

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 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) "*Domestic partners*" means two adult persons in a
32 committed relationship of mutual caring where all of the
33 following conditions apply:

34 (A) Both persons share a common residence.

35 (B) Both persons agree to be responsible for each
36 other's basic living expenses during the domestic
37 partnership.



1 (C) Neither person is married or a member of another
2 domestic partnership.

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

4 (E) Both persons file a Declaration of Domestic
5 Partnership with the employer.

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

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

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

11 ~~(3)~~

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

14 (A) Leave for reason of the birth of a child of the
15 employee, the placement of a child with an employee in
16 connection with the adoption or foster care of the child
17 by the employee, or the serious health condition of a child
18 of the employee.

19 (B) Leave to care for a ~~parent or a spouse~~ parent,
20 grandparent, sibling, spouse, or domestic partner who has
21 a serious health condition.

22 (C) Leave because of an employee’s own serious
23 health condition that makes the employee unable to
24 perform the functions of the position of that employee,
25 except for leave taken for disability on account of
26 pregnancy, childbirth, or related medical conditions.

27 (D) Leave to care for an individual who depends on
28 the employee for immediate care and support, ~~who has~~
29 ~~a relationship with the employee of one year or more,~~
30 who shares a common residence with the employee, and
31 who has a serious health condition.

32 ~~(4)~~

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

38 ~~(5)~~

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



1 ~~(6)~~

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

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

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

17 ~~(7)~~

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

22 ~~(8)~~

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

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

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

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

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



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

9 (f) (1) During any period that an eligible employee
10 takes leave pursuant to subdivision (a) or takes leave that
11 qualifies as leave taken under the FMLA, the employer
12 shall maintain and pay for coverage under a “group
13 health plan,” as defined in Section 5000(b)(1) of the
14 Internal Revenue Code of 1986, 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
17 commences, at the level and under the conditions
18 coverage would have been provided if the employee had
19 continued in employment continuously for the duration
20 of the leave. Nothing in the preceding sentence shall
21 preclude an employer from maintaining and paying for
22 coverage under a “group health plan” beyond 12
23 workweeks. An employer may recover the premium that
24 the employer paid as required by this subdivision for
25 maintaining coverage for the employee under the group
26 health plan if both of the following conditions occur:

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

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

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



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

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

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

38 (h) If the employee's need for a leave pursuant to this
39 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) It shall be an unlawful employment practice for an
2 employer to refuse to hire, or to discharge, fine, suspend,
3 expel, or discriminate against, any individual because of
4 any of the following:

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

7 (2) An individual's giving information or testimony as
8 to his or her own family care and medical leave, or
9 another person's family care and medical leave, in any
10 inquiry or proceeding related to rights guaranteed under
11 this section.

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

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

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

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

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

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



1 (A) The employee is a salaried employee who is
2 among the highest paid 10 percent of the employer's
3 employees who are employed within 75 miles of the
4 worksite at which that employee is employed.
5 (B) The refusal is necessary to prevent substantial and
6 grievous economic injury to the operations of the
7 employer.
8 (C) The employer notifies the employee of the intent
9 to refuse reinstatement at the time the employer
10 determines the refusal is necessary under subparagraph
11 (B).
12 (2) In any case in which the leave has already
13 commenced, the employer shall give the employee a
14 reasonable opportunity to return to work following the
15 notice prescribed by subparagraph (C).
16 (s) Leave taken by an employee pursuant to this
17 section shall run concurrently with leave taken pursuant
18 to the FMLA, except for any leave taken under the FMLA
19 for disability on account of pregnancy, childbirth, or
20 related medical conditions. The aggregate amount of
21 leave taken under this section or the FMLA, or both,
22 except for leave taken for disability on account of
23 pregnancy, childbirth, or related medical conditions,
24 shall not exceed 12 workweeks in a 12-month period. An
25 employee is entitled to take, in addition to the leave
26 provided for under this section and the FMLA, the leave
27 provided for in Section 12945, if the employee is otherwise
28 qualified for that leave.

