

AMENDED IN SENATE APRIL 23, 2015

SENATE BILL

No. 406

Introduced by Senator Jackson
(Coauthor: Assembly Member Gonzalez)

February 25, 2015

An act to amend Section 12945.2 of the Government Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

SB 406, as amended, Jackson. Employment: leave.

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, 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, an employee is required to have more than 12 months of service with the employer and at least 1,250 hours of service with the employer during the previous 12-month period. The act exempts from its provisions an employer that employs fewer than 50 employees within 75 miles of the worksite where the employee is employed (small business exemption). The act provides that if the same employer employs both parents entitled to leave under the act, the employer is not required to grant leave in connection with the birth, adoption, or foster care of a child that would allow the parents family care and medical leave totaling more than the amount specified in the act.

The act defines “employer” to mean any person who directly employs 50 or more persons to perform services for a wage or salary or the state, any political or civil subdivision of the state, and cities. The act defines “child” to mean a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis who is either under 18 years of age or an adult dependent child. The act defines “family care and medical leave” to mean, among other things, leave to care for a parent or a spouse who has a serious health condition. The act defines “parent” to mean a biological, foster, or adoptive parent, a stepparent, a legal guardian, or other person who stood in loco parentis to the employee when the employee was a child.

This bill would restrict that small business exemption to an employer that employs fewer than 25 employees within 75 miles of the worksite where the employee is employed.

The bill would make various changes to the definitions described above, thereby expanding the persons and purposes for which leave is required to be provided under the act. The act would redefine ~~employer~~ “*employer*” to include any person who directly employs 5 or more persons to perform services for a wage or salary. The bill would redefine the term “child” to include ~~a child of a domestic partner~~, *biological, adopted, or foster son or daughter, a stepchild, a legal ward, a son or daughter of a domestic partner, or a person to whom the employee stands in loco parentis*, and would remove the restriction on age or dependent status. The bill would expand the definition of leave with regard to caring for persons with a serious health condition to also include leave to care for a grandparent, grandchild, sibling, or domestic partner who has a serious health condition. The bill would include a parent-in-law in the definition of “parent.”

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 is an
 4 unlawful employment practice for an employer to refuse to grant
 5 a request by any employee with more than 12 months of service
 6 with the employer, and who has at least 1,250 hours of service
 7 with the employer during the previous 12-month period, to take

1 up to a total of 12 workweeks in any 12-month period for family
2 care and medical leave. Family care and medical leave requested
3 pursuant to this subdivision shall not be deemed to have been
4 granted unless the employer provides the employee, upon granting
5 the leave request, a guarantee of employment in the same or a
6 comparable position upon the termination of the leave. The
7 commission shall adopt a regulation specifying the elements of a
8 reasonable request.

9 (b) Notwithstanding subdivision (a), it shall not be an unlawful
10 employment practice for an employer to refuse to grant a request
11 for family care and medical leave by an employee if the employer
12 employs fewer than ~~five~~ 25 employees within 75 miles of the
13 worksite where that employee is employed.

14 (c) For purposes of this section:

15 (1) “Child” means a biological, adopted, or foster son or
16 daughter, a stepchild, a legal ward, a son or daughter of a domestic
17 partner, or a person to whom the employee stands in loco parentis.

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

19 (A) Any person who directly employs five or more persons to
20 perform services for a wage or salary.

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

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

24 (A) Leave for reason of the birth of a child of the employee or
25 the placement of a child with an employee in connection with the
26 adoption or foster care of the child by the employee.

27 (B) Leave to care for a child, parent, grandparent, grandchild,
28 sibling, spouse, or domestic partner who has a serious health
29 condition.

30 (C) Leave because of an employee’s own serious health
31 condition that makes the employee unable to perform the functions
32 of the position of that employee, except for leave taken for
33 disability on account of pregnancy, childbirth, or related medical
34 conditions.

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

39 (5) “FMLA” means the federal Family and Medical Leave Act
40 of 1993 (~~P.L.~~ (*Public Law* 103-3; 29 U.S.C. Sec. 2601 et seq.).

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

2 (A) An individual holding either a physician’s and surgeon’s
3 certificate issued pursuant to Article 4 (commencing with Section
4 2080) of Chapter 5 of Division 2 of the Business and Professions
5 Code, an osteopathic physician’s and surgeon’s certificate issued
6 pursuant to Article 4.5 (commencing with Section 2099.5) of
7 Chapter 5 of Division 2 of the Business and Professions Code, or
8 an individual duly licensed as a physician, surgeon, or osteopathic
9 physician or surgeon in another state or jurisdiction, who directly
10 treats or supervises the treatment of the serious health condition.

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

14 (7) “Parent” means a biological, foster, or adoptive parent, a
15 parent-in-law, a stepparent, a legal guardian, or other person who
16 stood in loco parentis to the employee when the employee was a
17 child.

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

21 (A) Inpatient care in a hospital, hospice, or residential health
22 care facility.

23 (B) Continuing treatment or continuing supervision by a health
24 care provider.

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

28 (e) An employee taking a leave permitted by subdivision (a)
29 may elect, or an employer may require the employee, to substitute,
30 for leave allowed under subdivision (a), any of the employee’s
31 accrued vacation leave or other accrued time off during this period
32 or any other paid or unpaid time off negotiated with the employer.
33 If an employee takes a leave because of the employee’s own serious
34 health condition, the employee may also elect, or the employer
35 may also require the employee, to substitute accrued sick leave
36 during the period of the leave. However, an employee shall not
37 use sick leave during a period of leave in connection with the birth,
38 adoption, or foster care of a child, or to care for a child, parent, or
39 spouse with a serious health condition, unless mutually agreed to
40 by the employer and the employee.

1 (f) (1) During any period that an eligible employee takes leave
2 pursuant to subdivision (a) or takes leave that qualifies as leave
3 taken under the FMLA, the employer shall maintain and pay for
4 coverage under a “group health plan,” as defined in Section
5 5000(b)(1) of the Internal Revenue Code, for the duration of the
6 leave, not to exceed 12 workweeks in a 12-month period,
7 commencing on the date leave taken under the FMLA commences,
8 at the level and under the conditions coverage would have been
9 provided if the employee had continued in employment
10 continuously for the duration of the leave. Nothing in the preceding
11 sentence shall preclude an employer from maintaining and paying
12 for coverage under a “group health plan” beyond 12 workweeks.
13 An employer may recover the premium that the employer paid as
14 required by this subdivision for maintaining coverage for the
15 employee under the group health plan if both of the following
16 conditions occur:

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

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

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

1 the nonpayment of premiums by an employee shall not constitute
2 a break in service, for purposes of longevity, seniority under any
3 collective bargaining agreement, or any employee benefit plan.

4 For purposes of pension and retirement plans, an employer shall
5 not be required to make plan payments for an employee during
6 the leave period, and the leave period shall not be required to be
7 counted for purposes of time accrued under the plan. However, an
8 employee covered by a pension plan may continue to make
9 contributions in accordance with the terms of the plan during the
10 period of the leave.

11 (g) During a family care and medical leave period, the employee
12 shall retain employee status with the employer, and the leave shall
13 not constitute a break in service, for purposes of longevity, seniority
14 under any collective bargaining agreement, or any employee benefit
15 plan. An employee returning from leave shall return with no less
16 seniority than the employee had when the leave commenced, for
17 purposes of layoff, recall, promotion, job assignment, and
18 seniority-related benefits such as vacation.

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

22 (i) If the employee's need for leave pursuant to this section is
23 foreseeable due to a planned medical treatment or supervision, the
24 employee shall make a reasonable effort to schedule the treatment
25 or supervision to avoid disruption to the operations of the employer,
26 subject to the approval of the health care provider of the individual
27 requiring the treatment or supervision.

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

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

34 (B) The probable duration of the condition.

35 (C) An estimate of the amount of time that the health care
36 provider believes the employee needs to care for the individual
37 requiring the care.

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

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

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

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

12 (B) The probable duration of the condition.

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

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

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

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

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

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

37 (4) As a condition of an employee's return from leave taken
38 because of the employee's own serious health condition, the
39 employer may have a uniformly applied practice or policy that
40 requires the employee to obtain certification from his or her health

1 care provider that the employee is able to resume work. Nothing
2 in this paragraph shall supersede a valid collective bargaining
3 agreement that governs the return to work of that employee.

4 (l) It shall be an unlawful employment practice for an employer
5 to refuse to hire, or to discharge, fine, suspend, expel, or
6 discriminate against, any individual because of any of the
7 following:

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

10 (2) An individual’s giving information or testimony as to his or
11 her own family care and medical leave, or another person’s family
12 care and medical leave, in any inquiry or proceeding related to
13 rights guaranteed under this section.

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

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

21 (o) This section shall be construed as separate and distinct from
22 Section 12945.

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

28 (q) (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 (r) 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.

16 (s) It is an unlawful employment practice for an employer to
17 interfere with, restrain, or deny the exercise of, or the attempt to
18 exercise, any right provided under this section.