SB 878 (LEYVA) WORK HOURS: SCHEDULING
OPPOSE
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April 7, 2016

TO: Members, Senate Committee on Labor and Industrial Relations

FROM: California Chamber of Commerce
Agricultural Council of California
California Ambulance Association
California Asian Pacific Chamber of Commerce
California Assisted Living Association
California Association of Nurseries and Garden Centers
California Employment Law Council
California Gaming Association
California Grocers Association
California Hotel and Lodging Association
California Independent Oil Marketers Association – CIOMA
California Manufacturers and Technology Association
California New Car Dealers Association
California Restaurant Association
California Ski Industry Association
California State Council of the Society of Human Resource Management
California Travel Association
Camarillo Chamber of Commerce
Carlsbad Chamber of Commerce
Chambers of Commerce Alliance Ventura and Santa Barbara Counties
Civil Justice Association of California
Computing Technology Industry Association – CompTIA
Corona Chamber of Commerce
Culver City Chamber of Commerce
El Centro Chamber of Commerce
El Dorado Hills Chamber of Commerce
Gilroy Chamber of Commerce
Greater Conejo Valley Chamber of Commerce
Greater Fresno Area Chamber of Commerce
Greater San Fernando Valley Chamber of Commerce
International Franchise Association
Lake Tahoe South Shore Chamber of Commerce
Montclair Chamber of Commerce
National Federation of Independent Business
North Orange County Chamber
Orange County Business Council
Oxnard Chamber of Commerce
Redondo Beach Chamber of Commerce & Visitors Bureau
Retail Industry Leaders Association
San Diego Regional Chamber of Commerce
Santa Clara Chamber of Commerce
Santa Maria Valley Chamber of Commerce Visitor & Convention Bureau
Southwest California Legislative Council
The Chamber of the Santa Barbara Region
Torrance Area Chamber of Commerce
United Chambers of Commerce San Fernando Valley & Region

Valley Industry & Commerce Association
Wine Institute

SUBJECT: SB 878 (LEYVA) WORK HOURS: SCHEDULING
SCHEDULED FOR HEARING – APRIL 13, 2016
OPPOSE – JOB KILLER

The California Chamber of Commerce and the organizations listed above respectfully **OPPOSE SB 878**, which has been identified as **JOB KILLER**, as amended March 15, 2016, which will eliminate flexibility in the workplace for both employers and employees, deny employees the opportunity to work additional hours if desired, limit employers' ability to accommodate customer demands, and subject employers to unnecessary layers of penalties, investigative actions, and costly litigation.

SB 878 Is Significantly Broader than the San Francisco Ordinance, Which Has Created Limited Flexibility for Businesses and Employees:

In December 2014, the San Francisco Board of Supervisors passed the "Retail Workers' Bill of Rights" that included a "fair scheduling" mandate. Mayor Ed Lee did not sign this ordinance. Notably, the San Francisco ordinance is only applicable to "formula retail establishment" employers with 20 employees or more in San Francisco and 40 locations world-wide, and the ordinance requires 14 days' advanced notice of a schedule. Since going into effect in July 2015, numerous employers in San Francisco have refused to make changes to a schedule once posted, which has harmed employees' request for changes due to personal needs. Additionally, employees who want and have requested additional hours of work are not provided those hours, given the threat of financial penalties against employers for the schedule change. Moreover, employers who have last minute fluctuations in customer demand due to unforeseen events simply work short-staffed, rather than face financial penalties. These consequences do not benefit the employee, employer or consumer.

SB 878 is significantly broader than the San Francisco Ordinance as it is applicable to *any* restaurant, grocery store or retail establishment, regardless of the number of employees and basically requires a 28-day notice of an employee's schedule. Imposing an even more aggressive and burdensome mandate than the San Francisco Ordinance, which has already proven harmful to employees, will absolutely destroy flexibility for any employer or employee in the retail, restaurant or grocery industries.

SB 878's Threat of Modification Pay and Numerous Avenues of Enforcement, Penalties and Investigation for Schedule Changes Will Absolutely Eliminate Flexibility in the Workplace and the Ability for Employees to Earn More Wages:

SB 878 requires employers to provide "modification pay" for changes made to an employee's schedule with less than 7-days' notice. Notably, the calculation of "modification pay" under **SB 878** is based upon the same onerous calculation that was included in the paid sick leave law (AB 1522 – Gonzalez, 2014) that required a clean-up bill (AB 304 – Gonzalez, 2015) the following year due to the significant challenges the 90-day look back provision created.

Although **SB 878** provides several exemptions as to when "modification pay" applies, employers will nevertheless be wary to make any changes to an employee's schedule in order to avoid the potential for modification pay. This is especially true with regard to the numerous threats of investigation and litigation authorized by this bill. **SB 878** threatens an employer for failure to properly provide "modification pay" with the following: (1) a $4,000 penalty for failing to accurately provide "modification pay"; (2) another $4,000 penalty for any harm that results to the employee or "another person" from a violation of this law; (3) a $50 per day penalty for failure to "promptly comply" with the Labor Commissioner's order; (4) investigation by the Labor Commissioner; (5) prosecution by the Attorney General; (6) a representative action by an employee under Labor Code Sections 2698 *et seq*., with penalties of $100 per employee per pay period and attorney's fees; and (6) an unfair competition claim under Business and Professions Code Sections 17200, *et seq.*

With all of these potential consequences at risk, an employer covered by **SB 878** will never change an employee schedule, even if it appears the change falls within one of the listed exceptions or the employee actually volunteers and requests the change/additional hours of work. The risk to the employer for a mistake is simply too great.

SB 878 Is Applicable to Both Large and Small Employers, as Well as Those Who Do Not Primarily Engage in Selling Merchandise or Food:

SB 878 applies to any restaurant, grocery store or retail store establishment, regardless of size. The scope of this bill is daunting and the burden it will impose is overwhelming. Even the San Francisco Ordinance that applies to large employers with 500 or more employees, who have more sophisticated scheduling software and technology, has created significant challenges with regard to advance scheduling and accommodating schedule changes. A small employer with limited resources will not be able to manage the 21-day "work schedule" that must be given to employees at least 7 days in advance of their first shift, or the nuances with regard to when "modification pay" applies.

Moreover, it is unclear from the definition as to which employees **SB 878** covers with regard to an employer who may have hybrid operations. For example, will a manufacturer or an employer in the technology industry that has an on-site cafeteria for its employees be required to comply with this scheduling requirement for the entire workforce? Will the hotel that has a gift shop, restaurant or bar located on its premises be forced to comply with **SB 878** for all employees? Given the broad definition included in **SB 878** of an employer, as well as the statutory scheme of penalties, litigation and enforcement, such employers who are not primarily engaged in selling merchandise or food will be forced into the overwhelming provisions of this mandate.

SB 878 Mandates a One-Size-Fits-All Advance Schedule Requirement:

SB 878 requires all employers who sell food or merchandise to basically provide a 28-day notice of an employee's schedule. Specifically, **SB 878** requires a 21-day work schedule that must be given to an employee no fewer than 7 days in advance before the first shift. First, this mandate fails to take into consideration the varying business models for employers who sell food or merchandise. While some may have predictability in their business cycle and, therefore, have the ability to provide such extensive notice, others simply cannot. Second, this mandate will force an employee to predict their own schedule more than 30 days in advance in order to provide their availability to an employer so the employer can create a 28-day notice schedule. As employers have experienced in San Francisco with the local ordinance that mandates a 14-day notice schedule, many employees simply cannot commit to shifts so far in advance, and end up frustrated with the schedule they receive that the employer cannot or will not change due to the threat of financial penalties.

SB 878 Limits an Employer's Ability to Respond to Customer Needs:

The retail and food environment is entirely dependent upon customer demand. While larger employers may be able to forecast labor needs based upon prior year sales, such software cannot predict every event. Weather, community events and employee changes all impact the ability to accurately schedule employees. **SB 878** threatens employers with "modification pay" for responding to these unpredictable events, which limits their ability to respond to customer demands.

SB 878 Forces an Employer to Provide "Modification Pay" to an On-Call Employee Who Is Already Being Compensated:

"On-call time" and "stand-by time" during which an employee may be called into work and therefore the employee is restricted or limited in what he or she can do is already compensable under California law. Just last year, in *Mendiola v. CPS Security Solutions, Inc*., 60 Cal.4th 833 (2015), the Supreme Court stated that, regardless of whether an employee could perform personal activities while on-call, the employer's control over that time to call-in the employee to work required the employer to provide the employee with compensation. Under **SB 878**, an employer would be forced to not only compensate the employee for the on-call time, even when the employee did not get called in, but also pay "modification

pay" of up to half of the employee's shift. This penalty will ultimately harm employees who have "on-call" shifts as it will discourage employers from scheduling those shifts which will cost employees hours of pay that they are currently enjoying.

SB 878 Creates Numerous, Costly Avenues of Litigation:

Labor Code Sections 2698, *et seq*., the Labor Code Private Attorneys General Act (PAGA), creates a representative action for any aggrieved employee for any Labor Code violation, including statutory penalties and employee-only attorney's fees. As the Governor's budget estimates, the Labor and Workforce Development Agency receives over 600 PAGA notices a month, which demonstrates the volume of PAGA lawsuits that are plaguing employers in California.

SB 878 would add to this growing problem, as any violation of **SB 878** would subject an employer to PAGA litigation. Even if the employer pays the employee "modification pay" for changes to the employees' schedule, the employer could still be subject to significant penalties and attorney's fees for PAGA litigation.

In addition to litigation under PAGA, an employee could also threaten an unfair competition claim under Business and Professions Code Section 17200, as well as a common law wrongful termination claim.

Under **SB 878**, an employer also faces investigations and enforcement actions by the Labor Commissioner, as well as the Attorney General, for failure to properly provide "modification pay," thereby exposing the employer to numerous threats of litigation and exposure for simply changing a schedule due to the employee's request.

SB 878 Expands the Statute of Limitations to File Litigation:

SB 878 references "modification pay" as "compensation" instead of a penalty. This choice of term is not inconsequential, as it potentially triggers a three-year statute of limitations to bring a civil action as opposed to a one-year statute of limitations for the penalty imposed. *See Murphy v. Kenneth Cole Productions, Inc.,* 40 Cal.4th 1094 (2007) (holding premium pay for missed meal period is subject to three-year statute of limitations versus one-year statute of limitations for penalties).

SB 878 Eliminates a Key Benefit to Working in the Retail and Food Industries:

Flexibility is one of the main reasons employees choose to work in the retail and food industries. Currently, employees can request schedule changes, trade shifts with other employees, work part-time, leave work early to attend to personal needs, etc. This flexible environment is favorable for students, employees who are caretakers, and those who only want part-time work. This flexibility will essentially be eliminated by the mandates under **SB 878**.

For these reasons, we respectfully **OPPOSE** your **SB 878** as a **JOB KILLER**.

cc: Camille Wagner, Office of the Governor
The Honorable Connie Leyva
Gideon Baum, Senate Committee on Labor and Industrial Relations
Cory Botts, Senate Republican Caucus
Senate Floor Analysis
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