



JOB KILLER

AB 95 (LOW) BEREAVEMENT LEAVE

April 16, 2021

TO: Members, Assembly Committee on Appropriations

FROM: California Chamber of Commerce, Ashley Hoffman, Policy Advocate *AH*
Associated General Contractors
Brea Chamber of Commerce
California Association for Health Services at Home
California Bankers Association
California Beer and Beverage Distributors
California Building Industry Association
California Farm Bureau
California Food Producers
California Hospital Association
California Landscape Contractors Association
California Restaurant Association
California Retailers Association
California Special Districts 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 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
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
Western Growers Association
Wilmington Chamber of Commerce

**SUBJECT: AB 95 (LOW) BEREAVEMENT LEAVE
OPPOSE/JOB KILLER – AS AMENDED MARCH 22, 2020**

The California Chamber of Commerce and the organizations listed above respectfully **OPPOSE AB 95 (Low)** and has been labeled a **JOB KILLER**. **AB 95** will mandate that every employer with 25 or more employees grant employees up to ten (10) days of bereavement leave upon the death of a spouse, child, parent, sibling, grandparent, grandchild, or domestic partner. It will also mandate that every employer with fewer than 25 employees grants up to three (3) days of bereavement leave. The bill further prohibits adverse action against employees and authorizes a brand-new private right of action (in addition to liability under PAGA and administrative enforcement through the Division of Labor Standards Enforcement). **AB 95** should instead be added as a qualifying reason under the California Family Rights Act (“CFRA”), which was just expanded last year to employers with 5 or more employees.

AB 95 Opens Up New Avenues to Litigation Against California Employers

AB 95 creates a new, stand-alone section of the Labor Code that specifically authorizes a new private right of action, including attorney’s fees, by an employee who alleges that their right to exercise or attempt to exercise their right to bereavement leave has been violated. The bill also provides that claims may be brought before and pursued by the Division of Labor Standards Enforcement (DLSE). Moreover, the bill also specifies that this new right to sue is “cumulative, nonexclusive, and in addition to any other rights and remedies” afforded by law. This means an employer could also be liable for other penalties and remedies for the same violation of the law, including a claim for penalties under the Labor Code Private Attorneys General Act of 2004 (PAGA). This enforcement scheme, including a brand-new private right of action, incentivizes costly litigation against California employers. If anything, enforcement of this new burdensome mandate should be exclusively enforced through administrative action by the DLSE.

California Employers Cannot Afford Yet Another Leave Mandate

California employers are certainly sympathetic towards their employees who have suffered the loss of a close family member. We support the rights of employers to provide bereavement leave on a *voluntary* basis, as many employers already provide such leave. We oppose **AB 95**, not because it promotes the right to bereavement leave, but rather because of the manner in which it does so. We do not believe an employer mandate on this issue is the appropriate role of government or the correct policy approach.

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.

While one more paid 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 number of overlapping leaves has grown over the last year and continues to grow:

- Paid sick leave – minimum of three days of leave for an employee or family member’s illness or preventative care. There is a bill proposal this year to increase the minimum number of paid sick days from 3 to 5 days
- CalOSHA Emergency Temporary Standard – imposed a 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; this leave has no pay cap. Also it 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 employee 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 variety of different 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 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 business 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 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 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
- 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.

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.”

This proposed financial burden is especially hard on small businesses given the fact that the employer has no discretion to deny paid sick leave 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. If an employer denies, interferes with, or discourages the employee from taking the leave, the employer could be subject to costly litigation.

The continued mandates placed on California employers to provide employees with numerous rights to protected leaves of absence is simply overwhelming. By making a 3 or 10-day bereavement leave mandatory in every situation, **AB 95** removes the flexibility employers need to balance bereavement leave requests with other pressing leave requests. Coordinating overlapping leave requests can be especially challenging for small businesses with limited staff.

AB 95 also proposes a much more significant burden than prior efforts to enact similar legislation in California. For example, SB 549 (Corbett) of 2007 proposed to require employers to provide up to *four* days of bereavement leave, but was vetoed by Governor Schwarzenegger. Similarly, AB 2340 (Monning) of 2010 would have mandated up to *three* days of bereavement leave and was also vetoed by Governor Schwarzenegger. Finally, AB 325 (Lowenthal) of 2011 would have mandated up to *four* days of bereavement leave and was vetoed by Governor Brown, who stated:

“Granting bereavement leave when a close family member dies is the moral and decent thing to do and I believe that the vast majority of employers voluntarily make such an accommodation for the loss of a loved one.

I am also concerned that this measure adds a more far reaching private right to sue than is contained in related statutes.”

By contrast, **AB 95** contains a much more burdensome mandate of up to *ten* days of leave.

AB 95 Is Much More Burdensome to Employers Than Similar Legislation in Oregon

Supporters of this bill and AB 2999 (Low) from 2020 point to Oregon’s 2014 enactment of a bereavement leave statute (ORS 659A.156. et seq.) as the basis for this legislation. However, supporters fail to acknowledge that the Oregon law is structured much differently than this proposal and is much less burdensome to Oregon employers.

First, the Oregon statute did not create a new and separate leave entitlement. Instead, bereavement leave was merely added to Oregon’s existing family and medical leave law, the Oregon Family Leave Act (“OFLA”) which provides covered employees with up to 12 weeks of unpaid leave for family and medical leave purposes. The Oregon law added two weeks of bereavement leave to this existing statute, to be included *within* the 12 weeks of existing family and medical leave.

In addition, the Oregon law allows employers to require employees to take paid leave accrued pursuant to any vacation, sick, personal or other paid leave policy. While **AB 95** provides that an employee may use accrued time, it does not allow the employer to require its use.

Finally, the Oregon law defines permissible uses of bereavement leave to consist of attending a funeral or funeral alternative, making arrangements for such services, and for grieving. However, **AB 95** does not define “bereavement leave” or specify any permissible purposes for its use, leaving it completely wide open and subject to potential abuse.

Oregon also does not have an equivalent law like PAGA. California is the only state that has PAGA, which adds an additional threat of litigation and costs against employers for any alleged violation of the Labor Code, which would include bereavement leave under **AB 95**.

AB 95 Should Instead Be Added to the California Family Rights Act

Many of the concerns expressed above could be reduced if the provisions of this bill were added to CFRA, rather than creating an entirely new leave entitlement in the Labor Code. This would make the mandate more reasonable as it could be included within the 12 weeks of unpaid leave already mandated by CFRA and would be subject to the CFRA definitions of employer and employee. This would make compliance more manageable, less burdensome, and would be entirely consistent with the approach taken in Oregon, which is the purported model for this legislation.

For these reasons and other reasons, we respectfully **OPPOSE AB 95** as a **JOB KILLER**.

cc: Stuart Thompson, Office of the Governor
Cassie Mancini, Office of Assembly Member Low
Joe Shinstock, Assembly Republican Caucus

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