

AMENDED IN ASSEMBLY SEPTEMBER 4, 2015

AMENDED IN ASSEMBLY SEPTEMBER 2, 2015

AMENDED IN SENATE JUNE 1, 2015

AMENDED IN SENATE APRIL 23, 2015

**SENATE BILL**

**No. 406**

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**Introduced by Senator Jackson**

(Coauthors: Assembly Members Gomez and 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 *for reason of the serious health condition of a child, and 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.~~

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*This 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:

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

16 (b) Notwithstanding subdivision (a), it shall not be an unlawful  
17 employment practice for an employer to refuse to grant a request  
18 for family care and medical leave by an employee if the employer  
19 employs fewer than ~~25~~ 50 employees within 75 miles of the  
20 worksite where that employee is employed.

21 (c) For purposes of this section:

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

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

26 (A) Any person who directly employs ~~25~~ 50 or more persons  
27 to 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) “Family care and medical leave” means any of the following:

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

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

37 (C) Leave because of an employee’s own serious health  
38 condition that makes the employee unable to perform the functions

1 of the position of that employee, except for leave taken for  
2 disability on account of pregnancy, childbirth, or related medical  
3 conditions.

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

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

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

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

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

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

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

30 (A) Inpatient care in a hospital, hospice, or residential health  
31 care facility.

32 (B) Continuing treatment or continuing supervision by a health  
33 care provider.

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

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

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

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

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

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

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

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

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

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

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

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

37 (j) (1) An employer may require that an employee's request  
38 for leave to care for a child, a spouse, or a parent who has a serious  
39 health condition be supported by a certification issued by the health

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

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

4 (B) The probable duration of the condition.

5 (C) An estimate of the amount of time that the health care  
6 provider believes the employee needs to care for the individual  
7 requiring the care.

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

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

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

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

22 (B) The probable duration of the condition.

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

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

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

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

38 (C) In any case in which the second opinion described in  
39 subparagraph (A) differs from the opinion in the original  
40 certification, the employer may require, at the employer's expense,

1 that the employee obtain the opinion of a third health care provider,  
2 designated or approved jointly by the employer and the employee,  
3 concerning the information certified under paragraph (1).

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

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

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

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

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

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

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

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

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

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

1 (A) The employee is a salaried employee who is among the  
2 highest paid 10 percent of the employer's employees who are  
3 employed within 75 miles of the worksite at which that employee  
4 is employed.

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

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

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

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

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