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Businesses



PACIFIC COAST  
RENDERERS ASSOCIATION



Associated General  
Contractors (AGC)



August 25, 2021

Members

California State Legislature  
State Capitol  
Sacramento, CA 95814

**Sent via email**

**SUBJECT: EXTENSION OF SB 95 (SKINNER) SEPTEMBER 30, 2021 SUNSET: COVID-19 PAID SUPPLEMENTAL SICK LEAVE  
OPPOSE**

To Whom It May Concern:

The California Chamber of Commerce and the organizations listed below respectfully must oppose any proposal for a blanket extension of SB 95 beyond the September 30, 2021 sunset date. The situation has changed significantly since SB 95 was enacted in March. Far fewer Californians were vaccinated, and many Californians had not yet had the opportunity to get vaccinated. Now, vaccines are free and widely available – but many Californians are choosing not to get them. This has led us to what has been called a “pandemic of the unvaccinated” where individuals are choosing to make themselves vulnerable to COVID-19 by avoiding safe vaccines. The California Department of Public Health reports that the case rate is 600% higher among unvaccinated individuals compared to vaccinated individuals.

Moreover, federal tax credits had previously helped employers to absorb SB 95’s mandate of paid supplemental sick leave. However, those tax credits will expire on September 30th, leaving businesses that are struggling to rebuild burdened with a new obligation they cannot afford at this time. This is especially true where there is frequent abuse of the right to leave because SB 95 prohibits employers from verifying leave requests through documentation. Employers cannot continue to subsidize the state’s response to this virus.

### **Extending SB 95 Undermines California's Efforts to Encourage Vaccination and Burdens Employers for Their Employees' Refusal of Vaccination:**

Encouraging vaccination is essential to the safety of all Californians and keeping our economy open. However, extending sick leave for those who have chosen to remain unvaccinated only encourages the decision to remain unvaccinated. This concern echoes across California's businesses –over forty percent of the 900 business we surveyed are worried that extending SB 95 would discourage employees from getting vaccinated.

Beyond encouraging vaccine hesitancy, such an extension would also place the burden of the employees' refusal to get vaccinated on California's struggling businesses by forcing them to provide additional leave because their employees' chose to refuse easily accessible vaccination. In other words: extending sick leave will burden businesses and potentially incentivize more workers to remain unvaccinated – in direct conflict with California's best interests.

### **Federal Tax Credits Expire on September 30, 2021, Leaving Small Businesses with No Means by Which to Offset the Cost of Leave:**

The burden on California's employers for such leave will only grow after September 30th. The American Rescue Plan (ARP) provided tax credits to businesses with fewer than 500 employees that offset some costs of providing leave under SB 95.<sup>1</sup> However, those tax credits expire on September 30, 2021 and there is no indication Congress plans to extend those credits.

We polled 900 of our members regarding COVID-19 Supplemental Paid Sick Leave. Out of the 900 respondents, more than 500 of them had sought federal tax credits to help offset the cost of COVID-19 paid sick leave. Forty percent of respondents are concerned about being able to afford additional COVID-19 paid sick leave if SB 95 is extended. While the smallest of California's businesses (under 26 employees) are exempted from the statute, a business with just 26 employees is still a small business. For those few businesses which have been lucky enough to grow through the pandemic (or are working to re-hire and return to their prior size), adding a 26<sup>th</sup> employee should not trigger such new costs and obligations. We appreciate recent efforts to help business through tax credits, fee waivers and grants, but those efforts do not cancel out the financial devastation that has befallen small businesses over these past eighteen months.

In contrast with the many small businesses across California that have failed or are barely hanging on, the State of California had an astonishing \$76 billion budget surplus this year, not including federal stimulus aid. If California believes it is good policy to provide extended sick leave for COVID-19 into the coming year, then - similar to the federal government- California should use its surplus to help pay. California's response to COVID-19 cannot continue to be borne by the business community, especially in light of other considerable paid time off and testing requirements under the California Occupational Safety and Health Emergency COVID Regulations ("ETS"), the workers' compensation presumption, and recent expansion of 12 weeks of family leave.

### **Sixty Percent of Employers are Concerned About Abuses of SB 95 Leave:**

Businesses are presently understaffed. Many industries report being unable to fill open positions despite increasing pay and benefits.<sup>2</sup> Layering of leaves and potential abuse of paid leave exacerbates this staffing issue. More than sixty percent of the employers that we surveyed raised concerns about employees fraudulently using SB 95 leave because employers cannot ask for documentation. Employers reported employees requesting multiple days off for vaccine side effects *before even getting the shot*, with some requesting the entire 80 hours up front. Because SB 95 permits employees to take 80 hours off to get the vaccine, those employers had no choice but to grant the leave. Others reported knowing people who admitted to taking paid time off under SB 95 or the CalOSHA ETS without symptoms because they knew they could just tell their employer that they were exposed or sick and the employer could not require any proof.

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<sup>1</sup> The tax credits did not offset *all* costs because the applicable tax credit cap for certain qualifying reasons was the lesser of either two-thirds the employee's regular pay or \$200 per day, while SB 95 mandated pay for all qualifying reasons be at the lesser of either the employee's regular rate of pay up to \$511 per day.

<sup>2</sup> See [California employers dangle incentives amid labor shortage | CalMatters](#)

Further, employees can stack leaves under SB 95, which makes abuse of the leave all the more damaging to day-to-day operations. While subdivision (c) of Labor Code Section 248.2 appears to provide credit to employers with generous leave programs, in practice it often does not. That subdivision has been interpreted by the Labor Commissioner as only counting for a credit if a business has a COVID-19 specific policy.<sup>3</sup> Employers that offered generous sick, vacation, and/or PTO policies that can be used for any reason get no credit for those policies. So, for example, if company A has always offered employees 10 days of paid sick leave and company B offered 3, but then in April 2020 company B enacted a separate COVID-19 company paid sick leave policy of an additional 7 days to each employee, company B gets credit for that under SB 95, but company A does not. Employees are able to abuse the 80 hours provided under SB 95 while still receiving the benefits of their employer's generous vacation or PTO policies.

#### **Multiple Sources of Paid and Unpaid Leave Already Exist, Including Paid Leave Under the CalOSHA ETS When an Employee Has COVID-19:**

There is no “gap” in present leave laws that an extension of SB 95 is needed to fill. Employees in California presently have multiple sources of both paid and unpaid leave that can be used for COVID-19-related purposes.

##### **1) Uncapped Paid Time Off and Testing Under CalOSHA’s ETS**

Proponents of SB 95 have previously stated that the ETS only applies to a “narrow” group of employees. That is not true. Any employee of any business of any size in California who has COVID-19, is subject to a local or state isolation order, or was in “close contact” of a COVID-19 case and is either unvaccinated or vaccinated and showing symptoms is entitled to: 1) be excluded from the workplace for at least 10 days, potentially longer if they are symptomatic, 2) continue being paid their full wages and benefits while they are excluded, and 3) receive a COVID-19 test at the expense of the employer. There is no cap on the amount of paid leave an employee can receive, and an employer cannot compel the employee to use existing, accrued paid sick leave prior to receiving exclusion pay.<sup>4</sup>

Recent amendments to the ETS made it even easier for employees to qualify for this paid time off because CalOSHA deleted the language in the ETS saying the employee must also be “otherwise able and available to work” to be entitled to full pay.

Further, it should be noted that the ETS presumes that an employee who tests positive for COVID-19 was exposed in the workplace. Even assuming that the employer demonstrates that the employee was not exposed in the workplace – which is very difficult to do - the employee is still entitled to unpaid leave. Because of the difficulty in meeting this burden, employees are generally receiving the *paid* sick leave under the ETS, regardless of the source of COVID-19, for the duration of their exclusion.

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<sup>3</sup> See [2021 COVID-19 Supplemental Paid Sick Leave FAQs \(ca.gov\)](#), FAQ 18: “If an employer voluntarily pays another supplemental benefit for COVID-19 related sick leave, including for leave that was taken before the 2021 COVID-19 Supplemental Paid Sick Leave law became effective, then may the employer receive a credit toward the requirements in the new 2021 COVID-19 Supplemental Paid Sick Leave law?” Answer: “. . . For an employer to receive a credit for those sick leave hours that the employer voluntarily paid, the following must apply . . . **To pay for this other supplemental benefit, the employer did not require the covered employee to use any other paid leave or paid time off available to the employee under a policy that is not specific to COVID-19, or vacation time . . .**”

<sup>4</sup> CalOSHA’s FAQ’s provide that an employer may compel employees to use existing paid sick leave “to the extent permitted by law.” The law does not permit compelling the use of sick leave under any circumstances. See Labor Code § 233 “. . . Employees have the sole discretion to designate days taken as paid sick leave under section 233.”; Labor Code § 246(k) “An employee may determine how much paid sick leave they need to use . . .”; DLSE Enforcement Manual – “30.2 Entitlement: An employee who . . . works in California for 30 or more days within a year for the same employer is entitled to paid sick days . . . An employee may determine how much paid sick leave he or she uses at any given time.” (available at: [https://www.dir.ca.gov/dlse/dlsemanual/dlse\\_enfcmmanual.pdf](https://www.dir.ca.gov/dlse/dlsemanual/dlse_enfcmmanual.pdf)); DLSE FAQ on paid sick leave – “For what purposes can an employee take paid sick leave – What can I use sick leave for? . . . The employee may decide how much paid sick leave he or she wants to use (for example, whether you want to take an entire day, or only part of a day). Your employer can require you to take a minimum of at least two hours of paid sick leave at time, but otherwise the determination of how much time is needed is left to the employee.”

## **2) Paid Sick Leave**

Under California Labor Code Section 246, employees are entitled to a minimum of 24 hours or three days of paid sick leave. That leave can be used for a health condition or preventative care for the employee or their family member. Family members include children, parents, parents-in-law, spouses, domestic partners, grandparents, grandchildren, or siblings. Multiple cities have even broader paid sick leave requirements through local ordinances, including Berkeley, Emeryville, Los Angeles, Oakland, San Diego, San Francisco, and Santa Monica. Beyond these requirements, many employers voluntarily offer *more* than three days of paid sick leave and many also offered supplemental COVID-19 paid sick leave even before it was mandated.

## **3) Twelve Weeks of Leave Under California Family Rights Act (“CFRA”)**

Employees who work for businesses with just five or more employees may also take up to twelve weeks of leave under CFRA. That 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. The leave can be taken in increments as small as one hour if needed. It can be used for the employee’s own serious medical condition, which may include COVID-19, or to care for a family member. The family members for which employees can take leave to provide care was expanded by SB 1383 (Jackson) in 2020 so that it now includes children, children of a domestic partner, parents, spouses, domestic partners, grandparents, grandchildren, or siblings. In support of the bill, Senator Jackson explicitly stated that the bill was **“necessary to ensure California workers affected by the coronavirus can take time to care for themselves or a sick family member and keep their workplaces and communities healthy and safe.”<sup>5</sup>**

While out on CFRA leave, employees can receive pay through State Disability Insurance or Paid Family Leave administered through the EDD, use paid vacation time or PTO offered by an employer, or use paid sick leave.

Mere months after small businesses had to adjust operations to learn how to comply with CFRA, they had to give employees an additional two weeks of paid leave under SB 95 retroactive to January 1, 2021. Our small businesses cannot take on more mandated leaves.

## **4) Twelve Weeks of Leave Under Family and Medical Leave Act (“FMLA”)**

Employees who work for businesses with 50 or more employees are also eligible for twelve weeks of leave under the FMLA. Similar to CFRA, this is protected leave that can be used for the employee’s own medical condition or to care for a family member. Prior to 2021, CFRA and FMLA leave ran concurrently. Now that the list of family members under CFRA is broader, an employee could take up to six and a half months of leave:

3 months – CFRA leave for a domestic partner, child of a domestic partner, grandparent, grandchild, or sibling;

### **PLUS (+)**

3 months – FMLA leave for their own medical condition or the medical condition of their spouse, child or parent

### **PLUS (+)**

2 weeks – AB 84/SB 95 leave to care for any individual who is experiencing symptoms of COVID-19 and seeking a medical diagnosis, has been advised to self-isolate, or is caring for someone whose school or place of care is closed for reasons related to COVID-19

As with CFRA, an employee can apply for pay from the EDD or use other paid benefits offered by their employer while out on leave.

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<sup>5</sup> Assem. Com. On Labor and Employment, Analysis of Senate Bill No. 1383 (2019-2020 Reg. Sess.), as amended June 29, 2020, p. 5. (emphasis added).

## **5) Paid Vacation and PTO**

In addition to paid sick leave, many employers voluntarily offer paid vacation or PTO. Although an employee should not need to use this for a COVID-19 diagnosis given the paid leave under the ETS and leave provided under CFRA and the FMLA, if needed employees can also use these voluntary paid leaves offered by their employer.

## **6) Workers' Compensation**

Under SB 1159 (Hill), there is a presumption that any firefighters/rescue services, peace officers, certain medical providers, and providers of in-home supportive services or other employees who contracted COVID-19 during an outbreak at the workplace is covered by workers' compensation. Those employees are entitled to medical treatment and benefits, including paid leave.

In sum, employers cannot continue to subsidize the cost of the COVID-19 pandemic. Any proposal to extend the right to leave must address the expiration of the federal tax credits, abuses of the right to leave, the need to encourage unvaccinated employees to promptly get the vaccine, and how increased vaccination rates have changed since March 2021 when SB 95 was originally enacted.

Sincerely,



Ashley Hoffman  
Policy Advocate  
California Chamber of Commerce

Acclamation Insurance Management Services  
African American Farmers of California  
Agricultural Council of California  
Allied Managed Care  
Almond Alliance of California  
Associated General Contractors  
Association of California Egg Farmers  
Beverly Hills Chamber of Commerce  
Brea Chamber of Commerce  
California Apartment Association  
California Assisted Living Association  
California Association for Health Services at Home  
California Association of Health Facilities  
California Association of Joint Powers Authorities  
California Association of Sheet Metal and Air Conditioning Contractors National Association  
California Association of Wheat Growers  
California Attractions and Parks Association  
California Bankers Association  
California Bean Shippers Association  
California Chamber of Commerce  
California Citrus Mutual  
California Cotton Ginners and Growers Association  
California Craft Brewers Association  
California Farm Bureau  
California Food Producers  
California Fresh Fruit Association  
California Fuels and Convenience Alliance  
California Grain and Feed Association  
California Hotel and Lodging 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 Staffing Professionals  
California State Floral Association  
California Strawberry Commission  
California Travel Association  
California Trucking Association  
California Warehouse Association  
Carlsbad Chamber of Commerce  
Chino Valley Chamber of Commerce  
Coalition of Small and Disabled Veteran Businesses  
Construction Employers' Association  
Family Business Association of California  
Family Winemakers of California  
Far West Equipment Dealers Association  
Flasher Barricade Association  
Fresno Chamber of Commerce  
Gilroy Chamber of Commerce  
Greater High Desert Chamber of Commerce  
Greater Riverside Chambers of Commerce  
Hollywood Chamber of Commerce  
Housing Contractors of California  
Lodi Chamber of Commerce  
Long Beach Area Chamber of Commerce  
Mammoth Lakes Chamber of Commerce  
Murrieta/Wildomar Chamber of Commerce  
National Federation of Independent Business  
Nisei Farmers League  
Oceanside Chamber of Commerce  
Orange County Business Council  
Pacific Coast Renderers Association  
Pacific Egg & Poultry Association  
Palos Verdes Peninsula Chamber of Commerce  
Plant California Alliance  
Pleasanton Chamber of Commerce  
Rancho Cordova Area Chamber of Commerce  
San Jose Chamber of Commerce  
Santa Maria Valley Chamber of Commerce  
Santa Rosa Metro Chamber  
Simi Valley Chamber  
Torrance Area Chamber of Commerce  
Tri-County Chamber Alliance  
Tulare Chamber of Commerce  
Valley Industry & Commerce Association  
Walnut Creek Chamber of Commerce & Visitors Bureau  
West Ventura County Business Alliance  
Western Agricultural Processors Association  
Western Carwash Association  
Western Electrical Contractors Association  
Wine Institute

cc:      Stuart Thompson, Office of the Governor  
          Angie Wei, Office of the Governor

AH:ll