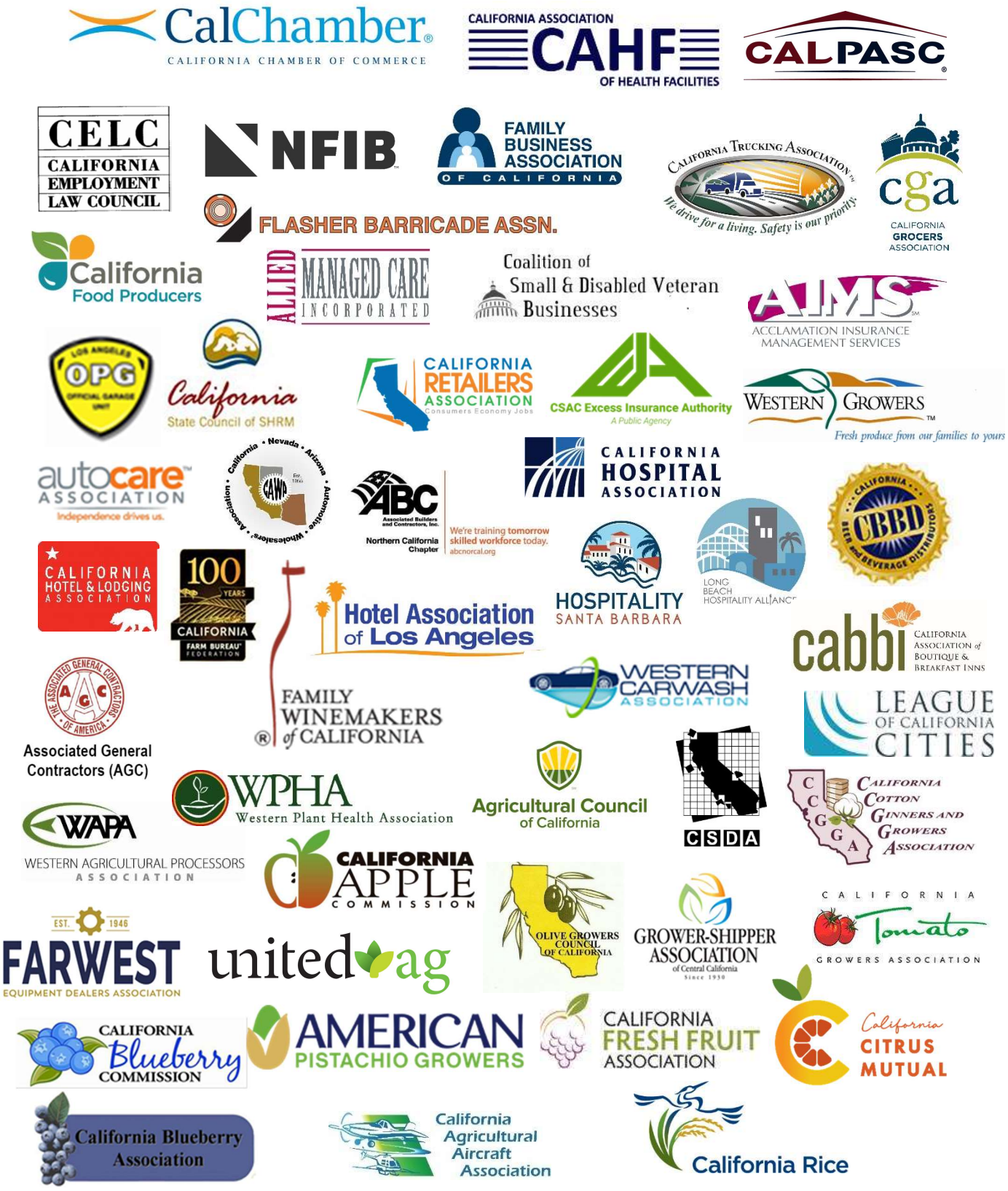
JOB KILLER

3216 (KALRA) EMPLOYMENT LEAVE: AUTHORIZITION: COVID



JOB KILLER

May 13, 2020

The Honorable Ash Kalra
California State Assembly
State Capitol, Room 2196
Sacramento, CA 95814

The Honorable Lorena Gonzalez
California State Assembly
State Capitol, Room 2114
Sacramento, CA 95814

SUBJECT: AB 3216 (KALRA/GONZALEZ) EMPLOYMENT LEAVE: AUTHORIZITION OPPOSE/JOB KILLER – AS AMENDED MARCH 12, 2020

Dear Assembly Member Kalra and Gonzalez:

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE** your **AB 3216 (Kalra/Gonzalez)**, as amended May 12, 2020, which has been labeled a **JOB KILLER.**

AB 3216 imposes staggering, significant and unprecedented new requirements on businesses of all sizes in California during a time of crisis when they can least afford it. These include drastic new family and medical leave requirements, significant new paid sick leave requirements, and unprecedented (and likely unconstitutional) "right of recall" requirements for certain businesses. Moreover, **AB 3216** makes significant changes to several areas of the law – including the California Family Rights Act (CFRA), Pregnancy Disability Leave (PDL), and Paid Family Leave (PFL) – which have nothing to do with the current crisis and are changes that advocates have long sought. These permanent and far-reaching changes are now being proposed under the cover of attempting to protect workers during the COVID-19 crisis.

The California Chamber of Commerce certainly acknowledges that these are unprecedented times, and that many employees are suffering from lack of work, reduction in hours, and other financial difficulties as a result of this crisis and government-mandated shutdowns.

We certainly agree that the short- and long-term health of all Californians should be everyone's priority and businesses throughout California are doing everything they can to protect their employees while still providing essential services and goods. Many businesses and their owners are themselves casualties of the necessary economic shutdown. They cannot be expected to shoulder a new employer-financed social safety net, with expensive new mandates, at precisely the moment when small businesses are shuttering, employee hours are cut, and uncertainty about the future is the new normal.

Therefore, we do not believe that the approach proposed in **AB 3216** is the proper course of action at this time.

AB 3216 Attempts to Enact a "Wish List" of Permanent Changes to the Law that Advocates Have Sought Unsuccessfully for Years – Under the Cover of the Current Crisis

AB 3216 proposes a number of changes to various leave laws that worker advocates have been pushing for a number of years. These efforts have been opposed by the business community over concerns regarding the resulting burdens to employers and have been unsuccessful thus far. Now, **AB 3216** attempts

to include these same policy proposals – many of which have nothing to do with the current crisis - under the guise of this bill.

These proposed unrelated changes include the following:

- The bill amends CFRA (not just the new emergency family and medical leave requirement) to apply to employers of any size. CFRA currently applies to employers with 50 or more employees within 75 miles of the worksite. This proposal to lower the 50-employee threshold in CFRA has been an agenda item for advocates for many years. California recently enacted the New Parent Leave Act (NPLA) which, after significant legislative debate was enacted to apply to employers with 20 or more employees. This bill completely eliminates that new law and instead applies *all* of CFRA to employers of any size.

- The bill expands the categories of "family members" under CFRA to include leave to care for a grandparent, grandchild, or sibling. Advocates have been attempting to expand CFRA in this manner for well over a decade.

- The bill expands employer coverage under California's Pregnancy Disability Leave (PDL) law from 5 employees to one or more employees – which has no apparent relationship for leave related to the current crisis.

- The bill eliminates the provision of existing law under the Paid Family Leave (PFL) program that provides an employee is not eligible for leave if another family member I ready, willing and able to provide care.

- The bills eliminates the provision of existing law under the PFL that allows an employer to require the employee to take up to two weeks of earned but unused vacation prior to the receipt of PFL benefits. This has long been a target for elimination by worker advocates well before this crisis.

It is one thing to generate a conversation about the need to develop new policies that apply to workers during a state of emergency such as COVID-19. That is a conversation the Legislature can and should be having. However, it is disingenuous and another thing altogether to use the cover of the current crisis to propose a worker advocate "wish list" of leave-related proposals that they have sought unsuccessfully for years. At a minimum these proposals should be eliminated from **AB 3216**. Continued debate over these long-standing issues can continue after this crisis.

AB 3216 Enacts a New 12-Week Emergency Family and Medical Leave Entitlement That Applies to All Employers Regardless of Size

AB 3216 proposes a brand-new 12-week emergency leave entitlement for family care and medical leave taken because of a "state of emergency," including a public health emergency declared by a local, state, or federal authority.

This new leave would apply to employers of any size and would therefore especially burden small employers. Moreover, this new emergency leave would apply to all employees, regardless of how long they have been employed or how many hours they have worked for the employer. By contrast, CFRA applies to employees who have been employed for at least 12 months and who have worded at least 1,250 hours during the previous year. Therefore, on day one an employee would immediately be entitled to 12 weeks of job-protected emergency leave. Therefore, the mandate established by **AB 3216** will apply to all employers, even the smallest employers in the state.

Therefore, **AB 3216** would provide for 12-weeks of job protected emergency leave in addition to 12 weeks of leave under the CFRA (which now would apply to all employers, regardless of size). This would result in a total of 24 weeks of leave. Moreover, while the bill purports that the leave under this bill and the federal FMLA shall not exceed 24 weeks, this language is meaningless and has no effect. As the Legislature is

well aware from looking at this issue over the years, California cannot mandate that state leave runs concurrently with the FMLA – that requires an act of Congress or a regulatory change at the federal level. Therefore, under **AB 3216** an employee could potentially be entitled to 12 weeks of emergency leave, 12 weeks of leave under CFRA, and 12 weeks of leave under the FMLA – for a staggering total of ***36 weeks*** of job protected leave, which would create a tremendous burden on employers.

Moreover, as discussed below the new leave under **AB 3216** would be in addition to numerous (and in most cases paid) leave entitlements enacted at the federal, state and local levels in recent weeks in direct response to the COVID-19 crisis.

AB 3216 Enacts a New Employer-Funded Emergency Paid Sick Leave Entitlement

AB 3216 requires all employers to provide employees with at least 80 hours or 10 days of paid sick leave to use for any specified purpose related to a "state of emergency." Qualifying reasons for this leave include (1) when the employee is subject to a federal, state or local public health order, (2) to care for a family member subject to such an order, (3) to care for a child or family member if a school or place of care is closed, (4) when the place of employment is closed by the employer or a public health official due to a state of emergency, and (7) when the employee is subject to a federal, state, or local evacuation order.

This new mandate differs and in broader in scope from similar emergency paid sick leave requirements enacted at the federal, state, and local level in recent weeks – and will likely be in additional to all of these other paid leave requirements.

For example, the federal Families First Coronavirus Response Act (FFCRA) provides for emergency paid sick leave and emergency family and medical leave only where the employee is "unable to work or telework" due to specified qualifying reasons. **AB 3216** does not even specify that employee must be unable to work due to the qualifying reasons in order to take the leave. Moreover, the terms under the FFCRA have engendered numerous guidance and regulations from the Department of Labor clarifying the meaning of terms and operation of the statutory provisions. **AB 3216** provides little, if any, clarification of the meaning of important terms and the circumstances under which the employee would qualify for paid sick leave. In addition, the FFCRA (as interpreted by the DOL) does not apply where the employer is closed down directly or indirectly by an emergency shutdown order because there is no work available for the employee. By contrast, **AB 3216** specifically provides that an employee is entitled to paid sick leave even when the "place of employment is closed," and when the employer has no work for them to perform.

Most importantly, the new emergency paid sick leave mandated by **AB 3216** is completely and 100% employer funded. Requiring an employer who is suffering economic catastrophe (and is likely closed down) during a state of emergency to provide significant paid sick leave is simply not realistic or feasible.

And finally, states of emergency regularly last for significant periods of time, long past the time of a pressing emergency. For example, the emergencies declared on November 8, 2018 and October 27, 2019 due to wildfires and extreme weather conditions in Ventura County and other counties remain in effect today, long after the fire season has ended. On December 23, 2019, Governor Newsom terminated more than 70 *ongoing* states of emergency that had been declared at various times over the last decade, from January 27, 2011 to November 30, 2018. Accordingly, this new paid sick leave mandate is not "limited" to defined periods of time, but rather will be an ongoing mandate long after the pressing emergency exists.

The Timing Could Not Be Worse - California Employers Can Ill Afford Yet Additional Leave Mandates

California employers are certainly sympathetic towards their employees who are unable to work due to COVID-19 related (or similar emergency) reasons experienced by the employee or a family member. However, the entirely new leaves proposed in **AB 3216** are in addition to numerous leave provisions under existing law, including several new mandates enacted at the federal, state, and local levels in recent weeks.

The new leaves under **AB 3216** would likely be in addition to numerous (and in most cases paid) leave entitlements enacted at the federal, state and local levels in recent weeks in direct response to the COVID-19 crisis.

At the federal level, the Families First Coronavirus Protection Act (FFCRA), which went into effect on April 1, already provides for various forms of job-protected and paid leave for employees impacted by COVID-19. The law provides for up to 80 hours of emergency paid sick leave for a variety of COVID-19 related reasons, including when the employee or a family member has been quarantined or has need for care due to COVID-19. In addition, the FFCRA provides for 12 weeks of job-protected leave (10 of which are paid) for any employee who has worked at least 30 days for a covered employer to care for a child who is home due to school or childcare closures. Notably, emergency family and medical leave under the FFCRA runs concurrently with leave a covered employee may be entitled to under the FMLA.

Most importantly, the federal law recognizes the new burden created by this mandate, and therefore provides employers with ***a tax credit to offset all of their costs***. Given the prompt action by the federal government, additional state-only protected leaves, such as that proposed in **AB 3216**, with their related costs and litigation risks, are unnecessary and duplicative.

In addition, Governor Newsom recently issued an executive order to provide 80 hours of paid sick leave for certain food sector workers, many of whom would also be covered by **AB 3216**. On top of that, a number of local jurisdictions in California (including Los Angeles, San Francisco, San Jose and Emeryville) have enacted their own COVID-19 paid sick leave requirements in recent weeks, many of which apply to employers not already covered by the federal FFCRA. All of these state and local mandated leaves would likely be in addition to the new leave requirements proposed under **AB 3216**.

Even before the COVID-19 crisis, California had numerous protected, overlapping leaves, which already burden employers. In addition to the new federal, state and local COVID-19 leave laws discussed above, there are numerous additional state leave proposals this year, including budget trailer bill language, to further expand these leave mandates. The continued mandates placed on California employers to provide employees with numerous rights to protected leaves of absences is simply overwhelming, especially during this current unprecedented crisis when many employers have been ordered to close their doors and can least afford it.

AB 3216 Proposes a New Unworkable and Constitutionally-Suspect "Right of Recall" Requirement

AB 3216 establishes a new "right to recall" requirement that applies to certain hotels, event centers, airport hospitality operations, or the provision of building services to office, retail, or other commercial buildings. These rights also extend where an employer goes out of business and there is a change in control or ownership.

In the midst of the current crisis, California employers have been struggling simply to continue operations and avoid going completely out of business – which means no workers would have any jobs. Employers have also adjusted their operations in order to retain as many of their workers as possible during these challenging times. This proposal would completely eliminate the crucial flexibility that businesses need to navigate crises such as this and preserve jobs over the long term.

Among other things, **AB 3216** requires covered employers to offer to recall laid-off workers, and to provide such employees at least 10 business days to respond. This is completely unworkable and would serve to stifle and delay a business returning to normal operations following such an emergency. Requiring recall based on seniority also hurts young workers and newer skilled workers, and eliminates the judgment and flexibility employers need to best structure their operations.

The "right of recall" provisions of **AB 3216** raise significant legal and constitutional concerns. Any law that substantially impairs pre-existing contractual obligations violates the contract clauses of both the federal and California constitutions. The statutory right of recall contained in **AB 3216** is legally suspect and would likely be struck down as violating the contracts clause. In addition, several aspects of the proposal may be

preempted by federal law, including federal labor law. Similar proposals have already been proposed, and in some cases, enacted at the local level in recent weeks and are likely to be the subject of protracted litigation over these same issues.

The answer to the current crisis (or future similar emergencies) is not to further weaken struggling employers with novel and burdensome legal requirements.

Conclusion

We understand that these are unprecedented times and that policymakers are striving to ensure that constituents and employees are provided certainty and protection during the current crisis and similar emergencies that may develop in the future. However, it is critical to remember that many businesses and their owners are themselves casualties of this economic shutdown. They cannot be expected to shoulder a new employer-financed social safety net, with expensive new mandates, at precisely the moment when small businesses are shuttering, employee hours are cut, and there is so much uncertainty about the future.

It is especially difficult for us to engage in meaningful policy discussion over these issues when the proposal at hand improperly attempts to include a laundry list of long-sought and permanent changes to California's leave laws that had been pushed by advocates well before the current crisis.

For these reasons, we respectfully **OPPOSE** your **AB 3216** as a **JOB KILLER**.

Sincerely,

Ben Ebbink
California Chamber of Commerce

Acclamation Insurance Management Services
Agricultural Council of California
Allied Managed Care
American Pistachio Growers
Associated Builders and Contractors Inc. – Northern California Chapter
Associated General Contractors
Auto Care Association
California Agricultural Aircraft Association
California Apple Commission
California Association of Boutique & Breakfast Inns
California Association of Health Facilities
California Association of Joint Powers Authorities
California Association of School Business Officials
California Beer and Beverage Distributors
California Blueberry Association
California Blueberry Commission
California Citrus Mutual
California Cotton Ginners and Growers Association
California Employment Law Council
California Farm Bureau Federation
California Food Producers
California Fresh Fruit Association
California Grocers Association
California Hospital Association
California Hotel & Lodging Association
California Manufacturers and Technology Association
California Professional Association of Specialty Contractors

California Restaurant Association
California Retailers Association
California Rice Commission
California Special Districts Association
California State Council of the Society for Human Resource Management (CalSHRM)
California Tomato Growers Association
California Trucking Association
CAWA – Representing the Automotive Parts Industry
Coalition of Small and Disabled Veteran Businesses
CSAC Excess Insurance Authority
Family Business Association of California
Family Winemakers of California
Far West Equipment Dealers Association
Flasher Barricade Association
Grower-Shipper Association of Central California
Hospitality Santa Barbara
Hotel Association of Los Angeles
Leading Age California
League of California Cities
Long Beach Hospitality Alliance
National Federation of Independent Business
Official Police Garages of Los Angeles
Olive Growers Council of California
United Ag
Western Agricultural Processors Association
Western Carwash Association
Western Electrical Contractors Association
Western Growers Association
Western Plant Health Association

cc: Stuart Thompson, Office of the Governor
Justin Delacruz, Office of Assembly Member Kalra

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