JOB KILLER

March 29, 2021

TO: Members, Assembly Committee on Labor and Employment

FROM: California Chamber of Commerce, Ashley Hoffman, Policy Advocate
Associated General Contractors

Brea Chamber of Commerce
California Apartment Association
California Beer and Beverage Distributors
California Building Industry Association
California Farm Bureau
California Food Producers
California Manufacturers and Technology Association
California New Car Dealers Association
California Restaurant Association
California Retailers Association
California State Council of the Society for Human Resource Management (CalSHRM)
Carlsbad Chamber of Commerce
Civil Justice Association of California
Construction Employers' Association
El Dorado Hills Chamber of Commerce
Family Winemakers of California
Folsom Chamber of Commerce
Garden Grove Chamber of Commerce
Greater Bakersfield Chamber of Commerce
Greater Coachella Valley Chamber of Commerce
Greater High Desert Chamber of Commerce
Greater Riverside Chambers of Commerce
Housing Contractors of California
Long Beach Area Chamber of Commerce
Murrieta/Wildomar Chamber of Commerce
National Federation of Independent Business
North Orange County Chamber
North San Diego Business Chamber
Oceanside Chamber of Commerce
Official Police Garages Los Angeles
Orange County Business Council
Oxnard Chamber of Commerce
Pleasanton Chamber of Commerce
Public Risk Innovation, Solutions and Management
Rancho Cordova Area Chamber of Commerce
Redondo Beach Chamber of Commerce
San Gabriel Valley Economic Partnership
Santa Maria Valley Chamber of Commerce
Santa Rosa Metro Chamber of Commerce
Simi Valley Chamber of Commerce
South Bay Association of Chambers of Commerce
Southwest California Legislative Council
Torrance Area Chamber of Commerce
Tulare Chamber of Commerce
Western Carwash Association

SUBJECT: AB 1119 (WICKS) EMPLOYMENT DISCRIMINATION AND ACCOMMODATION OPPOSE/JOB KILLER – AS INTRODUCED FEBRUARY 18, 2021

The California Chamber of Commerce and the organizations listed above respectfully **OPPOSE AB 1119 (Wicks),** which has been labeled as a **JOB KILLER. AB 1119** adds any individual with "family responsibilities" as a protected class to the Fair Employment and Housing Act (FEHA), which creates an automatic basis for an individual in that new classification to challenge any adverse employment action. **AB 1119** also imposes a burdensome new accommodation requirement on employers for any employee who has "family responsibilities," which could include daily or weekly time off requests and unexpected schedule changes. FEHA applies to employers with five or more employees and includes a costly private right of action, exposing small employers to litigation who make any mistake in the application of these new mandates.

AB 1119 Imposes a New, Uncapped Protected Leave Requirement on Small Employers:

AB 1119 amends FEHA to require employers to provide reasonable accommodations to any employee who has family responsibilities. "Family responsibilities" is broadly defined as "the obligations of an employee to provide direct and ongoing care for a minor child or a care recipient." A "care recipient" can be any person who resides in the employee's household and relies on the employee for medical care or the needs of daily living.

This mandate basically requires an employer to provide an employee with unlimited time off from work for "family responsibilities." Specifically, under this proposal, an employee would be entitled to request daily or weekly time off from work as an accommodation to care for a minor child or other recipient. That could include picking up a child every day from school or taking an unlimited number of days off to stay home with a child instead of obtaining daycare. Every parent working for an employer would have the same right to request these accommodations. An employer could find themselves with half of their staff asking to be off work by 3pm every day when the local K-12 schools end classes. The employer would be required to accommodate all of those employees, putting them in an impossible position to try to continue business operations understaffed or to decide who they can accommodate and who they cannot. Any denial of time off as an accommodation would expose the employer to costly litigation, as set forth below.

Leave Under AB 1119 Would Be Stacked On Top of Other Existing Leave Mandates:

Any time off an employee receives as an accommodation under FEHA would not run concurrently with the other California leaves of absence. An employee who requested a month off under **AB 1119** as a reasonable accommodation would still have 12 weeks of leave under the California Family Rights Act, 12 weeks of leave under the Family and Medical Leave Act, paid sick leave, and all other existing leaves to care for children/family members including:

- School/Childcare leave – Expanded in 2016 so that employees can take up to 40 hours per year to care for a child whose school or childcare provider is unavailable, enroll a child in school or childcare, or participate in school or childcare activities.
- School Appearance leave – Uncapped leave for an employee who needs to take time off to appear at school due to a student disciplinary action.
- Crime /Domestic Abuse/Sexual Assault/Stalking Victim leave – Uncapped leave for victim or victim's family member to attend related proceedings.

This list also does not include the dozens of local ordinances that have broader paid and unpaid leave requirements than those listed above. These leaves add significantly to the cumulative cost of doing business in California. For example, unscheduled absenteeism costs roughly $3,600 per year for each hourly employee in this state. (*See* "The Causes and Costs of Absenteeism in The Workplace," a publication of workforce solution company Circadian.) The continued mandates placed on California employers to provide employees with numerous rights to protected leaves of absence and other benefits is simply overwhelming and unmatched by any other state.

New, Protected Classification Would Limit Employers' Ability to Enforce Employment Policies:

AB 1119 also proposes to add any individual with "family responsibilities" as a new protected classification under FEHA. Adding a new classification to the list under FEHA would limit an employer's ability to enforce all employment policies, such as attendance policies. Every adverse employment action taken by the employer could be challenged as discriminatory based on "family responsibilities." For example, even if the employee did not request time off as an accommodation and simply took time off, whenever they wanted, scheduled or unscheduled, the employer could not discipline or terminate the employee for the time off without facing potential litigation under FEHA for discrimination, i.e., that the adverse employment action was taken because of the employee's status as a person with family responsibilities, not because the employee violated the employer's attendance policy. This will significantly limit an employer's ability to address discipline issues in the workplace, maintain stability, and eradicate any issues without costly litigation.

AB 1119 Exposes Employers to Costly Litigation:

FEHA includes a separate and independent private right of action for any alleged discrimination against a protected classification, failure to accommodate, or failure to engage in the interactive process to identify an accommodation. Each claim brings a separate opportunity for compensatory damages, injunctive relief, declaratory relief, punitive damages, and attorney's fees. Under **AB 1119,** an employee whose accommodation request was denied could sue for discrimination, failure to engage in the interactive process, retaliation, and failure to provide a reasonable accommodation.

The case law and regulations governing the interactive process and accommodations are voluminous and vague. Because accommodation requests are highly fact-specific, it is easy for an employer to believe they are following the law and then be hit with a lawsuit that is costly to defend. A 2017 study by insurance provider Hiscox regarding the cost of employee lawsuits estimated that the cost for a small to mid-size employer to defend and settle a single plaintiff discrimination claim was approximately $160,000, which was a $35,000 increase from Hiscox's study just two years earlier. This amount, especially for a small employer, reflects the financial risk associated with defending a lawsuit under FEHA. In 2016, Hiscox found that U.S. companies had a 10.5% chance of having an employment charge filed against them. For California, that percentage was **56.5%.** According to the DFEH's annual reports, the number of complaints filed in California continues to grow every year, with more than half of those employees choosing to immediately pursue civil litigation instead of having the DFEH investigate their claim.

Even when an employer does grant an accommodation for leave, there is likely to be a lawsuit about whether the employer should have done more. In the disability context, there has been extensive litigation about whether a specific accommodation is sufficient or whether the employee is entitled to more accommodations after the end of a period of leave. *See, e.g., Hanson v. Lucky Stores, Inc.*, 74 Cal. App. 4th 215, 215 (1999) (employee sued for failure to accommodate under FEHA after being on leave for 16 months); *Nadaf-Rahov v. Neiman Marcus Group, Inc.*, 166 Cal. App. 4th 952 (2008) (employee sued for disability discrimination, retaliation, failure to accommodate, and failure to engage in the interactive process after employer provided employee with nine months of leave). If an employee is laid off because the employer cannot accommodate the employee and they are otherwise unable to work, the employer is on the hook for continuing to look for open positions for the employee *even after the employee's employment has ended*. *Nadaf-Rahov*, *supra*, 166 Cal. App. 4th 952 (court reversed summary judgment because several positions became available four months after the employee was terminated - positoins that she potentially could have performed).

Small Employers Cannot Afford Another Costly Mandate:

FEHA applies to all employers with five or more employees. Because of the number of employees that would be entitled to those accommodations by this broad definition, this bill would result in a significant burden for businesses, especially small businesses. It is estimated that about 44% of small businesses are at risk of shutting down permanently as a result of the COVID-19 pandemic. Small business revenue is down more than 30% in California, with some sectors being down more than 70%. The Governor and the Legislature have both acknowledged that now is the time to invest in our businesses, especially our small businesses, to keep them from closing their doors, laying off more workers, or slowing their recovery and job growth.

Some argue that small businesses are receiving state and federal financial aid as a result of the pandemic, so these increased mandates should not be cause for concern. That is not true. For example, only a small portion of small business will qualify and be able to get funds offered by the Small Business COVID-19 Relief Grant Program. If, hypothetically, half the grants are distributed to the top tier, one-third to the middle tier and one-sixth to the lowest tier, then a total of about 150,000 businesses will receive some grant. That is a small fraction of the millions of struggling small businesses in California. There were 300,000 applications requesting more than $4 billion during the first round of grants offered by the state in 2020. Also, those grants are capped at between $5,000 and $25,000. Even small businesses that took out PPP loans in 2020 larger than $25,000 are still concerned about making payroll. Further, many small businesses are having to pay state taxes on those PPP loans as if they were income.

The Senate floor analysis of SB 87, the $2 billion grant program, confirmed that these programs alone cannot remedy the financial devastation caused by COVID-19 on our business community: “These grants will help some businesses in the short-term. However, even businesses that receive these grants, or receive aid through other programs, will need sustained support to continue operating. The grants proposed here are small compared to the magnitude of the revenue losses suffered in the past year, particularly for the larger businesses and the large nonprofit cultural institutions. In addition, large businesses across many sectors were excluded from this program but may also need financial assistance.”

This financial burden is especially hard on small businesses given that the employer has no discretion to deny CFRA or paid sick leave or ask an employee to modify the leave to accommodate the employer’s business operations or other employees who may be absent from work on other California leaves of absence or through reasonable accommodations under **AB 1119** or otherwise. If an employer denies, interferes with, or discourages the employee from taking the leave, the employer could be subject to costly litigation.

Instead of Burdening Employers with More Costs, the Legislature Should Provide More Flexible Work Options that Benefit Employers and Employees:

Like many of the bills and regulations that have been introduced over the past year, **AB 1119** again proposes that California’s employers subsidize an employee’s personal needs outside of work instead of considering alternative solutions that could benefit both employers and employees. Instead of imposing new costs on employers, the Legislature should reform California’s unnecessarily rigid wage and hour laws to allow employees flexibility in their weekly schedules that would allow workers more time to care for children and others. Presently, California’s inflexible Labor Code and steep penalty system dissuade employers from allowing employees to have more flexibility during their workday. Added costs such as split shift premiums, daily overtime, meal and rest break premiums, and a broad expense reimbursement requirement make workplace flexibility too expensive for employers to consider. Many employers are hesitant to continue to offer telecommuting after the pandemic because these wage and hour laws were not designed with telecommuting employees in mind. Any failure to adhere to certain rules immediately triggers penalties and attorney’s fees under various Labor Code provisions, including PAGA.

Employees want flexibility, whether it be through a more flexible daily schedule, alternative workweek schedule, or the ability to continue to telecommute after the conclusion of the pandemic. Updating these laws to provide more opportunities for employees to telecommute is an important issue that benefits both employees and employers and is very popular among California voters. In a recent survey conducted by the California Chamber of Commerce, 86% of polled voters agree (42% strongly) that the state’s labor laws should be changed so employees working at home have more flexibility and 92% agree (55% strongly) with policies that would make it easier for businesses to allow employees to telecommute. Providing more flexibility to employees would ease the burdens of care obligations for many employees.

For these and other reasons, we respectfully **OPPOSE AB 1119** as a **JOB KILLER.**

cc: Stuart Thompson, Office of the Governor
Melanie Morelos, Office of Assembly Member Wicks
Lauren Prichard, Assembly Republican Caucus

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