

November XX, 2013

The Honorable XXXXXXXXXXXX
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XXXXXXXX, XX XXXXXX

RE: S-2866

Dear Senator:

Our organizations respectfully oppose Senate Bill S-2866, which would impose a paid protected sick leave requirement on all employers. Our concerns are discussed in detail below.

1. Unintended Consequences: Under the bill all employers will have to provide either five or nine protected paid days out of the office, depending on the size of their businesses.

Employees would also be able to carry-over unused leave from one year to the next -- up to 40 hours for small companies (defined as fewer than 10 employees), and up to 72 hours for larger companies (defined as 10 employees and above). So, an employer who had 15 employees one year, but was forced to shrink the workforce to eight the next, would still have to provide nine days of paid protected leave despite the fact that the company has been struggling.

However, even if a business is not struggling, the legislation will still likely impact its solvency. In some cases employers are going to have to pay double wages – wages for the absent worker and wages for their replacement. Businesses set aside a specific amount of money for payroll based on what they anticipate in their sales and profits. If sales are not rising fast enough to accommodate payroll increases, employers may be forced to make tough personnel and operating decisions.

This is illustrated in a 2011 report focusing on San Francisco’s paid leave ordinance by the Institute for Women’s Policy Research. In the report, the Institute – while overall very supportive of the ordinance – noted that 15 percent of affected employers surveyed had layoffs or were forced to reduce hours as a result of the ordinance. Fourteen percent of employers also reported providing fewer raises, fewer bonuses, and having to reduce other benefits.

The evidence from other states, as well as the fact that employers will soon have to comply with the Affordable Care Act, and the minimum wage increase, lead us to believe that if this legislation takes effect in 2014, it will have widespread repercussions.

2. Liability Issues: The bill contains wide-sweeping anti-retaliation provisions that will make it difficult for employers to distinguish between legitimate and illegitimate uses of sick leave, and to discipline employees where appropriate.

The bill provides that an employer cannot count paid sick leave as an absence that results in the employee being subject to discipline or any adverse action. The courts interpret the term “adverse action” in various ways. If an employee is moved off of a project because they simply haven’t been in the office enough to complete it, would this constitute an adverse action? Along the same lines, the definition of “retaliatory personnel action” includes “unfavorable reassignment.” Taking a subjective view, couldn’t any reassignment be unfavorable and subject to a lawsuit if an employee doesn’t like it?

Even if an allegation against an employer is without merit, the employer will still have to spend time and money defending against it. And, the bill contains a “rebuttable presumption” that an employer has done something illegal if any type of adverse action is taken within 90 days of an employee filing a complaint or informing “any person” (undefined) about his or her rights. Does this mean that an employer will now be guilty until proven innocent and will have to justify that his conduct was legitimate in a subsequent proceeding? If so, this provision would be a significant departure from discrimination lawsuits where the burden of proof resides with the employee.

Also of concern is that by imposing wage and hour penalties for violators, employers could face disorderly persons offenses over disputes about time off (in addition to paying monetary penalties, facing possible class actions, having to reinstate employees, and paying full wages). Of equal concern is that the bill provides that in civil proceedings “any actual damages suffered by the employee as a result of the violation plus an equal amount of liquidated damages may be awarded.” And, the bill provides no good faith defense against these penalties for first time violators.

In short, with its broad anti-retaliation provisions and other imposed penalties, we believe the bill has the potential to significantly increase liability and costs for employers.

3. Affect on Employers Already Offering Benefits: Under the bill employers who are already offering paid time off (PTO) would still be subject to more regulation, additional recordkeeping requirements, and the need to revise their policies and procedures.

Employers have always had the ability to tailor their benefit plans to the needs of their workforce and to offer PTO as a recruiting and retention tool. This bill would take that ability away. It would essentially create a uniform benefit plan for “any individual engaged in service to a company,” including independent contractors, board of directors, etc. Under this plan, any individual compensated by an employer could begin to take leave as soon as they clocked-in 30 hours and worked 90 days regardless of whether they are even an employee (as opposed to an independent contractor). Creating such a system disregards employer policies for PTO eligibility, procedural requirements for requesting PTO, call-in procedures, and policies to control excessive absenteeism.

The bill also does not address how the sick time may be taken. Must it be taken in full day, half-day, or hourly increments? In some cases an employer may allow employees to take time in hourly increments, whereas in other cases employees coming and going would cause a

significant disruption. We believe that employers should explicitly have the ability to decide how PTO is awarded and used based on the unique needs of their workplaces.

Aside from those issues, the bill would require employers to keep confidential records of any sick time used by every employee for five years or risk being charged with failing to provide sick leave. While we believe this would be burdensome for all employers, it would be particularly difficult for large and multi-state employers with thousands of employees - the very companies our state continually tries to retain and attract.

4. Uses of Sick Time: The uses of sick leave included in the bill overlap and conflict with several existing leave laws.

In terms of overlap, the bill allows workers to take sick leave for the treatment and recovery of the employee's own physical or mental illness, or that of a family member, both of which are acceptable uses of the New Jersey Family Leave Act (NJFLA) and/or the federal Family and Medical Leave Act (FMLA). The bill also provides leave for victims of domestic violence which is already covered by the recently enacted New Jersey Security and Financial Empowerment Act (NJ SAFE Act).

In terms of conflict, the list of individuals included in the definition of "family member" for whom an employee could take leave under the bill is far more expansive than other laws. Under the federal FMLA, an employee's spouse, children, and parents are the only family members for which leave can be taken. Similarly, the NJ SAFE Act only includes children, parents, spouses, domestic partners, or civil union partners. Neither law includes "in-laws," nor grandparents or grandchildren.

Both issues pose several questions: would this leave run concurrently with these laws, or is it intended to be another benefit? And, if this bill is enacted, how will conflicts between the various laws get addressed particularly when other leave laws limit the definition of family member and specify that the leave will be unpaid?

5. Finding Replacements: The bill specifically prohibits requiring employees - who may have foreseeable notice that they will be absent - from finding their replacements. In some industries where shift work is involved, it's standard practice for workers to try to find others to cover their shifts. For many employers it is also critical that one person take the responsibility for opening an office, leading/covering a meeting, leading a shift, or operating a piece of machinery. As this bill is written, however, an employee would face no repercussions for not making arrangements to ensure that their company's operations were not affected by an absence.
6. Notification: The bill requires employers to provide notice of the availability of sick leave 30 days after the poster is issued; at the time of hiring; and any time the information is requested by the employee.

While it's certainly important that employees understand their rights, it's likewise important to remember that the average employer in New Jersey is already subject to more than 20

separate state and federal notice provisions. And, for some employers with government contracts, union contracts, veterans, or those in specialized fields (healthcare, real estate, etc.) that number could increase to over 30 separate notices. The result for employees is that it is often difficult to retain this information despite how valuable it is. The result for employers is often added administrative responsibilities that don't necessarily result in their workers being informed.

7. Documentation: While the bill allows employers to ask for documentation to justify the use of sick leave, it also requires them to pay for any costs the employee incurs in obtaining it. This puts employers in a Catch 22. If they rightfully request documentation because they believe an abuse is occurring, regardless of whether it is or not, they're still going to have to assume the costs of gas, tolls, etc.

In closing, we thank you for your consideration of our concerns and welcome the opportunity to meet with you if it would be helpful. You can reach our coalition by contacting Stefanie Riehl, Assistant Vice President for the New Jersey Business and Industry Association (NJBIA), at 609-858-9517 or by email at sriehl@njbia.org.

Sincerely,

Capital Region Minority Chamber of Commerce
Chamber of Commerce Southern New Jersey
Commerce and Industry Association of New Jersey
Fuel Merchants Association of New Jersey
Home Health Services Association of New Jersey
Hudson County Chamber of Commerce
Independent Association of Franchise Owners of Dunkin' Donuts and Baskin Robbins
Morey's Piers, Beachfront Waterparks and Resorts
National Federation of Independent Business – New Jersey
New Jersey Amusement Association
New Jersey Business & Industry Association
New Jersey Food Council
New Jersey Gasoline, C-Store, Automotive Association
New Jersey Hotel & Lodging Association
New Jersey Independent Electrical Contractors
New Jersey Lawsuit Reform Alliance
New Jersey Restaurant Association
New Jersey Retail Merchants Association
New Jersey State Chamber of Commerce
New Jersey Travel and Tourism Association
Princeton Regional Chamber of Commerce