

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

August 18, 2020

The Honorable Anthony Portantino
Chair
Senate Appropriations Committee
State Capitol Room 3086
Sacramento, CA 95814

The Honorable Patricia Bates
Vice-Chair
Senate Appropriations Committee
State Capitol Room 3048
Sacramento, CA 95814

Dear Senators Portantino and Bates,

The U.S. Chamber of Commerce (“the Chamber”) and the Chamber’s Institute for Legal Reform (“ILR”) believe that individuals deserve strong privacy protections and we share your interest in recognizing the importance of protecting the privacy of the information of these individuals. At the same time, we believe that it is critically important to enhance public health and get American workers safely back on the job, and both are in the national interest. Unfortunately, as currently drafted, AB 1782, “the TACT-PACT Act” and AB 660 would hinder the ability of Californians to safely return to work. For this reason, we oppose these bills.

Evidence shows that contact tracing can have a significant impact on reducing the transmission of COVID-19.¹ Contact tracing is also central to former Vice President Joe Biden and Senator Kamala Harris’ plan to reopen America.² Most American companies plan to utilize some form of contact tracing to protect their employees during the pandemic.³

Accordingly, we strongly oppose the policy approach taken by AB 1782 because it would prohibit companies from conducting the necessary contact tracing for employees required to safely return Californians to work. For example, if even one employee chooses not to consent to participate in the contact-tracing program, the entire health safety system employed could be compromised if that employee tests positive for COVID-19 and the business cannot notify other employees who may have come in contact with him or her. Further, the anti-discrimination language of the bill would allow employees to not participate in contact tracing and then penalize businesses who do not let such individuals onto the premises. A framework like this would be detrimental to the public policy goal of determining those employees who have been or may be exposed to COVID-19 and working to mitigate the spread of the virus to employees and, in turn, to customers who enter the establishments where employees work.

¹ Mijam Kretschmar and Janneke van de Wijgert, “Impact on delays on effectiveness of contact tracing strategies for COVID-19: a modelling study,” *The Lancet* (July 16, 2020) available at [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(20\)30157-2/fulltext](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30157-2/fulltext).

² <https://joebiden.com/reopening/#>.

³ Caroline Humer, “Over half of U.S. companies plan virus contact tracing for employees: survey,” *Reuters* (July 22, 2020) available at <https://www.reuters.com/article/us-health-coronavirus-usa-contacttracing/over-half-of-u-s-companies-plan-virus-contact-tracing-for-employees-survey-idUSKCN24N2SN>.

As currently drafted, both the TACT-PACT Act and AB 660 would leave California companies exposed to class action lawsuits when they should be focused on introducing measures designed to afford maximum protection to their employees and workspaces. While the goal of privacy is laudable, any legislation that enables private rights of action (“PRA”), particularly for contact tracing in the workplace, would slow the ability of the nation to safely reopen.

Additionally, we oppose PRAs as a method of enforcing privacy laws, as they are particularly inefficient and ineffective in this policy area. Such an enforcement mechanism would harm smaller companies already in distress as a result of the pandemic. Additionally, any contact tracing law should properly exclude enforcement for contact tracing in the workplace.

A PRA is an invitation to lawsuits to remedy technical violations that have little or no impact on consumers, and that are often difficult or impossible to trace an alleged harm to a particular entity or defendant, or to a specific act or omission. This can result in great financial damage to a business with little impact to consumers. Moreover, even when a consumer has suffered a concrete injury, they are unlikely to receive meaningful compensatory or injunctive relief through private litigation, especially when that litigation takes the form of a class action lawsuit.

Given these characteristics, attempting to enforce privacy laws through PRAs engenders a series of troubling consequences:

- PRAs, combined with the class action mechanism, often lead to grossly expensive litigation and extreme pressure to settle as companies are faced with the alternative of significant reputational damage and the risk of an outsized (or “nuclear”) verdict. This dynamic primarily benefits the plaintiffs’ bar and offers little relief to consumers whose privacy interests they claim to represent.
- PRAs allow individual plaintiffs’ lawyers to set both state and national policy. Rather, enforcement agencies such as the offices of the state attorneys general should shape statewide policy with a more holistic and experienced approach. Agencies can be expected to better understand the complexities of the law and to balance the various factors of encouraging compliance, supporting innovation, and preventing and remediating harm.
- PRAs lead to inconsistent and, potentially, to dramatically-varied rulings across jurisdictions. On the other hand, agency enforcement provides consistent decisions that shape privacy protections for consumers statewide, while also offering clarity to entities on how to align their practices with existing law.

The Chamber and ILR urge you to work to promote consumer privacy without imposing enforcement regimes that apply to employee contact tracing that create confusion and instead get California workers back to work safely by not advancing the TACT-PACT Act and AB 660. It is

crucial that stakeholders arrive at privacy policy solutions that protect individual privacy equally and instill certainty.

Sincerely,



Tom Quaadman
Executive Vice President
Chamber Technology
Engagement Center (C_TEC)



Harold Kim
President
U.S. Chamber Institute
for Legal Reform (ILR)

cc: California Senate Appropriations Committee, Speaker Rendon, President Pro Tempore
Atkins