



American Staffing Association

JOB KILLER

September 19, 2023

The Honorable Gavin Newsom
 Governor, State of California
 State Capitol
 Sacramento, CA 95814

SUBJECT: SB 616 (GONZALEZ) PAID SICK DAYS: ACCRUAL AND USE REQUEST FOR VETO

The California Chamber of Commerce and the organizations listed below respectfully **REQUEST** your **VETO** of **SB 616 (Gonzalez)**, which has been labeled as a **JOB KILLER. SB 616** would impose significant costs on businesses of every size by amending the Healthy Workplaces, Healthy Families Act (the Act) to increase the number of paid sick days employers are currently required to provide. It would increase minimum sick days from 3 days to 5 days, increase the cap that employers can place on paid sick days from 6 days to 10 days, and increase the number of paid sick days an employee can roll over to the next year from 3 days to 5 days. Those businesses that can afford to offer more than three days of sick leave are doing so, but many, many businesses cannot absorb that cost. These mandated, increased labor costs will inevitably either be passed on to consumers as higher prices for goods and services, or force employers to reduce jobs or cut wages or other benefits.

Small Employers Cannot Afford Such a Steep Increase in Leave Mandates:

SB 616 would more than double the existing paid sick leave requirement. While many in the state are beginning to move on from the COVID-19 pandemic, small businesses are not so lucky. Recently, the San Francisco Chronicle ran an article explaining that many small businesses are “**in survival mode**” as they reel from the financial impacts of COVID-19 and rising inflation.¹ This is especially true for businesses with small profit margins like food, retail, and specialty stores that cannot compete with prices offered by larger businesses. Hopes that business may pick up after COVID-19 have not materialized for many and these business owners had had to raise prices, cut jobs, or shut down.

While one more paid benefit may not seem significant in isolation, this mandate must be viewed in the context of all of California’s other leaves and paid benefits, especially the special paid leaves required from 2020 through 2023 due to COVID. Despite the economic struggles that businesses have faced recently, the number of overlapping leaves has grown over the last few years and continues to grow. Some are paid and some are unpaid, but even unpaid leaves increase costs on employers because the employer must either shift the work to other existing employees on short notice, which leads to overtime pay, or be understaffed. In addition to the Act, leaves still in existence and recent COVID-19-related leaves include:

- Cal/OSHA Emergency Temporary Standard Exclusion Pay– From November 2020 until February 2023, imposed new, uncapped paid leave on all employers for all employees who have COVID-19 or may have been exposed, even if the exposed employee never contracts COVID-19; leave has no pay cap. Also mandated employer pay for mandatory COVID-19 testing for employees.
- Cal/OSHA Non-Emergency COVID Regulation- Effective February 2023, employers must still exclude workers from the workplace who test positive for COVID-19, which is in effect mandatory unpaid leave.
- FFCRA, AB 1867, SB 95, and SB 114 – imposed 80-hour supplemental paid leave requirement on employers in 2020, 2021, and 2022 for various COVID-19-related reasons.
- Workers’ Compensation – expanded presumption for COVID-19 until January 1, 2024 so that employee may be entitled to paid leave and benefits under workers’ compensation system.
- CFRA – 12-week leave for the employee’s own illness or to care for a family member. CFRA was expanded twice in the last two years: in 2020 to apply to small business and to cover additional family members so that it no longer runs concurrently with FMLA and in 2022 to cover non-family members of the employee’s choosing. Employees can use this leave in smaller 1-2 hour increments if they so choose.
- FMLA – 12-week leave for the employee’s own illness or to care for a family member
- Pregnancy Disability leave – 4 months of leave
- Bereavement leave – Effective 2023, employees can take up to 5 days of leave if there is a death of a family member. There is a bill this year to create a second bereavement leave related to fertility and children.
- School/Childcare leave – Expanded in 2016 so that employees can take up to 40 hours per year to care for child whose school or childcare provider is unavailable, enroll a child in school or childcare, or participate in school or childcare activities
- School Appearance leave – Uncapped leave for employee who needs to take time off to appear at school due to a student disciplinary action

¹ [Bay Area businesses still in survival mode \(sfchronicle.com\)](https://www.sfchronicle.com/bayarea/article/Bay-Area-businesses-still-in-survival-mode-17270000)

- Crime /Domestic Abuse/Sexual Assault/Stalking Victim leave – Uncapped leave for victim or victim’s family member to attend related proceedings
- Jury/Witness leave – uncapped leave for jury duty or to serve as a witness
- Military Service leave – uncapped leave provided for military personnel; benefits must continue for at least 30 days. Ten days of leave for military spouses
- Drug Rehabilitation/Adult Literacy classes – uncapped leave for employees who wish to participate in alcohol or drug rehabilitation programs or adult literacy programs
- Volunteer Civil Service leave – uncapped leave to serve as a volunteer firefighter, peace officer, or emergency rescue personnel
- Organ and Bone Marrow Donor leave – 30 days paid leave + 30 additional days of unpaid leave
- Voting leave – two hours of paid leave for all statewide elections

This list also does not include local ordinances that have broader paid and unpaid leave requirements than those listed above. These leaves add significantly to the cumulative financial impact of the cost of doing business in California. For example, unscheduled absenteeism costs roughly \$3,600 per year for each hourly employee in this state. (See “The Causes and Costs of Absenteeism in The Workplace,” a publication of workforce solution company Circadian.) The continued mandates placed on California employers to provide employees with numerous rights to protected leaves of absences and other benefits is simply overwhelming.

SB 616 Does not Address Existing Problems with the Act

Since its enactment, a number of issues have arisen regarding implementation of the Act and how it is used for non-statutory reasons. **SB 616** does not address any of the following problems:

- **Local Ordinances:** The biggest compliance hurdle for California employers under the Act is that it allows cities and counties to adopt different sick leave mandates. The proliferation of local ordinances creates inconsistency and confusion for California employers that operate in multiple jurisdictions. There are currently nine local ordinances in addition to the Act, which have different rules regarding accrual methods, accrual use caps, use increments, which employees are covered, reasons for using paid sick leave, amount of leave, and the permitted use of documentation. A worker who travels across the state as part of their job duties could easily pass through multiple different paid sick leave laws in a single day.
- **Documentation:** The Act prohibits employers from ever asking for documentation. Employers have discovered employees using paid sick leave for non-statutory reasons, but there is nothing they can do because otherwise they face an alleged violation for interfering with or discouraging the use of leave. Worse, it often means that employees subsequently come in sick because they have used their sick days for other reasons. Employers often also see increases in use of the leave around holidays or near the end of seasonal employment, leading to exacerbated labor shortage during those time periods.
- **Rate of Pay:** Currently, paid sick leave must be paid at the employee’s “regular rate” of pay; however, “regular rate” of pay is not necessarily an employee’s normal hourly rate because it must include almost all forms of pay that the employee receives. For example, the following payments are included in the regular rate of pay: hourly earnings, salary, commissions, non-discretionary bonuses, piece work earnings, and the value of meals and lodging. With a lot of uncertainty surrounding this calculation and what should be included, this requirement can become very confusing for employers with regards to paid sick leave.

For example, the employer offers holiday pay to their employees; however, what if the employee calls in sick on the holiday? Does the employer need to pay holiday pay even though the employee invoked sick leave? Further, paying at the regular rate instead of the base rate only increases the motivation for employees to take advantage of paid sick leave because they can make more money by calling in sick or, if they call in sick during peak times of work, they will make more money than if they had called in sick on a regular workday.

- **Enforcement:** While the Act was moving through the legislature, it was the understanding of the employer community that PAGA penalties were not recoverable under the final version of the bill.

Courts agreed. See, e.g., *Stearne v. Heartland Payment Sys. LLC*, 2018 WL 746492 (E.D. Cal. Feb. 6, 2018). It was only last month that a California Court of Appeals upended that interpretation, holding that PAGA does apply to paid sick leave claims. This opens up businesses of every size to threats of litigation for significant penalties over any dispute regarding paid sick leave.

California Should Incentivize Paid Sick Leave, Not Mandate It:

Given the cumulative costs and existing protected leaves of absence with which California employers are already struggling to comply, California should refrain from mandating additional sick days and instead should provide incentives to employers to offer more expansive sick day benefits by reducing costs in other areas.

For these and other reasons, we respectfully **REQUEST** your **VETO of SB 616** as a **JOB KILLER**.

Sincerely,



Jennifer Barrera
President and Chief Executive Officer

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California Farm Bureau, Bryan Little
California Grocers Association, Leticia Garcia
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California Landscape Contractors Association (CLCA), Sandra Giarde
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Greater High Desert Chamber of Commerce, Mark Creffield
Greater Riverside Chambers of Commerce, Ana Martin
Hollywood Chamber of Commerce, Chris Micheli

Housing Contractors of California, Bruce Wick
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Murrieta/Wildomar Chamber of Commerce, Patrick Ellis
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National Federation of Independent Business (NFIB), Tim Taylor
Oceanside Chamber of Commerce, Scott Ashton
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