

**Introduced by Senator Hayden**

December 18, 1998

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

LEGISLATIVE COUNSEL'S DIGEST

SB 118, as introduced, 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 an individual who depends on the employee for immediate care and support, who has a relationship with the employee of one year or more, who shares a common residence with the employee, and who has 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  
 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.

31 (2) "Employer" means either of the following:  
 32 (A) Any person who directly employs 50 or more  
 33 persons to perform services for a wage or salary.  
 34 (B) The state, and any political or civil subdivision of  
 35 the state and cities.

36 (3) "Family care and medical leave" means any of the  
 37 following:



1 (A) Leave for reason of the birth of a child of the  
2 employee, the placement of a child with an employee in  
3 connection with the adoption or foster care of the child  
4 by the employee, or the serious health condition of a child  
5 of the employee.

6 (B) Leave to care for a parent or a spouse who has a  
7 serious health condition.

8 (C) Leave because of an employee's own serious  
9 health condition that makes the employee unable to  
10 perform the functions of the position of that employee,  
11 except for leave taken for disability on account of  
12 pregnancy, childbirth, or related medical conditions.

13 (D) *Leave to care for an individual who depends on*  
14 *the employee for immediate care and support, who has*  
15 *a relationship with the employee of one year or more,*  
16 *who shares a common residence with the employee, and*  
17 *who has a serious health condition.*

18 (4) "Employment in the same or a comparable  
19 position" means employment in a position that has the  
20 same or similar duties and pay that can be performed at  
21 the same or similar geographic location as the position  
22 held prior to the leave.

23 (5) "FMLA" means the federal Family and Medical  
24 Leave Act of 1993 (P.L. 103-3).

25 (6) "Health care provider" means any of the following:

26 (A) An individual holding either a physician's and  
27 surgeon's certificate issued pursuant to Article 4  
28 (commencing with Section 2080) of Chapter 5 of Division  
29 2 of the Business and Professions Code, an osteopathic  
30 physician's and surgeon's certificate issued pursuant to  
31 Article 4.5 (commencing with Section 2099.5) of Chapter  
32 5 of Division 2 of the Business and Professions Code, or an  
33 individual duly licensed as a physician, surgeon, or  
34 osteopathic physician or surgeon in another state or  
35 jurisdiction, who directly treats or supervises the  
36 treatment of the serious health condition.

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



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

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

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

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

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

15 (e) An employee taking a leave permitted by  
16 subdivision (a) may elect, or an employer may require  
17 the employee, to substitute, for leave allowed under  
18 subdivision (a), any of the employee’s accrued vacation  
19 leave or other accrued time off during this period or any  
20 other paid or unpaid time off negotiated with the  
21 employer. If an employee takes a leave because of the  
22 employee’s own serious health condition, the employee  
23 may also elect, or the employer may also require the  
24 employee, to substitute accrued sick leave during the  
25 period of the leave. However, an employee shall not use  
26 sick leave during a period of leave in connection with the  
27 birth, adoption, or foster care of a child, or to care for a  
28 child, parent, or spouse with a serious health condition,  
29 unless mutually agreed to by the employer and the  
30 employee.

31 (f) (1) During any period that an eligible employee  
32 takes leave pursuant to subdivision (a) or takes leave that  
33 qualifies as leave taken under the FMLA, the employer  
34 shall maintain and pay for coverage under a “group  
35 health plan,” as defined in Section 5000(b)(1) of the  
36 Internal Revenue Code of 1986, for the duration of the  
37 leave, not to exceed 12 workweeks in a 12-month period,  
38 commencing on the date leave taken under the FMLA  
39 commences, at the level and under the conditions  
40 coverage would have been provided if the employee had



1 continued in employment continuously for the duration  
2 of the leave. Nothing in the preceding sentence shall  
3 preclude an employer from maintaining and paying for  
4 coverage under a “group health plan” beyond 12  
5 workweeks. An employer may recover the premium that  
6 the employer paid as required by this subdivision for  
7 maintaining coverage for the employee under the group  
8 health plan if both of the following conditions occur:

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

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

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



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

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

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

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

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

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

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



1 (B) The probable duration of the condition.

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

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

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

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

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

21 (B) The probable duration of the condition.

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

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

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

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



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

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

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

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

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

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

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

37 (n) The amendments made to this section by the act  
38 adding this subdivision shall not be construed to require  
39 any changes in existing collective bargaining agreements



1 during the life of the contract, or until February 5, 1994,  
2 whichever occurs first.

3 (o) The provisions of this section shall be construed as  
4 separate and distinct from those of Section 12945.

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

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

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

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

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

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

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

37 (s) Leave taken by an employee pursuant to this  
38 section shall run concurrently with leave taken pursuant  
39 to the FMLA, except for any leave taken under the FMLA  
40 for disability on account of pregnancy, childbirth, or



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

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