March 27, 2019

The Honorable Rob Bonta
California State Assembly
State Capitol, Room 2148
Sacramento, CA 95814

SUBJECT: AB 628 (BONTA) EMPLOYMENT: VICTIMS OF SEXUAL HARASSMENT: PROTECTIONS
OPPOSE – AS INTRODUCED FEBRUARY 15, 2019

Dear Assembly Member Bonta:

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE** your **AB 628 (Bonta)**, which would create inconsistent definitions of sexual harassment under the Labor Code and Government Code, impose an unlimited leave of absence on employers for employees and their family members, and impose another pathway for costly litigation against employers for issues that are already protected under the Fair Employment and Housing Act (FEHA). While we fully support efforts to eliminate harassment in the workplace, this proposal will create significant challenges for employers to manage their workforce and comply with existing anti-harassment requirements.

AB 628 Creates an Inconsistent Definition of Sexual Harassment in the Labor Code Versus the Government Code That Will Create Confusion:

AB 628 amends current law to provide protected leave for employees and family members of "sexual harassment" victims.

FEHA (*see* Government Code Sections 12900, *et seq.*) currently defines and regulates sexual harassment in the workplace. While sexual harassment is always inappropriate, it is not always unlawful. In order for sexual harassment to be actionable, it must be either *quid pro quo* harassment or harassment that creates a hostile work environment. *Quid pro quo* harassment occurs when a supervisor trades a work benefit for sexual favors. Sexual harassment that creates a hostile work environment occurs when the behavior is so severe or pervasive it alters the conditions of the work environment. Sporadic, isolated events are not enough to establish a hostile work environment under FEHA unless sufficiently severe. *See Brennan v. Townsend & O'Leary Enterprises, Inc.,* 199 Cal.App.4th 1336 (2011). What constitutes actionable harassment is determined by the Department of Fair Employment and Housing (DFEH) during its investigation of a claim, or in civil court if DFEH does not make a determination.

Examples of conduct that can lead to sexual harassment include:

> Unwanted sexual advances, or visual, verbal, or physical conduct of a sexual nature, including: (A) leering, making sexual gestures, displaying of sexually suggestive objects, pictures, cartoons, or posters; (B) derogatory comments, epithets, slurs, or jokes, verbal abuse of a sexual nature, or graphic verbal commentaries or sexually degrading words used to describe an individual; (C) touching, assault, impeding, or blocking movements; (D) offering employment benefits in exchange for sexual favors; or (E) making or threatening retaliatory action after receiving a negative response to sexual advances.

Instead of simply adopting the standard set forth in FEHA for consistency, **AB 628** only includes the examples of what could be considered sexual harassment, which does not distinguish between actionable harassment versus inappropriate behavior. For example, the bill defines sexual harassment to include leering or the displaying of cartoons. Being shown an inappropriate cartoon on an isolated occasion is inappropriate but does not likely constitute harassment. Under **AB 628**, this one incident or even an allegation that the incident occurred, would be enough to justify an unlimited leave of absence for the employee and employee's family members based upon the limited definition of "sexual harassment." While this behavior is unacceptable, it is not legally actionable and should not provide a protected leave of absence.

Extending the Unlimited Leave to Family Members Will Create a Significant Burden on all Employers:

AB 628 extends unlimited job protected leave to immediate family members of victims. Immediate family member is broadly defined to include spouse, child, stepchild, foster parent, mother, stepmother, father, or stepfather, registered domestic partner, grandparent, grandchild, or sibling. Under this bill, an employee in Sacramento could allege that they were "sexually harassed" by someone on their way to work when that stranger accidentally brushed up against them. Under **AB 628**, the employee could then take job-protected leave as well as the employee's brother in San Diego. The employee and the employee's brother would not need to provide any type of verification from a medical professional or other documentation, so long as they provide their employer with advance notice of the need for time off. Thus, this type of leave will create a significant burden on employers to accommodate and is clearly ripe for abuse.

Employees are already entitled to take a leave of absence for the medical needs of a family member under California's Paid Sick Leave law, the California Family Rights Act (CFRA) or the federal Family and Medical Leave Act (FMLA). Even a victim of actual sexual harassment, as defined under FEHA, who has a medical condition as a result of the harassment, could take job protected leave for that condition. Expanding an unlimited, mandatory leave of absence for all employees and family members, is simply too high of a burden on employers.

AB 628 Will Unnecessarily Cause Confusion and Expand Employer Liability:

As previously discussed, FEHA regulates sexual harassment in the workplace and already provides protections to victims. However, **AB 628** places sexual harassment leave in the Labor Code. This provision is misplaced and leaves the employer trying to decipher two potentially conflicting statutes.

Additionally, **AB 628** unnecessarily expands employer liability. FEHA already allows victims who prevail in a sexual harassment suit to obtain compensatory damages, injunctive relief, declaratory relief, punitive damages, and attorney's fees. If sexual harassment protection is added to the Labor Code**,** employers are not only exposed to FEHA remedies, but also now lawsuits under the Private Attorneys General Act (PAGA).

PAGA allows an individual to pursue a "representative action" on behalf of similarly aggrieved employees without being subject to the strict filing requirements of a class action. If there are multiple Labor Code violations, penalties are stacked and very quickly add up. In addition, if the employee recovers any dollar amount, the employee is entitled to attorney's fees, which adds another layer of cost onto the employer. Therefore, sexual harassment leave should be moved to the Government Code in order to prevent confusion for employers and unnecessary liability.

AB 628 Potentially Extends the Statute of Limitations for Sexual Harassment Discrimination and Retaliation from One to Three Years, Which Contradicts the Current Statute of Limitations Under FEHA:

AB 628 contradicts the current statute of limitations prescribed by FEHA for sexual harassment discrimination and retaliation. As expressly stated in Government Code Section 12965(b), for an individual to file a discrimination, harassment or retaliation complaint in civil court, he or she must first exhaust his or her administrative remedy by filing a claim with DFEH. The current statute of limitations for filing a claim with DFEH is *one year* from the most recent harassing or discriminatory event. *See* Gov't. Code § 12965(b).

By placing sexual harassment protections in the Labor Code, **AB 628** potentially triples the statute of limitations for discrimination and retaliation complaints from one year to three years. *See* Code Civ. Proc. §§ 335, 338. Additionally, as previously discussed, **AB 628** provides the Labor Commissioner with jurisdiction over these complaints. We believe jurisdiction over sexual harassment complaints should remain with DFEH in order to prevent confusion and contradictory regulations.

Employers Cannot Be Required to Guarantee Confidentiality:

AB 628 requires employers to maintain confidentiality of an employee requesting leave under this provision. However, sexual harassment complaints are much different from domestic violence, sexual assault or stalking because they often occur in the workplace. When an accusation of sexual harassment is made, employers have a legal duty to conduct an investigation. Investigations must follow certain parameters to be considered legally adequate and the DFEH has implemented these requirements through regulations. *See* Cal. Code Reg. tit. 2 § 11023.

Per these regulations, once a complaint of harassment is made, employers must provide a timely response and conduct an impartial and timely investigation by qualified personnel. This means interviewing the victim, the alleged harasser and any potential witnesses. Therefore, an employer cannot ensure confidentiality if they are needing to interview and notify their own employees about what is going on.

Employers Will Be in Violation of FEHA If They Are Prohibited from Conducting an Investigation:

AB 628 requires employers to provide victims of sexual harassment with a leave of absence. However, if an employee is out on leave, the employer may not be able to conduct a timely investigation as required by FEHA. When an employee is on leave, the employee is not permitted work and the employer is prohibited from requiring the employee to work. A request to interview the employee as a part of an investigation impedes on the employee's rights regarding leave and exposes employers to possible wage and hour

lawsuits. **AB 628** does not address this issue and leaves the employer in the position of having to choose between violating FEHA's investigation requirements or violating the proposed sexual harassment protected leave.

For these reasons, we must **OPPOSE** your **AB 628**.

Sincerely,

Laura Curtis
Policy Advocate
California Chamber of Commerce

Brea Chamber of Commerce
California Ambulance Association
California Association of Joint Powers Authorities
California Farm Bureau Federation
California League of Food Producers
California Manufacturers & Technology Association
California New Car Dealers Association
California Restaurant Association
California Retailers Association
California State Association of Counties
California State Council for the Society for Human Resource Management
Camarillo Chamber of Commerce
Civil Justice Association of California
El Centro Chamber of Commerce
Greater Coachella Valley Chamber of Commerce
Greater Conejo Valley Chamber of commerce
League of California Cities
National Federation of Independent Business
North Orange County Chamber
Official Police Garages of Los Angeles
Oxnard Chamber of Commerce
Palm Desert Area Chamber of Commerce
Santa Maria Valley Chamber of Commerce
Southwest California Legislative Council
Torrance Area Chamber of Commerce
Western Growers Association

cc: Che Salinas, Office of the Governor