

AB 84/SB 95 (TING/SKINNER) BUDGET: PAID SUPPLEMENTAL COVID-19 SICK LEAVE- OPPOSE





Associated General Contractors (AGC)



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Honorable Members
California State Legislature
State Capitol
Sacramento, CA 95814

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State Capitol
Sacramento, CA 95814

Sent via email

**SUBJECT: AB 84/SB 95 (TING)/(SKINNER) BUDGET: PAID SUPPLEMENTAL COVID-19 SICK LEAVE
OPPOSE**

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE AB 84 (Ting)/ SB 95 (Skinner)**, as the bills would impose a significant cost onto small employers, who the State has already acknowledged are suffering due to this pandemic. This paid sick leave mandate would essentially negate any financial relief small employers may receive through the proposed grant programs pending in the Budget. Specifically, **AB 84/SB 95** 1) require employers, with only one or more employees, to provide up to 80 hours of paid sick leave per calendar year to all employees for COVID-19 related reasons, 2) apply retroactively to January 1, 2021, 3) provide no tax credit or funding to businesses to offset the cost of the leave unlike the Families First Coronavirus Act (FFCRA), and 4) drastically expand the reasons for which an employee can take leave.

California has an approximate \$20 billion budget windfall. Similar to the federal government, California should pay for sick leave if it believes it is necessary to address COVID-19, despite the number of existing leaves already in place. California's response to COVID-19 cannot continue to be subsidized by the business community, especially in light of the new paid time off and testing requirements under the California Occupational Safety and Health Emergency COVID Regulations ("ETS"), the workers' compensation presumption, and expansion of 12 weeks of family leave.

AB 84/SB 95 is Far Broader Than FFCRA or AB 1867 and Does Not Offer Financial Relief to Businesses to Offset the Cost of a New Leave:

AB 84/SB 95 mandate that all public and private California employers provide up to 80 hours of paid leave for workers who are unable to work or telework because of one of the following reasons: 1) the worker is subject to a federal, state, or local isolation order, 2) advised by a healthcare provider to self-isolate due to concerns related to COVID-19, 3) prohibited from working by the hiring entity due to concerns related to potential transmission of COVID-19, 4) attending an appointment to receive a COVID-19 vaccination, 5) experiencing symptoms related to a COVID-19 vaccine, 6) experiencing symptoms of COVID-19 and seeking medical diagnosis, 7) caring for an individual who must self-quarantine or is experiencing symptoms of COVID-19 and is seeking medical diagnosis, or 8) caring for an individual whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19. The bill applies retroactively to January 1, 2021.

This new mandate is concerning to businesses, especially small businesses, for a number of reasons. Most notably:

- The bill does not offer any financial relief to offset the cost of this leave. Even the FFCRA offered a one-to-one tax credit to offset the costs of that leave for businesses with 500 or fewer employees. President Biden's federal proposal also included a tax credit to offset the cost for small businesses.
- The individuals for which an employee can take leave to provide care are not limited to family members, expanding this leave right far beyond what employers have historically been required to provide under CFRA or paid sick leave under the Labor Code.
- This proposal requires 80 hours of leave in addition to any leave taken under the CalOSHA Emergency Temporary Standard, paid sick leave, local ordinances, family leave, or workers' compensation. This proposal basically allows an employee to stack these different existing leaves, providing employees with months of time off from work. Employers should be allowed to require these leaves to run concurrently, not separately.

- The bill mandates a separate, **additional** 80 hours of paid sick leave, even if an employer already has a separate paid sick leave policy that provides the same, if not more hours of leave. The Labor Commissioner has interpreted Sections 248(c) and 248.1(c) as meaning that an employer can only get credit for prior leaves if the employer has a COVID-19 specific policy. An employer that already provided generous amounts of leave or PTO that they let employees use for COVID-19-related reasons or expanded their existing policies to cover both COVID-19 and other illnesses/purposes cannot take advantage of this credit.
- The regular rate of pay at which an employer must compensate an employee is different from the regular rate of pay that applies to other paid sick leaves and is therefore not easily calculable in existing payroll programs. AB 1867 suffered from the same flaw, resulting in businesses being required to manually calculate employees' rate of pay. The rate should mirror the rate used in Section 246(I).
- The bill imposes an impossible wage statement requirement and exposes businesses to liability under Labor Code Section 226. Not only do employers have to calculate leave allotments for every single employee and update their wage statements within one pay period, but this is impossible to do for a worker who works variable hours. Those workers' leave entitlements are based on a rolling calendar that requires a manual calculation for each pay period and update each individual wage statement accordingly.

Imposing New Leave Costs on Businesses Would Undermine the Administration and the Legislature's Efforts to Help Struggling Businesses; The Small Business COVID-19 Relief Grant Program Does Not Cancel Out the Costs Imposed by AB 84/SB 95:

The business community is thankful for recent efforts by the Governor and the Legislature to assist businesses at this time, including legislation and budget proposals for tax credits, fee waivers, and grants. Elected officials in both parties have recognized that now is the time to invest in our businesses, especially our small businesses, to keep them from closing their doors or needing to result to more layoffs to stay afloat.

While those efforts represent a step in the right direction towards helping our businesses, they will not cancel out the immediate payroll costs necessary to pay for the new 80-hour leave requirement mandated by **AB 84/ SB 95**. For example, only some small business will qualify and be able to get funds offered by the Small Business Relief Grant Program. 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 struggling to make payroll. Further, small businesses are having to pay state taxes on those loans as if they were income because California's tax code does not conform to the federal tax code. To pass the Small Business Relief Grant Program and then immediately impose a new leave mandate that would cost thousands or even millions of dollars would completely undermine these recent promises to help keep California businesses alive.

Multiple Sources of Paid and Unpaid Leave Already Exist:

The proposition that the expiration of the FFCRA and AB 1867 means that California employees must work while sick or cannot quarantine following potential exposure is false. Employees have multiple sources of both paid and unpaid leave that can be used for COVID-19 related purposes, including unlimited paid time off under the new CalOSHA ETS.

1) Uncapped Paid Time Off and Testing Under CalOSHA's ETS

As explained in our letter dated February 1, 2021 on the CalOSHA ETS¹, any employee who has COVID-19, is subject to a local or state isolation order, or was in "close contact" of a COVID-19 case is entitled to 1) be excluded from the workplace for 10-14 days or until they meet the specified return to work criteria with job protection, 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.²

¹ That letter is available at: <https://advocacy.calchamber.com/policy/issues/workplace-safety/>

² 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

Employers are responsible for this uncapped paid leave even if the COVID-19 case is the result of social spread or brought in by an asymptomatic customer. By way of example: if social spread creates one COVID case in a workplace per month – even with no actual spread in the workplace – the employer will be forced to remove all workers who were close contacts of the positive case from the workplace for 10-14 days. The employer would not only be responsible for paying those employees their full pay and benefits, but they must also hire (and potentially train) temporary help to fill those roles and pay their wages, pay current employees overtime wages to make up that labor shortage, or shut down their business. One study on unscheduled absenteeism found that even during a normal year, employees missing work costs businesses approximately \$3,600 per year for each hourly employee and \$2,650 for salaried employees.³

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, parent-in-laws, 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.

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. Some smaller employers have also continued to voluntarily offer FFCRA leave as permitted by the most recent federal stimulus bill to receive tax credits through March 31, 2021.

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 includes 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, parent-in-laws, 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 health and safe.”⁴

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.

Less than two months after small businesses had to adjust operations to learn how to comply with CFRA, they would have to now give employees an additional two weeks of paid leave under AB 84/SB 95. Our small businesses cannot take on more leaves.

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 daysAn 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_enfmanual.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.”

³ See Circadian, *The Causes and Costs of Absenteeism in The Workplace*

⁴ 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).

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 the employee’s own medical condition or to care for a family member. Prior to 2020, 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 COVID-19 and seeking a medical diagnosis, has been advised to self-isolate, or care 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.

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 an 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 employee or other employee 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.

California looked very different last year when the federal and state governments imposed a leave mandate under the FFCRA and AB 1867. There were no vaccines and public health entities were still trying to determine how best to stop the spread of COVID-19. We are now seeing infection rates decline and California is administering vaccines as fast as possible. Between these improvements and the sources of leave identified above, the cost of this new leave does not justify its devastating effects on businesses.

AB 84/SB 95 Expose Employers to Potentially Devastating Litigation Under PAGA:

Employers are doing their best to keep up with the laundry list of continuously changing COVID-19 mandates and guidelines. They must consistently monitor evolving guidance at the local, state, and federal levels. Small employers in California are already having to defend against COVID-19 related litigation. Nearly half of all COVID-19 employment cases filed to date in California have been against small businesses with fewer than 50 employees.⁵ Another new leave mandate exposes these employers to additional costly litigation, even if the employer makes a good faith mistake in trying to administer and apply these overlapping leaves. That litigation becomes even more expensive to defend against if, like AB 1867’s paid sick leave mandate from last year, the

⁵ Fisher Phillips Employment Litigation Tracker: [COVID-19 Employment Litigation Tracker And Alerts \(fisherphillips.com\)](https://www.fisherphillips.com/COVID-19-Employment-Litigation-Tracker-And-Alerts)

alleged violation is of a section in the Labor Code because the plaintiff can add a claim for penalties under the Private Attorneys General Act (PAGA) to any lawsuit. Even if an employer has Employment Practices Liability Insurance ("EPLI"), those policies often either do not cover wage and hour lawsuits at all or only cover a limited amount of defense costs. The remaining legal fees and any award or settlement itself must come directly from the employer. The threatened penalties and inability to obtain insurance coverage to fight PAGA claims forces employers to either settle or risk hundreds of thousands of dollars if not millions litigating the case on the merits.

In sum, employers cannot continue to subsidize the cost of the COVID-19 pandemic. **Any new leave mandate must be funded by the California government.** Notably, the FFCRA included a paid time off requirement, which was funded by the federal government for private employers. Public employers and large employers under AB 1867 were not able to take advantage of those tax credits. California has agreed to do this for other industries, for example establishing a subsidy program to fund unpaid back rent in conjunction with the latest eviction moratorium proposal. California should be willing to do the same for its struggling businesses. Unless the Administration or Legislature is willing to cover the cost of a new leave requirement on top of the other existing leave mandates, we must oppose **AB 84/SB 95**.

Sincerely,



Ashley Hoffman
Policy Advocate

Acclamation Insurance Management Services
African American Farmers of California
Agricultural Council of California
Aliso Viejo Chamber of Commerce
Allied Managed Care
American Pistachio Growers
Antelope Valley Chambers of Commerce
Associated General Contractors
Brea Chamber of Commerce
Building Owners and Managers Association
California Agricultural Aircraft Association
California Apple Commission
California Assisted Living Association
California Association of Health Facilities
California Association of Licensed Security Agencies, Guards and Associates
California Association of Sheet Metal and Air Conditioning Contractors National Association
California Association of Winegrape Growers
California Bankers Association
California Beer and Beverage Distributors
California Blueberry Association
California Blueberry Commission
California Builders Alliance
California Business Properties Association
California Business Roundtable
California Cable & Telecommunications Association
California Chapters of the National Electrical Contractors Association
California Citrus Mutual
California Cotton Ginners and Growers Association
California Credit Union League
California Farm Bureau
California Finance Service Association
California Food Producers
California Fresh Fruit Association
California Fuels and Convenience Alliance
California Manufacturers & Technology Association

California Pork Producers Association
California Restaurant Association
California Retailers Association
California Special Districts Association
California Strawberry Commission
California Sweetpotato Council
California Trucking Association
Carlsbad Chamber of Commerce
Coalition of Small and Disabled Veteran Business
Commercial Real Estate Development Association – NAIOP
Construction Employers' Association
Corona Chamber of Commerce
Dana Point Chamber of Commerce
El Dorado County Chamber of Commerce
El Dorado Hills Chamber of Commerce
Elk Grove Chamber of Commerce
Family Business Association of California
Flasher Barricade Association
Folsom Chamber of Commerce
Fremont Chamber of Commerce
Garden Grove Chamber of Commerce
Greater Bakersfield Chamber of Commerce
Greater High Desert Chamber of Commerce
Greater Irvine Chamber of Commerce
Greater Riverside Chambers of Commerce
Greater San Fernando Valley Chamber of Commerce
Grower-Shipper Association of Central California
Hollywood Chamber of Commerce
Housing Contractors of California
International Council of Shopping Centers
Laguna Niguel Chamber of Commerce
League of California Cities
Lodi Chamber of Commerce
Long Beach Area Chamber of Commerce
Los Angeles Chapter of the National Tooling and Machining Association
Murrieta/Wildomar Chamber of Commerce
National Association of Theatre of CA/NV
National Federation of Independent Business
Nisei Farmers League
North Orange County Chamber
North San Diego Business Chamber
Oceanside Chamber of Commerce
Official Police Garages of Los Angeles
Olive Growers Council of California
Orange County Business Council
Oxnard Chamber of Commerce
Pesticide Applicators Professional Association
Plant California Alliance
Pleasanton Chamber of Commerce
Rancho Cordova Chamber of Commerce
Redondo Beach Chamber of Commerce & Visitors Bureau
Roseville Area Chamber of Commerce
Sacramento Regional Builders Exchange
San Clemente Chamber of Commerce
San Fernando Valley Chapter of the National Tooling and Machining Association
San Francisco Bay Area Chapter of the National Tooling and Machining Association
San Gabriel Valley Economic Partnership
Santa Maria Valley Chamber of Commerce

Santa Rosa Metro Chamber
Simi Valley Chamber of Commerce
South Bay Association of Chambers of Commerce
South Orange County Economic Coalition
Southwest California Legislative Council
The ERISA Industry Committee
Torrance Area Chamber of Commerce
Tri County Chamber Alliance
Tulare Chamber of Commerce
U.S. Chamber of Commerce
United Chamber Advocacy Network
United Contractors
Western Agricultural Processors Association
Western Electrical Contractors Association
Western Growers Association
Western Manufactured Housing Communities Association
Wine Institute
Yorba Linda Chamber of Commerce
Yuba Sutter Chamber of Commerce