

**AB 1209 (GONZALEZ FLETCHER) EMPLOYERS: GENDER PAY DIFFERENTIALS  
OPPOSE  
JOB KILLER**



**\*\*FLOOR ALERT\*\***

September 7, 2017

TO: Members, California State Assembly

FROM: California Chamber of Commerce *Paul Z*

Agricultural Council of California  
American Insurance Association  
Brea Chamber of Commerce  
California Ambulance Association  
California Association for Health Services at Home  
California Attractions and Parks Association  
California Bankers Association  
California Employment Law Council  
California Farm Bureau Federation  
California Land Title Association  
California League of Food Processors  
California Manufacturers and Technology Association  
California Professional Association of Specialty Contractors  
California Retailers Association  
California Restaurant Association  
Camarillo Chamber of Commerce  
Cerritos Regional Chamber of Commerce  
Civil Justice Association of California  
Claremont Chamber of Commerce  
Computing Technology Industry Association (CompTIA)  
El Centro Chamber of Commerce  
Family Business Association of California  
Fresno Chamber of Commerce  
Gilroy Chamber of Commerce  
Greater Conejo Valley Chamber of Commerce  
Greater Irvine Chamber of Commerce  
Motion Picture Association of America  
National Association of Theatre Owners of California and Nevada  
National Federation of Independent Business  
North Orange County Chamber of Commerce  
Oceanside Chamber of Commerce  
Official Police Garages of Los Angeles  
Orange County Business Council  
Personal Insurance Federation of California  
Ripon Chamber of Commerce  
San Valley Gabriel Valley Economic Partnership  
Santa Maria Valley Chamber of Commerce  
TechNet  
Vacaville Chamber of Commerce  
Western Growers Association  
Wine Institute

**SUBJECT: AB 1209 (GONZALEZ FLETCHER) EMPLOYERS: GENDER PAY DIFFERENTIALS  
OPPOSE – JOB KILLER  
NON-CONCURRENCE**

The California Chamber of Commerce and the organizations listed above are **OPPOSED** to **AB 1209 (Gonzalez Fletcher)**, as amended September 1, 2017, which has been labeled a **JOB KILLER**, as it will: (1) create a false impression of wage discrimination or unequal pay where none exists and, therefore, subject employers to unfair public criticism; (2) expose employers to significant litigation costs to defend against meritless claims; and (3) impose costs on Secretary of State (SOS) to collect the employer's data and post such information a publicly accessible website. It also creates a privacy concern for employees and the disclosure of their wages.

### **AB 1209 Seeks to Publicly Shame Employers for Wage Disparities That Do Not Violate the Law and Imposes New Costs and Burdens on the General Fund:**

As set forth in detail below, **AB 1209** requires employers to collect data regarding salaries paid to men and women in the same job title or classification and submit that data to the Secretary of State (SOS), where it will be posted on a publicly accessible website and specifically attributed to the individual company. The intent is to publicly shame companies who report any disparities in pay amongst employees of different genders. This criticism, however, is totally misplaced as wage disparities do not automatically equate into 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. 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.

In order to comply with its new obligations under this bill, the SOS will have to create new processes and mechanisms to receive employer reports created by **AB 1209** as well as publicly display these reports on its website for public review. This is a significant cost and burden on the General Fund.

### **AB 1209 Requires Employers to Carry the Burden of Proof for an Employee in a Claim of Unequal Pay Under Labor Code Section 1197.5 and Eases the Pathway for More Civil Litigation:**

**AB 1209** states that an employer shall submit data of the mean and median salaries of men and women in the same job title or job classification to the SOS. Thereafter, the data shall be categorized in a manner consistent with Labor Code Section 1197.5, which suggests that it is the SOS who is responsible for categorizing the data, not the employer. First, Section 1197.5 requires employers to pay equal wages to employees who perform “substantially similar” work. Job titles and descriptions are not determinative of whether two jobs are the same for purpose of equal pay under SB 358 or the federal Equal Pay Law, accordingly, it is unclear why employers should have to go through this administrative exercise. 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.”).

The new requirement in **AB 1209** for employers to categorize information consistent with Section 1197.5 unfairly forces an employer to carry the employee’s burden of proof under Section 1197.5. Specifically, SB 358 (Jackson) which amended Labor Code Section 1197.5 to make it explicitly clear that the employee carries the burden of proof to establish the employee was performing “substantially similar” work as an employee of a different race, gender, ethnicity, and being paid a different wage than that employee. Thereafter, the burden shifts to the employer to justify that pay differential according to a bona fide factor. (See Senate Judiciary Committee Analysis of SB 358, April 28, 2015)

If **AB 1209** requires an employer to “categorize” information consistent with Section 1197.5, meaning the employer now has to identify employees under the same job title and description and those performing “substantially similar” work, **AB 1209** is forcing the employer to establish the employee’s case. There is absolutely no need for the Legislature to ease the burden on a plaintiff to file a lawsuit against an employer by forcing the employer to establish the plaintiff’s burden of proof. Requiring employers to make the determination of “substantially similar” and then post it on a website as **AB 1209** proposes, will basically allow a plaintiff’s attorney to simply review a website for new lawsuits to file against California employers and expose such employers to costly and meritless litigation.

### **AB 1209 Utilizes Terms that Are Unclear as to What Data Should Be Included and May Be Impacted by Employee Choices:**

**AB 1209** requires employers to provide data regarding employee “wages.” It is unclear what that term includes. For example, is “wages” the employee’s annual gross salary or adjusted gross income? Does “wage” include salary, bonuses, overtime, company vehicles, travel expenses, vacation, sick leave, 401Ks, stock options, health benefits, etc.? Such a broad category of information, much of which may be dependent upon the employee’s own decisions and actions, can also create wage disparity that has nothing to do with the discriminatory intent by the employer.

An employee who requests to work reduced hours may earn a reduced salary. 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, the 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. None of these employee choices and actions will be captured or reflected in **AB 1209** to justify a potential wage disparity. Again, this omission on the report will create the false impression of wage discrimination where none exists.

**AB 1209 Exposes Employees’ Private Financial Information:**

**AB 1209** requires the SOS to publish employee wages according to job title and job description as well as in accordance with Section 1197.5. In some companies, there may only be one or two employees who perform a specific job. Accordingly, including the wages of such employees in a report subject to public scrutiny will basically disclose such employees’ specific wage that will easily be attributed to one particular person. While Section 1197.5 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. **AB 1209** would force an employer to disclose this information even when the particular employee with whom the wage information will be identified does not want that information publicized.

For these reasons, we **OPPOSE AB 1209 (Gonzalez Fletcher)** 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: The Honorable Lorena Gonzalez Fletcher  
Camille Wagner, Office of the Governor  
Taylor Jackson, Assembly Committee on Labor and Employment  
Joshua White, Assembly Republican Caucus  
District Office, Members, California State Assembly  
Department of Industrial Relations  
Labor and Workforce Development Agency

JB:ll