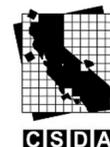


SB 1383 (Jackson) **JOB KILLER**





UPDATED

JOB KILLER

June 25, 2020

The Honorable Holly Mitchell  
Chair, Senate Budget Committee  
State Capitol  
Sacramento, CA 95814

The Honorable Jim Nielsen  
Vice Chair, Senate Budget Committee  
State Capitol  
Sacramento, CA 95814

Members, Senate Budget Committee  
State Capitol  
Sacramento, CA 95814

Members, California State Senate  
State Capitol  
Sacramento, CA 95814

Sent via email

SUBJECT: SB 1383 (JACKSON) UNLAWFUL EMPLOYMENT PRACTICE: FAMILY LEAVE  
OPPOSE AS AMENDED JUNE 23, 2020 – JOB KILLER

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE SB 1383** (Jackson) as a **JOB KILLER**, as it will significantly harm small employers in California by requiring all employers 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.

#### **SB 1383 Disproportionately Impacts the Smallest of Employers in California:**

**SB 1383** imposes a mandatory 12-week leave of absence on any employer with one or more employees. According to the most recent labor market data from the Employment Development Department (EDD), out of California's approximately 1.6 million employers, over 1.1 million employers in California have fewer than 5 employees. **SB 1383** will overwhelmingly hit the smallest employers in California, who are the least equipped to handle this proposal.

Specifically, based upon a study conducted on California's **six-week** Paid Family Leave Program in 2011 by Eileen Applebaum and Ruth Milkman, they found the following with regard to small employers:

“The smallest business we visited, an optometrist's office, was the least well equipped to cover leaves. This business only has three employees (apart from the owner), one of whom is a highly skilled technician. When this individual is absent, the optometrist fills in himself and takes fewer clients. ***Very small businesses like this one do face special challenges since an inevitable effect of their size is that very few co-workers are available to cover the work when someone is absent.***” (emphasis added)

**SB 1383** imposes a 12-week leave, double the amount of time considered in the above-referenced study. It will devastate small employers.

#### **SB 1383 Includes In-Home Care Providers and Will Impact Working Families:**

Given the broad definition of employer in **SB 1383** to include any employer that has one or more employees, it captures working families who have in home childcare providers or senior care. Many working families are choosing to keep their kids home while they return to work in order to minimize any risk of infection. **SB 1383** would impose a 12-week leave of absence on parents who utilize this as an option and threaten them with litigation if they make any mistake in its implementation. Working parents are not the same as a large employer and do not have the capacity or resources to implement this type of leave or respond to a lawsuit, as discussed below.

#### **SB 1383 Exposes Small Employers and Working Parents to Costly Litigation Even for Unintentional Mistakes:**

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 one employee 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. Parents are not labor and employment experts. They are bound to make an unintentional mistake along the way, which will cost them in 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.4<sup>th</sup> 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.4<sup>th</sup> 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 and working parents 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.

**SB 1383 Is Not Necessary to Implement the Budget:**

**SB 1383** does not impact the budget in any way. It is a policy change with no appropriation.

For these reasons, we respectfully **OPPOSE SB 1383** as a **JOB KILLER**.

Sincerely,



Jennifer Barrera  
Executive Vice President  
California Chamber of Commerce

American Institute of Architects California  
American Pistachio Growers

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 Automotive Wholesalers' 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 Citrus Mutual  
California Craft Brewers Association  
California Employment Law Council  
California Farm Bureau Federation  
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 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  
Conejo Valley Chamber of Commerce  
Construction Employers Association  
CSAC Excess Insurance Authority  
El Centro Chamber of Commerce  
El Dorado County Chamber of Commerce  
El Dorado Hills 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  
Gateways Chamber Alliance  
Gilroy Chamber of Commerce  
Greater Coachella Valley Chamber of Commerce  
Greater Riverside Chambers of Commerce  
International Council of Shopping Centers  
Laguna Niguel Chamber of Commerce  
League of California Cities  
Long Beach Chamber of Commerce  
Los Angeles Chamber of Commerce  
National Federation of Independent Business  
North Orange County Chamber  
Modesto Chamber of Commerce  
Murrieta/Wildomar Chamber of Commerce  
Nisei Farmers League  
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 Economic Partnership  
Santa Maria Valley Chamber of Commerce  
Silicon Valley Organization  
Southwest California Legislative Council  
Torrance Area Chamber of Commerce  
Tracy Chamber of Commerce  
UCAN Chambers of Commerce  
Western Electrical Contractors Association  
Western Growers Association  
Western Manufactured Housing Communities Association  
Western Plant Health

cc: Anthony Williams, Office of the Governor  
Cory Botts, Senate Republican Caucus  
Scott Seekatz, Senate Republican Caucus

JB:ll