

ASSEMBLY BILL

No. 849

Introduced by Assembly Member Swanson

February 26, 2009

An act to amend Section 12945.2 of the Government Code, relating to family and medical leave.

LEGISLATIVE COUNSEL'S DIGEST

AB 849, as introduced, Swanson. Family and medical leave.

Existing law, the Moore-Brown-Roberti Family Rights Act, makes it an unlawful employment practice for an employer, as defined, 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, "child" means a biological, adopted, foster, or 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 "parent" to mean the employee's biological, foster, or adoptive parent, stepparent, legal guardian, or other person who stood in loco parentis to the employee when the employee was a child.

This bill would increase the circumstances under which an employee is entitled to protected leave pursuant to the Family Rights Act by (1) eliminating the age and dependency elements from the definition of "child," thereby permitting an employee to take protected leave to care for his or her independent adult child suffering from a serious health

condition, (2) expanding the definition of “parent” to include an employee’s parent-in-law, and (3) permitting an employee to also take leave to care for a seriously ill grandparent, sibling, grandchild, or domestic partner, as defined.

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

16 (b) Notwithstanding subdivision (a), it ~~shall not be~~ is not an
17 unlawful employment practice for an employer to refuse to grant
18 a request for family care and medical leave by an employee if the
19 employer employs less than 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 child, a
23 stepchild, a legal ward, or a child of a person standing in loco
24 parentis ~~who is either of the following:~~

25 ~~(A) Under 18 years of age.~~

26 ~~(B) An adult dependent child.~~

27 (2) “Domestic partner” has the same meaning as set forth in
28 Section 297 of the Family Code.

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

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

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

3 ~~(3)–~~

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

9 (A) Leave for reason of the birth of a child of the employee; or
10 the placement of a child with an employee in connection with the
11 adoption or foster care of the child by the employee; ~~or the serious~~
12 ~~health condition of a child of the employee.~~

13 (B) Leave to care for a parent, *grandparent, sibling, child,*
14 *grandchild, domestic partner,* or a spouse who has a serious health
15 condition.

16 (C) Leave because of an employee’s own serious health
17 condition that makes the employee unable to perform the functions
18 of the position of that employee, except for leave taken for
19 disability on account of pregnancy, childbirth, or related medical
20 conditions.

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

25 ~~(5)–~~

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

28 ~~(6)–~~

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

30 (A) An individual holding either a physician’s and surgeon’s
31 certificate issued pursuant to Article 4 (commencing with Section
32 2080) of Chapter 5 of Division 2 of the Business and Professions
33 Code, an osteopathic physician’s and surgeon’s certificate issued
34 pursuant to Article 4.5 (commencing with Section 2099.5) of
35 Chapter 5 of Division 2 of the Business and Professions Code, or
36 an individual duly licensed as a physician, surgeon, or osteopathic
37 physician or surgeon in another state or jurisdiction, who directly
38 treats or supervises the treatment of the serious health condition.

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

~~(7)–~~

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

~~(8)–~~

(9) “*Parent-in-law*” means the parent of a spouse or a domestic partner.

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

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

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

(11) “*Sibling*” has the same meaning as defined in subdivision (c) of Section 362.1 of the Welfare and Institutions Code.

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

(e) An employee taking a leave permitted by subdivision (a) may elect, or an employer may require the employee, to substitute, for leave allowed under subdivision (a), any of the employee’s accrued vacation leave or other accrued time off during this period or any other paid or unpaid time off negotiated with the employer. If an employee takes a leave because of the employee’s own serious health condition, the employee may also elect, or the employer may also require the employee, to substitute accrued sick leave during the period of the leave. However, an employee shall not use sick leave during a period of leave in connection with the birth, adoption, or foster care of a child, or to care for a ~~child~~, parent, *grandparent, sibling, child, grandchild, domestic partner*, or spouse with a serious health condition, unless mutually agreed to by the employer and the employee.

(f) (1) During any period that an eligible employee takes leave pursuant to subdivision (a) or takes leave that qualifies as leave taken under the FMLA, the employer shall maintain and pay for

coverage under a “group health plan,” as defined in ~~Section 5000(b)(1) paragraph (1) of subsection (b) of Section 5000 of Title 26 of the Internal Revenue Code of 1986~~, for the duration of the leave, not to exceed 12 workweeks in a 12-month period, commencing on the date leave taken under the FMLA commences, at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of the leave. Nothing in the preceding sentence shall preclude an employer from maintaining and paying for coverage under a “group health plan” beyond 12 workweeks. An employer may recover the premium that the employer paid as required by this subdivision for maintaining coverage for the employee under the group health plan if both of the following conditions occur:

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

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

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

1 for purposes of longevity, seniority under any collective bargaining
2 agreement, or any employee benefit plan.

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

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

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

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

27 (j) (1) An employer may require that an employee's request
28 for leave to care for a ~~child, a spouse, or a parent~~, *grandparent*,
29 *sibling, child, grandchild, domestic partner, or spouse* who has a
30 serious health condition be supported by a certification issued by
31 the health care provider of the individual requiring care. That
32 certification 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~~ is an unlawful employment practice for an
5 employer to refuse to hire, or to discharge, fine, suspend, expel,
6 or 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~~ *does not* require any
15 changes in existing collective bargaining agreements during the
16 life of the contract, or until January 1, 1993, whichever occurs
17 first.

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

23 (o) ~~The provisions of this~~ *This* section shall be construed as
24 separate and distinct from ~~those of~~ Section 12945.

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

30 (q) In any case in which both parents entitled to leave under
31 subdivision (a) are employed by the same employer, the employer
32 shall not be required to grant leave in connection with the birth,
33 adoption, or foster care of a child that would allow the parents
34 family care and medical leave totaling more than the amount
35 specified in subdivision (a).

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

39 (A) The employee is a salaried employee who is among the
40 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 (s) 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.