



February 21, 2020

The Honorable Phil Ting  
 Chair, Assembly Committee on Budget  
 State Capitol, Room 6026  
 Sacramento, CA 95814

The Honorable Holly Mitchell  
 Chair Senate Committee on Budget and Fiscal Review  
 State Capitol, Room 5050  
 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 (<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 and up to 7 months of job protected leave for employers with 5 or more employees when pregnancy disability leave is involved. This is in addition to existing leaves of absences already required, exposing employers to costly litigation for any alleged violation of these leave laws.

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).

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.

### **The Paid Family Leave Trailer Bill Language Will Overwhelm Small Employers in California:**

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.

California just extended its family leave for employers with 20 or more employees within a 75-mile radius. We have not yet been able to evaluate the impact of this mandate on those smaller employers, however, the PFL Trailer Bill now seeks to expand this burden on all employers. A small business with a limited workforce simply does not have the capacity to take on such a significant burden as proposed.

### **The PFL Trailer Bill Requires Small Employers to Provide Up to 7 Months of Protected Leave When Pregnancy-Related Leave Is Involved:**

California already requires employers with only 5 or more employees to provide up to 4 months of protected leave for an employee who suffers a medical disability because of pregnancy. The PFL Trailer Bill will add another 12-weeks of leave for the same employee, thereby creating a total of 7 months of protected leave for pregnancy.

Up to 4 months – pregnancy disability leave;

**PLUS (+)**

3 months – child bonding leave under CFRA.

Such an extensive period of time for a small employer with a limited workforce to accommodate is unreasonable.

### **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 *McDaneld 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, especially small employers.

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

Sincerely,



Laura Curtis  
Policy Advocate  
California Chamber of Commerce

Auto Care Association  
California Association of Sheet Metal and Air Conditioning Contractors National Association  
California Association of Winegrape Growers  
California Attractions and Parks Association  
California Automotive Wholesalers' Association  
California Employment Law Council  
California Farm Bureau Federation  
California Food Producers  
California Manufacturers and Technology Association  
California Restaurant Association  
California State Council of the Society for Human Resource Management (CalSHRM)  
Camarillo Chamber of Commerce  
CSAC Excess Insurance Authority  
El Dorado County Chamber of Commerce  
El Dorado Hills Chamber of Commerce  
Family Business Association of California  
Fresno Chamber of Commerce  
Gateways Chamber Alliance  
Greater Coachella Valley Chamber  
Official Police Garages of Los Angeles  
Rancho Cordova Chamber of Commerce  
Redding Chamber of Commerce  
Santa Maria Valley Chamber  
Torrance Area Chamber of Commerce  
Western Growers Association

cc: Anthony Williams, Office of the Governor  
Members, Senate Committee on Budget and Fiscal Review  
Members, Assembly Committee on Budget

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