JOB KILLER

April 13, 2021

TO: Member, Assembly Committee on Labor and Employment

FROM: California Chamber of Commerce, Ashley Hoffman, Policy Advocate
California Attractions and Parks Association
California Hotel and Lodging Association
California Restaurant Association
California Travel Association
Chino Valley Chamber of Commerce
Civil Justice Association of California
Construction Employers' Association
Garden Grove Chamber of Commerce
Greater Bakersfield Chamber of Commerce
Greater Coachella Valley Chamber of Commerce
Greater Conejo Valley Chamber of Commerce
Greater Riverside Chambers of Commerce
Greater San Fernando Valley Chamber of Commerce
Housing Contractors of California
Long Beach Area Chamber of Commerce
North Orange County Chamber

Oceanside Chamber of Commerce
Official Police Garages of Los Angeles
Oxnard Chamber of Commerce
Pleasanton Chamber of Commerce
Rancho Cordova Area Chamber of Commerce
Redondo Beach Chamber of Commerce
Roseville Area Chamber of Commerce
San Gabriel Valley Economic Partnership
Santa Maria Valley Chamber of Commerce
Santa Rosa Metro Chamber of Commerce
South Bay Association of Chambers of Commerce
Torrance Area Chamber of Commerce
Tri County Chamber Alliance
Tulare Chamber of Commerce

SUBJECT: AB 1074 (GONZALEZ) EMPLOYMENT: REHIRING AND RETENTION: DISPLACED WORKERS
OPPOSE/JOB KILLER – AS INTRODUCED FEBRUARY 18, 2021

The California Chamber of Commerce and organizations listed above respectfully **OPPOSE AB 1074 (Gonzalez),** which has been labeled as a **JOB KILLER. AB 1074** imposes novel, retroactive and unworkable "right of recall" provisions for specified industries that will interfere with and delay covered businesses' ability to reopen during and after the COVID-19 pandemic. **AB 1074** will also subject these businesses to expensive PAGA liability at a time that they can least afford it, further jeopardizing their ability to reopen.

AB 1074 Proposes a "Right of Recall" Requirement That Will Impede Reopening and Was Vetoed By Governor Newsom in 2020:

AB 1074 establishes a new "right of recall" requirement that applies to small and large hotels, event centers, airport hospitality operations, or the provision of building services to office, retail, or other commercial buildings. Based on the broad language in the bill, it also applies to any restaurant or store that has a location inside a hotel or event center. These rights further apply when an employer goes out of business and there is a change in control or ownership.

California's hospitality industry has suffered worse than any other sector from the pandemic-related economic shutdowns and consumers' reluctance to patronize these businesses. The remaining hospitality employers have been struggling simply to continue operations and avoid going completely out of business – meaning no jobs for any returning workers. Employers have also adjusted their operations to retain as many of their workers as possible during these challenging times. When the hospitality industry can finally reopen, those entities will want to bring back their trained, former employees wherever possible. No hotel or other affected business has the capacity or time to retrain their entire staff during a pandemic. The problem with this bill is that it adds a burdensome, lengthy process as businesses are rehiring those employees and dictates exactly who must be brought back and in what order. The bill completely eliminates the flexibility that businesses need to navigate crises such as this and preserve jobs over the long term.

Specifically, **AB 1074** requires that employers rehire employees by seniority. **AB 1074** eliminates an employer's ability to evaluate former employees by skill, which is extremely important for businesses that are trying to operate with a reduced staff. Further, the bill requires that employers give employees five business days to respond to a job offer. This means that a business will have to wait at least a week before knowing which former employees are interested in returning to work. If no employees are interested or can take the necessary shifts, the business must then begin the process of searching for other candidates.

In vetoing the almost identical AB 3216 last year, Governor Newsom explicitly recognized that the law would place too onerous a burden on employers navigating through the challenges presented by COVID-19 and urged the Legislature to pursue other approaches to getting employees back to work:

"To the Members of the California State Assembly: I am returning Assembly Bill 3216 without my signature. This bill would provide a right of recall and retention for specified employees previously laid-off due to a local, state, or federal declaration of a public health-related state of emergency. It would require specified employers to offer the same or similar jobs to laid off employees or those which the laid off employee could be trained to do, based on seniority. The bill additionally would require employers who hire an individual other than a laid-off employee to provide that laid-off employee with the name of the individual who was hired and all the reasons for that decision. It would also require successor employers in these specified industries, regardless of the existence of a state of emergency, to give preference in hiring to employees of the incumbent employer by seniority. I recognize the real problem this bill is trying to fix-to ensure that workers who have been laid off due to the COVID19 pandemic have certainty about their rehiring and job security. But, as drafted, its prescriptive provisions would take effect during any state of emergency for all layoffs, including those that may be unrelated to such emergency. Tying the bill's provisions to a state of emergency will create a confusing patchwork of requirements in different counties at different times. The bill also risks the sharing of too much personal information of hired employees. There must be more reasonable tools to effectively enforce the recall provisions. **Finally, the hospitality industry and its employees have been hit hard by the economic impacts of the pandemic. I believe the requirements of this bill place too onerous a burden on employers navigating these tough challenges, and I would encourage the legislature to consider other approaches to ensure workers are not left behind**. Sincerely, Gavin Newsom"

AB 1074 basically ignores the Governor's concerns by proposing the same burdensome approach as last year.

AB 1074 Does Not Eliminate All Privacy Concerns Raised by AB 3216:

Another reason Governor Newsom vetoed AB 3216 was due to privacy concerns. If an employer chose not to re-hire a laid off employee, the employer was required to issue a written disclosure including the names of all workers who were hired instead and all of the reasons why those workers were hired.

While **AB 1074** eliminates the requirement to disclose the hired workers' names, the employer must still issue a written disclosure about the hired workers, including how long any hired workers had been employed previously and all of the reasons those workers were hired. The bill therefore still requires employers to provide, in writing, personal information about those hired workers to a third-party. It would not be difficult for a laid-off employee to figure out which one of their former co-workers was hired in their place. If the laid-off employee chose to file a claim with the Labor Commissioner or a PAGA claim challenging the employer's decision, those individuals would surely be brought into those claims through no fault of their own and find their identities revealed.

AB 1074 Raises Significant Constitutional Concerns and the Legality of Similar Local Ordinances is Being Challenged Through Litigation:

The "right of recall" provisions of **AB 1074** also raise significant legal and constitutional concerns. Any law that substantially impairs pre-existing contractual obligations violates the contract clauses of both the federal and California Constitutions.

First, this bill interferes with at-will employment. The proposal creates a novel, long-lasting retroactive right. Existing law does not recognize such a broad statutory right of recall. Quite the opposite – under California law and, absent an agreement otherwise, all "employment may be terminated at the will of either party on notice to the other." Labor Code Section 2922. Nearly every employment agreement in California either impliedly or expressly recognizes the at-will nature of the relationship. Employers hire workers assuming that, if the viability of their business was threatened, they could lay off these workers without granting them a legal right to bring a PAGA claim or file a claim with the Labor Commissioner. **AB 1074** would be an impermissible, fundamental change to the nature of at-will employment under California law and runs afoul of state and federal Constitutional provisions barring any law that impairs the obligation of pre-existing contracts.

Second, this bill interferes with severance packages offered to employees who were laid off due to COVID-19. Last year, some employers offered severance packages to employees impacted by the pandemic in

exchange for a statutory release of claims. **AB 1074** undermines those agreements and the consideration paid by the employer in exchange for that contract. Some cities, like San Francisco, specifically exempted employees who signed severance agreements from the scope of its recall requirement.

In addition, several aspects of the proposal may be preempted by federal law, (since the bill contains a broad collective bargaining agreement waiver and other provisions that may abrogate existing collective bargaining agreement). In sum, the statutory right of recall contained in **AB 1074** is legally suspect. There is litigation pending against a similar San Diego local ordinance challenging that ordinance on the grounds that it violates the contracts clause and due process clause of the federal and California constitution, is preempted by the Labor Management Relations Act, and violates Article XI of the California Constitution.

AB 1074 Establishes New PAGA Liability That Will Cripple Businesses:

Because **AB 1074** establishes a new section of the Labor Code, any violation would subject a business to expensive liability under the Labor Code Private Attorneys General Act (PAGA). Even where an employer chooses not to rehire a laid-off employee and provides the required written notice explaining its rationale, a worker could file a PAGA action challenging the employer's decision. PAGA liability also applies even for minor or technical violations and requires no showing of harm to the employees. Therefore, covered employers will be subject to costly PAGA liability even for minor mistakes in complying with a confusing and complex new rehire requirement. Employers cannot afford PAGA liability over even minor errors at the worst possible time, when they are attempting to reopen and get people back to work.

AB 1074 Is Less About Protecting Workers and More About Preserving Union Status:

Despite its lofty promises about "protecting workers," **AB 1074** is part of a longstanding effort by organized labor to enact legislation to protect incumbent unions and to recruit employees in these unions. Over the last two decades, there have been numerous efforts, some successful, to enact legislation requiring "worker retention" and similar requirements to those proposed in **AB 1074**. For example, AB 350 (Solorio) from 2011 proposed a worker retention requirement related to building services contracts similar to that contained in **AB 1074**. AB 350 failed passage on the Senate Floor.

These previous legislative efforts, as well as the proposed industries covered under **AB 1074** (which are all union priority industries), illustrate what this proposed legislation is really about. **AB 1074** is designed to ensure that an incumbent union that has been elected as the bargaining representative through the proper procedures for the prior contractor, will remain the bargaining representative for the subsequent employer. Under the "successor employer" doctrine, a subsequent employer who (1) hires the majority of its predecessor's employees; and (2) is generally in the same business, must recognize the incumbent union and bargain with it in good faith. *See NLRB v. Burns Int'l Security Services, Inc*., 406 U.S. 272, 281 (1972). Because **AB 1074** mandates that subsequent employers recall the predecessor's employees and also adds hotel workers to Labor Code section 1060, it would allow the incumbent union to demand recognition of its status as the bargaining representative. We believe the decision of whether or not to have a union in the workplace should be left to the employers and employees, after following the proper procedures outlined by the National Labor Relations Act. Neither party should be forced into such a relationship.

Preserving the union collective bargaining status in industries with high union density may be a matter that policymakers agree or disagree with. But policymakers should be open and transparent about the intended goal of this legislation – and not do so under the cover of protecting workers during the COVID-19 crisis.

We understand that these are unprecedented times and that policymakers are striving to ensure that constituents and employees are provided certainty and protection during the current crisis and similar emergencies that may develop in the future. However, it is critical to remember that many businesses and their owners are themselves casualties of this economic shutdown. The solution is not to saddle them with a new and unworkable mandate that will slow their recovery and re-opening, and subject them to extensive PAGA liability at the worst possible moment.

For these and other reasons, we respectfully **OPPOSE AB 1074** as a **JOB KILLER.**

cc: Stuart Thompson, Office of the Governor
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