

AB 5 (GONZALEZ FLETCHER/KALRA) EMPLOYERS: OPPORTUNITY TO WORK ACT
JOB KILLER





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February 6, 2017

The Honorable Lorena Gonzalez Fletcher
California State Assembly
State Capitol Room 2114

The Honorable Ash Kalra
California State Assembly
State Capitol Room 5160
Sacramento, CA 95814

**SUBJECT: AB 5 (GONZALEZ FLETCHER/KALRA) EMPLOYERS: OPPORTUNITY TO WORK ACT
OPPOSE – JOB KILLER**

Dear Assembly Members,

The California Chamber of Commerce and the organizations listed below must respectfully **OPPOSE** your **AB 5 (Gonzalez Fletcher/Kalra)**, which has been labeled a **JOB KILLER**, because it will limit employers' ability to effectively manage their workforce to address both consumer and employee requests, subject

employers to costly fines and multiple avenues of litigation for technical violations that do not actually result in any harm to the employee, is inconsistent with existing law, and will limit job opportunities for unemployed workers.

AB 5 Proposes Unnecessary Burdens on Small Employers:

AB 5 mandates small employers with as few as 10 employees to offer all employees who have the skills and experience to perform additional hours of work that become available, prior to hiring a new employee, temporary employee or contractor. This mandate creates a host of complications and concerns, including:

- (1) If an employer has facilities in different parts of the state, **AB 5** mandates the employer to offer additional hours of work to employees in facilities where the employee does not work. For example, under **AB 5**, an employer who has at least 10 employees throughout the state would have to contact employees in Southern California who have the skills and responsibilities to perform additional hours of work in Northern California, even though it is geographically unlikely the employee would be available to accept the additional hours of work. Requiring employers to go through this time consuming exercise for all employees who have the skills and responsibilities to perform the work, but yet, for other reasons such as physical location, are unlikely to accept those hours creates unnecessary delay and limits an employer's ability to respond to consumer demands and last-minute employee requests for time off.
- (2) **AB 5** mandates an employer to contact each employee who has the skills and responsibilities to perform the work required, even though that employee may have explicitly told the employer: (a) the employee is not interested in additional hours of work; (b) the employee is specifically unavailable on the day/time the additional hours are available; or, (c) while offering the additional hours of work to an employee at that time may not require overtime compensation, the additional hours of work added to the remaining scheduled shifts of that employee will require the employee to work overtime, thereby increasing the cost to an employer.
- (3) **AB 5** fails to indicate what an employer actually has to do to satisfy the "offer" requirement of additional hours. Is a mass email distribution sufficient? Does the employer have to personally contact each employee? And, what happens if the employer cannot get a hold of each employee? How long does the employer have to wait for a response from the employee before identifying which employee will receive the additional hours of work? These unanswered questions will ultimately lead to litigation against the employer when an employee does not receive additional hours of work.
- (4) After contacting each employee whom the employer reasonably presumes can perform the work, **AB 5** requires an employer to use a "transparent and nondiscriminatory process" to pick amongst numerous available employees who will ultimately receive the additional hours of work. This requirement exposes an employer to threats of litigation, fines, and administrative complaints when one employee is given the additional time over the other. In fact, the proposed definition of "retaliation" in the bill explicitly identifies the "denial of additional hours" as retaliation, thereby setting an employer up for costly litigation.
- (5) **AB 5** also imposes an unreasonable document retention mandate on employers. Under **AB 5**, an employer shall retain documentation regarding offers of additional hours of work, employee work schedules, and employee written statements. There is no time limit on this document retention and, therefore, an employer essentially has to retain such documents indefinitely. This unlimited time frame will expose employers to constant threats of penalties and litigation for any missing documentation.

AB 5 Imposes Multiple Layers of Enforcement and Lawsuits Against Small Employers:

AB 5 additionally exposes small employers to multiple enforcement mechanisms for technical violations that do not even injure the employee. Under **AB 5**, an employee can either choose to file a complaint with the Division of Labor Standards Enforcement (DLSE) or civil litigation for any violation of the provisions in the bill, including (1) failure of an employer to retain all work schedules of all employees, indefinitely; (2) failing to post in a conspicuous place information on this proposal; or, (3) retaining other

documentation. **AB 5** provides **any** employee with the right to sue for these paper violations, even if such document violations do not pertain to that specific employee or actually cause any harm or injury to an employee.

Moreover, due to the inclusion of this proposal under the Labor Code, an employee can also file a Labor Code Private Attorneys General Act (PAGA) lawsuit and receive \$100 per employee, per pay period, for these violations, in addition to attorney's fees. Piling on litigation costs on small employers for violations that do not actually harm or injure an employee is simply unnecessary and unfair, and it limits their ability to expand and create jobs.

AB 5 Creates a Conflict for Employers Between State and Federal Laws and Punishes Employers for Communicating Truthful Information:

AB 5 also includes language regarding retaliation concerning the threat of reporting actual or suspected citizenship or immigration status to a federal, state or local agency that is already addressed in existing law. In 2013, AB 263 (Hernandez) was signed into law and sets forth in Labor Code Section 1019 that no employer can retaliate against an employee for the exercise of his or her rights under the Labor Code by threatening to contact or contacting immigration authorities. AB 263/Labor Code Section 1019 balanced the concern of such retaliation against employees with employers' concerns regarding complying with federal law. **AB 5** does not have that same balance and will place employers in an unnecessary legal predicament between state and federal laws.

AB 5 further seeks to limit an employer's freedom of speech by deeming any communication to another employer regarding an employee's exercise of rights under this law as "retaliation." This expansive prohibition on the right to free speech is concerning given that it would limit an employer's ability to communicate about public information such as civil litigation, as well as inform a successor employer of potential liabilities for which the successor employer may assume. Labor Code Section 1050 already prohibits and punishes an employer for making misrepresentations to a future employer in an attempt to prevent the former employee from obtaining employment. Similarly, Civil Code Sections 44-47 prohibit defamation and/or false communications regarding any person, except those communications deemed privileged. It is unnecessary to limit and penalize an employer for communicating truthful information.

AB 5 Limits Opportunities for Other Workers:

AB 5 mandates an employer to offer existing employees additional hours of work, rather than offering those hours to unemployed individuals, favoring one employee over another and potentially prolonging an individual's unemployment status. Moreover, **AB 5** may discourage employers from offering part-time employment opportunities at all due to this mandate and will encourage those employers to simply supplement a full-time workforce with contract employees when needed.

Similar Local Ordinances Are Significantly Narrower than AB 5:

AB 5 appears to be modeled after San Jose and San Francisco ordinances requiring larger employers to provide part-time employees with additional hours of work. However, San Francisco is only applicable to national employers with multiple locations and San Jose has a specific small employer exemption. Moreover, both ordinances only require an employer to offer additional hours of work to part-time employees, not full-time employees. **AB 5** applies to all employers with only 10 employees, and does not limit the requirement to offer additional hours of work to only part-time employees, thereby exposing small employers throughout California to significant scheduling burdens and litigation that they are not capable of implementing or defending.

For these reasons, we respectfully **OPPOSE** your **AB 5** as a **JOB KILLER**.

California Chamber of Commerce
African American Farmers of California
American Fire Sprinkler Association
American Petroleum and Convenience Store Associations
AMN Healthcare
Associated Builders and Contractors – Northern California Chapter
Associated Builders and Contractors – San Diego Chapter
Associated General Contractors

Association of California Egg Farmers
Auto Care Association
Brea Chamber of Commerce
California Agricultural Aircraft Association
California Ambulance Association
California Assisted Living Association
California Association of Nurseries and Garden Centers
California Association of Wheat Growers
California Attractions and Parks Association
California Bankers Association
California Building Industry Association
California Business Properties Association
California Citizens Against Lawsuit Abuse
California Cotton Ginners and Growers Association
California Employment Law Council
California Farm Bureau Federation
California Fresh Fruit Association
California Grain and Feed Association
California Hotel and Lodging Association
California Manufacturers and Technology Association
California Pear Growers Association
California Professional Association of Specialty Contractors
California Restaurant Association
California Retailers Association
California Staffing Professionals
California State Council of the Society for Human Resources Management
California Strawberry Commission
California Tomato Growers Association
California Travel Association
California Trucking Association
Camarillo Chamber of Commerce
Carlsbad Chamber of Commerce
CAWA – Representing the Automotive Parts Industry
Chambers of Commerce Alliance Ventura & Santa Barbara Counties
Chino Valley Chamber of Commerce
East Bay Leadership Council
El Centro Chamber of Commerce and Visitors Bureau
El Dorado Hills Chamber of Commerce
Family Business Association
Family Winemakers of California
Far West Equipment Dealers Association
Greater Bakersfield Chamber of Commerce
Greater Conejo Valley Chamber of Commerce
Greater Fresno Area Chamber of Commerce
Greater Riverside Chambers of Commerce
Hesperia Chamber of Commerce
Independent Roofing Contractors of California, Inc.
Lodi Chamber of Commerce
Long Beach Area Chamber of Commerce
Los Angeles Area Chamber of Commerce
Mountain View Chamber of Commerce
National Association of Theatre Owners of California/Nevada
National Federation of Independent Business
Nisei Farmers League
Norco Area Chamber of Commerce & Visitors Center
North Orange County Chamber of Commerce
Oxnard Chamber of Commerce
Pacific Egg and Poultry Association
Palm Desert Area Chamber of Commerce
Plumbing-Heating-Cooling Contractors of California
Redondo Beach Chamber of Commerce & Visitors Bureau

Retail Industry Leaders Association
San Diego Regional Chamber of Commerce
San Jose Silicon Valley Chamber of Commerce
Santa Ana Chamber of Commerce
Santa Maria Valley Chamber of Commerce Visitor and Convention Bureau
Simi Valley Chamber of Commerce and Visitor Center
South Bay Association of Chambers of Commerce
Southwest CA Legislative Council
The Chamber of the Santa Barbara Region
Torrance Area Chamber of Commerce
Tulare Chamber of Commerce
Vacaville Chamber of Commerce
Victor Valley Chamber of Commerce
Western Agricultural Processors Association
Western Carwash Association
Western Electrical Contractors Association
Western Growers Association
Wine Institute

cc: Camille Wagner, Office of the Governor
District Office, The Honorable Lorena Gonzalez Fletcher
District Office, The Honorable Ash Kalra