

Date of Hearing: March 21, 2018

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Marc Berman, Chair

AB 1947 (Low) – As Introduced January 29, 2018

SUBJECT: Petitions: compensation for signatures.

SUMMARY: Prohibits a person who gathers signatures on an initiative, referendum, or recall petition from being paid on a per-signature basis. Specifically, **this bill:**

- 1) Makes it unlawful for a person to pay or to receive money or any other thing of value based on the number of signatures obtained on a state or local initiative, referendum, or recall petition.
- 2) Provides that a violation of this bill is a misdemeanor, punishable as follows:
 - a) A person or organization who pays another person based on the number of signatures obtained on a petition is punishable by a fine of up to \$25,000, imprisonment in a county jail for up to a year, or by both the fine and imprisonment.
 - b) A person who is paid based on the number of signatures obtained on a petition is punishable by a fine of up to \$1,000, imprisonment in a county jail for up to six months, or by both the fine and imprisonment.
- 3) Specifies that this bill does not prohibit the payment for signature gathering that is not based, either directly or indirectly, on the number of signatures obtained on a state or local initiative, referendum, or recall petition.

EXISTING LAW:

- 1) Permits voters to propose statutes or amendments to the state Constitution by initiative.
- 2) Permits voters to approve or reject statutes or parts of statutes approved by the Legislature, except as specified, by referendum.
- 3) Permits voters to remove an elective officer from state or local office before the end of the term of office, as specified, by recall.
- 4) Permits any person who is 18 years of age or older to circulate a state or local initiative, referendum, or recall petition.
- 5) Requires a state or local initiative petition to contain the following notice in 12-point type before the portion of the petition for voters' signatures:

NOTICE TO THE PUBLIC

THIS PETITION MAY BE CIRCULATED BY A PAID SIGNATURE GATHERER OR A VOLUNTEER. YOU HAVE THE RIGHT TO ASK.

- 6) Makes it a misdemeanor for a person to do any of the following:
 - a) While circulating a state or local initiative, referendum, or recall petition, intentionally misrepresent or intentionally make a false statement concerning the contents, purport, or effect of the petition to any person who signs or is requested to sign the petition.
 - b) Willfully and knowingly circulate, publish, or exhibit any false statement or misrepresentation concerning the contents, purport, or effect of a state or local initiative, referendum, or recall petition for the purpose of obtaining any signature to, or persuading or influencing any person to sign, that petition.
 - c) While circulating a state or local initiative petition, intentionally make a false statement in response to an inquiry by a voter as to whether the circulator is paid or a volunteer.
- 7) Provides that a person, company, organization, company official, or other organizational officer in charge of a person who circulates an initiative, referendum, or recall petition who knowingly directs an affiant to make a false affidavit or who knows or reasonably should know that an affiant has made a false affidavit concerning an initiative, referendum, or recall petition or the signatures appended thereto is punishable by a fine not exceeding \$5,000, by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment.
- 8) Provides that upon conviction of any of the conduct described above in 6) or 7), among other conduct, a court may order as a condition of probation that the convicted person be prohibited from receiving money or other valuable consideration for gathering signatures on an initiative, referendum, or recall petition.

FISCAL EFFECT: Unknown. State-mandated local program; contains a crimes and infractions disclaimer.

COMMENTS:

- 1) **Purpose of the Bill:** According to the author:

In recent years, it has become a common experience to get approached outside a local grocery or retail store by signature gatherers. Many individuals have been approached by aggressive signature gatherers that mislead them into signing petitions they otherwise would not endorse. This practice degrades the integrity of direct democracy and our initiative process.

Some signature gathering firms compensate circulators based on the number of signatures they collect, which is known as "bounty hunting". These bounty hunters have an incentive to do whatever they can to get an individual's signature – even deceit the person or cheat the system. In order to qualify for the ballot, some initiative proponents qualify their initiatives by illegally misinforming voters and forging names. AB 1947 helps maintain the integrity of the initiative process by eliminating the incentive for paid signature gatherers to approach individuals aggressively and spread misinformation.

- 2) **Initiative, Referendum, and Recall & Other States:** According to information from the National Conference on State Legislatures (NCSL), 24 states, including California, allow voters through the initiative to propose laws, constitutional amendments, or both through a petition process. Twenty-three states, including California, allow voters through the referendum process to petition to demand a popular vote on a new law passed by the Legislature. Nineteen states, including California, permit state officers to be removed from office before the end of the term of office through the recall process.

At least five states (Arizona, Montana, North Dakota, Oregon, and South Dakota) limit the ability of initiative or referendum proponents to pay signature gatherers on a per-signature basis. One state (Nebraska) recently repealed a state law that prohibited petition circulators from being paid on a per-signature basis, while another state (Wyoming) recently repealed a state law that restricted *initiative* proponents from paying signature gatherers on a per-signature basis while continuing to ban payments on a per-signature basis for *referendum* petitions. Laws to ban per-signature payments in at least six other states (Colorado, Idaho, Maine, Mississippi, Ohio, and Washington) have been invalidated by courts (additional details are available below). Alaska does not ban payments that are made on a per-signature basis, but prohibits any such payment that is greater than \$1 per signature.

- 3) **Payment for Signature Gathering and Constitutional Issues:** In 1988, the United States Supreme Court ruled that a Colorado prohibition against the use of paid circulators for initiative petitions violated the First Amendment's right of free speech. Writing for a unanimous court, Justice Stevens noted that "[t]he State's interest in protecting the integrity of the initiative process does not justify the prohibition because the State has failed to demonstrate that it is necessary to burden appellees' ability to communicate their message in order to meet its concerns." *Meyer v. Grant* (1988), 486 U.S. 414. The *Meyer* court, however, did not address the issue of whether a state may regulate the manner in which circulators are paid.

In 1999, the United States Supreme Court examined a Colorado law that provided a number of other restrictions on the signature collection process for ballot initiatives. In that case the court ruled that there must be a compelling state interest to justify any restrictions on initiative petition circulation. *Buckley v. American Constitutional Law Foundation* (1999), 525 U.S. 182.

In *Buckley*, the court invalidated Colorado's requirement that paid petition circulators wear a badge identifying themselves and identifying that they are paid circulators. The court stated that the requirement to wear badges inhibits participation in the petitioning process.

Although the United States Supreme Court has not ruled on the constitutionality of prohibiting payment for signature collection on a per-signature basis, a number of federal courts have considered challenges to such laws, with the courts reaching different conclusions about the constitutionality of per-signature payment bans.

In February 2001, the Eighth Circuit Court of Appeals ruled that a North Dakota law prohibiting payment for signature collection on a per-signature basis was consistent with the United States Constitution and with the Supreme Court's rulings in *Buckley* and *Meyer*. In

reaching this decision, the court noted that the state "produced sufficient evidence that the regulation is necessary to insure the integrity of the initiative process," and also noted that no evidence was presented "that payment by the hour, rather than on commission, would in any way burden [the] ability to collect signatures." *Initiative & Referendum Institute v. Jaeger* (2001), 241 F.3d 614.

In February 2006, the Ninth Circuit Court of Appeals ruled that an Oregon law that prohibited payment to electoral petition signature gatherers on a piece-work or per-signature basis did not impose a severe burden under the First Amendment, and therefore did not unconstitutionally burden core political speech. The court found that Oregon had an "important regulatory interest in preventing fraud and its appearances in its electoral processes," and that prohibiting the payment of signature gatherers on a per-signature basis was reasonably related to that interest. *Prete v. Bradbury* (2006), 438 F.3d 949.

In October 2006, the Second Circuit Court of Appeals upheld a New York law that prohibited payment of any compensation to individuals hired to circulate electoral petitions if that compensation is contingent on the number of signatures obtained. Because New York does not have the initiative process, the law applies only to nomination petitions for candidates and to petitions to qualify a new political party. In its decision upholding the law, the Court referenced the decisions in the Eighth and Ninth Circuits, and noted that "[l]ike our sister circuits, we find the record presented to us provides insufficient support for a claim that the ban on per-signature payment is akin to the complete prohibition on paying petition circulators that was deemed unconstitutional in *Meyer*, or that the alternative methods of payment it leaves available are insufficient." *Person v. New York State Board of Elections* (2006), 467 F.3d 141.

On the other hand, the Sixth Circuit Court of Appeals struck down an Ohio law that made it a felony to pay anyone for gathering signatures on election-related petitions on any basis other than time worked. In its decision, the Court noted that while Ohio's interest in eliminating election fraud is a compelling state interest, "there is no evidence in the record that most, many, or even more than a de minimis number of circulators who were paid by signature engaged in fraud in the past." The court further noted that "[t]here is little dispute that operating under a per-time-only system will increase the costs of both proposing an initiative and qualifying it for the ballot," and cited evidence presented that professional coordinators and circulators were less interested in working under a per-time-only system. At the same time, however, the Court discussed the rulings in the Second, Eighth, and Ninth Circuits, noting that unlike the laws that were upheld in North Dakota, Oregon, and New York, the Ohio law was more restrictive and had harsher criminal sanctions for violations.

Specifically, the court noted that the laws in North Dakota, Oregon, and New York banned payments made on a per-signature basis, while Ohio banned all payment to circulators except on a per-time basis. The court noted that unlike the laws considered by appellate courts in other circuits, the Ohio law would prohibit bonuses to circulators based on productivity or longevity, would prohibit a person employing circulators from setting a minimum signature requirement, and could even prohibit a person employing circulators from terminating a circulator who consistently did not collect enough signatures. Additionally, the court noted that a violation of the Ohio law was a felony, compared to misdemeanor penalties for

violations in North Dakota, Oregon, and New York. Although the court recognized these distinctions between the Ohio law and the laws upheld by three other appellate circuits, the court refused to discuss whether it would uphold an Ohio law that was similar to Oregon's, North Dakota's, or New York's. *Citizens for Tax Reform et al. v. Deters et al.* (2008), 518 F.3d 375.

A number of federal district courts have struck down bans on per-signature payments in other states, however. In 1994, a federal district court struck down a Washington law that made it illegal to pay gatherers of signatures on initiative and referendum petitions on a per-signature basis, noting in its decision that the state had failed to provide any "proof of fraud stemming specifically from the payment per signature method of collection." *Limit v. Maleng* (1994), 874 F.Supp. 1138. In 1997, a district court struck down a similar Mississippi law, citing evidence presented that the "payment of a flat daily rate to Mississippi circulators had yielded poor results," and concluding that the state had failed to prove "actual fraud or threat to citizens' confidence in government posed by...circulators who were paid per signature." *Term Limits Leadership Council, Inc. v. Clark* (1997), 984 F.Supp. 470. Federal district courts also struck down similar laws in Maine (*On Our Terms '97 PAC v. Secretary of State of State of Maine* (1999), 101 F.Supp.2d 19) and in Idaho (*Idaho Coalition United for Bears v. Cenarrusa* (2001), 234 F.Supp.2d 1159). More recently, a Colorado court issued a permanent injunction against a Colorado law that prohibited a petition circulator from being paid more than twenty percent of his or her compensation on a per-signature basis (*Independence Institute v. Gessler* (2013), 936 F.Supp.2d 1256).

In light of the differing opinions reached by various federal courts on the constitutionality of laws that prohibit payments on a per-signature basis for signature gathering on petitions, it is unclear whether this bill, if enacted, would be upheld in a court challenge.

- 4) **Petition Fraud:** According to information from the Secretary of State's office, between 1994 and 2015, the office opened 273 cases investigating potential petition fraud, of which 50 cases were referred for prosecution. These figures do not include petition fraud investigations that may have been conducted by other law enforcement agencies around the state.
- 5) **Labor Law Implications:** This bill prohibits the payment of individuals on a per-signature basis for collecting signatures on petitions. Typically, in California, those individuals who are paid to circulate petitions or register voters on a per-signature or per-piece basis are independent contractors. However, to the extent that this bill forces individuals who are paid to circulate petitions or register voters to be paid an hourly wage, this bill could also result in these individuals being considered employees under California law. As such, the individual, corporation, or group paying individuals to circulate petitions may be required to pay minimum wage, provide workers compensation insurance and unemployment insurance for its employees, and maintain a payroll system.
- 6) **Increased Costs:** As noted above in comment #5, those individuals or groups paying signature collectors may be required to provide certain benefits such as unemployment insurance and workers compensation insurance. This may result in higher costs to those groups that pay individuals to circulate petitions. In addition, prohibiting payment of

individuals on a per-signature basis could increase costs because it may become more difficult to measure the work product of petition circulators. Potential increased costs may be partially offset if, by reducing the incentive to submit fraudulently-obtained signatures, this legislation results in paid circulators submitting fewer such signatures.

7) **Arguments in Support:** In support of this bill, California Professional Firefighters writes:

Gone are the days when the initiative process was driven by average Californians compelled to act when lawmakers wouldn't. Petition circulators were once almost universally unpaid, and signature gathering campaigns failed most often from a lack of volunteers. An inability to qualify a measure for the ballot was simply a sign that proponents needed more time to recruit an army of volunteers with which to cultivate sufficient grassroots support. Without both public support and devoted volunteers, previous initiative campaigns couldn't generate the required number of petition signatures to qualify for the ballot. The system, on its own, eliminated proposals that lacked true citizen support, which ultimately meant they weren't ready to become law.

Unfortunately today, however, any wealthy individual with a checkbook and the desire to weigh in politically can almost unilaterally put an initiative on the ballot given the existing regulatory framework. It has become evident in recent election cycles that there is a critical need to restore balance and fairness to the signature gathering process, as well as return the system back to the people and end the tyranny of modern day "robber baron railroad officials." AB 1947 is needed to strengthen the integrity of the process by which proposed petitions qualify for the ballot, while at the same time erode incentives for fraud and deceit.

8) **Arguments in Opposition:** In a coalition letter in opposition to this bill, the California Chamber of Commerce and others write:

AB 1947 would have the unintended consequence of limiting the public's role in the ballot process. By outlawing payment for signature collection on a per signature basis, AB 1947 would make it prohibitively expensive to do an initiative or a recall and next to impossible to do a referendum.

In addition, there is no compelling evidence that there is rampant fraud with this type of payment. According to the Secretary of State's Election Fraud Investigation Unit (EFIU), between 1994 and 2010, the EFIU opened 240 cases for falsifying petitions, of which 46 were sent to district attorneys for prosecution, resulting in 33 convictions. During that timeframe over 100 initiatives were placed on the ballot requiring *millions* of signatures. Opening 240 cases resulting in 33 convictions is hardly a representation of rampant fraud.

Furthermore, it is unclear how limiting the payment type for signatures will ensure that the public will receive better information when petitioners approach them. Indeed, AB 1947 is likely to limit how far and wide these important

election materials are disseminated and even exclude certain areas as petitioners attempt to reach as many California voters as possible.

- 9) **Related Legislation:** SB 1394 (Newman), which is pending in the Senate Committee on Elections & Constitutional Amendments, is similar to this bill, except that it also would permit a private individual to bring a civil action to enforce the bill and to recover the civil penalty imposed by the bill, as specified.
- 10) **Previous Legislation:** This bill is identical to SB 168 (Corbett) of 2011, which was vetoed by Governor Brown. In his veto message, the Governor stated that "per-signature payment is often the most cost-effective method for collecting the hundreds of thousands of signatures needed to qualify a ballot measure," and that "[e]liminating this option will drive up the cost of circulating ballot measures, thereby further favoring the wealthiest interests."

SB 34 (Corbett) of 2009, which was vetoed by Governor Schwarzenegger, was identical to SB 168 and this bill.

AB 2946 (Leno) of 2006, contained provisions similar to this bill to prohibit payment on per-signature basis for individuals circulating petitions. AB 2946 was vetoed by Governor Schwarzenegger.

AB 1367 (Berman), Chapter 848, Statutes of 2017, provides that a person, company, organization, company official, or other organizational officer in charge of a person who circulates an initiative, referendum, or recall petition who knowingly directs an affiant to make a false affidavit or who knows or reasonably should know that an affiant has made a false affidavit concerning an initiative, referendum, or recall petition or the signatures appended thereto is punishable by a fine not exceeding \$5,000, by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment.

REGISTERED SUPPORT / OPPOSITION:

Support

California Professional Firefighters

Opposition

California Chamber of Commerce
Howard Jarvis Taxpayers Association
Murrieta Chamber of Commerce
Southwest California Legislative Council
Wildomar Chamber of Commerce

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