



May 5, 2017

TO: Members, Assembly Committee on Appropriations

FROM: California Chamber of Commerce
California Attractions and Parks Association, Inc.
California Business Properties Association
California Restaurant Association
California Retailers Association
California Travel Association
Chamber Alliance of Ventura and Santa Barbara Counties
Family Business Association of California
National Federation of Independent Business

**SUBJECT: AB 1099 (GONZALEZ FLETCHER) COMPENSATION: GRATUITIES
SCHEDULED FOR HEARING – MAY 10, 2017
OPPOSE**

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE AB 1099**, as amended on April 5, 2017, as it unnecessarily requires targeted businesses who allow consumers to utilize debit or credit card payments to also provide an opportunity for those consumers to provide a gratuity by debit or credit card. Failure to comply with this requirement would subject employers to costly litigation under various sections of the Labor Code, including the Labor Code Private Attorney General Act (PAGA), Section 2698 *et. seq.* Moreover, similar, but narrower legislation, was just vetoed by Governor Brown last year.

AB 1099 unfairly targets only certain California businesses including hotel/lodging establishments, car washing/polishing businesses, barbery/cosmetology businesses, massage establishments, and an “online-enabled application or platform that connects workers to customers for labor services” by requiring these businesses to allow consumers to pay a gratuity by debit or credit card if the business allows payment of services by debit or credit card. First, this requirement will create a significant administrative burden and costs for such businesses to revise all credit card and debit card receipts to ensure there is a line item available for a gratuity. Second, it will create the impression that a consumer should or is expected to leave a gratuity for services that are not customarily subject to a gratuity. And, third if a customer does leave a gratuity, how does the business know to whom the gratuity should be provided? For example, if a hotel allows a guest to pay for the room by credit card and under **AB 1099**, provides a line item for a gratuity, how does the hotel know which employee should receive this compensation? Is the gratuity for the cleaning

service provided? The assistance with luggage? The concierge? Allocating which employee(s) should receive the gratuity is a difficult determination that will subject an employer to litigation, as evidenced by tip pooling/sharing policies in the restaurant industry.

Specifically, Labor Code section 351 specifies that any gratuity is the sole property of the employee to whom it was left. There is ongoing debate in the restaurant industry where gratuities are customary as to whether the employer can mandate a tip pooling policy where tips are shared amongst all employees in the restaurant as well as whether supervisors who provide direct service to a customer are entitled to share in any collective tips left for a team of employees. See *Budrow v. Dave & Buster's of California, Inc.*, 2009171 Cal.App.4th 875 (2009) (stating “[u]ltimately, the decision about which employees are to participate in the tip pool must be based on a reasonable assessment of the patrons' intentions. It is, in the final analysis, the patron who decides to whom the tip is to be “paid,” “given,” or “left.” It is those intentions that must be anticipated in deciding which employees are to participate in the tip pool.”); and *Chau v. Starbucks Corporation*, 174 Cal.App.4th 688 (2009) (allowing a shift supervisor to participate in tip sharing). Years of litigation over the allocation of tips have plagued the restaurant industry and created a disparity amongst employees who perform work in the back of the house versus those that provide direct service to a customer. **AB 1099** will create that same uncertainty and litigation in the other industries that it targets given the lack of any guidance provided on how to properly allocate gratuities to employees, especially when the intent of the customer is unclear.

AB 1099 also requires payment of the “tip” provided to the employee at the next payday. Businesses who that are not in industries where tips are commonly accepted or expected, would have to revise all existing pay stubs under Labor Code Section 226, to identify any gratuity paid to an employee. Additionally, if the employer failed to correctly identify to whom the gratuity should be allocated, this would create additional liability under Section 226 for an inaccurate pay stub, with penalties under Section 226.7 as well as penalties under the Labor Code Private Attorney General Act (PAGA). Litigation under PAGA continues to rise each year due to the costly penalties and attorney’s fees associated with a representative action under this section. **AB 1099** would contribute to that rise in litigation.

Finally, last year SB 896 (Nguyen) a similar, but more narrow proposal was presented to Governor Brown for consideration. SB 896 would have required a nail salon to require the option to tip by a credit or debit card. Governor Brown vetoed this bill, in part, based upon the following:

“I am returning Senate Bill 896 without my signature. This bill requires a nail salon that accepts credit cards for nail care to also accept a credit card for the payment of tips. I understand the author's intent to encourage the giving of tips to nail salon workers, but I don't believe that government should mandate the use of credit cards as required by this bill. In matters like this, the competitive marketplace should be sufficient.”

We agree with Governor Brown, that government should not mandate the way credit cards should be utilized, but rather, leave it to the competitive marketplace.

cc: The Honorable Gonzalez Fletcher
Camille Wagner, Office of the Governor
Pedro Reyes, Assembly Committee on Appropriations
Jared Yoshiki, Assembly Republican Caucus
District Offices, Members, Assembly Committee on Appropriations
Department of Industrial Relations
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