April 2, 2019

TO: Members, Senate Committee on Judiciary

SUBJECT: SB 142 (WIENER) EMPLOYEES: LACTATION ACCOMMODATION OPPOSED – AS INTRODUCED JANUARY 18, 2019

The California Chamber of Commerce and the organizations listed below are OPPOSED to SB 142 (Wiener), which would impose burdensome mandates upon employers regarding lactation accommodations that would expose them to costly litigation.

While we believe the bill is well intentioned, it is quite burdensome for employers and exposes employers to potential litigation traps including, but not limited to:

- Duplicating liability that already exist in the Fair Employment and Housing Act (FEHA)
- Creating new avenues for Private Attorneys General Act (PAGA) liability
- Imposing overly burdensome building code requirements

**Governor Brown Just Vetoed the Narrower Version of SB 142 Last Year.**

Governor Brown signed AB 1976 (Limón) last year which established a new mandate regarding lactation accommodations for California employers. The new law requires employers to provide a location other than a “bathroom” for an employee to express breastmilk. See Labor Code § 1031. The location must be private and in close proximity to the employee’s work area. Id. While the ink is barely dry on AB 1976, SB 142 would significantly amend that law. The legislature should allow time for AB 1976 (Limón) to be implemented before requiring new lactation accommodation requirements that expose employers to additional and significant liability.

Additionally, we are opposed to SB 142 because the bill is nearly identical to last year’s SB 937 (Weiner) as introduced. Throughout the legislative session, the business community worked diligently with the author’s office to amend SB 937. While the amendments did not alleviate all of the concerns, they at least addressed some of the issues with the bill. However, this year, the author has chosen to reintroduce this bill without including all of the agreed upon amendments.
In fact, Governor Brown vetoed SB 937, the narrower version of SB 142, stating, “I have signed AB 1976 which furthers the state's ongoing efforts to support working mothers and their families. Therefore, this bill is not necessary.”

**SB 142 Building Code Requirements Will Cost Employers $30,000 to $105,000.**

SB 142 requires installation of lactation space in specific buildings when there is a tenant improvement project. To meet the standards imposed by SB 142, it is estimated to cost employers approximately **$30,000 to $105,000** for an existing building. Additionally, it is estimated to cost employers who must comply with the building requirements approximately **$5,400 to $14,400** each year in ongoing maintenance and costs for this type of buildout. The cost may vary based on the market and property value, but the construction costs are real numbers based on lactation room buildouts required by a similar local ordinance.

**SB 142 UnnecessarilyDuplicates Retaliation Liability.**

SB 142 unnecessarily expands employer liability regarding lactation accommodation retaliation. The Fair Employment and Housing Act (FEHA) already regulates discrimination and retaliation issues involving lactation accommodations. Per FEHA, it is unlawful for an employer to retaliate against an employee who requests a lactation break or an accommodation. See Labor Code § 98.6; Gov. Code, § 12940, subd. (m)(2); Cal. Code of Regs., tit. 2, § 11035, subd. (d). However, SB 142 unnecessarily duplicates FEHA by proposing to place lactation accommodation retaliation liability in Section 1033 of the Labor Code.

In 2017, AB 569 (Gonzalez Fletcher) attempted to add provisions to the Labor Code regarding reproductive health even though reproductive health discrimination, like sexual harassment, is already prohibited by FEHA. AB 569 was vetoed by Governor Brown who stated, “I believe these types of claims should remain within the jurisdiction of the Department of Fair Employment and Housing.” In a similar manner, the liability provisions of SB 142 should not be duplicated in the Labor Code.

**SB 142 Expands Employer Civil Liability.**

SB 142 expands employer liability regarding potential rest break violations. Current state law requires employers to provide reasonable break time for employees needing to express milk. If an employee needs additional time outside of her usual paid breaks, the time must be provided, but can be unpaid. Per Labor Code Section 1031, the Labor Commissioner may issue a $100 penalty citation for failure to comply with these requirements.

However, SB 142 proposes to amend current law to state that, “The denial of reasonable break time or adequate space to express milk in accordance with this chapter shall be deemed a failure to provide a rest period in accordance with state law for purposes of Section 226.7.” Labor Code Section 226.7 provides that, if an employer fails to provide a meal, rest or recovery period, the employer must pay the employee one additional hour of pay at the employee’s regular rate of compensation for each work day that the meal or rest break is not provided. More importantly, the “one additional hour of pay” in Labor Code Section 226.7 is a wage and not a penalty. *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094 (2007).

Since Section 226.7 technically provides compensation (wages), not penalties, employees can argue that they are entitled to penalties on top of the additional wage payment. Thus, per SB 142, employers who allegedly fail to provide adequate break time for a lactation accommodation are not only exposed to FEHA remedies based on a potential claim for lactation accommodation discrimination (compensatory damages, injunctive relief, declaratory relief, punitive damages, and attorney’s fees), but also penalties.

Additionally, since SB 142 is amending the Labor Code, employers would also be exposed to Private Attorneys General Act (PAGA) liability. 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. Per PAGA, a plaintiff who suffers just one Labor Code violation may seek all PAGA penalties for any type of violation committed by that employer against any other employee creating a devastating amount of liability. *See Huff v. Securitas Sec. Servs. USA, Inc.*, 23 Cal. App. 5th 745 (2018).
Finally, the bill would add a new private right of action. While the author stated in Senate Labor Committee that he was removing this provision from the bill, those amendments are not in print yet. By adding a new private right of action, an aggrieved employee would have the option of filing a case in civil court without needing to file with the Labor Commissioner or filing a PAGA action. This private right of action includes a one-way fee-shifting provision. California is already widely perceived as having a hostile litigation environment. One factor that contributes to this negative perception is the high award and 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, it should not be one-sided. A two-way attorney’s fee-shifting provision provides a level playing field—both parties should have some financial risk in pursuing litigation in order to minimize frivolous lawsuits that overburden the courts.

SB 142 Imposes Unwarranted Documentation Requirements.

SB 142 requires employers to maintain records of a request for a lactation accommodation for 3 years and requires the employer to provide the Labor Commissioner access to those records. Thus, the employer may provide an employee a reasonable lactation accommodation but can be in violation of SB 142 if the employer simply forgets to maintain a record of the lactation accommodation request. California already has extensive document/record keeping requirements for employers, and SB 142 just adds to this existing burden.


SB 142 states that the lactation accommodation space must be “safe, clean, and free of toxic or hazardous materials” (emphasis added). However, given that the bill provides no definition of “toxic or hazardous materials,” this requirement arguably sets employers up for automatic noncompliance even if they exercise all reasonable efforts to reduce or eliminate the existence of toxic or hazardous materials in their facilities.

SB 142 requires that the employer “shall provide access to a sink with running water . . . in close proximity to the employee’s workspace.” However, in a previous subdivision, the bill states, “A lactation room or location shall not be a bathroom.” Yet, many buildings do not have sinks with running water that are not located in a restroom. Providing additional plumbing is prohibitively expensive for employers especially considering a lactation accommodation is not a permanent accommodation since most employees only need the accommodation for 6-12 months.

The Industrial Welfare Commission requires employers to provide a suitable rest facility for employees during working hours in an area separate from the toilet rooms or the work area. See id. However, SB 142 states that the facility used as a lactation accommodation must take “precedent” over other uses of the room. Therefore, simply complying with SB 142 by denying employee access to a breakroom while it is being used as a lactation space will force an employer to violate provisions of the IWC Wage Orders.

For these reasons, we OPPOSE SB 142 (Wiener).

Sincerely,

Laura Curtis
Policy Advocate
California Chamber of Commerce

Building Owners and Managers Association
California Ambulance Association
California Association of Licensed Security Agencies, Guards & Associates
California Business Properties Association
California Manufacturers & Technology Association
California Restaurant Association
California Retailers Association
California Special Districts Association
California State Association of Counties
California Travel Association
Civil Justice Association of California
Commercial Real Estate Development Association – NAIOP
CSAC – Excess Insurance Authority
Greater Coachella Valley Chamber of Commerce
Greater Conejo Valley Chamber of Commerce
International Council of Shopping Centers
Nichols, Melburg & Rosetto Architects & Engineers
Sacramento Regional Builders Exchange

cc: Che Salinas, Office of the Governor
    Cassidy Denny, Office of the Honorable Scott Wiener
    Margie Estrada Caniglia, Senate Committee on Judiciary
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