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August 17, 2022

TO: Members of the California Assembly
RE: SB 1149 (Leyva) – the Public Right to Know Act – SUPPORT

Opposition amendments would render SB 1149 worthless

Recent amendments proposed to Senator Leyva are very similar to the amendments proposed by CJAC in early May. Both would strike from the bill its application to court protective orders. The Senator rejected both sets of amendments because they would essentially gut SB 1149.

Here's why:

For lawsuits dealing with product defects and environmental hazards, there are two independent layers of confidentiality. The bill seeks to address both:

1) Protective orders (early in the litigation)

   a. These are usually entered by courts early on in litigation and are *enforceable indefinitely* (meaning they exist forever, even after settlement, verdict, or appeal)

   b. Overwhelmingly—about 95% of the time according to best estimates—when courts hide information about a defective product or environmental hazard that poses a danger to public health or safety it is through protective orders, not secret settlements.

2) Secret settlements (end of the litigation)

This legislation is only effective if it addresses both **protective orders AND secrecy agreements**. This is because even if confidentiality in secrecy agreements is no longer enforceable, all confidentiality provisions in protective orders would **remain enforceable**.

If SB 1149 is no longer applicable to protective orders (as proposed by the opposition) information about defective products or environmental hazards that pose a danger to public health or safety will continue to be kept secret from the public. That means the public will remain in the dark and continue to be at risk of being harmed and/or killed by these products and hazards.

Why SB 1149 (2022) Cannot Be Compared to SB 331 (2021)

SB 331 was primarily concerned with secret settlements in workplace harassment cases including sexual assault. Prohibiting these meant that serial abusers could no longer hide behind secrecy agreements.

By contrast, in product liability cases today, the main problem is that courts routinely enter **overbroad protective orders** that make secret virtually all the important documents in product liability cases, including information related to the defective and dangerous nature of products. They also make secret documents that show a company's negligence or conscious disregard for the harm caused by their products.

Overbroad protective orders typically are not the problem in sexual harassment and assault cases. Evidence related to sexual harassment and assault is not the same as trade secrets, business strategies, etc. Therefore, any protective orders shielding the proprietary information of a business typically **do not apply to evidence related to sexual harassment and assault**.

Author proposes new amendments

In lieu of all the concerns raised by legislators and the opposition, we propose **three more amendments** that will:

(1) expand the definition of "trade secrets";

(2) remove the term "presumption" from the bill; and

(3) lessen the burden in (d)(3)(B).

1. The amended definition for "trade secrets" **expands the definition of "trade secrets"** to include information that legislators and the opposition were concerned would not be protected in SB 1149. We concede this point and make the following changes to ensure that this bill would cover such information.

2. We've also **removed the term "presumption"** from the language of the statute because we repeatedly heard this is a major concern from legislators and the opposition. This is another major concession which will make it easier for those seeking confidentiality.

3. In response to all of the concerns raised, **we have completely rewritten (d)(3)(B**). The rewritten section lessens the burden on the parties seeking an order of nondisclosure.

Amendments noted below:

(3) "Trade secret" has the same meaning as set forth in Section 3426.1 of the Civil ~~Code.~~ *Code, and may include particular portions of a party's financial data, nonpublic business strategies, information regarding potential mergers or acquisitions, and nonpublic information pertaining to new product launches.*

1002.9(c)

(c) Notwithstanding any other law, ~~there shall be a presumption that~~ the disclosure of discoverable factual information, as described in Section 2017.010, relating to a covered civil action shall not be restricted, and a court or arbitral tribunal shall not enter, by stipulation or otherwise, an order that restricts the public disclosure of such information, except in the form of an order of nondisclosure, as provided in paragraph (3) of subdivision (d).

1002.9(d)(3)(B)

(d) Subdivisions (b) and (c) do not preclude a provision or order that restricts the disclosure of any of the following information relating to a covered civil action:

(3) (A) Information relating to a current proprietary customer list or a trade secret, if the party seeking to restrict its disclosure moves the court or arbitral tribunal in good faith for an order of nondisclosure restricting the disclosure of specified information and the order is granted pursuant to subparagraph (B).

(B) A court or arbitral tribunal may ~~enter an order of nondisclosure~~ *limit the scope of disclosure if it determines that a party or other affected person requesting the order demonstrates that the interest favoring nondisclosure* of specified information described in subparagraph (A) ~~if the party requesting the order demonstrates that the presumption in favor of disclosure is clearly outweighed by a specific and substantial overriding confidentiality interest.~~ *clearly outweighs the interest favoring disclosure of the information. The court may make this determination only pursuant to a motion for an order of nondisclosure by a party or other affected person, as provided in paragraph (1) of subdivision (g).* The order shall be narrowly tailored to restrict the disclosure of no more information, and for no longer a period of time, than is necessary to protect the interest.

Considering the major concessions proposed by the Author in response to concerns raised by members and the opposition, we continue to urge your support for SB 1149 – the Public Right to Know Act – because it will save lives and protect public health and safety.

For more information, please contact Kristina Bas Hamilton at kristina@kbhadvocacy.com or 916-402-6276