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April 7, 2020

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

The Honorable Anthony Rendon
Speaker
California State Assembly
State Capitol, Room 219
Sacramento, CA 95814

The Honorable Toni Atkins
President Pro Tempore
California State Senate
State Capitol, Room 205
Sacramento, CA 95814

Dear Governor Newsom, Pro Tem Atkins, and Speaker Rendon:

Recently, the California Labor Federation sent you a letter discussing many of the very difficult consequences of the coronavirus pandemic. We certainly agree that the short- and long-term health of all Californians should be everyone's priority and businesses throughout California are doing everything they can to protect their employees while still providing essential services and goods, as well as being on the forefront of developing testing, treatment and vaccines.

Their letter, however, seems to suggest that the business community should be the safety net to mitigate the unprecedented outcomes of this natural disaster and the government's response. Our state and federal governments, with the help of the private sector, have always been the safety net. And, in times of crisis response, it is government that delivers essential assistance for recovery and allocates necessary resources that may become scarce. Thus, we must respectfully disagree with the premise of the Labor Fed's letter that private sector should shoulder this burden.

California businesses are already volunteering their support in numerous ways to help our state through this pandemic, including altering manufacturing operations to produce personal protective equipment, ventilators, and other necessary supplies. Restaurants are donating food to vulnerable populations in their communities, while hotels are working with state and local officials to house first responders, healthcare personnel, and other groups in need of medical isolation or shelter. Other businesses that have the financial resources available are providing grants to struggling small businesses and continuing to pay for employees' wages and benefits, even though the employees are not working. Employers are finding ways to help out where they can.

Many businesses and their owners are casualties of the necessary economic shutdown. They cannot be expected to shoulder a new employer-financed social safety net, with expensive new mandates, at precisely the moment when small businesses are shuttering, employee hours are cut, and uncertainty about the future is the new normal.

Attached is our detailed analysis of and response to some of the Labor Fed suggestions.

If you have any questions, please feel free to contact me.

Sincerely,

Allan Zaremberg
President, CEO
California Chamber of Commerce

On behalf of the above organizations

cc: Ann O'Leary, Governor's Office, Chief of Staff
Anthony Williams, Governor's Office, Legislative Affairs Secretary
Angie Wei, Governor's Office, Special Advisor
Julie Su, Labor & Workforce Development Agency Secretary
Assembly Member Ash Kalra, Chair, Assembly Labor and Employment Committee
Senator Jerry Hill, Chair, Senate Labor, Public Employment and Retirement Committee

AZ:JB:ll

**Addendum**

Expansion of Protected Leaves of Absence

The federal Family First Coronavirus Protection Act, which went into effect April 1st, already provides protected, paid leave for employees impacted by the coronavirus. The new law provides 12 weeks of paid emergency family medical leave to any employee who has worked at least 30 days for a covered employer to care for a child who is home due to school or childcare closures. It also provides 14 days of paid sick leave to any employee to care for themselves or another individual due to COVID-19, or to care for a child who is home as a result of a school or childcare provider closure. Importantly, the federal law recognizes the new burden created by this mandate, so provides employers with a tax credit to offset some of their costs. Given the prompt action by the federal government, additional state-only protected leaves, with their related costs and litigation, are unnecessary for California.

Health Care Coverage for COVID-19

The Labor Federation calls for a state mandate that health plans and insurers waive co-pays and deductibles for all COVID-19 related treatment for "essential critical infrastructure (ECI)" workers, not just for testing and screening of workers. The COVID-19 is a notorious and virulent infection, but it is certainly not the only devastating disease or condition facing Californians. This mandate would dramatically increase health plan premiums for all insureds to make up the costs associated with providing such coverage for a single disease. ECI workers' health plans cover treatment, including in-patient hospitalizations, pursuant to plan guidelines. An ECI worker, as any insured, has been paying into a health plan to cover medical treatment, such as a COVID-19 infection. This particular virus should not be given preferential coverage over any other disease or condition. Nor, for that matter, should ECI workers receive a co-pay and deductible waiver for COVID treatment in preference to other COVID-19 sufferers in the state.

The Labor Fed also suggests that the state require employers to maintain medical benefits for workers who lose coverage because of layoffs or hour reductions caused by the public health emergency. This is fiscally impossible. Private sector businesses are already financially strapped, which is precisely why there are layoffs or hours reductions in the first place. The federal CARES Act has made short-term loans available to cover business-related expenses, including health care coverage, which may alleviate some layoffs. But requiring businesses that are economically struggling to provide health care coverage for non-employees is a cure worse than the disease. Providing a safety net, including healthcare coverage, for displaced workers is the role of the government, not the private sector. Unemployed Californians have the option of applying for benefits through Covered California, Medicaid (in certain instances), and COBRA.

Cal-OSHA

The Labor Federation recommends all ECI workers, as outlined in Executive Order N-33-20, to have access to personal protective equipment, sanitation supplies, and mandatory breaks to wash their hands and sanitize their workstations. We understand the motivation for this suggestion, but it is overbroad and impractical. Personal protective equipment and sanitation supplies are in high demand and low supply. Indeed, the shortage is so severe that hospitals across the nation today cannot procure necessary PPE. Mandating specific levels of PPE or sanitation supplies for all ECI workers could divert precious resources away from where they are most needed, such as healthcare facilities.

Additionally, California already has mandated meal and rest periods that have created years of litigation and costs on employers. Many employers utilize best practices by encouraging or requiring their employees to wash their hands and sanitize their workstations whenever necessary. But mandating the scheduling of a break as a legal requirement, ensuring the employee has taken the break to wash their hands/sanitize, and then holding the employer responsible for any failure to provide such a break is an overly prescriptive requirement that simply is infeasible for employers to enforce.

Worker's Compensation

The Labor Fed recommends a presumption that any health care worker, firefighter, EMS and rescue personnel, front line law enforcement officers, or ECI worker that contracts COVID-19 or is quarantined at the request of a physician as a result of COVID-19 be entitled to worker's compensation benefits. This request will create an enormous and unnecessary burden on the worker's compensation system.

California has a no-fault system of workers' compensation insurance that must be "liberally construed" with the purpose of extending benefits to injured workers. Current law allows for a worker to file a claim for workers' compensation benefits if they believe they contracted COVID-19 while on the job, and those claims would be considered on an individual basis. There is simply no basis supporting the assertion that the system in place is failing workers and leading to bad outcomes. The imposition of a legal presumption, absent any justification, serves only to make it functionally impossible for an employer to contest any COVID-19 claim. In order to overcome a rebuttable legal presumption an employer would have to prove, based on a preponderance of the evidence, that a worker filing a claim had contracted COVID-19 at some place other than work. This is a standard that simply can't be met under these circumstances.

A similar proposal to create a COVID-19 presumption in the State of New York was recently estimated by the New York Compensation Insurance Rating Board (NYCIRB) to cost as much as $31 billion. This estimate was based on New York-specific data, but it is reasonable to assume that California – a larger state with a similarly complex and costly workers' compensation system – would be similarly expensive. The consequences of hitting California's workers' compensation system with this type of unexpected and unnecessary cost surge would likely cause massive cost increases for California employers and destabilization of the insurance market.

Creating a Presumption of Employee Status for "Gig Workers"

The Labor Fed recommends that EDD find that any individual who has worked as an independent contractor for a gig economy company is presumed to be an employee and any such company retroactively contribute to the unemployment insurance fund. This is an unsubtle hijacking of a crisis to further their political agenda. Not all "gig workers" believe they are misclassified and should not be required to say otherwise when they are already entitled to access benefits from the federal government.

Through the CARES Act, the federal government has already provided access to 39 weeks of unemployment insurance-like benefits for independent contractors and those who are self-employed (plus the $600-a-week supplemental federal UI payment) via the new Pandemic Unemployment Assistance program. These benefits are fully funded by the federal treasury, not by retroactive payments on California employers, who will be struggling to recover from this disruption for years to come. Given that the federal government is subsidizing these benefits, there will be no impact to the State UI Fund for individuals who access these benefits and therefore no need for the gig economy companies to pay into the fund. This new system also allows individuals **who do not believe they are misclassified**, with an opportunity to seek benefits without having to prove employee status or attest under penalty of perjury that they were not independent contractors, which could potentially disqualify them from other financial benefits.

Additionally, there is legitimate ambiguity surrounding employee status due to AB 5 (Gonzalez) - and there is already a method in place to resolve it. AB 5 went into effect this past January, completely changing the criteria if an individual is an employee or an independent contractor, for purposes of unemployment insurance. Despite the spotlight the Labor Fed seeks to shine on these workers, a gig worker is no different than any other individual who believes he or she might be misclassified as an independent contractor and may now be seeking unemployment insurance. Any of these individuals should utilize the same, existing EDD process to resolve the ambiguities that AB 5 has created and claim misclassification. Creating a presumption of employee status for one category of workers again discriminates against all other individuals who believe they were inappropriately misclassified yet must follow the existing procedures at EDD.