

PAID FAMILY LEAVE TRAILER BILL LANGUAGE



May 28, 2020

The Honorable Holly Mitchell
Chair, Senate Committee on Budget and Fiscal Review
State Capitol, Room 5050
Sacramento, CA 95814

Members, Senate Committee on Budget and Fiscal Review
State Capitol
Sacramento, CA 95814

Sent via email

**SUBJECT: PAID FAMILY LEAVE TRAILER BILL LANGUAGE
OPPOSE**

To Whom It May Concern:

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE** the Paid Family Leave Trailer Bill Language (PFL Trailer Bill) (<https://esd.dof.ca.gov/dofpublic/trailerBill.html>), which would significantly harm small employers in California by requiring **all** employers to provide 12-weeks of protected leave of absence each year. This is in addition to existing leaves of absences already required, thereby requiring up to 6 months of mandatory leave, and exposing employers to costly litigation for any alleged violation.

The PFL Trailer bill 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. The proposed language will impose a mandatory 12-week leave of absence for all employers, even employers with only one employee, to manage and implement. Now is not the time to be placing such burdens on employers who are struggling to reopen and rebuild.

PFL Trailer Bill Is Not Necessary to Implement the Budget:

The Paid Family Leave Trailer Bill (“PFL Trailer Bill”) language is inappropriately placed in the budget because it does not make statutory changes to implement the Paid Family Leave (“PFL”) program. Nor does this proposed language amend the Unemployment Insurance Code regarding PFL. It actually amends the Government Code and the California Family Rights Act. In fact, per the PFL Trailer Bill, an employee does not need to be receiving PFL benefits or even need to apply for PFL benefits to take the leave. And, the leave provided by the PFL Trailer Bill (CFRA leave) is actually four weeks longer than the wage replacement benefits provided under PFL (CFRA leave is 12 weeks and PFL is 8 weeks of wage replacement).

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The PFL Trailer Bill language is similar to a 2019 Senate Bill, SB 135 (Jackson), which failed passage—arguably because it would have placed the same significant burdens on small businesses as this proposed language.

Supporters of this language have indicated that the PFL language is somehow connected to the loans being offered through the IBank for small businesses – it is not. There is no connection between the two and neither are dependent on the other to be adopted/implemented.

The Paid Family Leave Trailer Bill Language Will Overwhelm Small Employers in California Suffering from the Pandemic:

The PFL Trailer Bill requires **all** employers (“employers with one or more employees”) to provide a 12-week, protected leave of absence to employees. This proposed leave is “protected,” meaning the employer has no discretion to deny it or ask the 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 and devastating litigation.

Moreover, as a part of the federal Coronavirus Aid, Relief and Economic Security Act (“CARES Act”), the federal government expanded its federal leave law to all employers and requires them to provide 12 weeks of leave to care for a child as a result of COVID-19.

The CARES Act also mandated two weeks of paid sick leave for an employee who is sick from COVID-19 or to care for a family member who is sick.

The PFL Trailer bill would be in addition to the federal leave already provided. Specifically, an employee could be entitled to 14 weeks of leave under the CARES Act and then another 12 weeks of leave under this proposed PFL trailer bill, totaling 26 weeks of protected leave.

Small employers do not have the capacity to maintain an employee’s job for 26 weeks while an employee is out on leave.

For Employers with 50 or More Employees, the PFL Trailer Bill Will Expand the Amount of Protected Leave an Employee May Take to Half of a Year:

The PFL Trailer Bill 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, the PFL Trailer Bill language 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 the PFL Trailer Bill 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, the PFL Trailer Bill language 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.

The PFL Trailer Bill Increases Costs and Exposes Employers to Potentially Devastating Litigation:

Even though the leave under the PFL Trailer Bill is not "paid" by the employer, that does not mean the employer will not endure added costs. While on leave, the employer will have to: (1) maintain medical benefits while the employee is on leave; (2) pay for a temporary employee to cover for the employee on leave, usually at a higher premium given the limited duration of employment; or (3) pay overtime to other employees to cover the work of the employee on leave.

Finding a temporary employee to fill the vacancy is even more complicated now given the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* and the passage of AB 5 because the ability of employers to hire independent contractors to fill these roles is either extremely restricted or completely eliminated. Also, the cost of overtime is higher given the increase of the minimum wage, which will add to the overall cost especially for small employers.

An employee who believes the employer did not provide the 12-weeks of protected leave, failed to return the employee to the same or comparable position, or did not maintain benefits while out on the 12-weeks of leave, could pursue a claim against the employer seeking compensatory damages, injunctive relief, declaratory relief, punitive damages, and attorney's fees.

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 the PFL Trailer Bill, and the ability to leverage an employer into resolving or settling the case regardless of merit.

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.4th 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 *McDanel v. Eastern Municipal Water District Board*, 109 Cal.App.4th 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).

California Already Imposes Numerous Family Friendly Leaves of Absence on Employers:

The National Conference of State Legislatures has highlighted California as one of the states providing the most family friendly programs and protected leaves of absence given its list of protected leaves of absence, including: paid sick days, school activities leave, kin care, paid family leave program, pregnancy disability leave, and the California Family Rights Act. See "State and Family Medical Leave Laws," *National Conference of State Legislatures*, July 19, 2016. This list is in addition to the leaves of absence required at the federal level. Expanding CFRA in this way is simply too much for employers to bear at this time, especially small employers.

For these reasons, we respectfully **OPPOSE** the PFL Trailer Bill language.

Sincerely,



Jennifer Barrera
Executive Vice President
California Chamber of Commerce

American Institute of Architects California
Associated General Contractors
Auto Care Association
Building Owners and Managers Association
California Association of Winegrape Growers
California Attractions and Parks Association
California Automotive Wholesalers' Association
California Bankers Association
California Business Properties Association
California Business Roundtable
California Craft Brewers Association
California Employment Law Council
California Farm Bureau Federation
California Food Producers
California Forestry Association
California Manufacturers and Technology Association
California Restaurant Association
California Retailers Association
California State Council of the Society for Human Resource Management (CalSHRM)
California Travel Association
California Trucking Association
Camarillo Chamber of Commerce
Civil Justice Association of California
Commercial Real Estate Development Association – NAIOP of California
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
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
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
Official Police Garages of Los Angeles
Orange County Business Council
Pleasanton Chamber of Commerce
Rancho Cordova Chamber of Commerce
Redding Chamber of Commerce
Salinas Valley 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

cc: Anthony Williams, Office of the Governor

JB:ll