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CALIFORNIA RESTAURANT ASSOCIATION
PREPARE TO BE INSPIRED.

AB 1897 (HERNANDEZ) - JOB KILLER



June 16, 2014

TO: Members, Senate Committee on Judiciary

**SUBJECT: AB 1897 (HERNANDEZ) LABOR CONTRACTING: CLIENT LIABILITY
SCHEDULED FOR HEARING – JUNE 24, 2014
OPPOSE – JOB KILLER**

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE AB 1897 (Hernandez)**, as amended May 28, 2014, which has been identified as a **JOB KILLER**, as it forces one company to essentially insure the wage and hour obligations, workers' compensation coverage, and occupational health and safety duties of a separate employer's employees, which will discourage the use of contractors and their employees.

AB 1897 Holds an Innocent Business Liable for the Employment Obligations of Another Employer:

Recent amendments exempted small businesses, motion picture payroll services, hiring halls, and non-profit community organizations from the onerous provisions of this bill. **However**, the overwhelming majority of employers in California will still be unfairly held liable for the wage and hour violations of another that they could neither control nor prevent. Specifically, **AB 1897** mandates that any "client employer," defined as any entity that obtains or is provided workers for labor or services from a "labor contractor," defined as an individual or entity that supplies labor or services to a client employer, shall be liable for the (1) payment of wages of the contractor's employees; (2) all contributions, including tax contributions of the contractor and its employees; (3) the contractor's worker's compensation coverage; and (4) occupational health and safety requirements. This liability under **AB 1897** is extended to an innocent third party that did not contribute to the violations, control the working conditions, control the manner of payment, dictate the employees' schedules, or even control the work environment.

Currently, a third party may be liable for the labor obligations of another employer under two legal theories: (1) joint employer liability or (2) independent contractor misclassification. The key factor for both of these analyses is that the third party exerted such **control** over the working conditions of the contractor's employees that essentially the third party acted as the real employer. See *Bradley v. California Dept. of Corrections and Rehabilitation*, 158 Cal.App.4th 1612 (2008)(state agency exerted sufficient control over individual to be considered employer for purposes of FEHA); *Martinez v. Combs* 49 Cal.4th 35 (2010)(stating that for joint employer liability, employee must prove the third party exerted

control over the working conditions of the employee); (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989) ("the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired"); *Cristler v. Express Messenger Systems, Inc.*, 171 Cal.App.4th 72 (2009) (same); *Lara v. Workers' Compensation Appeals Bd.*, 182 Cal.App.4th 393 (2010) (same). The burden to establish either theory is on the employee who is seeking to hold the third-party liable for any alleged employment violations.

AB 1897 completely ignores this long-standing common law analysis and imposes liability despite the lack of any control exerted by the third-party. For example, under **AB 1897**, a business which contracts with a delivery company for packages to be picked up and dropped off could be held liable for the delivery company's wage and hour violations or lack of worker's compensation coverage while on the third party's property, despite the fact that the business only interacted with the delivery person for a limited time each day, and neither knew nor had the opportunity to engage and prevent any violations from actually occurring. Unbeknownst to the third party business, the employee picking up or dropping off the packages could be working past his required 30-minute meal period, or could be working over his/her eight hours, neither of which the third party business knew or controlled. However, under **AB 1897**, the third party business would unfairly be held liable for these violations. Such an expansion of liability to innocent parties is simply unreasonable and unprecedented.

AB 1897 Will Create Significant Litigation:

As a part of the Labor Code, any violation of **AB 1897** will trigger a potential representative action under the Labor Code Private Attorney General Act (PAGA), Labor Code Section 2699, *et seq.*, thereby expanding the threat of onerous litigation against any third party that utilizes contractors as a part of its usual course of business. To the extent a third party is held liable under PAGA for the employment obligations of another, there will unquestionably be a second lawsuit for indemnity between the third party and actual employer.

The judicial branch has suffered severe budget cuts over the last three years, with multiple courthouses shut down and drastic staff reductions, thereby significantly delaying the time it takes for civil disputes to be resolved. Forcing an innocent third party to pursue litigation that may take years in order to recover monies paid out for the violations of another is simply unfair.

Adequate Protections Already Exist for Documented Problems With Contracting:

For those industries in which there has been documented evidence of unlawful contracting practices and abuse of contracted labor, the legislature has already enacted laws to address and prevent such abuses. Specifically, for several industries, including farm labor, garment, construction, security guards, janitorial, and, most recently, warehouse workers, Labor Code Section 2810 holds the entity that contracts for workers in those industries liable if the contract for such labor does not include the following: (1) a description of the total hours to be worked, the total wages to be paid, and the dates of payment; (2) the worker's compensation policy and insurance carrier information; (3) the employer tax identification number; (4) the address of where the work will be performed; and, (5) the name, address, and telephone number of the person or entity through whom the labor or services are to be provided. **AB 1897** expands liability to all industries and all individuals who contract for labor or services, despite the lack of any evidence that there is a need beyond the industries already regulated.

Moreover, Labor Code 2810.5, which was just enacted in 2012, requires all employers, including temporary staffing agencies, to provide at the time of hire a notification of the following information: (1) the name and address of the employer and, if a temporary staffing agency, the location of where the employee will be performing work; (2) the telephone number of the employer; (3) the name and address of the worker's compensation carrier; (4) the employee's rate of pay; and, (5) the regular pay date. This notification specifically addresses and combats the claim made by proponents that temporary staffing employees are not provided with such important information. Accordingly, such a drastic measure as **AB 1897** is unnecessary given current protections in the law.

For these reasons, we are **OPPOSED** to **AB 1897**.

Sincerely,

California Chamber of Commerce
Agricultural Council of California
Associated Builders and Contractors of California
Associated General Contractors
Building Owners and Managers Association of California
California Ambulance Association
California Asian Chamber of Commerce
California Association of Winegrape Growers
California Bankers Association
California Business Properties Association
California Chapter of American Fence Association
California Citrus Mutual
California Coalition on Workers' Compensation
California Cotton Growers Association
California Cotton Ginners Association
California Employment Law Council
California Farm Bureau Federation
California Fence Contractors' Association
California Grape and Tree Fruit League
California Grocers Association
California Hospital Association
California Hotel and Lodging Association
California Landscape Contractors Association
California League of Food Processors
California Manufacturers and Technology Association
California Newspaper Publishers Association
California Pool and Spa Association
California Restaurant Association
California Retailers Association
California Trucking Association
Chambers of Commerce Alliance of Ventura and Santa Barbara Counties
Civil Justice Association of California
Custom Logistics & Delivery Association
Desert Hot Springs Chamber of Commerce & Visitors Center
El Dorado County Chamber of Commerce
Family Winemakers of California
Flasher Barricade Association
Fullerton Chamber of Commerce
Greater Bakersfield Chamber of Commerce
International Council of Shopping Centers
International Franchise Association
International Warehouse Logistics Association
Marin Builders Association
NAIOP of California, the Commercial Real Estate Development Association
National Federation of Independent Business
Oxnard Chamber of Commerce
Redondo Beach Chamber of Commerce
San Diego East County Chamber of Commerce
San Gabriel Valley Legislative Coalition of Chambers
San Jose Silicon Valley Chamber of Commerce
Santa Clara Chamber of Commerce and Convention-Visitors Bureau

Simi Valley Chamber of Commerce
South Bay Association of Chambers of Commerce
Southwest California Legislative Council
The Chamber of Commerce of the Santa Barbara Region
The United Chambers of Commerce of the San Fernando Valley
Visalia Chamber of Commerce
Western Agricultural Processors Association
Western Growers Association
Wine Institute

cc: Camille Wagner, Office of the Governor
The Honorable Roger Hernandez
Tara Welch, Senate Committee on Judiciary
Cory Botts, Senate Republican Caucus
Senate Floor Analyses
District Offices, Members, Senate Committee on Judiciary
Department of Industrial Relations
Labor and Workforce Development Agency