

AMENDED IN SENATE MAY 25, 1999

AMENDED IN SENATE APRIL 6, 1999

SENATE BILL

No. 118

Introduced by Senator Hayden

December 18, 1998

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

LEGISLATIVE COUNSEL'S DIGEST

SB 118, as amended, Hayden. Employment: family care and medical leave.

Existing law makes it an unlawful employment practice for any employer, as defined, to refuse to grant a request by any employee with more than one year of service with the employer and who has worked at least 1,250 hours during the previous 12-month period, to take family care and medical leave, as defined, in connection with the birth or adoption or serious health condition of the employee's child, or to care for a parent or spouse who has a serious health condition, or because of the employee's own serious health condition, as defined.

This bill would also provide that an employee may take family care and medical leave to care for a grandparent or sibling, *or domestic partner, as defined, who has a serious health condition* or to care for an individual who depends on the employee for immediate care and support, who shares a common residence with the employee, and who has a serious health condition. *This bill would also authorize an employer*

to require a request for leave pursuant to these provisions to be supported by a specified affidavit and would authorize an employer to receive up to \$1,500 in damages from an employee who willfully submits a false affidavit.

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
2 Code is amended to read:

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

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

25 (c) For purposes of this section:

26 (1) "Child" means a biological, adopted, or foster
27 child, a stepchild, a legal ward, or a child of a person
28 standing in loco parentis who is either of the following:

- 29 (A) Under 18 years of age.
- 30 (B) An adult dependent child.



1 (2) “Domestic partners” means two adult persons in a
2 committed relationship of mutual caring where all of the
3 following conditions apply:

4 (A) Both persons share a common residence.

5 (B) Both persons agree to be responsible for each
6 other’s basic living expenses during the domestic
7 partnership.

8 (C) Neither person is married or a member of another
9 domestic partnership.

10 (D) Both persons are at least 18 years of age.

11 (E) Both persons file a Declaration of Domestic
12 Partnership with the employer.

13 (3) “Employer” means either of the following:

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

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

18 (4) “Family care and medical leave” means any of the
19 following:

20 (A) Leave for reason of the birth of a child of the
21 employee, the placement of a child with an employee in
22 connection with the adoption or foster care of the child
23 by the employee, or the serious health condition of a child
24 of the employee.

25 (B) Leave to care for a parent, grandparent, sibling,
26 spouse, or domestic partner who has a serious health
27 condition.

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

33 (D) Leave to care for an individual who depends on
34 the employee for immediate care and support, who
35 shares a common residence with the employee, and who
36 has a serious health condition.

37 (5) “Employment in the same or a comparable
38 position” means employment in a position that has the
39 same or similar duties and pay that can be performed at



1 the same or similar geographic location as the position
2 held prior to the leave.

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

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

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

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

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

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

27 (A) Inpatient care in a hospital, hospice, or residential
28 health care facility.

29 (B) Continuing treatment or continuing supervision
30 by a health care provider.

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

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



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

10 (f) (1) During any period that an eligible employee
11 takes leave pursuant to subdivision (a) or takes leave that
12 qualifies as leave taken under the FMLA, the employer
13 shall maintain and pay for coverage under a "group
14 health plan," as defined in Section 5000(b)(1) of the
15 Internal Revenue Code of 1986, for the duration of the
16 leave, not to exceed 12 workweeks in a 12-month period,
17 commencing on the date leave taken under the FMLA
18 commences, at the level and under the conditions
19 coverage would have been provided if the employee had
20 continued in employment continuously for the duration
21 of the leave. Nothing in the preceding sentence shall
22 preclude an employer from maintaining and paying for
23 coverage under a "group health plan" beyond 12
24 workweeks. An employer may recover the premium that
25 the employer paid as required by this subdivision for
26 maintaining coverage for the employee under the group
27 health plan if both of the following conditions occur:

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

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

36 (2) Any employee taking leave pursuant to
37 subdivision (a) shall continue to be entitled to participate
38 in employee health plans for any period during which
39 coverage is not provided by the employer under
40 paragraph (1), employee benefit plans, including life,



1 short-term, or long-term disability or accident insurance,
2 pension and retirement plans, and supplemental
3 unemployment benefit plans to the same extent and
4 under the same conditions as apply to an unpaid leave
5 taken for any purpose other than those described in
6 subdivision (a). In the absence of these conditions an
7 employee shall continue to be entitled to participate in
8 these plans and, in the case of health and welfare
9 employee benefit plans, including life, short-term, or
10 long-term disability or accident insurance, or other
11 similar plans, the employer may, at his or her discretion,
12 require the employee to pay premiums, at the group rate,
13 during the period of leave not covered by any accrued
14 vacation leave, or other accrued time off, or any other
15 paid or unpaid time off negotiated with the employer, as
16 a condition of continued coverage during the leave
17 period. However, the nonpayment of premiums by an
18 employee shall not constitute a break in service, for
19 purposes of longevity, seniority under any collective
20 bargaining agreement, or any employee benefit plan.

21 For purposes of pension and retirement plans, an
22 employer shall not be required to make plan payments
23 for an employee during the leave period, and the leave
24 period shall not be required to be counted for purposes
25 of time accrued under the plan. However, an employee
26 covered by a pension plan may continue to make
27 contributions in accordance with the terms of the plan
28 during the period of the leave.

29 (g) During a family care and medical leave period, the
30 employee shall retain employee status with the employer,
31 and the leave shall not constitute a break in service, for
32 purposes of longevity, seniority under any collective
33 bargaining agreement, or any employee benefit plan. An
34 employee returning from leave shall return with no less
35 seniority than the employee had when the leave
36 commenced, for purposes of layoff, recall, promotion, job
37 assignment, and seniority-related benefits such as
38 vacation.

39 (h) If the employee's need for a leave pursuant to this
40 section is foreseeable, the employee shall provide the



1 employer with reasonable advance notice of the need for
2 the leave.

3 (i) If the employee's need for leave pursuant to this
4 section is foreseeable due to a planned medical treatment
5 or supervision, the employee shall make a reasonable
6 effort to schedule the treatment or supervision to avoid
7 disruption to the operations of the employer, subject to
8 the approval of the health care provider of the individual
9 requiring the treatment or supervision.

10 (j) (1) An employer may require that an employee's
11 request for leave to care for an individual other than the
12 employee who has a serious health condition be
13 supported by a certification issued by the health care
14 provider of the individual requiring care. That
15 certification shall be sufficient if it includes all of the
16 following:

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

19 (B) The probable duration of the condition.

20 (C) An estimate of the amount of time that the health
21 care provider believes the employee needs to care for the
22 individual requiring the care.

23 (D) A statement that the serious health condition
24 warrants the participation of the employee to provide
25 care during a period of the treatment or supervision of
26 the individual requiring care.

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

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

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

39 (B) The probable duration of the condition.



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

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

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

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

19 (C) In any case in which the second opinion described
20 in subparagraph (A) differs from the opinion in the
21 original certification, the employer may require, at the
22 employer's expense, that the employee obtain the
23 opinion of a third health care provider, designated or
24 approved jointly by the employer and the employee,
25 concerning the information certified under paragraph
26 (1).

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

31 (4) As a condition of an employee's return from leave
32 taken because of the employee's own serious health
33 condition, the employer may have a uniformly applied
34 practice or policy that requires the employee to obtain
35 certification from his or her health care provider that the
36 employee is able to resume work. Nothing in this
37 paragraph shall supersede a valid collective bargaining
38 agreement that governs the return to work of that
39 employee.



1 (l) An employer may require that an employee's
2 request for leave pursuant to subdivision (a) be
3 supported by an affidavit that the employee qualifies for
4 the leave. If it is determined in a civil action brought by
5 an employer that an employee willfully filed a false
6 affidavit that he or she qualified for leave under this
7 subdivision, the court shall award the employer actual
8 damages not exceeding one thousand five hundred
9 dollars (\$1,500). This subdivision applies only to a request
10 for leave to care for a grandparent, sibling, domestic
11 partner, or an individual who depends on the employee
12 for immediate care and support who shares a common
13 residence with the employee and who has a serious health
14 condition.

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

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

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

26 ~~(m)~~

27 (n) This section shall not be construed to require any
28 changes in existing collective bargaining agreements
29 during the life of the contract, or until January 1, 1993,
30 whichever occurs first.

31 ~~(n)~~

32 (o) The amendments made to this section by the act
33 adding this subdivision shall not be construed to require
34 any changes in existing collective bargaining agreements
35 during the life of the contract, or until February 5, 1994,
36 whichever occurs first.

37 ~~(o)~~

38 (p) The provisions of this section shall be construed as
39 separate and distinct from those of Section 12945.

40 ~~(p)~~



1 (q) Leave provided for pursuant to this section may be
2 taken in one or more periods. The 12-month period
3 during which 12 workweeks of leave may be taken under
4 this section shall run concurrently with the 12-month
5 period under the FMLA, and shall commence the date
6 leave taken under the FMLA commences.

7 ~~(q)~~

8 (r) In any case in which both parents entitled to leave
9 under subdivision (a) are employed by the same
10 employer, the employer shall not be required to grant
11 leave in connection with the birth, adoption, or foster
12 care of a child that would allow the parents family care
13 and medical leave totaling more than the amount
14 specified in subdivision (a).

15 ~~(r)~~

16 (s) (1) Notwithstanding subdivision (a), an employer
17 may refuse to reinstate an employee returning from leave
18 to the same or a comparable position if all of the following
19 apply:

20 (A) The employee is a salaried employee who is
21 among the highest paid 10 percent of the employer's
22 employees who are employed within 75 miles of the
23 worksite at which that employee is employed.

24 (B) The refusal is necessary to prevent substantial and
25 grievous economic injury to the operations of the
26 employer.

27 (C) The employer notifies the employee of the intent
28 to refuse reinstatement at the time the employer
29 determines the refusal is necessary under subparagraph
30 (B).

31 (2) In any case in which the leave has already
32 commenced, the employer shall give the employee a
33 reasonable opportunity to return to work following the
34 notice prescribed by subparagraph (C).

35 ~~(s)~~

36 (t) Leave taken by an employee pursuant to this
37 section shall run concurrently with leave taken pursuant
38 to the FMLA, except for any leave taken under the FMLA
39 for disability on account of pregnancy, childbirth, or
40 related medical conditions. The aggregate amount of



1 leave taken under this section or the FMLA, or both,
2 except for leave taken for disability on account of
3 pregnancy, childbirth, or related medical conditions,
4 shall not exceed 12 workweeks in a 12-month period. An
5 employee is entitled to take, in addition to the leave
6 provided for under this section and the FMLA, the leave
7 provided for in Section 12945, if the employee is otherwise
8 qualified for that leave.

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