

AMENDED IN ASSEMBLY MARCH 2, 2010

CALIFORNIA LEGISLATURE—2009—10 REGULAR SESSION

ASSEMBLY BILL

No. 1667

Introduced by Assembly Member Swanson

January 20, 2010

~~An act to amend Section 12945.2 of the Government Code, relating to family and medical leave. An act to add Section 31485.16 to the Government Code, relating to public employment.~~

LEGISLATIVE COUNSEL'S DIGEST

AB 1667, as amended, Swanson. ~~Family and medical leave. Public employment: County of Alameda.~~

The County Employees Retirement Law of 1937 authorizes, until January 1, 2011, the board of supervisors of the Counties of Solano and Santa Barbara to, by resolution, ordinance, contract, or contract amendment, provide different retirement benefits for some safety member bargaining units within the safety member classification of a county retirement system, as specified.

This bill would authorize the Board of Supervisors of the County of Alameda, by resolution adopted by majority vote as part of any negotiated memorandum of understanding with a bargaining unit that represents safety employees, to require a safety employee of that bargaining unit or unrepresented safety employee hired after approval of the resolution, to elect in writing a permanent choice between 2 specified pension calculations, as specified. The bill would also authorize the board to adopt a resolution by majority vote to provide a different formula or calculation of retirement benefits for new members of other safety bargaining units or other unrepresented safety employees hired after approval of the resolution, as specified, or to provide a

different formula or calculation of safety retirement benefits for new safety members in one bargaining unit than that which is provided for new safety members of other bargaining units or new unrepresented safety members.

The bill would also specify that the board shall not require that a bargaining unit be divided solely for the purpose of providing different retirement benefits. The bill would authorize the board to separately negotiate retirement benefits with a bargaining unit if the members of that bargaining unit so elect.

~~Existing law, the Moore-Brown-Roberti Family Rights Act, makes it an unlawful employment practice for an employer 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, or (3) because the employee is suffering from a serious health condition rendering him or her unable to perform the functions of the job.~~

~~This bill would increase the circumstances under which an employee is entitled to protected leave pursuant to the Family Rights Act by permitting an employee to take leave to care for a sibling with a serious health condition.~~

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 31485.16 is added to the Government
2 Code, to read:
3 31485.16. (a) Notwithstanding any other provision of this
4 chapter, in a county of the fourth class, as defined in Sections
5 28020 and 28025, as amended by Chapter 1204 of the Statutes of
6 1971, the board of supervisors may, by resolution adopted by
7 majority vote, as part of any negotiated memorandum of
8 understanding with a bargaining unit that represents safety
9 employees, require a safety employee of that bargaining unit or
10 unrepresented safety employee hired after approval of the
11 resolution, to elect in writing, either the pension calculation stated
12 in Section 31639.5 or the pension calculation stated in Section
13 31664.2. The election shall be made within 45 calendar days of

1 *beginning employment with the county. If a new safety employee*
2 *does not elect the pension calculation stated in Section 31664.2*
3 *within 45 days of beginning employment, the new safety employee*
4 *shall be deemed to have elected the pension calculation stated in*
5 *Section 31639.5. Once made, a safety employee under this section*
6 *shall not be permitted to rescind his or her election.*

7 *(b) The resolution described in subdivision (a) may provide a*
8 *different formula or calculation of retirement benefits for new*
9 *members of other safety bargaining units or other unrepresented*
10 *safety employees hired after approval of the resolution, by making*
11 *any section of this chapter applicable to those different safety*
12 *bargaining units or unrepresented employees, within the safety*
13 *member classification, pursuant to a negotiated memorandum of*
14 *understanding as described in Section 3505.1.*

15 *(c) The resolution described in subdivision (a) may provide a*
16 *different formula or calculation of safety retirement benefits for*
17 *new safety members in one bargaining unit than that which is*
18 *provided for new safety members of other bargaining units or new*
19 *unrepresented safety members.*

20 *(d) A resolution adopted pursuant to this section or previously*
21 *adopted resolutions of the board may require members to pay all*
22 *or part of the contributions by a member or employer, or both,*
23 *that would have been required if the section or sections specified*
24 *within this chapter were or have been adopted by resolution. The*
25 *payment by a member shall become part of the accumulated*
26 *contributions of the member. For those members who are*
27 *represented by a bargaining unit, the payment requirement shall*
28 *be approved in a memorandum of understanding executed by the*
29 *board of supervisors and the employee representatives.*

30 *(e) The board of supervisors, in a resolution described in*
31 *subdivision (a), shall not require that a bargaining unit be divided*
32 *solely for the purpose of providing different retirement benefits.*
33 *However, if the members of a bargaining unit within the same or*
34 *similar membership classification so elect, retirement benefits may*
35 *be separately negotiated with that bargaining unit.*

36 *(f) Notwithstanding any other provision of law, the effective*
37 *date of a resolution specified in subdivision (a) may be different*
38 *than the date of the resolution.*

39 ~~SECTION 1. Section 12945.2 of the Government Code is~~
40 ~~amended to read:~~

1 ~~12945.2. (a) Except as provided in subdivision (b), it is an~~
2 ~~unlawful employment practice for any employer, as defined in~~
3 ~~paragraph (2) of subdivision (c), to refuse to grant a request by~~
4 ~~any employee with more than 12 months of service with the~~
5 ~~employer, and who has at least 1,250 hours of service with the~~
6 ~~employer during the previous 12-month period, to take up to a~~
7 ~~total of 12 workweeks in any 12-month period for family care and~~
8 ~~medical leave. Family care and medical leave requested pursuant~~
9 ~~to this subdivision shall not be deemed to have been granted unless~~
10 ~~the employer provides the employee, upon granting the leave~~
11 ~~request, a guarantee of employment in the same or a comparable~~
12 ~~position upon the termination of the leave. The commission shall~~
13 ~~adopt a regulation specifying the elements of a reasonable request.~~
14 ~~(b) Notwithstanding subdivision (a), it is not an unlawful~~
15 ~~employment practice for an employer to refuse to grant a request~~
16 ~~for family care and medical leave by an employee if the employer~~
17 ~~employs less than 50 employees within 75 miles of the worksite~~
18 ~~where that employee is employed.~~
19 ~~(c) For purposes of this section:~~
20 ~~(1) “Child” means a biological, adopted, or foster child, a~~
21 ~~stepchild, a legal ward, or a child of a person standing in loco~~
22 ~~parentis who is either of the following:~~
23 ~~(A) Under 18 years of age.~~
24 ~~(B) An adult dependent child.~~
25 ~~(2) “Employer” means either of the following:~~
26 ~~(A) Any person who directly employs 50 or more persons to~~
27 ~~perform services for a wage or salary.~~
28 ~~(B) The state, and any political or civil subdivision of the state~~
29 ~~and cities.~~
30 ~~(3) “Employment in the same or a comparable position” means~~
31 ~~employment in a position that has the same or similar duties and~~
32 ~~pay that can be performed at the same or similar geographic~~
33 ~~location as the position held prior to the leave.~~
34 ~~(4) “Family care and medical leave” means any of the following:~~
35 ~~(A) Leave for reason of the birth of a child of the employee, the~~
36 ~~placement of a child with an employee in connection with the~~
37 ~~adoption or foster care of the child by the employee, or the serious~~
38 ~~health condition of a child of the employee.~~
39 ~~(B) Leave to care for a parent, sibling, or spouse who has a~~
40 ~~serious health condition.~~

1 ~~(C) Leave because of an employee's own serious health~~
2 ~~condition that makes the employee unable to perform the functions~~
3 ~~of the position of that employee, except for leave taken for~~
4 ~~disability on account of pregnancy, childbirth, or related medical~~
5 ~~conditions.~~

6 ~~(5) "FMLA" means the federal Family and Medical Leave Act~~
7 ~~of 1993 (P.L. 103-3).~~

8 ~~(6) "Health care provider" means any of the following:~~

9 ~~(A) An individual holding either a physician's and surgeon's~~
10 ~~certificate issued pursuant to Article 4 (commencing with Section~~
11 ~~2080) of Chapter 5 of Division 2 of the Business and Professions~~
12 ~~Code, an osteopathic physician's and surgeon's certificate issued~~
13 ~~pursuant to Article 4.5 (commencing with Section 2099.5) of~~
14 ~~Chapter 5 of Division 2 of the Business and Professions Code, or~~
15 ~~an individual duly licensed as a physician, surgeon, or osteopathic~~
16 ~~physician or surgeon in another state or jurisdiction, who directly~~
17 ~~treats or supervises the treatment of the serious health condition.~~

18 ~~(B) Any other person determined by the United States Secretary~~
19 ~~of Labor to be capable of providing health care services under the~~
20 ~~FMLA.~~

21 ~~(7) "Parent" means a biological, foster, or adoptive parent, a~~
22 ~~stepparent, a legal guardian, or other person who stood in loco~~
23 ~~parentis to the employee when the employee was a child.~~

24 ~~(8) "Serious health condition" means an illness, injury,~~
25 ~~impairment, or physical or mental condition that involves either~~
26 ~~of the following:~~

27 ~~(A) Inpatient care in a hospital, hospice, or residential health~~
28 ~~care facility.~~

29 ~~(B) Continuing treatment or continuing supervision by a health~~
30 ~~care provider.~~

31 ~~(11) "Sibling" has the same meaning as defined in subdivision~~
32 ~~(e) of Section 362.1 of the Welfare and Institutions Code.~~

33 ~~(d) An employer shall not be required to pay an employee for~~
34 ~~any leave taken pursuant to subdivision (a), except as required by~~
35 ~~subdivision (e).~~

36 ~~(e) An employee taking a leave permitted by subdivision (a)~~
37 ~~may elect, or an employer may require the employee, to substitute,~~
38 ~~for leave allowed under subdivision (a), any of the employee's~~
39 ~~accrued vacation leave or other accrued time off during this period~~
40 ~~or any other paid or unpaid time off negotiated with the employer.~~

1 If an employee takes a leave because of the employee’s own serious
 2 health condition, the employee may also elect, or the employer
 3 may also require the employee, to substitute accrued sick leave
 4 during the period of the leave. However, an employee shall not
 5 use sick leave during a period of leave in connection with the birth,
 6 adoption, or foster care of a child, or to care for a child, parent,
 7 sibling, or spouse with a serious health condition, unless mutually
 8 agreed to by the employer and the employee.

9 (f) (1) During any period that an eligible employee takes leave
 10 pursuant to subdivision (a) or takes leave that qualifies as leave
 11 taken under the FMLA, the employer shall maintain and pay for
 12 coverage under a “group health plan,” as defined in paragraph (1)
 13 of subsection (b) of Section 5000 of Title 26 of the Internal
 14 Revenue Code, for the duration of the leave, not to exceed 12
 15 workweeks in a 12-month period, commencing on the date leave
 16 taken under the FMLA commences, at the level and under the
 17 conditions coverage would have been provided if the employee
 18 had continued in employment continuously for the duration of the
 19 leave. Nothing in the preceding sentence shall preclude an
 20 employer from maintaining and paying for coverage under a “group
 21 health plan” beyond 12 workweeks. An employer may recover the
 22 premium that the employer paid as required by this subdivision
 23 for maintaining coverage for the employee under the group health
 24 plan if both of the following conditions occur:

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

27 (B) The employee’s failure to return from leave is for a reason
 28 other than the continuation, recurrence, or onset of a serious health
 29 condition that entitles the employee to leave under subdivision (a)
 30 or other circumstances beyond the control of the employee.

31 (2) (A) Any employee taking leave pursuant to subdivision (a)
 32 shall continue to be entitled to participate in employee health plans
 33 for any period during which coverage is not provided by the
 34 employer under paragraph (1), employee benefit plans, including
 35 life, short-term, or long-term disability or accident insurance,
 36 pension and retirement plans, and supplemental unemployment
 37 benefit plans to the same extent and under the same conditions as
 38 apply to an unpaid leave taken for any purpose other than those
 39 described in subdivision (a). In the absence of these conditions an
 40 employee shall continue to be entitled to participate in these plans

1 and, in the case of health and welfare employee benefit plans,
2 including life, short-term, or long-term disability or accident
3 insurance, or other similar plans, the employer may, at his or her
4 discretion, require the employee to pay premiums, at the group
5 rate, during the period of leave not covered by any accrued vacation
6 leave, or other accrued time off, or any other paid or unpaid time
7 off negotiated with the employer, as a condition of continued
8 coverage during the leave period. However, the nonpayment of
9 premiums by an employee shall not constitute a break in service,
10 for purposes of longevity, seniority under any collective bargaining
11 agreement, or any employee benefit plan.

12 (B) For purposes of pension and retirement plans, an employer
13 shall not be required to make plan payments for an employee
14 during the leave period, and the leave period shall not be required
15 to be counted for purposes of time accrued under the plan.
16 However, an employee covered by a pension plan may continue
17 to make contributions in accordance with the terms of the plan
18 during the period of the leave.

19 (g) During a family care and medical leave period, the employee
20 shall retain employee status with the employer, and the leave shall
21 not constitute a break in service, for purposes of longevity, seniority
22 under any collective bargaining agreement, or any employee benefit
23 plan. An employee returning from leave shall return with no less
24 seniority than the employee had when the leave commenced, for
25 purposes of layoff, recall, promotion, job assignment, and
26 seniority-related benefits such as vacation.

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

30 (i) If the employee's need for leave pursuant to this section is
31 foreseeable due to a planned medical treatment or supervision, the
32 employee shall make a reasonable effort to schedule the treatment
33 or supervision to avoid disruption to the operations of the employer,
34 subject to the approval of the health care provider of the individual
35 requiring the treatment or supervision.

36 (j) (1) An employer may require that an employee's request
37 for leave to care for a child, parent, sibling, or spouse who has a
38 serious health condition be supported by a certification issued by
39 the health care provider of the individual requiring care. That
40 certification shall be sufficient if it includes all of the following:

- 1 ~~(A) The date on which the serious health condition commenced.~~
- 2 ~~(B) The probable duration of the condition.~~
- 3 ~~(C) An estimate of the amount of time that the health care~~
4 ~~provider believes the employee needs to care for the individual~~
5 ~~requiring the care.~~
- 6 ~~(D) A statement that the serious health condition warrants the~~
7 ~~participation of a family member to provide care during a period~~
8 ~~of the treatment or supervision of the individual requiring care.~~
- 9 ~~(2) Upon expiration of the time estimated by the health care~~
10 ~~provider in subparagraph (C) of paragraph (1), the employer may~~
11 ~~require the employee to obtain recertification, in accordance with~~
12 ~~the procedure provided in paragraph (1), if additional leave is~~
13 ~~required.~~
- 14 ~~(k) (1) An employer may require that an employee's request~~
15 ~~for leave because of the employee's own serious health condition~~
16 ~~be supported by a certification issued by his or her health care~~
17 ~~provider. That certification shall be sufficient if it includes all of~~
18 ~~the following:~~
- 19 ~~(A) The date on which the serious health condition commenced.~~
- 20 ~~(B) The probable duration of the condition.~~
- 21 ~~(C) A statement that, due to the serious health condition, the~~
22 ~~employee is unable to perform the function of his or her position.~~
- 23 ~~(2) The employer may require that the employee obtain~~
24 ~~subsequent recertification regarding the employee's serious health~~
25 ~~condition on a reasonable basis, in accordance with the procedure~~
26 ~~provided in paragraph (1), if additional leave is required.~~
- 27 ~~(3) (A) In any case in which the employer has reason to doubt~~
28 ~~the validity of the certification provided pursuant to this section,~~
29 ~~the employer may require, at the employer's expense, that the~~
30 ~~employee obtain the opinion of a second health care provider,~~
31 ~~designated or approved by the employer, concerning any~~
32 ~~information certified under paragraph (1):~~
- 33 ~~(B) The health care provider designated or approved under~~
34 ~~subparagraph (A) shall not be employed on a regular basis by the~~
35 ~~employer.~~
- 36 ~~(C) In any case in which the second opinion described in~~
37 ~~subparagraph (A) differs from the opinion in the original~~
38 ~~certification, the employer may require, at the employer's expense,~~
39 ~~that the employee obtain the opinion of a third health care provider,~~

1 designated or approved jointly by the employer and the employee,
2 concerning the information certified under paragraph (1):

3 ~~(D) The opinion of the third health care provider concerning~~
4 ~~the information certified under paragraph (1) shall be considered~~
5 ~~to be final and shall be binding on the employer and the employee.~~

6 ~~(4) As a condition of an employee's return from leave taken~~
7 ~~because of the employee's own serious health condition, the~~
8 ~~employer may have a uniformly applied practice or policy that~~
9 ~~requires the employee to obtain certification from his or her health~~
10 ~~care provider that the employee is able to resume work. Nothing~~
11 ~~in this paragraph shall supersede a valid collective bargaining~~
12 ~~agreement that governs the return to work of that employee.~~

13 ~~(l) It is an unlawful employment practice for an employer to~~
14 ~~refuse to hire, or to discharge, fine, suspend, expel, or discriminate~~
15 ~~against, any individual because of any of the following:~~

16 ~~(1) An individual's exercise of the right to family care and~~
17 ~~medical leave provided by subdivision (a):~~

18 ~~(2) An individual's giving information or testimony as to his or~~
19 ~~her own family care and medical leave, or another person's family~~
20 ~~care and medical leave, in any inquiry or proceeding related to~~
21 ~~rights guaranteed under this section.~~

22 ~~(m) This section does not require any changes in existing~~
23 ~~collective bargaining agreements during the life of the contract,~~
24 ~~or until January 1, 1993, whichever occurs first.~~

25 ~~(n) The amendments made to this section by Chapter 827 of the~~
26 ~~Statutes of 1993 shall not be construed to require any changes in~~
27 ~~existing collective bargaining agreements during the life of the~~
28 ~~contract, or until February 5, 1994, whichever occurs first.~~

29 ~~(o) This section shall be construed as separate and distinct from~~
30 ~~Section 12945.~~

31 ~~(p) Leave provided for pursuant to this section may be taken in~~
32 ~~one or more periods. The 12-month period during which 12~~
33 ~~workweeks of leave may be taken under this section shall run~~
34 ~~concurrently with the 12-month period under the FMLA, and shall~~
35 ~~commence the date leave taken under the FMLA commences.~~

36 ~~(q) In any case in which both parents entitled to leave under~~
37 ~~subdivision (a) are employed by the same employer, the employer~~
38 ~~shall not be required to grant leave in connection with the birth,~~
39 ~~adoption, or foster care of a child that would allow the parents~~

1 family care and medical leave totaling more than the amount
2 specified in subdivision (a).

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

6 (A) The employee is a salaried employee who is among the
7 highest paid 10 percent of the employer's employees who are
8 employed within 75 miles of the worksite at which that employee
9 is employed.

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

12 (C) The employer notifies the employee of the intent to refuse
13 reinstatement at the time the employer determines the refusal is
14 necessary under subparagraph (B).

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

19 (s) Leave taken by an employee pursuant to this section shall
20 run concurrently with leave taken pursuant to the FMLA, except
21 for any leave taken under the FMLA for disability on account of
22 pregnancy, childbirth, or related medical conditions. The aggregate
23 amount of leave taken under this section or the FMLA, or both,
24 except for leave taken for disability on account of pregnancy,
25 childbirth, or related medical conditions, shall not exceed 12
26 workweeks in a 12-month period. An employee is entitled to take,
27 in addition to the leave provided for under this section and the
28 FMLA, the leave provided for in Section 12945, if the employee
29 is otherwise qualified for that leave.