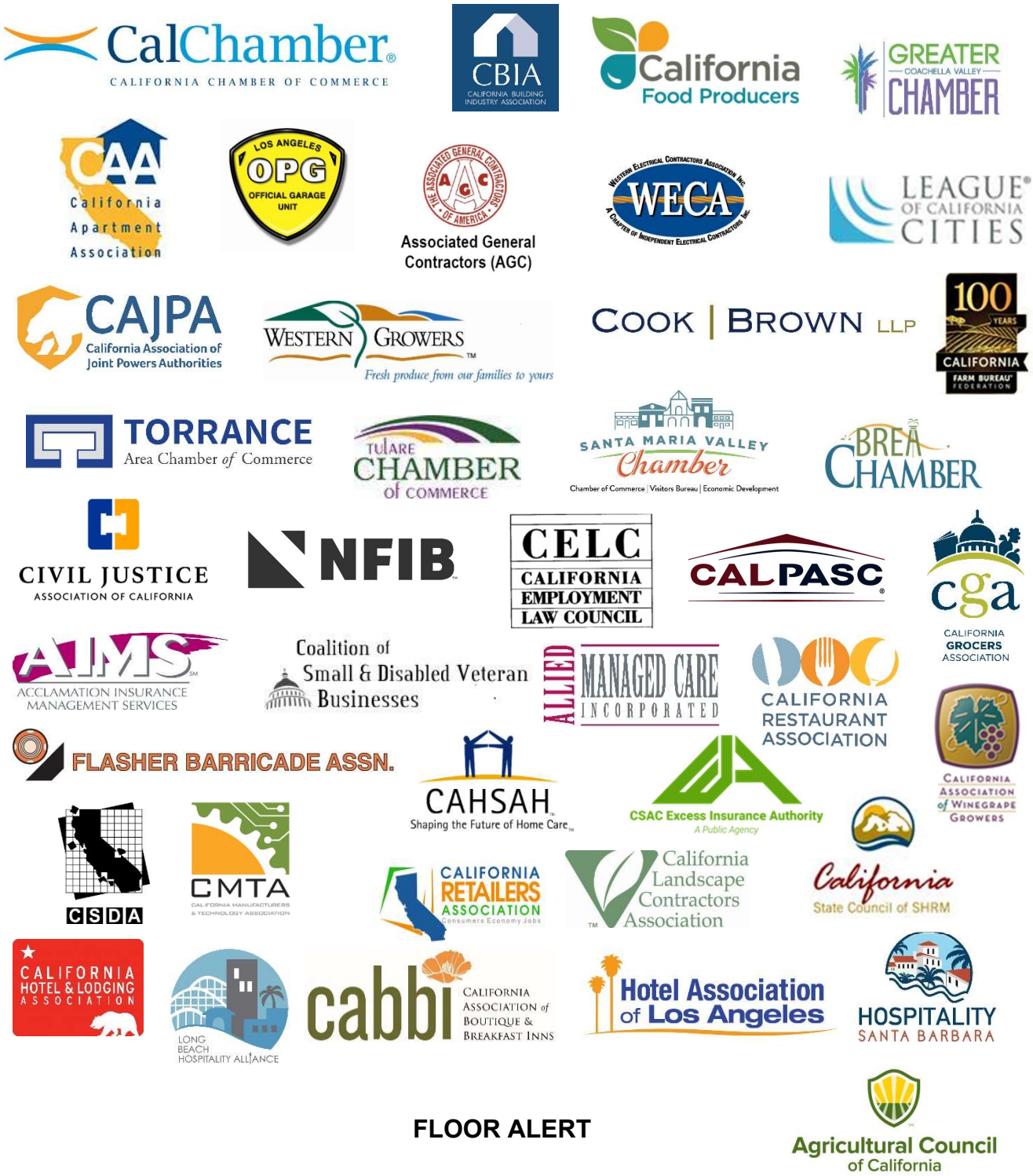

FLOOR ALERT

June 4, 2020

TO: Members, California State Assembly

FROM: Ben Ebbink
California Chamber of Commerce

Acclamation Insurance Management Services
Agricultural Council of California

Allied Managed Care
Associated General Contractors
Brea Chamber of Commerce
California Apartment Association
California Association for Health Services at Home
California Association of Boutique & Breakfast Inns
California Association of Joint Powers Authorities
California Association of Winegrape Growers
California Building Industry Association
California Employment Law Council
California Farm Bureau Federation
California Food Producers
California Grocers Association
California Hotel & Lodging Association
California Landscape Contractors Association
California Manufacturers and Technology Association
California Professional Association of Specialty Contractors
California Restaurant Association
California Retailers Association
California Special Districts Association
California State Council of the Society for Human Resource Management (CalSHRM)
Civil Justice Association of California
Coalition of Small and Disabled Veteran Business
Cook Brown, LLP
CSAC Excess Insurance Authority
Flasher Barricade Association
Greater Coachella Valley Chamber of Commerce
Hospitality Santa Barbara
Hotel Association of Los Angeles
League of California Cities
Long Beach Hospitality Alliance
National Federation of Independent Business
Official Police Garages of Los Angeles
Santa Maria Valley Chamber of Commerce
Torrance Area Chamber of Commerce
Tulare Chamber of Commerce
Western Electrical Contractors Association
Western Growers Association

SUBJECT: AB 1947 (KALRA) EMPLOYMENT VIOLATION COMPLAINTS: REQUIREMENTS: TIME
OPPOSE

The California Chamber of Commerce and the organizations listed above respectfully **OPPOSE AB 1947 (Kalra)**, as it undermines the essence of the Division of Labor Standards Enforcement's (DSLE) complaint process by requiring a one-sided attorney's fee provision that will incentivize additional litigation.

DLSE Process Currently Provides Safeguards for Employees:

Labor Code Section 1102.5 protects an employee who provides information and has reason to believe the information discloses a violation of the law. These employees are referred to as "whistleblowers". Whistleblower retaliation occurs when an employee engages in this lawful activity yet suffers an adverse employment action because he or she engaged in this protected activity. Labor Code Section 98.7 sets forth a detailed process regarding how these complaints are handled. These procedures have safeguards for employees to ensure that there is adequate opportunity to present evidence in a timely and efficient manner and pursue an appeal or litigation if necessary.

Once a complaint for retaliation under Labor Code Section 1102.5 has been filed, the worker is contacted by a retaliation complaint investigator who conducts an investigation interviewing the worker, the employer and relevant witnesses. The investigator helps employees through the process advising them of their legal rights. If a settlement conference is agreed upon, the investigator advises the employee and negotiates on his or her behalf.

Once the investigation is complete, if no settlement is reached, the investigator will prepare a summary for the Labor Commissioner. The Labor Commissioner will then issue a determination. The investigator and the Labor Commissioner help guide and advise the employee throughout the entire complaint proceeding.

AB 1947 Will Undermine the Essence of the DLSE Process:

AB 1947 will undermine the DLSE process by adding one-sided attorney's fee recovery for an employee who prevails in a whistleblower action. The DLSE does not have exclusive jurisdiction over whistleblower complaints. Instead, the DLSE process provides an alternative to civil litigation. The decision is up to the employee and, if the employee decides to file a complaint with the Labor Commissioner, it is usually because this is the less contentious approach. However, if **AB 1947** were to be enacted, then more employees would file their claims in civil court rather than utilize the DLSE process.

This is because under **AB 1947** the employee has nothing to lose[1] since the employee is the only one entitled to attorney's fee recovery. Even if the employer successfully prevails upon a meritless claim, the employer cannot recover attorney's fees. Under current law, an employee can recover attorney's fees for whistleblower actions filed in civil court, but the employee is not explicitly entitled to them; as a result, there is still risk involved in filing a civil claim. *See* Code of Civ. Proc. § 1021.5; *see also Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811, 829.

Ambiguity of AB 1947 Potentially Allows Attorney's Fee Recovery Through Administrative Process:

There is also ambiguity in the language of **AB 1947** which potentially allows an employee to recover attorney's fees through the administrative action. This would make the DLSE process itself adversarial since the employee will be motivated to hire an attorney to represent them throughout the administrative proceeding, rather than the DLSE process, which serves as the less contentious alternative to civil litigation.

AB 1947 Is Explicitly One-Sided:

California is already widely perceived as having a hostile litigation environment for employers. One factor that contributes to this negative perception is high damage awards and the threat of attorney's fees in civil litigation that often dwarf the financial recovery the plaintiff actually receives. We do not believe attorney's fees should be added; however, if they are added, they should not be one-sided.

Instead, a two-way attorney's fee-shifting provision provides a level playing field for litigation that will help deter any frivolous cases from being filed due to concern that the litigant could ultimately pay for the costs of litigation, including attorney's fees. Therefore, we request that, if this bill moves forward with the attorney's fee provision, it applies equally to plaintiffs and defendants.

Both parties should have some financial risk in pursuing litigation in order to minimize frivolous lawsuits that overburden the courts' dockets and preclude valid claims from being resolved on a timely basis. **AB 1947** overturns this balance by limiting an employer's ability to recover its attorney's fees, which could create an incentive for more potentially frivolous litigation.

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[1] It is standard in employment litigation for a plaintiff's attorney to be paid according to a contingency fee arrangement, meaning the employee will only pay for the attorney's services if the employee receives a financial award through settlement or trial. If the litigation is ultimately unsuccessful and the plaintiff receives no monetary compensation, then the attorney is never compensated for their time. This means that there is typically no immediate out-of-pocket expense for attorney's fees for an employee to pursue the litigation.

For these reasons, we must **OPPOSE AB 1947**.

cc: Stuart Thompson, Office of the Governor
Zena Hallak, Office of Assembly Member Kalra
Megan Lane, Assembly Committee on Labor and Employment
Lauren Prichard, Assembly Republican Caucus

BME:ll