CalChamber
CALIFORNIA CHAMBER OF COMMERCE

January 12, 2017

The Honorable Lorena Gonzalez Fletcher
California State Assembly
State Capitol Room #2114
Sacramento, CA 95814

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

Dear Assembly Member Gonzalez Fletcher:

The California Chamber of Commerce respectfully **OPPOSES** your **AB 5 (Gonzalez Fletcher)**, 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, will 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 limits 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, before 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 unnecessarily 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 skill and experience 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 on 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

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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.

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

AB 5 Is Inconsistent with Existing Law:

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 their 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 law.

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 a 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 prohibits 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 against 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 local 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.**

Sincerely,

Jennifer Barrera
Senior Policy Advocate

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

JB:ll