

ASSEMBLY BILL

No. 1667

Introduced by Assembly Member Swanson

January 20, 2010

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

LEGISLATIVE COUNSEL'S DIGEST

AB 1667, 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 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, or (3) because the employee is suffering from a serious health condition rendering him or her unable to perform the functions of the job.

This bill would increase the circumstances under which an employee is entitled to protected leave pursuant to the Family Rights Act by permitting an employee to take leave to care for a sibling with a serious health condition.

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

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

19 (c) For purposes of this section:

20 (1) “Child” means a biological, adopted, or foster child, a
 21 stepchild, a legal ward, or a child of a person standing in loco
 22 parentis who is either of the following:

23 (A) Under 18 years of age.
 24 (B) An adult dependent child.

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

26 (A) Any person who directly employs 50 or more persons to
 27 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) “*Employment in the same or a comparable position*” means
 31 *employment in a position that has the same or similar duties and*
 32 *pay that can be performed at the same or similar geographic*
 33 *location as the position held prior to the leave.*

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

35 (A) Leave for reason of the birth of a child of the employee, the
 36 placement of a child with an employee in connection with the
 37 adoption or foster care of the child by the employee, or the serious
 38 health condition of a child of the employee.
 39 (B) Leave to care for a parent, *sibling*, or a spouse who has a
 40 serious health condition.

1 (C) Leave because of an employee’s own serious health
2 condition that makes the employee unable to perform the functions
3 of the position of that employee, except for leave taken for
4 disability on account of pregnancy, childbirth, or related medical
5 conditions.

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

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

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

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

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

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

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

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

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

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

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

1 (e) An employee taking a leave permitted by subdivision (a)
2 may elect, or an employer may require the employee, to substitute,
3 for leave allowed under subdivision (a), any of the employee's
4 accrued vacation leave or other accrued time off during this period
5 or any other paid or unpaid time off negotiated with the employer.
6 If an employee takes a leave because of the employee's own serious
7 health condition, the employee may also elect, or the employer
8 may also require the employee, to substitute accrued sick leave
9 during the period of the leave. However, an employee shall not
10 use sick leave during a period of leave in connection with the birth,
11 adoption, or foster care of a child, or to care for a child, parent,
12 *sibling*, or spouse with a serious health condition, unless mutually
13 agreed to by the employer and the employee.

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

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

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

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

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

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

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

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

36 (i) If the employee's need for leave pursuant to this section is
37 foreseeable due to a planned medical treatment or supervision, the
38 employee shall make a reasonable effort to schedule the treatment
39 or supervision to avoid disruption to the operations of the employer,

1 subject to the approval of the health care provider of the individual
2 requiring the treatment or supervision.

3 (j) (1) An employer may require that an employee's request
4 for leave to care for a child, ~~a parent, sibling, or spouse, or a parent~~
5 who has a serious health condition be supported by a certification
6 issued by the health care provider of the individual requiring care.
7 That certification shall be sufficient if it includes all of the
8 following:

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

10 (B) The probable duration of the condition.

11 (C) An estimate of the amount of time that the health care
12 provider believes the employee needs to care for the individual
13 requiring the care.

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

17 (2) Upon expiration of the time estimated by the health care
18 provider in subparagraph (C) of paragraph (1), the employer may
19 require the employee to obtain recertification, in accordance with
20 the procedure provided in paragraph (1), if additional leave is
21 required.

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

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

28 (B) The probable duration of the condition.

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

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

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

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

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

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

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

20 (l) ~~It shall be~~ *is* an unlawful employment practice for an
21 employer to refuse to hire, or to discharge, fine, suspend, expel,
22 or discriminate against, any individual because of any of the
23 following:

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

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

30 (m) This section ~~shall not be construed to~~ *does not* require any
31 changes in existing collective bargaining agreements during the
32 life of the contract, or until January 1, 1993, whichever occurs
33 first.

34 (n) The amendments made to this section by ~~the act adding this~~
35 ~~subdivision~~ *Chapter 827 of the Statutes of 1993* shall not be
36 construed to require any changes in existing collective bargaining
37 agreements during the life of the contract, or until February 5,
38 1994, whichever occurs first.

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

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

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

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

15 (A) The employee is a salaried employee who is among the
16 highest paid 10 percent of the employer’s employees who are
17 employed within 75 miles of the worksite at which that employee
18 is employed.

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

21 (C) The employer notifies the employee of the intent to refuse
22 reinstatement at the time the employer determines the refusal is
23 necessary under subparagraph (B).

24 (2) In any case in which the leave has already commenced, the
25 employer shall give the employee a reasonable opportunity to
26 return to work following the notice prescribed by subparagraph
27 (C).

28 (s) Leave taken by an employee pursuant to this section shall
29 run concurrently with leave taken pursuant to the FMLA, except
30 for any leave taken under the FMLA for disability on account of
31 pregnancy, childbirth, or related medical conditions. The aggregate
32 amount of leave taken under this section or the FMLA, or both,
33 except for leave taken for disability on account of pregnancy,
34 childbirth, or related medical conditions, shall not exceed 12
35 workweeks in a 12-month period. An employee is entitled to take,
36 in addition to the leave provided for under this section and the
37 FMLA, the leave provided for in Section 12945, if the employee
38 is otherwise qualified for that leave.

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