Airlines for America®

We Connect the World

February 24, 2021

Chair Karin Power
House Judiciary Subcommittee
on Civil Law
900 Court Street NE
Salem, OR 97301

RE: HB 2205

Dear Chair Power and Committee Members:

Airlines for America (A4A) is the trade association of the leading U.S. passenger and cargo airlines, many of which serve Portland International Airport and other Oregon airports, providing safe, affordable services to Oregon residents and businesses. Airlines are proud economic drivers in Oregon, and we value the relationship we have with the state and the passengers and shippers we fly in and out each year.

We respectfully write in opposition to House Bill 2205 (HB 2205), which is essentially a private attorneys general statute (PAGA) that allows private parties (acting as relators) and their counsel to bring public enforcement actions. Although several states – most notably, California – have PAGA laws, HB 2205 is striking in its broad sweep: it is not limited to labor code violations (like California's PAGA law), but allows relators to enforce *any* laws for which state agencies have enforcement authority. From an employment perspective, PAGA laws create incentives to file lawsuits over minor interpretation disputes with little or no damages associated, litigation that significantly increases business operating costs without materially benefiting employees. The airline industry has historically been an economic driver, providing well-paying, quality jobs with good benefits. As a result of the ongoing global health crisis, however, our industry is going through its worst crisis in its history; at its lowest point, demand for air travel plummeted 96 percent to a level not seen since the 1950s. We are grateful for strong federal support which has allowed our members to avoid involuntary furloughs, but the situation remains dire as demand for air travel is still down more than 60 percent and carriers are continuing to burn an estimated $150 million in cash each day. Increasing litigation costs now will slow down our members' economic recovery and impact our ability to provide and support good paying jobs in Oregon.

HB 2205's Unprecedented Broad Sweep Increases Business Costs and Undermines Coherent State Public Policy

The bill authorizes individuals or "representative organizations" to "bring an enforcement action to recover civil penalties for a violation enforceable by state officials," plus costs and attorneys' fees. There is no limitation on violations subject to enforcement action – the broad language of the bill would capture violations of statute, but also of rules or regulations. Section 2(2) gives relators authority to pursue the same civil penalties state authorities may assess; however, when no civil penalty is specifically provided by law, HB 2205 authorizes courts to assess a $250 civil penalty per individual per two week period (plus costs and attorneys' fees). Ultimately, HB 2205 authorizes relators and counsel to recover penalties not otherwise provided by law, thus granting private parties more power to pursue penalties than state enforcement authorities.

In creating potential for recovery – and attendant costs and attorneys fees – where the law does not otherwise do so, HB 2205 expands the potential for costly litigation. Typically, litigation is checked by practical limitations like recovery potential – where there are no damages, or when they are too low to be worth the cost of litigation – parties seek other resolution. However, this bill eliminates that restraint by creating potential economic recovery where none is recognized by law, and then by allowing separate recovery of costs and attorneys fees. A real-life litigation constraint – limited recovery potential greatly outweighed by costs and attorneys fees – is no longer an issue. In allowing imposition of a repeating penalty ($250 every two weeks per aggrieved employee) without requiring any demonstration of actual damages or opt-in of aggrieved individuals, HB 2205 converts minor compliance interpretation disputes to repeated recovery potential for the trial bar, with all the attendant litigation costs borne by businesses like our members.

HB 2205's broad sweep would impact the labor and consumer protection arenas, which will be costly to business, but could also have unintended impact in other areas. Because the authority to stand in place of state authorities is not limited to specific statutes, relators and counsel could seek to enforce, for example, parts of the insurance code; state education law; any of the state's industrial regulations; and even its tax laws. It can even be used by disgruntled state employees to bring suits against the state itself, made all the easier by Section 2(1)(d) allowing representative organizations to keep the identity of aggrieved individuals confidential. The bill would allow private parties to bring suit to enforce interpretations that state subject matter experts rejected or deemed unnecessary. The state's own public policy priorities will always be in tension with private parties seeking financial recovery, or pushing their own policy agenda. HB 2205's costs cannot be fully accounted because the bill's scope is almost limitless.

Unfortunately, our members have firsthand experience with the wasteful costs of PAGA litigation. Under the California PAGA statute, named plaintiffs and their counsel have successfully brought suits for violations of California's wage statement law based on differing interpretations of what constitutes a compliant wage statement, even with no allegation that the employee was paid incorrectly, and no grievance by employees' elected union representatives. We project that these penalties, plus attorney fees, exceed a quarter billion dollars of liability annually – even without any allegation that an employee was paid incorrectly. That is just the

cost of one PAGA statute enforcing one section of the labor code. HB 2205 is much more expansive, allowing private enforcement of *all* Oregon laws and regulations, and even allowing for civil penalties not otherwise provided by law.

These Additional Litigation Costs Will Make Economic Recovery More Challenging

These costs come during a global pandemic, and at a time that our industry can least afford it. Prior to this global health crisis, U.S. airlines were transporting a record 2.5 million passengers and 58,000 tons of cargo each day. As travel restrictions and stay-at-home orders were implemented, demand for air travel declined sharply. At its lowest point in late April, passenger volumes were down 96% to a level not seen since before the dawn of the jet age (in the 1950s).

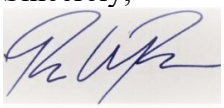
This crisis hit a robust airline industry at lightning speed, but recovery will not be as swift. Air transport demand has never experienced a V-shaped recovery from a downturn. Air travel remains highly discretionary; when passengers start to return, they will fly less frequently and less in premium cabins. For context, air travel took 3 years to recover from 9/11 and more than 7 years from the Global Financial Crisis. Post-9/11, air-travel demand reductions were largely confined to domestic and transatlantic markets. The effects of COVID-19 are clearly global. Rising unemployment, diminished incomes and household net worth and strained government coffers will likely result in businesses, households and governments curtailing travel budgets.

Given data from past crises, the trajectory of the virus, widespread deployment of a vaccine and the global economic outlook, air traffic recovery is expected to take at least three years. Once demand has recovered, it will take years for airlines to retire the billions of dollars of debt and to address the sizable associated interest expense, limiting their wherewithal to rehire and to reinvest. Most analysts do not see a return to pre-COVID traffic levels until at least 2023 and a return to pre-COVID financial health until at least 2025. The airline industry cannot absorb the litigation costs of this bill without impact to its recovery trajectory, and its ability to bring quality, high paying jobs with benefits to the area.

Conclusion

HB 2205 incentivizes frivolous litigation, increases business operating costs at a time when Oregon businesses can least afford it, and undermines coherent public policy. A4A respectfully urges that you oppose the bill.

Sincerely,



Riva Parker
Vice President, Labor & Employment/Litigation
rparker@airlines.org