SB 1383 (Jackson) JOB KILLER


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JOB KILLER

UPDATED

September 2, 2020

The Honorable Gavin Newsom
Governor, State of California
State Capitol
Sacramento, CA 95814

SUBJECT: SB 1383 (JACKSON) UNLAWFUL EMPLOYMENT PRACTICE: FAMILY LEAVE REQUEST FOR VETO

The California Chamber of Commerce and the organizations listed below respectfully **REQUEST** your **VETO** on **SB 1383 (Jackson)** as amended on June 29, 2020 as a **JOB KILLER**, as it will significantly harm over 150,000 small employers in California by requiring any employer with only 5 employees to provide 12-weeks of protected leave each year and threatening them with litigation for any unintentional mistake.

SB 1383 is **not** limited in scope to only address COVID-19 and will place a significant burden on employers at a time when they can least afford it. Now is not the time to be placing such burdens on employers who are struggling to reopen and rebuild.

Recent Statistics on COVID Impact to Small Employers:

***The following analysis is from the Assembly Committee on Jobs, Economic Development and the Economy on August 2, 2020*:**

> **"Small Businesses and Coronavirus**: Economic developers, finance professionals, and even the Office of the Legislative Analyst agree that small businesses have been particularly impacted by the coronavirus pandemic. According to a national survey and separate report on the impacts of COVID-19 on small and medium size businesses, both published by McKinsey in April 2020:
>
> a) 70% of businesses are delaying purchases, reducing current spending, and holding back on making major investments. [*While not an unexpected outcome, this level of delayed spending has significant multiplier effects as its impacts move throughout the economy.*]
>
> b) 50% of workers at small businesses with less than 100 employees are at risk of losing their jobs due to the pandemic. This represents over 2.2 million workers. This is a higher percentage of job losses than those projected for larger private sector employers.
>
> c) 40% of the vulnerable small business jobs fall within two occupational categories: food service and customer service and sales.
>
> d) 60% of the vulnerable small business jobs do not require a four-year degree, meaning that displaced workers will likely not have formally recognized skills to help them get their next job.
>
> e) 55% of businesses felt that the economic impacts of the coronavirus were going to last over one year, with 29% responding the impacts were going to be felt for three years.
>
> f) 25% of businesses said they would be filing for bankruptcy within six months.
>
> The McKinsey report ranks California among the top states in which small businesses are and will be impacted by the COVID-19 emergency. The report finds that 92% of workers in small businesses engaged in the accommodation and food sectors are at risk. For workers at small construction firms, the report states that 54% are vulnerable, which is still a significant impact."

These statistics are alarming and with the pandemic continuing, it is questionable how potentially worse these statistics could become. Imposing a 12-week leave for each eligible employee to use, perhaps at the

same time as other employees, could literally put a small business out of business. For your review and consideration, we have attached as **Exhibit "A"** to this letter, testimonials from small businesses throughout the state expressing their concern about **SB 1383**.

AB 1867 Does Not Eliminate the Risk of Costly Litigation to Small Employers Impacted by SB 1383:

The leave mandated under **SB 1383** is enforced through a private right of action that includes compensatory damages, injunctive relief, declaratory relief, punitive damages, and attorney's fees. Any employee who believes an employer did not properly administer the leave, interfered with the leave, or denied the leave, can face litigation.

An employer with only five employees does not have a dedicated human resources team or in-house counsel to advise them on how to properly administer this leave, document it, track it, obtain medical verifications, etc. The regulations on implementing the 12 weeks of leave under CFRA are approximately 36 pages long. A small employer is bound to make an unintentional mistake along the way, which will cost them in litigation.

While we appreciate the effort to limit or reduce litigation against small employers through the small business mediation program included in AB 1867, we have concerns with the ultimate impact, due to the following:

(1) **Small Business Mediation Program is Limited**: The program only applies to employers with less than 20 employees. SB 1383 expands leave to any employer with between 5-49 employees. All employers who are being faced with implementing this type of leave for the first time, should have the opportunity to resolve any unintentional mistakes through mediation instead of litigation;

(2) **Notice of Right to Mediate Is Too Late:** The right to request mediation would be within 30 days after an employer receives notice of an employee's Right to Sue Notice from the Department of Fair Employment and Housing. This is a problem as there is NO requirement for either the Agency or the employee to provide an employer with notice that a right to sue letter has been issued to the employee. Oftentimes, employers do not receive a copy until litigation has already been initiated and the employer requests a copy of the letter during discovery. At this point, both parties are already represented by counsel, legal fees are already incurred by both sides, and the success of mediation is limited.

(3) **Sunset:** The mediation program automatically sunsets in 2024. The mandatory leave does not sunset, and post-2024, small employers will be exposed to immediate litigation.

A 2015 study by insurance provider Hiscox regarding the cost of employee lawsuits under FEHA estimated that the cost for a small to mid-size employer to defend and settle a single plaintiff discrimination claim was approximately $125,000. This amount, especially for a small employer, reflects the financial risk associated with defending a lawsuit under FEHA, such as the litigation created by **SB 1383**.

While the argument regarding litigation has previously been that no employee will pursue litigation under CFRA against an employer who has provided the required leave, cases show otherwise: in *Richey v. Autonation*, 60 Cal.4th 909 (2015), an employee took CFRA leave from his employer for 12 weeks due to his own medical condition. However, while on "medical leave," the employee opened and worked at his own restaurant. The employer fired the employee and the employee sued the employer for retaliation for taking CFRA leave. Although the employer ultimately prevailed, the employer had to pay for litigation for over six years. *See also McDaneld v. Eastern Municipal Water District Board,* 109 Cal.App.4th 702 (2003) (finding against employee who sued his employer for violation of CFRA after employee was terminated because he was found golfing and performing intermittent sprinkler installation/repair while he had requested time off to care for his father); *Rankins v. Verizon Communications Co.*(unpublished) 2007 WL 241154 (finding against employee who sued employer for violation of CFRA when the employee was terminated by employer for submitting false medical certification/letter for CFRA leave); *Holley v. Waddington North America, Inc.* (unpublished) 2012 WL 883134 (finding against employee who sued

employer for interference with his rights under CFRA, even though employer provided the employee with over 14 months of leave).

SB 1383 Imposes a Significant Administrative Burden:

Providing leave under CFRA is not as simple as just counting out 12 weeks on a calendar and providing that time off. For medical conditions, employees can take the leave in increments as small as one to two hours at a time. An employee is only required to provide an employee with "reasonable notice," which is subjective and can literally be minutes before a shift begins – leaving an employer with limited employees in a challenging situation.

Also, an employer must track the time off as "CFRA leave" or it may not count against the 12 weeks. Retroactively designating leave as "CFRA" is a risky employment practice that could lead to litigation.

Small employers do not have dedicated staff to track and document each hour an employee takes off for CFRA leave.

SB 1383 Adds Costs to Small Employers Even Though It Is Not Paid:

Even though the leave required in **SB 1383** is not "paid" by the employer, that does not mean the employer will not endure added costs. The leave is "protected," meaning an employer must return the employee to the same position the employee had before going out on leave. This means holding a position open for three months or more. While an employer can temporarily fill the position with a new employee, that replacement usually comes at a premium. A replacement employee knows it is short term and, therefore, requires a premium wage, is less dedicated to the position, and often leaves for a better opportunity at a moment's notice. Also, many jobs require extensive amount of time and money to train a new employee, adding another cost. Some employers shift the work to other existing employees, which often leads to overtime pay. And, most of the leaves of absence require employers to maintain health benefits while the employee is out.

Due to the passage of AB 5, the option to hire an independent contractor to fill the position is either extremely restricted or eliminated.

The 12-Weeks of Leave in SB 1383 is in Addition to Other Existing Leaves on Small Employers:

This 12-week leave of absence on small employers cannot be viewed in isolation, but must be considered with regard to all of the other California specific leaves employers must juggle including the following: Pregnancy Disability Leave (up to four months); disability leave under Fair Employment and Housing Act (no specific amount of time – but not unlimited either. The leave provided must be considered as a "reasonable" accommodation for the disability); Worker's Compensation injury (amount of leave based upon doctor's recommendation); California Paid Sick Leave (minimum of 3 days); Paid leave for Organ/Bone Marrow Donation Leave (30 days/year); Jury Duty Leave (unlimited); Victim of Crime or Witness Leave (unlimited); Victim of Domestic Violence/Sexual Assault (unlimited); Emergency Duty of volunteer firefighters, reserve peace officers, or emergency rescue personnel (unlimited); Civil Air Patrol Leave (10 days/year); School Suspension Leave (unlimited); School Activities Leave (40 hours/year).

For Employers with 50 or More Employees, SB 1383 Will Expand the Amount of Protected Leave an Employee May Take to Half of a Year:

SB 1383 changes requirements for qualifying for the California Family Rights Act (CFRA) leave by amending the definition of family member for whom the employee can take leave. This means that the Family and Medical Leave Act's (FMLA) and CFRA's qualifying requirements no longer conform with each other. This is a significant issue because California cannot preempt or limit the application of federal law under FMLA. In other words, simply because the employee already took leave under CFRA does not negate their ability to then qualify for FMLA leave as well.

CFRA leave provides qualifying employees with 12 weeks of job protected leave during a 12-month period for his or her own medical condition or the medical condition of his or her spouse, child or parent, or for the

birth, adoption or foster care placement of a child. The federal equivalent of CFRA is FMLA. CFRA and FMLA leave normally run together, so the total time taken is a maximum of 3 months.

However, **SB 1383** greatly expands the definition of "family member" to include a child of a domestic partner, grandparent, grandchild, sibling, or domestic partner. Additionally, the bill removes the requirement that a "child" be under the age of 18 or a dependent adult child. Because a domestic partner, a child of a domestic partner, a grandparent, a grandchild, or a sibling are not family members covered under FMLA, these leaves will not coincide.

Accordingly, the employee could take leave under **SB 1383** for 3 months to care for a domestic partner, child of a domestic partner, grandparent, grandchild, or sibling, return to work, and then take another 3 months off under FMLA for the employee's own medical condition or the medical condition of a spouse, child or parent or for the birth, adoption or foster care placement of a child.

3 months – CFRA leave for a domestic partner, child of a domestic partner, grandparent, grandchild, or sibling;

PLUS (+)

3 months – FMLA leave for his or her own medical condition or the medical condition of his or her spouse, child or parent, or for the birth, adoption or foster care placement of a child.

Thus, **SB 1383** creates 6 months of job protected leave for employers covered by FMLA.

Notably, an employee can take intermittent leave under CFRA and FMLA in increments as small as one hour at a time, thereby providing an extensive amount of protected time off for California employees that California employers would have to administer and track properly in order to protect themselves against potential liability. The initial intent of CFRA was to provide a balance between an individual's work life and personal life. However, this proposed change would certainly disrupt that balance and negatively impact California employers.

For these reasons, we respectfully **REQUEST** your **VETO** on **SB 1383**..

Sincerely,

Jennifer Barrera
Executive Vice President
California Chamber of Commerce

African American Farmers of California
Agricultural Council of California
American Institute of Architects California
American Pistachio Growers
Associated Builders and Contractors of California – Northern California Chapter
Associated General Contractors
Association of California Egg Farmers
Auto Care Association
Brea Chamber of Commerce
Building Owners and Managers Association
California Agricultural Aircraft Association
California Apple Commission
California Association of Joint Powers Authorities
California Association of Wheat Growers
California Association of Winegrape Growers
California Attractions and Parks Association
California Bankers Association
California Bean Shippers Association

California Blueberry Association
California Blueberry Commission
California Building Industry Association
California Business Properties Association
California Business Roundtable
California Cattlemen's Association
California Citrus Mutual
California Craft Brewers Association
California Dental Association
California Employment Law Council
California Farm Bureau Federation
California Financial Services Association
California Food Producers
California Forestry Association
California Fresh Fruit Association
California Grain and Feed Association
California Grocers Association
California Hospital Association
California Hotel & Lodging Association
California Landscape Contractors Association
California Manufacturers and Technology Association
California Metals Coalition
California New Car Dealers Association
California Pear Growers Association
California Restaurant Association
California Retailers Association
California Seed Association
California Special Districts Association
California State Council of the Society for Human Resource Management (CalSHRM)
California State Floral Association
California Tomato Growers Association
California Travel Association
California Trucking Association
Camarillo Chamber of Commerce
California Warehouse Association
CAWA – Representing the Automotive Parts Industry
Chambers of Commerce Alliance – Ventura and Santa Barbara Counties
Civil Justice Association of California
Commercial Real Estate Development Association – NAIOP of California
Construction Employers' Association
CSAC Excess Insurance Authority
Dana Point Chamber of Commerce
El Centro Chamber of Commerce
El Dorado County Chamber of Commerce
El Dorado Hills Chamber of Commerce
Encinitas Chamber of Commerce
Family Business Association of California
Far West Equipment Dealers Association
Flasher Barricade Association
Folsom Chamber of Commerce
Fountain Valley Chamber of Commerce
Fresno Chamber of Commerce
Gateway Chamber Alliance
Gilroy Chamber of Commerce
Greater Coachella Valley Chamber of Commerce
Greater Conejo Valley Chamber of Commerce
Greater Riverside Chambers of Commerce
Hollywood Chamber of Commerce
Insights Association

International Council of Shopping Centers
Laguna Niguel Chamber of Commerce
League of California Cities
Long Beach Chamber of Commerce
Los Angeles Area Chamber of Commerce
Modesto Chamber of Commerce
Murrieta/Wildomar Chamber of Commerce
National Federation of Independent Business
Nisei Farmers League
North Orange County Chamber
Oceanside Chamber of Commerce
Official Police Garages of Los Angeles
Olive Growers Council of California
Orange County Business Council
Pleasanton Chamber of Commerce
Rancho Cordova Chamber of Commerce
Redding Chamber of Commerce
Salinas Valley Chamber of Commerce
San Clemente Chamber of Commerce
San Diego Regional Chamber of Commerce
San Gabriel Valley Economic Partnership
Santa Maria Valley Chamber of Commerce
Santee Chamber of Commerce
Silicon Valley Leadership Group
Silicon Valley Organization
Simi Valley Chamber of Commerce
Southwest California Legislative Council
Torrance Area Chamber of Commerce
Tracy Chamber of Commerce
UCAN Chambers of Commerce
Visalia Chamber of Commerce
Western Electrical Contractors Association
Western Growers Association
Western Manufactured Housing Communities Association
Western Plant Health Association

cc: Anthony Williams, Office of the Governor

JB:ll