CalChamber
CALIFORNIA CHAMBER OF COMMERCE

February 5, 2020

The Honorable Connie Leyva
California State Senate
State Capitol, Room 4061
Sacramento, CA 95814

SUBJECT: SB 850 (LEYVA) WORK HOURS: SCHEDULING
AS INTRODUCED JANUARY 13, 2020
OPPOSE – JOB KILLER

Dear Senator Leyva:

The California Chamber of Commerce respectfully **OPPOSES SB 850**, which has been identified as a **JOB KILLER**, as introduced on January 13, 2020, because it 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 850 is ill-timed considering Assembly Bill 5 just went into effect on January 1, 2020. AB 5 prevents many individuals from being able to operate as independent contractors and these freelancers often choose independent work because they are able to control and create a more flexible schedule. The Legislature should focus on policies that improve workplace flexibility rather than curtailing it, which **SB 850** would do.

SB 850'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 Additional Wages:

SB 850 requires employers to provide "modification pay" for changes made to an employee's schedule with fewer than 7-days' notice. Although **SB 850** 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 of having to pay "modification pay."

This is especially true with regard to the numerous threats of investigation and litigation authorized by this bill. **SB 850** 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 (7) an unfair competition claim under Business and Professions Code Sections 17200, *et seq.*

With all of these potential risky consequences, an employer covered by **SB 850** will never change an employee's 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.

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SB 850 Is Significantly Broader than Other Local Ordinances, Which Have Already Limited Flexibility for Both Businesses and Employees:

In 2014, the San Francisco Board of Supervisors passed the "Retail Workers' Bill of Rights" that included a "fair scheduling" mandate. 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' requests for changes due to personal needs.

Additionally, employees who want and have requested additional hours of work are not provided those extra 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 customer.

In fact, a study of San Francisco's ordinance reveals that "35% of employers have become less flexible with employee schedule changes, 21% are offering fewer part-time positions, 19% are scheduling fewer workers per shift, 17% are offering fewer jobs across the board, 6% are pursuing self-service automated alternatives to hiring workers, and another 6% say they are reducing customer service." Shannon, Erin. "How restrictive scheduling is working for employers and workers in San Francisco." *Washington Policy Center,* 18 Jul. 2016, https://www.washingtonpolicy.org/publications/detail/how-restrictive-scheduling-is-working-for-employers-and-workers-in-san-francisco (citing Yelowitz, Dr. Aaron, Corder, Dr. Lloyd, *Weighing Priorities for Part-Time Workers*, Employment Policies Institute, May 2016).

Similarly, the City of Emeryville adopted its Fair Workweek Ordinance, which took effect in July 2017. However, this ordinance only applies to specific retailers and restaurants that have 56 or more employees globally and where the patrons order or select food or beverages and pay before eating (e.g., fast food).

The City of Berkeley's predictive scheduling ordinance that went into effect in March of 2017 is also narrow. Under the ordinance, employees may request flexible or predictable working arrangements two (2) times a year and only after a major life event (e.g., the birth of a child, placement of a child through adoption or foster care, or an increase in an employee's caregiving duties for a person with a serious health condition who is in a family relationship with the employee).

SB 850 is significantly broader than any of these local ordinances because 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 local ordinances, which have already proven harmful to employees, will absolutely decimate flexibility for any employer or employee in the retail, restaurant or grocery industries.

SB 850 Is Applicable to Both Large and Small Employers, as Well as Those Who Do Not Primarily Engage in Selling Merchandise or Food:

SB 850 applies to any restaurant, grocery store or retail store establishment, regardless of size. The scope of this bill is daunting and the likely burden it will impose is overwhelming. Even the San Francisco Ordinance that applies to larger employers, 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 bill's definition of an employer as to which employees **SB 850** 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 850** for all employees? Given the broad definition included in

SB 850 of an employer, as well as the statutory scheme of penalties, litigation and enforcement, those employers who are not primarily engaged in selling merchandise or food will be forced into the overwhelming provisions of this mandate.

SB 850 Requires a One-Size-Fits-All Advance Scheduling Requirement:

SB 850 requires all employers who sell food or merchandise to basically provide a 28-day notice of an employee's schedule. Specifically, **SB 850** 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 predict their staffing needs so far in advance.

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 schedule more than 28 days in the future. 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. Based upon the San Francisco experience, a 28-day notice will create an even larger burden on employers and employees alike.

SB 850 Limits an Employer's Ability to Respond to Customer Needs:

The retail and food industries are 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 occurence. Weather, community events and employee changes all impact the ability to accurately schedule employees for hours of work. **SB 850** threatens employers with "modification pay" for responding to these unpredictable events, which limits their ability to respond to customer demands.

SB 850 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 where an employee is restricted or limited in what he or she can do, is already compensable under California law. *See Mendiola v. CPS Security Solutions, Inc*., 60 Cal.4th 833 (2015); *Ward v. Tilly's, Inc.*, 31 Cal.App.5th 1167 (2019). Regardless of whether an employee could perform personal activities while on-call, the employer's control over that time requires the employer to compensate the employee.

Under **SB 850**, an employer would be forced to not only compensate the employee for the on-call time, even when the employee did not get called into work, 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 850 Creates Numerous, Costly Avenues of Litigation:

The Labor Code Private Attorneys General Act (PAGA), creates a representative action for any aggrieved employee to bring 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 per month, which demonstrates the volume of PAGA lawsuits that are plaguing employers in California today.

SB 850 would add to this growing problem, as any violation of **SB 850** would subject an employer to the threat of 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 850**, 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 850 Expands the Statute of Limitations to File Litigation:

SB 850 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 a three-year statute of limitations versus a one-year statute of limitations for penalties).

SB 850 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 to work part-time. This flexibility will essentially be eliminated by the mandates under **SB 850**.

For these reasons, we respectfully **OPPOSE SB 850** as a **JOB KILLER**.

Sincerely,

Laura Curtis
Policy Advocate

cc: Stuart Thomson, Office of the Governor
District Office, The Honorable Connie Leyva

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