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CALIFORNIA RETAILERS ASSOCIATION



April 16, 2013

The Honorable William Monning
California State Senate
State Capitol, Room 4066
Sacramento, CA 95814

SUBJECT: SB 462 (MONNING) EMPLOYMENT: COMPENSATION OPPOSE

Dear Senator Monning:

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE** your **SB 462**, as it undermines the Supreme Court and the clear language of the Labor Code that has been in place since 1986, in order to provide a one-sided attorney fee provision that will incentivize further meritless wage and hour litigation.

Currently, Labor Code section 218.5 provides attorney's fees to a "prevailing party" in any action for the recovery of wages or benefits, except for minimum wage or overtime claims. Accordingly, if an employer successfully proves during litigation that the employee is not entitled to the benefits or wages alleged, the employer can seek recovery of its attorney's fees under this provision. This two-way attorney's fee shifting provision was recently affirmed by the Supreme Court in *Kirby v. Immoos Fire Protection*, 53 Cal.4th 1244 (2012).

SB 462 alters section 218.5 and the Court's holding by providing that an employer may only obtain its attorney's fees if the employer can prove the action was brought in bad faith. "Bad faith" is a difficult standard to prove and will substantially limit an employer's ability to recover its attorney's fees for defending litigation that lacked merit. See Code of Civil Procedure section 128.5; *In re Marriage of Drake*, 53 Cal.App.4th 1139 (1997) (stating that action taken solely to harass opponent will support finding of bad faith for purposes of imposing sanctions; however, actions that merely lack merit will not); *Baker v. Mulholland Sec. and Patrol, Inc.*, 204 Cal.App.4th 776 (2012) (plaintiff's failure to prevail under FEHA claim insufficient basis to award attorney's fees for bad faith).

The Honorable William Monning

April 16, 2013

Page 2

We believe a two-way attorney's fee shifting provision provides a level playing field for litigation that will help deter any frivolous cases from being filed due to concern that the litigant could ultimately pay for the costs of litigation, including attorney's fees. **SB 462** disrupts this balance by limiting an employer's ability to recover its attorney's fees for meritless claims, which could create more frivolous litigation.

For these reasons, we must **OPPOSE SB 462**.

Sincerely,

CalChamber
Acclamation Insurance Management Services
Air Conditioning Trade Association
Allied Managed Care
Associated Builders and Contractors of California
Associated General Contractors
California Apartment Association
California Chapter of American Fence Association
California Fence Contractors' Association
California Framing Contractors Association
California Grocers Association
California Lodging Industry Association
California Manufacturers and Technology Association
California Retailers Association
Culver City Chamber of Commerce
Engineering Contractors' Association
Flasher Barricade Association
Fullerton Chamber of Commerce
Greater Conejo Valley Chamber of Commerce
Marin Builders Association
National Federation of Independent Business
Plumbing-Heating-Cooling Contractors Association of California
Redondo Beach Chamber of Commerce
Santa Clara Chamber of Commerce and Convention-Visitors Bureau
Simi Valley Chamber of Commerce
Southwest California Legislative Council
Valley Industry and Commerce Association
Western Electrical Contractors Association

cc: David Lanier, Office of the Governor
The Honorable William Monning, District Office
Gilroy Chamber of Commerce
Salinas Chamber of Commerce
Monterey Chamber of Commerce
San Luis Obispo Chamber of Commerce
Los Altos Chamber of Commerce