utilize their property.

It is undisputed that the judicial branch has suffered severe budget cuts in recent years that has created a significant backlog of civil cases. Unless the judicial branch receives additional funding in this year's budget, it will have to continue to cut services and reduce staff. Under **AB 2416**, property owners who (1) cannot locate the employee who recorded the lien to have it removed or (2) the employee refuses to remove the lien, will have the property essentially frozen for months, even years, until the judicial branch can actually calendar the petition for adjudication.

For these reasons, we are **OPPOSED** to **AB 2416** as a **JOB KILLER**.

Sincerely,

California Chamber of Commerce
Acclamation Insurance Management Services
Air Conditioning Trade Association
Allied Managed Care
Associated Builders and Contractors of California
Associated Builders and Contractors – San Diego Chapter
Associated General Contractors
Building Owners and Managers Association of California
California Apartment Association
California Association for Health Services at Home
California Association of Winegrape Growers
California Building Industry Association
California Business Properties Association
California Business Roundtable
California Chapter of American Fence Association
California Farm Bureau Federation
California Fence Contractors' Association
California Grocers Association
California Hospital Association
California Hotel and Lodging Association
California Land Title Association
California Landscape Contractors Association
California League of Food Processors
California Manufacturers and Technology Association
California Mortgage Bankers Association
California Newspaper Publishers Association
California Pool and Spa Association
California Professional Association of Specialty Contractors

California Restaurant Association
California Retailers Association
Civil Justice Association of California
Coalition of Small and Disabled Veterans Businesses
Construction Employers' Association
El Centro Chamber of Commerce
Flasher Barricade Association
Fullerton Chamber of Commerce
Greater Bakersfield Chamber of Commerce
Greater Riverside Chambers of Commerce
Independent Insurance Agents & Brokers of California
International Council of Shopping Centers
Marin Builders Association
NAIOP of California, the Commercial Real Estate Development Association
National Federation of Independent Business
Orange County Business Council
Oxnard Chamber of Commerce
Palm Desert Area Chamber of Commerce
Plumbing-Heating-Cooling Contractors Association of California
Porterville Chamber of Commerce
San Jose Silicon Valley Chamber of Commerce
Santa Clara Chamber of Commerce and Convention-Visitors Bureau
Simi Valley Chamber of Commerce
Southwest California Legislative Council
Tahoe Chamber of Commerce
Visalia Chamber of Commerce
Western Electrical Contractors Association
Western Growers Association

cc: Camille Wagner, Office of the Governor
The Honorable Mark Stone, District Office