

**ASSEMBLY BILL**

**No. 592**

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**Introduced by Assembly Member Lara**

February 16, 2011

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An act to amend Sections 12945 and 12945.2 of the Government Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 592, as introduced, Lara. Employment: leave: interference.

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.

Existing law makes it an unlawful employment practice, unless based upon a bona fide occupational qualification, for an employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions to take leave on account of pregnancy for a reasonable period of time, not to exceed 4 months and thereafter return to work. Leave under these provisions is in addition to the leave provided under the Moore-Brown-Roberti Family Rights Act.

This bill would also make it an unlawful employment practice for an employer to interfere with, or restrain the exercise or attempted exercise of, any right provided to an employee under the above provisions.

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 of the Government Code is  
2 amended to read:

3 12945. (a) In addition to the provisions that govern pregnancy,  
4 childbirth, or related medical conditions in Sections 12926 and  
5 12940, ~~the following~~ shall be an unlawful employment practice,  
6 unless based upon a bona fide occupational qualification:

7 (a)  
8 (1) For an employer to refuse to allow a female employee  
9 disabled by pregnancy, childbirth, or related medical conditions  
10 to take a leave for a reasonable period of time not to exceed four  
11 months and thereafter return to work, as set forth in the  
12 commission’s regulations. The employee shall be entitled to utilize  
13 any accrued vacation leave during this period of time. Reasonable  
14 period of time means that period during which the female employee  
15 is disabled on account of pregnancy, childbirth, or related medical  
16 conditions.

17 An employer may require an employee who plans to take a leave  
18 pursuant to this subdivision to give the employer reasonable notice  
19 of the date the leave shall commence and the estimated duration  
20 of the leave.

21 ~~(b)(1)~~  
22 (2) (A) For an employer to refuse to provide reasonable  
23 accommodation for an employee for conditions related to  
24 pregnancy, childbirth, or related medical conditions, if she so  
25 requests, with the advice of her health care provider.

26 ~~(2)~~  
27 (B) For an employer who has a policy, practice, or collective  
28 bargaining agreement requiring or authorizing the transfer of  
29 temporarily disabled employees to less strenuous or hazardous  
30 positions for the duration of the disability to refuse to transfer a  
31 pregnant female employee who so requests.

32 ~~(3)~~  
33 (C) For an employer to refuse to temporarily transfer a pregnant  
34 female employee to a less strenuous or hazardous position for the  
35 duration of her pregnancy if she so requests, with the advice of

1 her physician, where that transfer can be reasonably  
2 accommodated. However, no employer shall be required by this  
3 section to create additional employment that the employer would  
4 not otherwise have created, nor shall the employer be required to  
5 discharge any employee, transfer any employee with more  
6 seniority, or promote any employee who is not qualified to perform  
7 the job.

8 (e)

9 (3) *For an employer to interfere with, or restrain the exercise*  
10 *or attempted exercise of, any right provided to an employee under*  
11 *this subdivision.*

12 (b) This section shall not be construed to affect any other  
13 provision of law relating to sex discrimination or pregnancy, or in  
14 any way to diminish the coverage of pregnancy, childbirth, or  
15 medical conditions related to pregnancy or childbirth under any  
16 other provisions of this part, including subdivision (a) of Section  
17 12940.

18 SEC. 2. Section 12945.2 of the Government Code is amended  
19 to read:

20 12945.2. (a) (1) Except as provided in subdivision (b), it shall  
21 be an unlawful employment practice for any employer, as defined  
22 in paragraph (2) of subdivision (c), to refuse to grant a request by  
23 any employee with more than 12 months of service with the  
24 employer, and who has at least 1,250 hours of service with the  
25 employer during the previous 12-month period, to take up to a  
26 total of 12 workweeks in any 12-month period for family care and  
27 medical leave. Family care and medical leave requested pursuant  
28 to this subdivision shall not be deemed to have been granted unless  
29 the employer provides the employee, upon granting the leave  
30 request, a guarantee of employment in the same or a comparable  
31 position upon the termination of the leave. The commission shall  
32 adopt a regulation specifying the elements of a reasonable request.

33 (2) *It shall also be unlawful employment practice for an*  
34 *employer to interfere with, or restrain the exercise or attempted*  
35 *exercise of, the right of an employee to request leave pursuant to*  
36 *paragraph (1).*

37 (b) Notwithstanding subdivision (a), it shall not be an unlawful  
38 employment practice for an employer to refuse to grant a request  
39 for family care and medical leave by an employee if the employer

1 employs less than 50 employees within 75 miles of the worksite  
2 where that employee is employed.

3 (c) For purposes of this section:

4 (1) “Child” means a biological, adopted, or foster child, a  
5 stepchild, a legal ward, or a child of a person standing in loco  
6 parentis who is either of the following:

7 (A) Under 18 years of age.

8 (B) An adult dependent child.

9 (2) “Employer” means either of the following:

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

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

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

15 (A) Leave for reason of the birth of a child of the employee, the  
16 placement of a child with an employee in connection with the  
17 adoption or foster care of the child by the employee, or the serious  
18 health condition of a child of the employee.

19 (B) Leave to care for a parent or a spouse who has a serious  
20 health condition.

21 (C) Leave because of an employee’s own serious health  
22 condition that makes the employee unable to perform the functions  
23 of the position of that employee, except for leave taken for  
24 disability on account of pregnancy, childbirth, or related medical  
25 conditions.

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

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

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

33 (A) An individual holding either a physician’s and surgeon’s  
34 certificate issued pursuant to Article 4 (commencing with Section  
35 2080) of Chapter 5 of Division 2 of the Business and Professions  
36 Code, an osteopathic physician’s and surgeon’s certificate issued  
37 pursuant to Article 4.5 (commencing with Section 2099.5) of  
38 Chapter 5 of Division 2 of the Business and Professions Code, or  
39 an individual duly licensed as a physician, surgeon, or osteopathic

1 physician or surgeon in another state or jurisdiction, who directly  
2 treats or supervises the treatment of the serious health condition.

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

6 (7) “Parent” means a biological, foster, or adoptive parent, a  
7 stepparent, a legal guardian, or other person who stood in loco  
8 parentis to the employee when the employee was a child.

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

12 (A) Inpatient care in a hospital, hospice, or residential health  
13 care facility.

14 (B) Continuing treatment or continuing supervision by a health  
15 care provider.

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

19 (e) An employee taking a leave permitted by subdivision (a)  
20 may elect, or an employer may require the employee, to substitute,  
21 for leave allowed under subdivision (a), any of the employee’s  
22 accrued vacation leave or other accrued time off during this period  
23 or any other paid or unpaid time off negotiated with the employer.  
24 If an employee takes a leave because of the employee’s own serious  
25 health condition, the employee may also elect, or the employer  
26 may also require the employee, to substitute accrued sick leave  
27 during the period of the leave. However, an employee shall not  
28 use sick leave during a period of leave in connection with the birth,  
29 adoption, or foster care of a child, or to care for a child, parent, or  
30 spouse with a serious health condition, unless mutually agreed to  
31 by the employer and the employee.

32 (f) (1) During any period that an eligible employee takes leave  
33 pursuant to subdivision (a) or takes leave that qualifies as leave  
34 taken under the FMLA, the employer shall maintain and pay for  
35 coverage under a “group health plan,” as defined in Section  
36 5000(b)(1) of the Internal Revenue Code of 1986, for the duration  
37 of the leave, not to exceed 12 workweeks in a 12-month period,  
38 commencing on the date leave taken under the FMLA commences,  
39 at the level and under the conditions coverage would have been  
40 provided if the employee had continued in employment

1 continuously for the duration of the leave. Nothing in the preceding  
2 sentence shall preclude an employer from maintaining and paying  
3 for coverage under a “group health plan” beyond 12 workweeks.  
4 An employer may recover the premium that the employer paid as  
5 required by this subdivision for maintaining coverage for the  
6 employee under the group health plan if both of the following  
7 conditions occur:

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

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

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

35 For purposes of pension and retirement plans, an employer shall  
36 not be required to make plan payments for an employee during  
37 the leave period, and the leave period shall not be required to be  
38 counted for purposes of time accrued under the plan. However, an  
39 employee covered by a pension plan may continue to make

1 contributions in accordance with the terms of the plan during the  
2 period of the leave.

3 (g) During a family care and medical leave period, the employee  
4 shall retain employee status with the employer, and the leave shall  
5 not constitute a break in service, for purposes of longevity, seniority  
6 under any collective bargaining agreement, or any employee benefit  
7 plan. An employee returning from leave shall return with no less  
8 seniority than the employee had when the leave commenced, for  
9 purposes of layoff, recall, promotion, job assignment, and  
10 seniority-related benefits such as vacation.

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

14 (i) If the employee's need for leave pursuant to this section is  
15 foreseeable due to a planned medical treatment or supervision, the  
16 employee shall make a reasonable effort to schedule the treatment  
17 or supervision to avoid disruption to the operations of the employer,  
18 subject to the approval of the health care provider of the individual  
19 requiring the treatment or supervision.

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

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

26 (B) The probable duration of the condition.

27 (C) An estimate of the amount of time that the health care  
28 provider believes the employee needs to care for the individual  
29 requiring the care.

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

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

38 (k) (1) An employer may require that an employee's request  
39 for leave because of the employee's own serious health condition  
40 be supported by a certification issued by his or her health care

1 provider. That certification shall be sufficient if it includes all of  
2 the following:

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

4 (B) The probable duration of the condition.

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

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

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

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

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

26 (D) The opinion of the third health care provider concerning  
27 the information certified under paragraph (1) shall be considered  
28 to be final and shall be binding on the employer and the 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 health  
33 care provider that the employee is able to resume work. Nothing  
34 in this paragraph shall supersede a valid collective bargaining  
35 agreement that governs the return to work of that employee.

36 (l) It shall be an unlawful employment practice for an employer  
37 to refuse to hire, or to discharge, fine, suspend, expel, or  
38 discriminate against, any individual because of any of the  
39 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 or  
4 her own family care and medical leave, or another person's family  
5 care and medical leave, in any inquiry or proceeding related to  
6 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 this~~  
11 ~~subdivision~~ *Chapter 827 of the Statutes of 1993* shall not be  
12 construed to require any changes in existing collective bargaining  
13 agreements during the life of the contract, or until February 5,  
14 1994, whichever occurs first.

15 ~~The provisions of this~~ This section shall be construed as  
16 separate and distinct from ~~those of~~ Section 12945.

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

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

28 (r) (1) Notwithstanding subdivision (a), an employer may refuse  
29 to reinstate an employee returning from leave to the same or a  
30 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 grievous  
36 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 aggregate  
9 amount of leave taken under this section or the FMLA, or both,  
10 except for leave taken for disability on account of pregnancy,  
11 childbirth, or related medical conditions, shall not exceed 12  
12 workweeks in a 12-month period. An employee is entitled to take,  
13 in addition to the leave provided for under this section and the  
14 FMLA, the leave provided for in Section 12945, if the employee  
15 is otherwise qualified for that leave.