

AB 1041 (WICKS) EMPLOYMENT: LEAVE



## FLOOR ALERT

September 1, 2021

TO: Members, California State Senate Committee

**SUBJECT: AB 1041 (WICKS) EMPLOYMENT: LEAVE  
OPPOSE – AS AMENDED APRIL 22, 2021**

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE AB 1041 (Wicks)**, which will significantly expand the California Family Rights Act (CFRA) and paid sick leave to allow an employee to take protected and/or paid time off to care for any person of their choice. The existing provisions of CFRA are already challenging, confusing, and burdensome, and small employers who are struggling as a result of this pandemic are overwhelmed by the current law. Additionally, existing paid sick leave laws are difficult to administer. Expanding both of these laws as proposed under **AB 1041** will simply expedite the shutdown of more small businesses in California and further expose employers to unnecessary costs and more litigation.

### **CFRA Leave Was Just Expanded this Year and Imposes a Significant Burden on Small Employers:**

CFRA was just expanded on January 1, 2021 to apply to small businesses with only 5 employees. Not only was CFRA extended to apply to small businesses, but also the family members for whom an employee can take leave to provide care was expanded. Because of those changes, CFRA no longer runs concurrently with its federal counterpart, the Family and Medical Leave Act (FMLA). Between the two statutes, an employee could be out of work for six months and the employer would have no discretion to deny CFRA or FMLA or ask an employee to modify the leave to accommodate the employer's business operations or other employees who may be out of work on other California leaves of absence or as an accommodation under FEHA. Even worse, the employee can choose to take CFRA leave in increments instead of all at once, as short as 1-2 hours. This puts small employers in the near impossible position of having to sporadically find replacement employees or pay other employees overtime to cover the work.

Expanding CFRA last year to small businesses also increased their administrative burden. The regulations implementing CFRA are lengthy, spanning several dozen pages. If an employer errs in following any one of those regulations, the employer could be subject to costly litigation. Making a drastic change to CFRA during the first year that small businesses are trying to navigate how to implement the law will increase that burden at a time when businesses can least afford it.

**AB 1041** would expand CFRA even further and allow employees to take care of any person of their choosing. Under CFRA, if an employer were to question the status of the relationship of the person for whom the employee was taking the leave, this could be seen as interfering with or discouraging the employee from taking the leave, exposing the employer to litigation.

### **CFRA and the Healthy Workplaces Healthy Family Act Already Cover Time Off for Those Individuals Who Stand in the Shoes of an Employee's Parents or Are Like a Child to the Employee:**

Under CFRA and the Healthy Workplaces Healthy Family Act (Act), an employee can already take time off to care for people who are not family members. An employee can take leave to care for a child if they are someone **who stands in loco parentis to the child**. Similarly, an employee can take time off to care for an individual **who stood in loco parentis to them as a child**. A biological or legal relationship is not necessary in either of those situations to qualify for CFRA leave. If an employee is charged with a parent's duties and responsibilities to a child, they can already take leave to care for that child. The law, therefore, already applies to many situations involving non-biological family relationships.

### **Leave Expansions Expose Employers to Costly Litigation:**

CFRA 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 initiate litigation. Paid sick leave can be enforced through the Labor Commissioner or a lawsuit under the Private Attorneys General Act (PAGA), under which an employee can sue on behalf of themselves or any other aggrieved employee for any Labor Code violation. The employees would be entitled to penalties of \$50 per employee per day the alleged violation occurred or continued plus attorney's fees. PAGA penalties are often leveraged by attorneys for high settlements far beyond the value of any actual harm. By expanding CFRA and paid sick leave as proposed in **AB 1041**, it will expose employers to even more costly litigation under both statutes.

### **California Employers, Especially Small Employers, Cannot Afford Yet Another Mandated Increase in Benefits:**

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 or needing to resort to more layoffs to stay afloat.

Leaves of absence disproportionately affect small businesses. A study conducted on California's six-week Paid Family Leave Program in 2011 by Eileen Applebaum and Ruth Milkman 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*).

Not only do small businesses now have to comply with a leave double that length under CFRA, but also **AB 1041** would expand that leave so that an employer could take 12 weeks to care for anyone they choose.

While one more benefit may not seem significant in isolation, this mandate must be viewed in the context of all of California's other leaves and paid benefits. California has numerous protected, overlapping leaves and benefits requirements. Despite the economic struggles that businesses have faced in light of COVID-19, the Legislature has only added more overlapping leaves over the last year, and as this bill demonstrates, continues to propose even more. Existing paid leaves include:

- Paid sick leave – Minimum of three days of leave for an employee's or family member's illness or preventative care. Legislation introduced this year would increase the minimum number of paid sick days from 3 to 5 days
- CalOSHA Emergency Temporary Standard – Imposed new 10-day paid leave on all employers for all employees who have COVID-19 or may have been exposed, even if the exposed employee never contracts COVID-19; leave has no pay cap. Also mandates employer pay for mandatory COVID-19 testing for employers
- FFCRA and AB 1867 – Imposed 80-hour paid leave requirement on all employers in 2020 for various COVID-19-related reasons
- Workers' Compensation – Expanded presumption for COVID-19 so that employees may be entitled to paid leave and benefits under workers' compensation system
- SB 95 – The Legislature recently passed budget trailer bill language that imposes a second 80-hour paid leave requirement in 2021, retroactive to January 1, 2021, for various COVID-19-related reasons
- Organ and Bone Marrow Donor leave – 30 days paid leave plus 30 additional days of unpaid leave

- Voting leave – two hours of paid leave for all statewide elections

In addition to the above paid leaves, there are a multitude of unpaid leaves that increase costs on employers because the employer must either shift the work to other existing employees on short notice, which leads to overtime pay, or be understaffed. These unpaid leaves include:

- CFRA – 12-week leave for the employee’s own illness or to care for a family member. CFRA was expanded last year to apply to small businesses and to cover additional family members so that it no longer runs concurrently with FMLA. Employees can use this leave in smaller 1-2 hour increments if they so choose
- FMLA – 12-week leave for the employee’s own illness or to care for a family member
- Pregnancy Disability leave- 4 months of leave
- School/Childcare leave – Expanded in 2016 so that employees can take up to 40 hours per year to care for 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 employees who need 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
- Jury/Witness leave – Uncapped leave for jury duty or to serve as a witness
- Military Service leave – Uncapped leave provided for military personnel; benefits must continue for at least 30 days. Ten days of leave for military spouses
- Drug Rehabilitation/Adult Literacy classes – Uncapped leave for employees who wish to participate in alcohol or drug rehabilitation programs or adult literacy programs
- Volunteer Civil Service leave – Uncapped leave to serve as a volunteer firefighter, peace officer, or emergency rescue personnel

There are several bill proposals this year to expand these leaves and benefits. 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 financial impact of the 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.

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 some small businesses 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 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.” Now is not the time to increase leave mandates.

**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 1041** once again tries to make California's employers pay for all of 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 address personal needs. 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 make addressing personal needs outside of work easier for many employees.

For these and other reasons, we respectfully **OPPOSE AB 1041**.

Sincerely,



Ashley Hoffman  
Policy Advocate  
California Chamber of Commerce

Associated General Contractors  
Beverly Hills Chamber of Commerce  
Brea Chamber of Commerce  
California Association of Joint Powers Authorities  
California Beer and Beverage Distributors  
California Building Industry Association  
California Business Properties Association  
California Chamber of Commerce  
California Farm Bureau  
California Food Producers  
California Hospital Association  
California Landscape Contractors Association  
California Railroads  
California Restaurant Association  
California Retailers Association  
California Special Districts Association  
California State Association of Counties  
California State Council of the Society for Human Resource Management (CalSHRM)  
Carlsbad Chamber of Commerce  
El Dorado Hills Chamber of Commerce  
Family Business Association of California  
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 of Los Angeles  
Orange County Business Council  
Oxnard Chamber of Commerce  
Pleasanton Chamber of Commerce  
Plumbing-Heating-Cooling Contractors of California  
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  
Wilmington Chamber of Commerce

cc: Stuart Thompson, Office of the Governor  
Melanie Morelos, Office of Assembly Member Wicks  
Alma Perez, Senate Committee on Labor, Public Employment and Retirement  
Cory Botts, Senate Republican Caucus  
Scott Seekatz, Senate Republican Caucus

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