**** FLOOR ALERT****

AB 465 (HERNANDEZ) CONTRACTS AGAINST PUBLIC POLICY
OPPOSE – JOB KILLER

August 25, 2015

TO: Members, California State Assembly

FROM: California Chamber of Commerce
Agricultural Council of California
Air Conditioning Trade Association
Associated Builders and Contractors of California
Associated General Contractors
Association of California Insurance Companies
California Apartment Association
California Association of Federal Firearms Licensees
California Association of Health Facilities
California Association of Realtors
California Bankers Association
California Building Industry Association
California Business Properties Association
California Citizens Against Lawsuit Abuse
California Employment Law Council
California Farm Bureau Federation
California Grocers Association
California Hospital Association
California Hotel and Lodging Association
California League of Food Processors
California Manufacturers and Technology Association
California New Car Dealers Association
California Newspaper Publishers Association
California Restaurant Association
California Retailers Association
California Trucking Association
Civil Justice Association of California
Computing Technology Industry Association - CompTIA
Cooperative of American Physicians
CTIA-The Wireless Association
Motion Picture Association of America
National Federation of Independent Business
Oxnard Chamber of Commerce
Personal Insurance Association of California
Rancho Cordova Chamber of Commerce
Redondo Beach Chamber of Commerce & Visitors Bureau
San Diego Regional Chamber of Commerce
San Jose Silicon Valley Chamber of Commerce
Securities Industry and Financial Markets Association
South Bay Association of Chambers of Commerce
Southwest California Legislative Council
TechNet
Torrance Area Chamber of Commerce
West Coast Lumber & Building Materials Association
Western Electrical Contractors Association
Western Growers Association
Wine Institute

SUBJECT: AB 465 (HERNANDEZ) CONTRACTS AGAINST PUBLIC POLICY
OPPOSE – JOB KILLER – NON-CONCURRENCE

The California Chamber of Commerce and the organizations listed above respectfully **OPPOSE AB 465 (Hernandez)**, as amended on August 19, 2015, which has been labeled a **JOB KILLER**. **AB 465** will preclude pre-dispute employment arbitration agreements, which both the California Supreme Court and the United States Supreme Court have already authorized. As such, **AB 465** will only serve to increase litigation costs of individual claims, representative actions and class action lawsuits against California employers of all sizes until such legislation can work through the judicial process to be challenged once again.

Existing Contract Law Already Requires All Employment Arbitration Agreements To Be Freely and Mutually Executed:

Any contract must be knowing and voluntary or else it cannot be enforced. This standard is applicable to arbitration agreements, including those that are mandated as a condition of employment. Civil Code Sections 1561 - 1579 specify that any contract must be consented to by both parties, meaning the consent is: (1) free; (2) mutual; and, (3) communicated by each to the other. Consent is not free when it is obtained through duress, menace, fraud, undue influence, or mistake (Civil Code Section 1567).

With regard to arbitration agreements, Code of Civil Procedure Section 1281 specifically states that an arbitration agreement is enforceable, except for those defenses applicable to the revocation of contracts in general. Accordingly, an arbitration agreement cannot be enforced if the employee has not freely consented to the agreement.

However, simply because an arbitration agreement is an adhesion contract, which is made as a condition of employment, does not mean the employee has not freely consented. Numerous decisions issued by the California and United States Supreme Courts have determined that, like other adhesion contracts that are integrated into consumer product sales, an employee freely consents to the agreement.

"*As we have seen, the cases uniformly agree that a compulsory predispute arbitration agreement is not rendered unenforceable just because it is required as a condition of employment or offered on a "take it or leave it" basis. An employee who signs such an agreement is obligated to submit employment-related disputes to arbitration; if he refuses to do so, the courts stand ready to compel arbitration. Yet, as [the employee] would have it, he can refuse to sign an arbitration agreement, be discharged, and strike gold with a wrongful termination suit. The law does not permit such an absurd result*." *Lagatree v. Luce, Forward, Hamilton & Scripps*, 74 Cal.App.4th 1105 (1999). *See also*, *Armanderiz v. Foundation Health Psychcare Services, Inc*. 24 Cal.4th 83 (2000); *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011); *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109 (2013).

Existing Law Already Mandates All Employment Arbitration Agreements to be Conscionable:

While courts have upheld mandatory arbitration agreements as voluntary or executed with free consent by the employee, the courts do recognize that an employee does not have the bargaining power to negotiate terms of the contract and, therefore, the courts have set forth mandatory provisions that must be included in the arbitration agreement to make the agreement fair. Specifically, in *Armanderiz v. Foundation Health Psychcare Services, Inc*. 24 Cal.4th 83 (2000), the California Supreme Court held that pre-dispute employment arbitration agreements upon which employment is conditioned that encompass unwaivable statutory rights are valid and enforceable as long as the following contractual protections are 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.

Arbitration agreements that have not included these mandatory provisions have regularly been struck down as unconscionable. *See Wherry v. Award, Inc*., 192 Cal.App.4th 1242 (2011) in which 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 a California independent contractor to pay upfront costs, arbitrate in

New York, and waive statutory rights was substantively unconscionable); and *Trivedi v. Curexo Technology Corp*., 189 Cal.App.4th 387 (2010) (refusing to enforce an arbitration agreement that provided a prevailing party an attorney's fee award without imposing a limitation of recovery under FEHA). Accordingly, adequate protections already exist in pre-dispute, mandatory employment arbitration agreements to ensure such agreements are fair.

Arbitration Does Not Favor Employers Under the "Repeat Player" Theory:

Proponents of **AB 465** claim that employers obtain some favorable advantage in arbitration because they pay for the arbitration and are often a "repeat player" so the arbitration provider wants to ensure their continued business. This allegation is factually unsupported.

First, employers are *mandated* to pay for all arbitration costs. Specifically, the California Supreme Court stated in *Armendariz, supra,* that an employment arbitration agreement could not require an employee to pay for any fees or costs in arbitration that the employee would not have to pay for in court (i.e., the cost of an arbitrator). Accordingly, the employer has no choice but to pay for the arbitration.

Second, although an employer may have a contract with one of the major arbitrator providers, such as AAA or JAMS, the employer does not necessarily have a specific contract or financial relationship with the arbitrator who decides the case. Moreover, California law requires an arbitrator to disclose to all parties *prior to the arbitration* the following information: (1) familial relationships with any of the parties or lawyers involved; (2) personal relationships with any of the parties or lawyers involved; (3) service as an arbitrator for one of the parties or attorneys involved within the last five years, including all of the case information and the results of each case; (4) any other professional relationships with the parties or attorneys involved in the case; (5) any financial relationships with the parties or attorneys involved in the case; and, (6) any other matter which might create doubt as to whether the arbitrator can be impartial.

This obligation to disclose is ongoing and an arbitrator has an ethical duty to disqualify himself or herself at any time during the arbitration if impartiality is compromised.

Third**,** an employee has an equal opportunity to pick the arbitrator from a panel of proposed arbitrators. For example, under AAA's rules of employment arbitration, Rule 12, it sets forth the manner in which an arbitrator is determined, including that both sides receive an identical list of proposed arbitrators which they can select from for the forthcoming arbitration.

Fourth, the Supreme Court specifically mandated that an employment arbitration agreement provide for a "neutral arbitrator." Accordingly, an agreement that did anything to jeopardize this requirement would be unenforceable.

Fifth, as identified in the study by Eisenberg and Hill referenced below, employees have a higher success rate in arbitration than court, so any "repeat player" favoritism is not supported by the actual results.

Studies Prove Employment Arbitration Is More Efficient and Provides Higher Success Rates for Employees:

According to the U.S. District Court Judicial Caseload Profiler, there were 29,312 civil cases filed in California in 2014. As of June 2014, approximately 2,132 cases had been pending in federal court in California for over three years and the median time from filing of a civil complaint to trial in Northern California was 31 months.

Comparatively, a 2004 faculty scholarship in the Cornell Law Faculty Publication 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. Also, Eisenberg and Hill found: *"[m]any people expect employee claimants to fare worse in arbitration than litigation. Yet we find the opposite: employee claimants win a higher proportion of arbitrations than they win trials"* (emphasis added).

Similar results regarding arbitration were found with regard to consumer arbitration agreements. In a presentation to the George Washington University Law School in March 2011, attorney Andrew Pincus also agreed that the national data and evidence available demonstrate that consumers do the same, if not better, in arbitration than litigation, as one of the largest arbitration providers documented at least 45% of consumer arbitrations result in a damages award, while over 70% of consumer-initiated securities arbitrations result in a recovery to the consumer.

Finally, 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 465 Is Broader Than AB 2617 (Weber) and Includes All Employment Claims:

Proponents of **AB 465** have suggested that this bill is the same as AB 2617 (Weber), which was signed by Governor Brown last year. This comparison is flawed. AB 2617 only applied to arbitration agreements for the resolution of hate crimes under the Unruh Civil Rights Act. **AB 465** seeks to ban all pre-dispute arbitration agreements made as a condition of employment for any and all claims arising during the employment relationship. This proposed ban includes all claims under the Labor Code, Fair Employment and Housing Act, tort claims, Unfair Competition claims, Misappropriation of Trade Secrets, Title VII, and the Fair Labor and Standards Act. The scope of **AB 465** is much broader than AB 2617.

AB 465 Will Force Low-Wage Employees to Overburdened Courts:

Banning pre-dispute employment arbitration agreements will force low-wage employees to overburdened courts. Assuming an employee can find an attorney willing to pursue the case, an employee will potentially have to wait years for a resolution, as opposed to arbitration that is generally resolved in less than a year.

In March 2015, in her State of the Judiciary address, Chief Justice Tani G. Cantil-Sakauye commented that the judicial system is still falling short in its necessary funding, which has resulted in closed courthouses, reduced hours of service and reduced number of employees. This funding shortage has significantly increased the length of time to resolve civil lawsuits. Arbitration is a valuable alternative method to resolve disputes in an efficient manner and should be encouraged. Instead, **AB 465** will force more employment disputes into the already overburdened judicial system, thereby delaying any recovery of potential wages for an employee.

AB 465 Is Pre-Empted by Federal and State Laws:

AB 465 deems any pre-dispute contractual provision made as a condition of employment that waives "any legal right, penalty, forum, or procedure for specified employment law violations as unconscionable, involuntary, and against public policy." This prohibition directly conflicts with rulings from both the California Supreme Court and the United States Supreme Court. 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.

In 2011, the U.S. Supreme Court in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) held that the Federal Arbitration Act 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. Specifically, the Court stated that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id*.

In 2013, the California Supreme Court reversed its initial ruling in *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109 and held an arbitration agreement that requires an employee to waive his or her

administrative “Berman hearing” before the Labor Commissioner is not *per se* unconscionable and precluding such a waiver would frustrate the intent of the FAA. Specifically, the Court stated "[i]n light of *Concepcion*, we conclude that because compelling the parties to undergo a Berman hearing would impose significant delays in the commencement of arbitration, the approach we took in *Sonic I* is inconsistent with the FAA. Accordingly, we now hold, contrary to *Sonic I*, that the FAA preempts our state-law rule categorically prohibiting waiver of a Berman hearing in a predispute arbitration agreement imposed on an employee as a condition of employment." *Id*. at 1124. “[T]he fact that arbitration supplants an administrative hearing *cannot* be a basis for finding an arbitration agreement unconscionable.” *Id*. at 1146 (emphasis added).

AB 465 directly conflicts with these prior and recent rulings from both the California and United States Supreme Courts, which have consistently stated any state law that interferes with the Federal Arbitration Act is preempted. We believe **AB 465** would ultimately be found to be preempted as well. However, the time, cost and uncertainty created for all California employers while any legal challenge to **AB 465** is pending in the judicial system would be detrimental to businesses and unnecessary.

AB 465 Will Create a Worse Litigation Environment and Lack of Job Creation:

California’s economic recovery is dependent on its ability to create an environment where job creation can flourish. In the 2014 Chief Executive’s tenth annual survey of CEOs’ opinions of Best and Worst States in which to do business, California was ranked as one of the worst three states in which to do business. The magazine stated: “[a]ccording to Dun & Bradstreet, 2,565 California businesses with three or more employees have relocated to other states between January 2007 and 2011, and 109,000 jobs left with those employers”. As one CEO commented, “personal income tax rates and too much ‘big government’ regulation…public employee unions dominate California to its detriment.” Similarly, the American Tort Reform Association’s “Judicial Hellholes Watch List” for 2014/2015 found that California was ranked as having the second worst litigation environment. **AB 465** will neither help California’s litigation environment nor promote businesses’ ability to create jobs as it will drive up California employers’ litigation costs.

For all of these reasons, we are **OPPOSED** to **AB 465** 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: Camille Wagner, Office of the Governor
The Honorable Roger Hernandez
Anthony Archie, Assembly Republican Caucus
District Offices, Members, California State Assembly
Department of Industrial Relations
Labor and Workforce Development Agency