April 3, 2019

The Honorable Kevin McCarty
California State Assembly
State Capitol Room 2136
Sacramento, CA 95814

SUBJECT: AB 882 (MCCARTY) TERMINATION OF EMPLOYMENT: DRUG TESTING: MEDICATION-ASSISTED TREATMENT
OPPOSED/JOB KILLER – AS INTRODUCED FEBRUARY 20, 2019

Dear Assemblymember McCarty,

The California Chamber of Commerce respectfully **OPPOSES** your **AB 882** (**McCarty**), as introduced February 20, 2019, as a **JOB KILLER** because it undermines employer's ability to provide a safe and drug-free workplace by side-stepping the existing disability protections and corresponding employer/employee obligations, creates a new, duplicative oversight for employers, exposes employers to litigation, and potentially encompasses medical marijuana in the workplace, which voters have already rejected.

Importantly, we do not oppose **AB 882** out of any disagreement with drug rehabilitation programs or other efforts to combat the country's opioid epidemic. However, **AB 882** will create safety concerns and litigation for California's employers, without substantially improving the situation of recovering addicts in California.

California Law Already Protects Individuals With Disabilities, Including Those Undergoing Substance Abuse Treatment.

Existing California law already protects employees with disabilities pursuant to the Fair Employment and Housing Act (FEHA).[1] FEHA, overseen by the Department of Fair Employment & Housing (DFEH), prohibits employers with more than 5 employees from terminating an employee solely based on a disability. Though current drug use is not protected as a disability, Department of Health and Human Services has interpreted substance use disorders such as drug addiction, and their corresponding treatments (the focus of **AB 882)**, to qualify as a disability under Americans with Disabilities Act (ADA). It is likely that drug addiction would similarly be treated as a disability under California's FEHA.

If an employee has a disability, employers must engage in an interactive process with a disabled employee to determine if, with a reasonable accommodation, the employee can accomplish the essential functions of the position. This collaborative process under FEHA considers both the needs of the disabled employee and the nature of the position to determine whether the employee's disability can be accommodated and, if so, how it can be accommodated. If an employee's disability makes it impossible for that employee to fulfill the essential functions of a position in the long term, despite reasonable accommodations by the employer, then that employee can be terminated from their position. For example, if a position's essential functions include handling heavy machinery or working at considerable height, safety might require constant vigilance on the part of the employee – as a matter of safety to both the employee and those around them. An individual under the influence of medication may not be able to perform these functions, even with a reasonable accommodation.

Notably, under FEHA, an employer is not required to provide a reasonable accommodation that creates an "undue hardship" on the employer. Case law has identified various accommodations that are considered unreasonable or an undue hardship: *See Furtado v. State Personnel Board*, 212 Cal.App.4th 729 (holding

[1] Government Code §§12900 – 12996.

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that an employer is not required to create a position for reassignment to accommodate a disability); *Canupp v. Children's Receive Home of Sacramento*, 81 F.Supp.3d 767 (E.D. Cal. 2016) (determining that an undefined leave of absence is not a reasonable accommodation as an employer should not be required to wait indefinitely to see if an employee's medical condition is corrected); *Sptizer v. The Good Guys*, 80 Cal.App.4th 1376 (2000) (quoting that "[t]he responsibility to reassign a disabled employee who cannot be otherwise accommodated does 'not require creating a new job, moving another employee, promoting the disabled employee, or violating another employee's rights under a collective bargaining agreement'").

In contrast with existing law, **AB 882** would forbid employers, regardless of their size, from terminating any employee for a positive drug test result if the drug identified was being used as part of a "medication-assisted treatment, under the care of a physician" (MAT) or a "licensed narcotics treatment program" (NTP), even if the employee cannot perform the essential functions of the job and there are no accommodations available. **AB 882**'s prohibition completely ignores and side steps the existing structure within FEHA for addressing employees with disabilities via the interactive process and limits an employer's ability to maintain the safety of the workplace. Moreover, this inconsistency between **AB 882** and FEHA will cause confusion, a significant burden, as well as costly litigation.

AB 882 Will Create Litigation and Liability for California's Employers.

First, **AB 882** will create additional wrongful termination claims for employers. In the event that an **AB 882**-covered employee is terminated based on wrongdoing (a workplace injury) and a corresponding blood test is positive for methadone (or other medication-assisted treatment drugs, as discussed below), **AB 882** will create another potential ground for the employee to claim their termination was unlawful.

Second, **AB 882** will create unavoidable liability for employers in the event that an employee covered by **AB 882** injures a third-party. If an **AB 882**-covered employee injures a third-party, the resulting lawsuit would hinge on what the business should have done to prevent the accident. However, under **AB 882**, the employer would be hamstrung – unable to terminate the employee prior to an accident, but liable for their mistakes after the fact. This is a no-win scenario for California employers.

AB 882 Potentially Encompasses Medical Marijuana in the Workplace, Which Voters Rejected.

In addition to **AB 882's** misplaced oversight and litigation risks, **AB 882** also fails to define the drugs that its protections would cover. **AB 882** utilizes the term "medication-assisted treatment under the care of a physician." While this may be a term of art in discussions based upon substance abuse, it is not necessarily a term of art in the Labor Code and could be broadly interpreted to be any medication administered by a physician, including medical marijuana and other opioids.

Regarding marijuana, this would explicitly conflict with the voters' stated intention in legalizing marijuana via Proposition 64, which protected employers' ability to exclude marijuana from the workplace. Proposition 64 provided in relevant part:

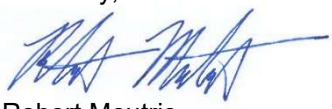
> Nothing in [Prop 64] shall be construed or interpreted to amend, repeal, affect, restrict, or preempt . . . The rights and obligations of public and private employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace, or affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees, or prevent employers from complying with state or federal law.[2]

Moreover, the California Supreme Court's *Ross v. RagingWire Telecommunications* decision similarly upheld employers' right to manage their workplaces, including maintaining a drug-free workplace.

[2] Health & Safety Code Section 11362.45.

For these and other reasons, we are **OPPOSED** to your **AB 882** (**McCarty**) as a **JOB KILLER**.

Sincerely,



Robert Moutrie,
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California Chamber of Commerce

cc: Che Salinas, Office of the Governor

RM:ldl