April 11, 2022

TO: Members, Senate Committee on Labor, Public Employment and Retirement

SUBJECT: SB 1458 (LIMON) WORKERS' COMPENSATION: DISABILITY BENEFITS: GENDER DISPARITY
OPPOSE – AS INTRODUCED FEBRUARY 18, 2022

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE** your **SB 1458 (Limón). SB 1458** is likely unconstitutional, undermines the workers' compensation system, and conflicts with existing law.

SB 1458 Likely Violates Both the California and Federal Constitutions

While Section 4 of Article XIV of the California Constitution "grants to the Legislature 'plenary power, unlimited by any provision of this Constitution to establish and enforce a complete system of workers' compensation," that power is not absolute. *See Yosemite Lumber Co. v. Industrial Acc. Commission of Cal.*, 187 Cal. 774, 780 (1922) ("Nothing is added to the force of the provision by the use of the word 'plenary.' If the Legislature has power to do a certain thing, its power to do it is always plenary. It is merely surplus verbiage.") Not only are there limitations to that power, but also the California Legislature is of course still subject to the federal Constitution.

Federal Constitution: SB 1458 mandates an increase in workers' compensation benefits for workers solely based on sex. If a man and a woman make the same salary and suffer the same injury, the claims administrator may be required to pay the woman higher workers' compensation benefits because of her sex alone.[1] No matter how well-intentioned, this raises several constitutional concerns:

[1] While on its face the bill would increase either gender's benefits based on the DFEH report or national wage averages, the author's intent and likely outcome is the bill would result primarily in an increase of women's workers' compensation benefits.

Equal Protection Clause: The Equal Protection Clause prohibits states from denying persons equal protection of law. This is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Laws that differentiate between people based on characteristics like sex, race, or national origin must survive a higher level of judicial scrutiny than other laws.

Where a law treats people differently based on sex alone, the law is unconstitutional unless it is substantially related to a sufficiently important governmental interest. Courts look at how well the law serves the stated objective and whether there is a less discriminatory approach available. While wage disparity is an important government interest, the bill is likely to fail because of its approach. First, the bill does not address the underlying issue. It does not seek to identify workers who are being discriminated against in their pay or increase their wages. Rather, it focuses on a sliver of the population, injured workers, and provides an increase to one obscure benefit that the vast majority of workers will never receive.

Second, the bill is based solely on assumptions, not fact. The proposed increase in workers' compensation benefits is not based on a finding that there is indeed discrimination, but rather on the difference in average pay between men and women at the company as shown in the company's DFEH[2] pay data report. That report itself does not show pay disparity. It instead asks employers to categorize employees across broad job categories and broad pay scales. The EEOC, which developed the report template, has explicitly stated that it "d[id] not intend or expect that this data will identify specific, similarly situated comparators or that it will establish pay discrimination as a legal matter."[3] The report also does not capture the legal, bona fide reasons under Labor Code Section 1197.5 for which there may be pay differentials between men and women.

For companies that do not file a pay data report with the DFEH, the increase in pay is even more tangential: it is based on the *national average* pay differential between men and women. It is unlikely that **SB 1458** would pass the required heightened level of scrutiny if challenged.

Due Process Clause: The Due Process Clause prohibits the states from depriving a person or entity of procedural protections. **SB 1458** deprives employers of procedural protections by presuming that every single female employee or every single male employee is being discriminated against in their pay. The company is not afforded any rights or procedures to determine whether that is actually true or have that issue adjudicated.

Instead, **SB 1458** automatically increases all workers' compensation benefits for workers of the same sex based on that assumption. For example, a company that does not discriminate will have their workers' compensation benefits payout increased either based on the national average wage rates or because their report shows that women make less on average than men, regardless of the fact that no unlawful or unjust conduct occurred.

Even if it is not found to be unconstitutional, **SB 1458** is fundamentally flawed. The bill applies wage averages to all workers, regardless of their specific circumstances or whether there is indeed discrimination occurring. Essentially, it presumes that every man or woman is being unlawfully discriminated against and to the same degree. This bill does not account for an employee's longevity at the employer or special certifications or experience that result in higher earnings from one employee over the other. Further, it does not take into consideration any collective bargaining agreements and/or public agency salary schedules.

California Constitution: Article XIV, Section 4 provides that the Legislature has the power enact workers' compensation laws to "create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability". Courts have deemed unconstitutional laws that exceed the bounds of this authority.

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[2] Additionally, those reports are confidential, so a claims administrator has no access to them.

[3] FR-2016-07-14.pdf (thefederalregister.org)

For example, in *Six Flags, Inc. v. Workers' Comp. Appeals Bd.*, 145 Cal.App.4th 91 (Cal. App. 2006), the court considered whether the Legislature could statutorily extend workers' compensation death benefits to heirs who were not dependents. The court held that the statute was unconstitutional because it exceeded the scope of the Legislature's power:

> "…the plenary power clause of article XIV, section 4, cannot be used to expand the Legislature's power beyond the purposes set forth in the other sections of article XIV, section 4, that is, to compensate workers or their dependents if the worker dies in the course and scope of employment."

Similarly, here, **SB 1458** likely exceeds the Legislature's authority. The purpose of **SB 1458** is to address one consequence of gender wage disparity (notably without actually adjudicating whether such a disparity actually exists), not to create or enforce a liability to compensate a worker for injury. The underlying purpose of **SB 1458** is wholly separate from the intent and operation of the workers' compensation system.

<u>SB 1458 Undermines Fairness of the Workers' Compensation System</u>

California's workers' compensation system provides several types of benefits. Indemnity benefits are intended to offset an workers' loss of income that results from a workplace injury. There are two main types of indemnity benefits – temporary disability benefits and permanent disability benefits. Those benefits are calculated by determining an employee's average weekly wage. The Labor Code sets forth specific formulas as to how to make these calculations that are adjusted annually. Those formulas include statutory minimums and maximums in benefits. The system is designed to provide claims adjustors with a fair means by which to calculate benefits so that injured workers are treated the same.

SB 1458 instead adjusts that formula for some workers based on one characteristic: sex. Multiple examples show how this would generate inequitable results, and potential discrimination, between two women who suffer the same injury and earn the same wages:

Example 1:

- Woman 1 works for a company with 120 employees whose DFEH report shows that women make on average 5% less than men. Her benefits increase by 5%.
- Woman 2 works for a company with 10 employees, all of whom are female, who does not file a DFEH report. The national average difference in pay for her occupation is 20%. Her benefits increase by 20%.

Example 2:

- Woman 1 works for a company with 1,000 employees whose DFEH report shows that women make on average 5% more than men. Her benefits remain unchanged.
- Woman 2 works for a company with 10 employees, all of whom are female, who does not file a DFEH report. The national average difference in pay for her occupation is 20%. Her benefits increase by 20%.

Example 3:

- Woman 1 works for a company with 1,000 employees whose DFEH report shows that women make on average 5% more than men. Her benefits remain unchanged.
- Woman 2 works for a company with 90 employees. If the company did file a DFEH report, it would show that women, on average, make the same as men. The national average difference in pay for her occupation is 20%. Her benefits increase by 20%.

Consider then, a man who makes the same wages as the two women above and suffers the same injury. If he works with Woman 1, then in example 2 he would have a 5% increase in benefits while Woman 1's benefits remain unchanged and Woman 2's increase by 20%.

The above examples demonstrate how arbitrary this bill would operate in practice. Even if amendments were taken to key all increases off of the national averages, which the sponsors have suggested as a

potential alternative, the underlying flaw in this bill remains the same: that the proposed benefit increases rest on pure assumptions, not facts about whether an employee is being fairly paid.

SB 1458 Conflicts with Labor Code Section 4453

Labor Code Section 4453 provides for minimum and maximum wages for purposes of temporary and permanent total disability payments as well as for permanent partial disability payments. If a worker were entitled to an increase under **SB 1458** that pushed their payment total over those statutory maximums, this would create a conflict between the two provisions.

Further, **SB 1458** does not address workers who have multiple employers and would therefore either have different DFEH reports or it is possible that one files a report and the other does not. This creates further conflicts with Labor Code Section 4453(c)(2), which provides:

> Where the employee is working for two or more employers at or about the time of the injury, the average weekly earnings shall be taken as the aggregate of these earnings from all employments computed in terms of one week; but the earnings from employments other than the employment in which the injury occurred shall not be taken at a higher rate than the hourly rate paid at the time of the injury.

SB 1458 Creates Conflicts Between State Agency Authority

The Workers' Compensation Appeals Board (WCAB) presently has jurisdiction over workers' compensation benefits. However, the Department of Industrial Relations (DIR) and DFEH are tasked with enforcement of the Equal Pay Act and Fair Employment and Housing Act, which govern the underlying issue of pay discrimination. If there were any sort of dispute over whether a worker should be owed increased benefits, it is unclear which agency properly would have jurisdiction because neither department is expected to deal with both workers' compensation and alleged pay discrimination.

For these reasons, and others, we respectfully **OPPOSE** your **SB 1458.**

Sincerely,

Ashley Hoffman
Policy Advocate
California Chamber of Commerce

American Property Casualty Insurance Association
Association of California Healthcare Districts
BETA Healthcare Group
California Association of Joint Powers Authorities
California Association of Winegrape Growers
California Chamber of Commerce
California Farm Bureau
California Grocers Association
California Hospital Association
California Landscape Contractors Association
California League of Food Producers
California Special Districts Association
California State Association of Counties
Fountain Valley Chamber of Commerce
Greater High Desert Chamber of Commerce
Hayward Chamber of Commerce
Housing Contractors of California
La Cañada Flintridge Chamber of Commerce

National Federation of Independent Business
Oceanside Chamber of Commerce
Public Risk Innovation, Solutions and Management (PRISM)
Rancho Cordova Area Chamber of Commerce
Rancho Mirage Chamber of Commerce
Roseville Area Chamber of Commerce
Rural County Representatives of California
Western Growers Association

cc: Legislative Affairs, Office of the Governor
Alma Perez, Senate Labor, Public Employment and Retirement Committee
Jimmy Wittrock, Office of Senator Limón
Cory Botts, Senate Republican Caucus

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