SB 1284 (JACKSON) EMPLOYERS: ANNUAL REPORT: PAY DATA
OPPOSE/JOB KILLER

Associated General Contractors (AGC)

The Voice of Small Business.

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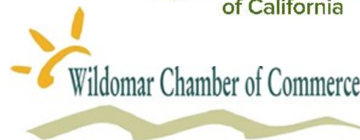
OPENING DOORS FOR BUSINESS



Personal Insurance Federation of California

May 2, 2018

TO: Members, Senate Committee on Appropriations

FROM: California Chamber of Commerce
Agricultural Council of California
Associated General Contractors
Brea Chamber of Commerce
California Ambulance Association
California Association for Health Services at Home
California Bankers Association
California Employment Law Council
California Farm Bureau Federation
California Hotel and Lodging Association
California Land Title Association
California Landscape Contractors Association
California League of Food Producers
California Manufacturers and Technology Association
California Restaurant Association
California Retailers Association
California Taxpayers Association
California Trucking Association
Cerritos Regional Chambers of Commerce
Citizens Against Lawsuit Abuse
Construction Employers' Association
Culver City Chamber of Commerce
Family Business Association of California
Fresno Chamber of Commerce
Gateway Chamber Alliance
Greater Bakersfield Chamber of Commerce
Greater Coachella Valley Chamber of Commerce
Greater Conejo Valley Chamber of Commerce
Greater Irvine Chamber of Commerce
Long Beach Area Chamber of Commerce
Murrieta Chamber of Commerce
National Association of Mutual Insurance Companies
National Federation of Independent Business
Official Police Garages of Los Angeles
Orange County Business Council
Palm Desert Area Chamber of Commerce
Personal Insurance Federation of California
Rancho Cordova Chamber of Commerce
Redondo Beach Chamber of Commerce
Retail Industry Leaders Association
San Gabriel Valley Economic Partnership
Santa Ana Chamber of Commerce
Santa Maria Valley Chamber of Commerce
Simi Valley Chamber of Commerce
South Bay Association of Chambers of Commerce
Torrance Chamber of Commerce
Valley Industry and Commerce Association
Western Growers Association

Wildomar Chamber of Commerce
Wine Institute

SUBJECT: SB 1284 (JACKSON) EMPLOYERS: ANNUAL REPORT: PAY DATA OPPOSE/JOB KILLER – AS AMENED APRIL 24, 2018

The California Chamber of Commerce and the organizations listed above respectfully **OPPOSE SB 1284 (Jackson)**, which has been labeled a **JOB KILLER**, as it will create a false impression of wage discrimination or unequal pay where none exists and, therefore, subject employers to unfair public criticism, enforcement measures, and significant litigation costs to defend against meritless claims. It also creates a privacy concern for employees and the disclosure of their wages.

Governor Brown Just Vetoed a Similar Public Shaming Bill Last Year.

Last year, Governor Brown vetoed AB 1209 (Assembly Member Gonzalez Fletcher), which was a very similar bill. In his veto message he stated, “While transparency is often the first step to addressing an identified problem, it is unclear that the bill as written, given its ambiguous wording, will provide data that will meaningfully contribute to efforts to close the gender wage gap. Indeed, I am worried that this ambiguity could be exploited to encourage more litigation than pay equity.” **SB 1284** provides the same uncertainty and ambiguity. The bill requires an employer to turn over pay data information that will give the false impression of pay disparity where none exists.

As also referenced in Governor Brown’s AB 1209 veto message, there is a Pay Equity Task Force assigned to analyzing the Equal Pay Act, as well as workplace and compensation policies that can lead to successful compliance with the Act. The Pay Equity Task Force is supposed to release a report regarding the Equal Pay Act this year. Thus, **SB 1284** is premature and the legislature should wait for the Pay Equity Task Force’s report before imposing a new mandate on employers.

SB 1284 Exposes Employers to Public Shaming for Wage Disparities That Are Not Unlawful.

While **SB 1284** was recently amended to exempt employer pay data from the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code), the bill still allows for public disclosure once “any proceeding” is initiated “under Section 1197.5 of this code [the Fair Pay Act] or Section 12940 of the Government Code [Fair Employment and Housing Act] involving such information.” That means the confidentiality of the pay data is conditional and not an absolute bar from public disclosure. The potential disclosure of the pay data could lead to public shaming of employers because, while the aggregate data might disclose wage disparities, wage disparities do not automatically equate to wage discrimination or a violation of law.

As Labor Code Section 1197.5 recognizes, there are numerous, lawful, bona fide factors as to why wage disparities may exist between employees performing substantially similar work, such as: (1) different educational or training backgrounds amongst employees; (2) different career experience; (3) varying levels of seniority or longevity with the employer; (4) objective, merit-based system of the employer; (5) a compensation system that measures earning by quantity or quality of production; (6) geographical differences that impact the cost of living and job market; and, (7) shift differentials. Additionally, simply because a “proceeding” is initiated in relation to wage disparity does not mean the employer is guilty of unlawful wage disparity. Thus, publicly shaming companies for wage disparities that are not unlawful is simply unfair, will discourage growth in California and expose employers to costs associated with defending against meritless litigation.

Additionally, **SB 1284** still requires the DIR to make the reports available to the Department of Fair Employment and Housing upon request. However, once again there are no guidelines for how the information can and will be used.

SB 1284 Exposes Employees' Private Financial Information.

Not only is the privacy of the employer at stake, but also the privacy of the employee is jeopardized with **SB 1284**. The bill requires an employer to report "each employee's total earnings" according to job title. In some companies, there may only be one or two employees under a particular job title. Accordingly, including specific wage information of such employees in a report subject to public scrutiny will basically disclose these employees' compensation that will easily be attributed to one particular person.

While the law currently allows employees to voluntarily share their pay information with other employees if they so choose, it does not require an employee against his or her will to disclose that information. **SB 1284** would allow the DIR and the DFEH to publicize this information once a proceeding is initiated, forcing an employer to disclose this information even when the particular employee with whom the salary information will be identified does not want that information publicized.

SB 1284 Requires California Employers to Comply with a New Separate Mandate.

As drafted, **SB 1284** presumes that the federal EEO-1 pay data reporting requirement already went into effect; however, the pay data provision of the EEO-1 reporting requirement was suspended by the federal government. Thus, **SB 1284** creates a new reporting requirement for employers that do business in California. **SB 1284** is also not identical to the proposed EEO-1 pay data reporting requirements that were supposed to go into effect. For example, the look back period for **SB 1284** is one year from any pay period between July 1 and September 30 of each reporting year. However, the EEO-1 proposed regulations that were going to use the ***calendar*** year, which is how W-2 earnings are stored. Thus, by using the proposed EEO-1 Report, employers will actually be in direct violation of **SB 1284**. This is just one example of the inconsistencies that will overburden employers by requiring them to comply with a new and separate mandate.

SB 1284 Relies Upon Job Titles and Classifications to Compare Jobs, Which Undermines the Intent of SB 358 to Compare "Substantially Similar" Positions and, as Such, Will Provide a False Impression of Wage Discrimination When None Exists.

Collecting pay data in the aggregate will likely demonstrate wage disparity amongst employees in the different job classifications or titles according to gender. However, a disparity in wages does not automatically translate into wage discrimination or a violation of Labor Code Section 1197.5 (as amended by SB 358), which is our primary concern with the proposed data collection. The aggregate data proposed to be collected fails to compare equal jobs or those that are "substantially similar." Specifically, **SB 1284** seeks to collect pay data according to job title, not according to whether the jobs are "substantially similar" for purposes of comparison. Job titles are not determinative of whether two jobs are the same for purpose of equal pay under Labor Code Section 1197.5 or the federal Equal Pay Law. *See Brennan v. Prince William Hospital Corp*., 503 F.2d 282, 288 (4th Cir. 1974) (stating "[j]ob descriptions and titles, however, are not decisive. Actual job requirements and performance are controlling."); *Ingram v. Brink's, Inc*., 414 F.2d 222, 231 (1st Cir. 2005) (stating "[t]he EPA is more concerned with substance than title"); *Chapman v. Pacific Tel. & Tel. Co*., 456 F.Supp. 65, 69 (N.D. Cal. 1978) (holding, "[t]he regulations and cases make it clear that it is actual job content, not job titles or descriptions which is controlling."); and *EEOC Compliance Manual Compensation Discrimination* ("job titles and formal job descriptions are helpful in making this determination, but because jobs involving similar work may have different titles and descriptions, these things are not controlling.")

The term "substantially similar" was adopted in Labor Code Section 1197.5 to capture the intent of equal pay – meaning that employees who, with minor deviations, perform the same work according to a composite of skill, responsibility and effort, should be paid the same wage rate, unless a bona fide factor for the disparity exists. The example utilized in the legislative debate of this bill compared a housekeeper at a hotel who cleaned hotel rooms versus a janitor who cleaned the lobby. While a housekeeper and janitor may be "substantially similar" based upon the skill, responsibility and effort required, it is unlikely that employees will have the same job title.

Comparatively, two in-house attorneys may have the same job title, but may **not** actually have substantially similar job duties for purposes of comparison. As the court recognized in *E.E.O.C. v. Port Authority of New York and New Jersey*, 768 F.3d 247, 256-258 (2nd Cir. 2014), an attorney and another attorney are not the same just based on title, but rather, a "successful EPA claim depends on a comparison of actual job content; broad generalizations drawn from job titles, classification, or divisions, and conclusory assertions of sex discrimination, cannot suffice"; in order for jobs compared to be "substantially equal," a plaintiff must establish that the jobs compared entail common duties or consent, and do not simply overlap in titles or classifications." Due to the fact that **SB 1284** is completely reliant on job classifications and titles, it will create a false impression of wage discrimination or unequal pay where none exists.

SB 1284 Fails to Take into Consideration an Employer's Objective, Non-Discriminatory, "Bona Fide Factors" for the Wage Disparity and Therefore Undermines the Balance Provided by Labor Code Section 1197.5.

As previously discussed, Labor Code Section 1197.5 recognizes there are objective, non-discriminatory reasons for an employer to have a wage differential. Aggregate data as proposed in **SB 1284** fails to take these valid, non-discriminatory reasons into consideration and will create a false impression of wage discrimination where none exists. For example, there could be a disparity in the mean of salaries between two exempt employees because one employee has only worked for the employer for 6 months, whereas the other employee has been with the employer for 10 years. A wage disparity could exist because one employee may be hired directly out of college while another employee has five years of prior experience in the same position. Additionally, a pay disparity could exist because one employee negotiated a higher salary while the other negotiated more flexible hours. These factors will not be effectively captured in the aggregate data under **SB 1284** to adequately defend against undue criticism and, therefore, will create the impression of an equal pay violation where none exists.

SB 1284 Utilizes Data That May Be Impacted by Employee Choices.

SB 1284 requires employers to provide pay data regarding an employee's total earnings as shown on the Internal Revenue Service Form W-2. However, a W-2 form does not take into account an employee's own decisions and actions that can also create wage disparity that has nothing to do with discriminatory intent by the employer.

For example, an employee who requests to work part-time, reduced hours, or only on specific shifts that pay a lesser rate than others will impact the wages he or she earns. *Per Diem* employees may only work one shift per month, at the employee's own request. Moreover, if the employee is a "sales worker" or performing another job where the employee receives commissions or bonuses based upon his or her performance, this will create a wage disparity. Even though all employees in the equal or substantially similar position are working under the same commission or bonus plan, the employee's own actions and performance will dictate what the employee actually earns.

Finally, a wage disparity can also be created by an employee's personal choices as to pre-tax payroll deductions. One employee may max out all pre-tax deductions for a 401(k), dependent child reimbursement, medical expense reimbursement, college savings, etc., while another employee may not request any such deductions be made to his or her paycheck. None of these employee choices and actions will be captured or reflected in **SB 1284** to justify a potential wage disparity. Again, this omission on the report will create the false impression of wage discrimination, where none exists.

For these reasons, we must **OPPOSE SB 1284** as a **JOB KILLER**.

cc: Camille Wagner, Office of the Governor
The Honorable Hannah-Beth Jackson
Mark McKenzie, Senate Committee on Appropriations
Jessica Billingsley, Senate Republican Caucus
District Offices, Members, Senate Committee on Appropriations