

AMENDED IN SENATE JUNE 1, 2015

AMENDED IN SENATE APRIL 23, 2015

**SENATE BILL**

**No. 406**

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**Introduced by Senator Jackson**  
(Coauthor: Assembly Member Gonzalez)

February 25, 2015

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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” to include any person who directly employs ~~5~~ 25 or more persons to perform services for a wage or salary. The bill would redefine the term “child” to include a 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

1 with the employer, and who has at least 1,250 hours of service  
2 with the employer during the previous 12-month period, to take  
3 up to a total of 12 workweeks in any 12-month period for family  
4 care and medical leave. Family care and medical leave requested  
5 pursuant to this subdivision shall not be deemed to have been  
6 granted unless the employer provides the employee, upon granting  
7 the leave request, a guarantee of employment in the same or a  
8 comparable position upon the termination of the leave. The  
9 commission shall adopt a regulation specifying the elements of a  
10 reasonable request.

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

16 (c) For purposes of this section:

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

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

21 (A) Any person who directly employs ~~five~~ 25 or more persons  
22 to perform services for a wage or salary.

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

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

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

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

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

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

- 1 (5) “FMLA” means the federal Family and Medical Leave Act  
2 of 1993 (Public Law 103-3; 29 U.S.C. Sec. 2601 et seq.).
- 3 (6) “Health care provider” means any of the following:
- 4 (A) An individual holding either a physician’s and surgeon’s  
5 certificate issued pursuant to Article 4 (commencing with Section  
6 2080) of Chapter 5 of Division 2 of the Business and Professions  
7 Code, an osteopathic physician’s and surgeon’s certificate issued  
8 pursuant to Article 4.5 (commencing with Section 2099.5) of  
9 Chapter 5 of Division 2 of the Business and Professions Code, or  
10 an individual duly licensed as a physician, surgeon, or osteopathic  
11 physician or surgeon in another state or jurisdiction, who directly  
12 treats or supervises the treatment of the serious health condition.
- 13 (B) Any other person determined by the United States Secretary  
14 of Labor to be capable of providing health care services under the  
15 FMLA.
- 16 (7) “Parent” means a biological, foster, or adoptive parent, a  
17 parent-in-law, a stepparent, a legal guardian, or other person who  
18 stood in loco parentis to the employee when the employee was a  
19 child.
- 20 (8) “Serious health condition” means an illness, injury,  
21 impairment, or physical or mental condition that involves either  
22 of the following:
- 23 (A) Inpatient care in a hospital, hospice, or residential health  
24 care facility.
- 25 (B) Continuing treatment or continuing supervision by a health  
26 care provider.
- 27 (d) An employer shall not be required to pay an employee for  
28 any leave taken pursuant to subdivision (a), except as required by  
29 subdivision (e).
- 30 (e) An employee taking a leave permitted by subdivision (a)  
31 may elect, or an employer may require the employee, to substitute,  
32 for leave allowed under subdivision (a), any of the employee’s  
33 accrued vacation leave or other accrued time off during this period  
34 or any other paid or unpaid time off negotiated with the employer.  
35 If an employee takes a leave because of the employee’s own serious  
36 health condition, the employee may also elect, or the employer  
37 may also require the employee, to substitute accrued sick leave  
38 during the period of the leave. However, an employee shall not  
39 use sick leave during a period of leave in connection with the birth,  
40 adoption, or foster care of a child, or to care for a child, parent, or

1 spouse with a serious health condition, unless mutually agreed to  
2 by the employer and the employee.

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

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

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

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

1 other paid or unpaid time off negotiated with the employer, as a  
2 condition of continued coverage during the leave period. However,  
3 the nonpayment of premiums by an employee shall not constitute  
4 a break in service, for purposes of longevity, seniority under any  
5 collective bargaining agreement, or any employee benefit plan.

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

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

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

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

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

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

36 (B) The probable duration of the condition.

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

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

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

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

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

15 (B) The probable duration of the condition.

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

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

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

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

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

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

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

8 (l) It shall be an unlawful employment practice for an employer  
9 to refuse to hire, or to discharge, fine, suspend, expel, or  
10 discriminate against, any individual because of any of the  
11 following:

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

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

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

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

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

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

32 (q) (1) Notwithstanding subdivision (a), an employer may refuse  
33 to reinstate an employee returning from leave to the same or a  
34 comparable position if all of the following apply:

35 (A) The employee is a salaried employee who is among the  
36 highest paid 10 percent of the employer's employees who are  
37 employed within 75 miles of the worksite at which that employee  
38 is employed.

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



1 (C) The employer notifies the employee of the intent to refuse  
2 reinstatement at the time the employer determines the refusal is  
3 necessary under subparagraph (B).

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

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

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