April 4, 2019

TO: Members, Senate Committee on Labor, Public Employment and Retirement

SUBJECT: **SB 135 (JACKSON) PAID FAMILY LEAVE**
OPPOSE – JOB KILLER

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE SB 135** as amended March 25, 2019, which has been labeled as a **JOB KILLER**, which would significantly harm small employers in California with as few as 5 employees by requiring these employers to provide 12 weeks of a protected leave of absence each year, in addition to existing leaves of absences already required, as well as potentially require larger employers to provide 10 months of protected leave, with the exposure to costly litigation for any alleged violation.

SB 135 Will Overwhelm Small Employers in California:

SB 135 requires an employer with only five employees to provide a 12-week, protected leave of absence to an employee, regardless of the number of hours the employee works. This proposed leave is "protected," meaning the employer has no discretion to deny it or ask the employee to modify the leave to accommodate the employer's business operations or other employees' who may be out of work on other California leave of absences. If an employer denies, interferes with, or discourages the employee from taking the leave, the employer could be subject to crushing litigation, as discussed below.

California just extended its family leave for employers with 20 or more employees within a 75-mile radius, who have worked for the employer for one year and at least 1,250 hours. We have not yet been able to evaluate the impact of this mandate on those smaller employers. Yet, **SB 135** now seeks to expand this burden on essentially all employers. A small business with a limited workforce simply does not have the capacity to take on such a significant burden as proposed.

SB 135 Requires Small Employers to Provide Up to 7 Months of Protected Leave When Pregnancy-Related Leave Is Involved:

California already requires employers with 5 or more employees to provide up to 4 months of protected leave for an employee who suffers a medical disability because of pregnancy. **SB 135** will add another 12-weeks of leave for the same employee, thereby creating a total of 7 months of protected leave for pregnancy. Such an extensive period of time for a small employer with a limited workforce to accommodate such a long amount of protected leave is unreasonable.

For Employers with 50 or More Employees, SB 135 Will Expand the Amount of Protected Leave an Employee May Take to Half of a Year:

SB 135 reduces the requirements for qualifying for the California Family Rights Act (CFRA) leave, which would mean that the Family and Medical Leave Act's (FMLA) and CFRA's qualifying requirements no longer coincide. 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. Just like FMLA, in order to qualify for CFRA, the employee must have worked for the employer for 1,250 hours over the 12 months preceding the date the leave would commence. This means that CFRA and FMLA leave normally run together, so the total time taken is a maximum of 3 months.

However, **SB 135** eliminates the threshold number of hours and reduces the 12-month requirement to 180 days. 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.

Under **SB 135**, an employee could work any number of hours in a 180-day period prior to taking CFRA leave (which would not trigger FMLA). Upon returning to work, the employee would still have the opportunity to qualify for another 12-week protected leave of absence under FMLA once he or she reaches the 1,250 hours worked threshold. Thus, a California employer with 50 or more employees could potentially be required to provide up to 24 weeks of protected leave in one year for a single employee.

Notably, an employee can take CFRA and FMLA leaves in as small of increments 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.

SB 135 Creates the Potential for Employers to Provide 10 Months of Protected Leave for Larger Employers When Pregnancy-Related Leave Is Involved:

California employers with 50 or more employees already have to provide the following leaves for employees:

Up to 4 months – pregnancy disability leave/Family and Medical Leave Act (FMLA);

PLUS (+)

3 months – child bonding leave under FMLA/CFRA.

While employees who work 1,250 hours over a 12-month period currently receive this benefit either through FMLA or CFRA leave, **SB 135** expands the potential 7-month leave to those that only work for 180 days but fewer than 1,250 hours. Under **SB 135**, an employee could work any number of hours in a 180-day period prior to taking pregnancy disability and CFRA leave (which would not trigger FMLA). Upon returning to work, the employee would still have the opportunity to qualify for another 12-week protected leave of absence under FMLA once the 1,250 hours worked threshold is reached.

This expansive leave would not be available to fulltime employees who already hit the 1,250-hour threshold because their leave would still run concurrently with FMLA, thereby limiting them to 7 months. Thus, **SB 135** creates the opportunity for two, separate 12-week leaves of absence, in addition to pregnancy disability leave, ***thereby creating a potential leave of absence of 10 months.***

SB 135 Significantly Expands the Scope of Leave Beyond Immediate Family Members:

Currently, CFRA leave only applies to an employee's 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. **SB 135** greatly expands this definition to not only include a child of a domestic partner, a child-in-law, parent-in-law, grandparent, grandchild, or sibling, but also a designated person. "Designated person" is defined as a "person identified by the employee at the time the employee requests family care and medical leave. An employer may limit an employee to designating only one person per 12-month period for family care and medical leave."

Additionally, because a "designated person" may not be a family member covered under FMLA, it creates the same burden of layering leaves of absence on an employer who has 50 or more employees. Specifically, if an employee under **SB 135** identifies his or her best friend as a "designated person" to take 12 weeks of protected leave, that best friend is not a covered member under FMLA. Accordingly, the employee could take leave under **SB 135** for 3 months, return to work, and then take another 3 months off under FMLA for the employee's or family member's medical condition.

SB 135 Increases Costs and Exposes Employers to Devastating Litigation:

Even though the leave under **SB 135** is not "paid" by the employer, that does not mean the employer will not endure added costs. While on leave, the employer will have to: (1) maintain medical benefits while the employee is on leave; (2) pay for a temporary employee to cover for the employee on leave, usually at a higher premium given the limited duration of employment; or (3) pay overtime to other employees to cover the work of the employee on leave. The cost of overtime is higher given the increase of the minimum wage, which will add to the overall cost especially for small employers.

Additionally, an employee who believes the employer did not provide the 12-weeks of protected leave, failed to return the employee to the same or comparable position, or maintain benefits while out on the 12-weeks of leave, could pursue a claim against the employer seeking compensatory damages, injunctive relief, declaratory relief, punitive damages, and attorney's fees.

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 135**, and the ability to leverage an employer into resolving or settling the case regardless of merit.

While the author has previously indicated 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).

California Already Imposes Numerous Family Friendly Leaves of Absence on Employers:

California is already recognized by the National Conference of State Legislatures as one of the most family friendly states given its list of programs and protected leaves of absence, including: paid sick days, school activities leave, kin care, paid family leave program, pregnancy disability leave, and the California Family Rights Act. This list is in addition to the leaves of absence required at the federal level. Imposing another 12-week leave of absence is simply too much for employers to bear, especially small employers.

For these reasons, we respectfully **OPPOSE SB 135** as a **JOB KILLER**.

Sincerely,

Laura Curtis
Policy Advocate
California Chamber of Commerce

Auto Care Association
Brea Chamber of Commerce
California Ambulance Association
California Employment Law Council
California Farm Bureau Federation
California League of Food Producers
California Manufacturers and Technology Association
Camarillo Chamber of Commerce
CAWA – Representing the Automotive Parts Industry
El Centro Chamber of Commerce
El Dorado Hills Chamber of Commerce
Family Business Association of California
Greater Bakersfield Chamber of Commerce
Greater Coachella Valley Chamber of Commerce
Greater Conejo Valley Chamber of Commerce
Greater San Fernando Valley Chamber of Commerce
League of California Cities
Murrieta/Wildomar Chamber of Commerce
North Orange County Chamber
Official Police Garages of Los Angeles
Palm Desert Area Chamber of Commerce
Rancho Cordova Chamber of Commerce
San Gabriel Valley Economic Partnership
Southwest California Legislative Council
Torrance Area Chamber of Commerce
Western Growers Association

cc: Che Salinas, Office of the Governor
Cory Botts, Senate Republican Caucus
Scott Seekatz, Senate Republican Caucus
LC:ll