

Introduced by Senator KuehlFebruary 16, 2005

An act to amend Section 12945.2 of the Government Code, relating to family and medical leave.

LEGISLATIVE COUNSEL'S DIGEST

SB 300, as introduced, Kuehl. Family and medical leave.

Existing law, the Moore-Brown-Roberti Family Rights Act, makes it an unlawful employment practice for an employer, as defined, to refuse to grant a request by an eligible employee to take up to 12 workweeks of unpaid protected leave during any 12-month period (1) to bond with a child who was born to, adopted by, or placed for foster care with, the employee, (2) to care for the employee's parent, spouse, or child who has a serious health condition, as defined, or (3) because the employee is suffering from a serious health condition rendering him or her unable to perform the functions of the job. Under the act, "child" means a biological, adopted, foster, or stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18 or an adult dependent child. The act defines "parent" to mean the employee's biological, foster, adoptive, or stepparent, legal guardian, or other person who stood in loco parentis to the employee when the employee was a child.

This bill would increase the circumstances under which an employee is entitled to protected leave pursuant to the Family Rights Act by (1) eliminating the age and dependency elements from the definition of "child," thereby permitting an employee to take protected leave to care for his or her independent adult child suffering from a serious health condition, (2) expanding the definition of "parent" to include an employee's parent-in-law and (3) permitting an employee

to take leave to care for a seriously ill grandparent, sibling, or domestic partner, as defined.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 12945.2 of the Government Code is
2 amended to read:

3 12945.2. (a) Except as provided in subdivision (b), it shall be
4 an unlawful employment practice for any employer, as defined in
5 paragraph (2) of subdivision (c), to refuse to grant a request by
6 any employee with more than 12 months of service with the
7 employer, and who has at least 1,250 hours of service with the
8 employer during the previous 12-month period, to take up to a
9 total of 12 workweeks in any 12-month period for family care
10 and medical leave. Family care and medical leave requested
11 pursuant to this subdivision shall not be deemed to have been
12 granted unless the employer provides the employee, upon
13 granting the leave request, a guarantee of employment in the
14 same or a comparable position upon the termination of the leave.
15 The commission shall adopt a regulation specifying the elements
16 of a reasonable request.

17 (b) Notwithstanding subdivision (a), it shall not be an unlawful
18 employment practice for an employer to refuse to grant a request
19 for family care and medical leave by an employee if the
20 employer employs less than 50 employees within 75 miles of the
21 worksite where that employee is employed.

22 (c) For purposes of this section:

23 (1) "Child" means a biological, adopted, or foster child, a
24 stepchild, a legal ward, or a child of a person standing in loco
25 parentis ~~who is either of the following:~~

26 ~~(A) Under 18 years of age.~~

27 ~~(B) An adult dependent child.~~

28 (2) "Domestic partner" has the same meaning set forth in
29 Section 297 of the Family Code.

30 (3) "Employer" means either of the following:

31 (A) Any person who directly employs 50 or more persons to
32 perform services for a wage or salary.

1 (B) The state, and any political or civil subdivision of the state
2 and cities.

3 (3) “Family care and medical leave” means any of the
4 following:

5 (A) Leave for reason of the birth of a child of the employee; *or*
6 the placement of a child with an employee in connection with the
7 adoption or foster care of the child by the employee; ~~or the~~
8 ~~serious health condition of a child of the employee.~~

9 (B) Leave to care for a parent, *grandparent, sibling, child,*
10 *domestic partner,* or a spouse who has a serious health condition.

11 (C) Leave because of an employee’s own serious health
12 condition that makes the employee unable to perform the
13 functions of the position of that employee, except for leave taken
14 for disability on account of pregnancy, childbirth, or related
15 medical conditions.

16 (4) “Employment in the same or a comparable position”
17 means employment in a position that has the same or similar
18 duties and pay that can be performed at the same or similar
19 geographic location as the position held prior to the leave.

20 (5) “FMLA” means the federal Family and Medical Leave Act
21 of 1993 (P.L. 103-3).

22 (6) “Health care provider” means any of the following:

23 (A) An individual holding either a physician’s and surgeon’s
24 certificate issued pursuant to Article 4 (commencing with Section
25 2080) of Chapter 5 of Division 2 of the Business and Professions
26 Code, an osteopathic physician’s and surgeon’s certificate issued
27 pursuant to Article 4.5 (commencing with Section 2099.5) of
28 Chapter 5 of Division 2 of the Business and Professions Code, or
29 an individual duly licensed as a physician, surgeon, or
30 osteopathic physician or surgeon in another state or jurisdiction,
31 who directly treats or supervises the treatment of the serious
32 health condition.

33 (B) Any other person determined by the United States
34 Secretary of Labor to be capable of providing health care
35 services under the FMLA.

36 (7) “Parent” means a biological, foster, or adoptive parent, a
37 stepparent, *a parent-in-law,* a legal guardian, or other person who
38 stood in loco parentis to the employee when the employee was a
39 child.

1 (8) “Serious health condition” means an illness, injury,
2 impairment, or physical or mental condition that involves either
3 of the following:

4 (A) Inpatient care in a hospital, hospice, or residential health
5 care facility.

6 (B) Continuing treatment or continuing supervision by a health
7 care provider.

8 (d) An employer shall not be required to pay an employee for
9 any leave taken pursuant to subdivision (a), except as required by
10 subdivision (e).

11 (e) An employee taking a leave permitted by subdivision (a)
12 may elect, or an employer may require the employee, to
13 substitute, for leave allowed under subdivision (a), any of the
14 employee’s accrued vacation leave or other accrued time off
15 during this period or any other paid or unpaid time off negotiated
16 with the employer. If an employee takes a leave because of the
17 employee’s own serious health condition, the employee may also
18 elect, or the employer may also require the employee, to
19 substitute accrued sick leave during the period of the leave.
20 However, an employee shall not use sick leave during a period of
21 leave in connection with the birth, adoption, or foster care of a
22 child, or to care for a ~~child~~, parent, *grandparent*, *sibling*, *child*,
23 *domestic partner*, or spouse with a serious health condition,
24 unless mutually agreed to by the employer and the employee.

25 (f) (1) During any period that an eligible employee takes
26 leave pursuant to subdivision (a) or takes leave that qualifies as
27 leave taken under the FMLA, the employer shall maintain and
28 pay for coverage under a “group health plan,” as defined in
29 Section 5000(b)(1) of the Internal Revenue Code of 1986, for the
30 duration of the leave, not to exceed 12 workweeks in a 12-month
31 period, commencing on the date leave taken under the FMLA
32 commences, at the level and under the conditions coverage
33 would have been provided if the employee had continued in
34 employment continuously for the duration of the leave. Nothing
35 in the preceding sentence shall preclude an employer from
36 maintaining and paying for coverage under a “group health plan”
37 beyond 12 workweeks. An employer may recover the premium
38 that the employer paid as required by this subdivision for
39 maintaining coverage for the employee under the group health
40 plan if both of the following conditions occur:

1 (A) The employee fails to return from leave after the period of
2 leave to which the employee is entitled has expired.

3 (B) The employee's failure to return from leave is for a reason
4 other than the continuation, recurrence, or onset of a serious
5 health condition that entitles the employee to leave under
6 subdivision (a) or other circumstances beyond the control of the
7 employee.

8 (2) Any employee taking leave pursuant to subdivision (a)
9 shall continue to be entitled to participate in employee health
10 plans for any period during which coverage is not provided by
11 the employer under paragraph (1), employee benefit plans,
12 including life, short-term, or long-term disability or accident
13 insurance, pension and retirement plans, and supplemental
14 unemployment benefit plans to the same extent and under the
15 same conditions as apply to an unpaid leave taken for any
16 purpose other than those described in subdivision (a). In the
17 absence of these conditions an employee shall continue to be
18 entitled to participate in these plans and, in the case of health and
19 welfare employee benefit plans, including life, short-term, or
20 long-term disability or accident insurance, or other similar plans,
21 the employer may, at his or her discretion, require the employee
22 to pay premiums, at the group rate, during the period of leave not
23 covered by any accrued vacation leave, or other accrued time off,
24 or any other paid or unpaid time off negotiated with the
25 employer, as a condition of continued coverage during the leave
26 period. However, the nonpayment of premiums by an employee
27 shall not constitute a break in service, for purposes of longevity,
28 seniority under any collective bargaining agreement, or any
29 employee benefit plan.

30 For purposes of pension and retirement plans, an employer
31 shall not be required to make plan payments for an employee
32 during the leave period, and the leave period shall not be required
33 to be counted for purposes of time accrued under the plan.
34 However, an employee covered by a pension plan may continue
35 to make contributions in accordance with the terms of the plan
36 during the period of the leave.

37 (g) During a family care and medical leave period, the
38 employee shall retain employee status with the employer, and the
39 leave shall not constitute a break in service, for purposes of
40 longevity, seniority under any collective bargaining agreement,

1 or any employee benefit plan. An employee returning from leave
2 shall return with no less seniority than the employee had when
3 the leave commenced, for purposes of layoff, recall, promotion,
4 job assignment, and seniority-related benefits such as vacation.

5 (h) If the employee's need for a leave pursuant to this section
6 is foreseeable, the employee shall provide the employer with
7 reasonable advance notice of the need for the leave.

8 (i) If the employee's need for leave pursuant to this section is
9 foreseeable due to a planned medical treatment or supervision,
10 the employee shall make a reasonable effort to schedule the
11 treatment or supervision to avoid disruption to the operations of
12 the employer, subject to the approval of the health care provider
13 of the individual requiring the treatment or supervision.

14 (j) (1) An employer may require that an employee's request
15 for leave to care for a ~~child, a spouse, or a parent, grandparent,~~
16 *sibling, child, domestic partner, or spouse* who has a serious
17 health condition be supported by a certification issued by the
18 health care provider of the individual requiring care. That
19 certification shall be sufficient if it includes all of the following:

20 (A) The date on which the serious health condition
21 commenced.

22 (B) The probable duration of the condition.

23 (C) An estimate of the amount of time that the health care
24 provider believes the employee needs to care for the individual
25 requiring the care.

26 (D) A statement that the serious health condition warrants the
27 participation of a family member to provide care during a period
28 of the treatment or supervision of the individual requiring care.

29 (2) Upon expiration of the time estimated by the health care
30 provider in subparagraph (C) of paragraph (1), the employer may
31 require the employee to obtain recertification, in accordance with
32 the procedure provided in paragraph (1), if additional leave is
33 required.

34 (k) (1) An employer may require that an employee's request
35 for leave because of the employee's own serious health condition
36 be supported by a certification issued by his or her health care
37 provider. That certification shall be sufficient if it includes all of
38 the following:

39 (A) The date on which the serious health condition
40 commenced.

1 (B) The probable duration of the condition.

2 (C) A statement that, due to the serious health condition, the
3 employee is unable to perform the function of his or her position.

4 (2) The employer may require that the employee obtain
5 subsequent recertification regarding the employee's serious
6 health condition on a reasonable basis, in accordance with the
7 procedure provided in paragraph (1), if additional leave is
8 required.

9 (3) (A) In any case in which the employer has reason to doubt
10 the validity of the certification provided pursuant to this section,
11 the employer may require, at the employer's expense, that the
12 employee obtain the opinion of a second health care provider,
13 designated or approved by the employer, concerning any
14 information certified under paragraph (1).

15 (B) The health care provider designated or approved under
16 subparagraph (A) shall not be employed on a regular basis by the
17 employer.

18 (C) In any case in which the second opinion described in
19 subparagraph (A) differs from the opinion in the original
20 certification, the employer may require, at the employer's
21 expense, that the employee obtain the opinion of a third health
22 care provider, designated or approved jointly by the employer
23 and the employee, concerning the information certified under
24 paragraph (1).

25 (D) The opinion of the third health care provider concerning
26 the information certified under paragraph (1) shall be considered
27 to be final and shall be binding on the employer and the
28 employee.

29 (4) As a condition of an employee's return from leave taken
30 because of the employee's own serious health condition, the
31 employer may have a uniformly applied practice or policy that
32 requires the employee to obtain certification from his or her
33 health care provider that the employee is able to resume work.
34 Nothing in this paragraph shall supersede a valid collective
35 bargaining agreement that governs the return to work of that
36 employee.

37 (l) It shall be an unlawful employment practice for an
38 employer to refuse to hire, or to discharge, fine, suspend, expel,
39 or discriminate against, any individual because of any of the
40 following:

1 (1) An individual's exercise of the right to family care and
2 medical leave provided by subdivision (a).

3 (2) An individual's giving information or testimony as to his
4 or her own family care and medical leave, or another person's
5 family care and medical leave, in any inquiry or proceeding
6 related to rights guaranteed under this section.

7 (m) This section shall not be construed to require any changes
8 in existing collective bargaining agreements during the life of the
9 contract, or until January 1, 1993, whichever occurs first.

10 (n) The amendments made to this section by the act adding
11 this subdivision shall not be construed to require any changes in
12 existing collective bargaining agreements during the life of the
13 contract, or until February 5, 1994, whichever occurs first.

14 (o) The provisions of this section shall be construed as
15 separate and distinct from those of Section 12945.

16 (p) Leave provided for pursuant to this section may be taken in
17 one or more periods. The 12-month period during which 12
18 workweeks of leave may be taken under this section shall run
19 concurrently with the 12-month period under the FMLA, and
20 shall commence the date leave taken under the FMLA
21 commences.

22 (q) In any case in which both parents entitled to leave under
23 subdivision (a) are employed by the same employer, the
24 employer shall not be required to grant leave in connection with
25 the birth, adoption, or foster care of a child that would allow the
26 parents family care and medical leave totaling more than the
27 amount specified in subdivision (a).

28 (r) (1) Notwithstanding subdivision (a), an employer may
29 refuse to reinstate an employee returning from leave to the same
30 or a comparable position if all of the following apply:

31 (A) The employee is a salaried employee who is among the
32 highest paid 10 percent of the employer's employees who are
33 employed within 75 miles of the worksite at which that employee
34 is employed.

35 (B) The refusal is necessary to prevent substantial and
36 grievous economic injury to the operations of the employer.

37 (C) The employer notifies the employee of the intent to refuse
38 reinstatement at the time the employer determines the refusal is
39 necessary under subparagraph (B).

1 (2) In any case in which the leave has already commenced, the
2 employer shall give the employee a reasonable opportunity to
3 return to work following the notice prescribed by subparagraph
4 (C).

5 (s) Leave taken by an employee pursuant to this section shall
6 run concurrently with leave taken pursuant to the FMLA, except
7 for any leave taken under the FMLA for disability on account of
8 pregnancy, childbirth, or related medical conditions. The
9 aggregate amount of leave taken under this section or the FMLA,
10 or both, except for leave taken for disability on account of
11 pregnancy, childbirth, or related medical conditions, shall not
12 exceed 12 workweeks in a 12-month period. An employee is
13 entitled to take, in addition to the leave provided for under this
14 section and the FMLA, the leave provided for in Section 12945,
15 if the employee is otherwise qualified for that leave.

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