

AMENDED IN ASSEMBLY SEPTEMBER 2, 2015

AMENDED IN SENATE JUNE 1, 2015

AMENDED IN SENATE APRIL 23, 2015

SENATE BILL

No. 406

Introduced by Senator Jackson

(~~Coauthor:~~ *Coauthors: Assembly Member Members Gomez and
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” to include any person who directly employs 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:

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

14 (b) Notwithstanding subdivision (a), it shall not be 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 fewer than 25 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 son or
21 daughter, a stepchild, a legal ward, a son or daughter of a domestic
22 partner, or a person to whom the employee stands in loco parentis.

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

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

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

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

29 (A) Leave for reason of the birth of a child of the employee or
30 the placement of a child with an employee in connection with the
31 adoption or foster care of the child by the employee.

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

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

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

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

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

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

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

20 (7) “Parent” means a biological, foster, or adoptive parent, a
21 parent-in-law, a stepparent, a legal guardian, or other person who
22 stood in loco parentis to the employee when the employee was a
23 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 (d) An employer shall not be required to pay an employee for
32 any leave taken pursuant to subdivision (a), except as required by
33 subdivision (e).

34 (e) An employee taking a leave permitted by subdivision (a)
35 may elect, or an employer may require the employee, to substitute,
36 for leave allowed under subdivision (a), any of the employee’s
37 accrued vacation leave or other accrued time off during this period
38 or any other paid or unpaid time off negotiated with the employer.
39 If an employee takes a leave because of the employee’s own serious
40 health condition, the employee may also elect, or the employer

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

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

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

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

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

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

10 ~~For~~

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

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

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

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

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

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

1 (B) The probable duration of the condition.

2 (C) An estimate of the amount of time that the health care
3 provider believes the employee needs to care for the individual
4 requiring the care.

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

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

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

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

19 (B) The probable duration of the condition.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

38 (A) The employee is a salaried employee who is among the
39 highest paid 10 percent of the employer's employees who are

1 employed within 75 miles of the worksite at which that employee
2 is employed.

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

5 (C) The employer notifies the employee of the intent to refuse
6 reinstatement at the time the employer determines the refusal is
7 necessary under subparagraph (B).

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

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

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

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