

AMENDED IN ASSEMBLY JUNE 16, 1999

AMENDED IN SENATE MAY 25, 1999

AMENDED IN SENATE APRIL 6, 1999

SENATE BILL

No. 118

Introduced by Senator Hayden

(Coauthors: Senators Solis and Vasconcellos)

(Coauthors: Assembly Members Alquist, Aroner, Calderon, Gallegos, Jackson, Kuehl, Longville, Romero, Shelley, and Steinberg)

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:



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

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

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

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

9 (A) Both persons share a common residence.

10 (B) Both persons agree to be responsible for each
11 other’s basic living expenses during the domestic
12 partnership.

13 (C) Neither person is married or a member of another
14 domestic partnership.

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

16 (E) Both persons file a Declaration of Domestic
17 Partnership with the employer.

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

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

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

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

25 (A) Leave for reason of the birth of a child of the
26 employee, the placement of a child with an employee in
27 connection with the adoption or foster care of the child
28 by the employee, or the serious health condition of a child
29 of the employee.

30 (B) Leave to care for a parent, grandparent, sibling,
31 spouse, or domestic partner who has a serious health
32 condition.

33 (C) Leave because of an employee’s own serious
34 health condition that makes the employee unable to
35 perform the functions of the position of that employee,
36 except for leave taken for disability on account of
37 pregnancy, childbirth, or related medical conditions.

38 (D) Leave to care for an individual who depends on
39 the employee for immediate care and support, who



1 shares a common residence with the employee, and who
2 has a serious health condition.

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

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

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

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

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

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

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

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

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

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

39 (e) An employee taking a leave permitted by
40 subdivision (a) may elect, or an employer may require



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

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

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

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



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

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

34 (g) During a family care and medical leave period, the
35 employee shall retain employee status with the employer,
36 and the leave shall not constitute a break in service, for
37 purposes of longevity, seniority under any collective
38 bargaining agreement, or any employee benefit plan. An
39 employee returning from leave shall return with no less
40 seniority than the employee had when the leave



1 commenced, for purposes of layoff, recall, promotion, job
2 assignment, and seniority-related benefits such as
3 vacation.

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

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

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

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

24 (B) The probable duration of the condition.

25 (C) An estimate of the amount of time that the health
26 care provider believes the employee needs to care for the
27 individual requiring the care.

28 (D) A statement that the serious health condition
29 warrants the participation of the employee to provide
30 care during a period of the treatment or supervision of
31 the individual requiring care.

32 (2) Upon expiration of the time estimated by the
33 health care provider in subparagraph (C) of paragraph
34 (1), the employer may require the employee to obtain
35 recertification, in accordance with the procedure
36 provided in paragraph (1), if additional leave is required.

37 (k) (1) An employer may require that an employee's
38 request for leave because of the employee's own serious
39 health condition be supported by a certification issued by



1 his or her health care provider. That certification shall be
2 sufficient if it includes all of the following:

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

5 (B) The probable duration of the condition.

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

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

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

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

24 (C) In any case in which the second opinion described
25 in subparagraph (A) differs from the opinion in the
26 original certification, the employer may require, at the
27 employer's expense, that the employee obtain the
28 opinion of a third health care provider, designated or
29 approved jointly by the employer and the employee,
30 concerning the information certified under paragraph
31 (1).

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

36 (4) As a condition of an employee's return from leave
37 taken because of the employee's own serious health
38 condition, the employer may have a uniformly applied
39 practice or policy that requires the employee to obtain
40 certification from his or her health care provider that the



1 employee is able to resume work. Nothing in this
2 paragraph shall supersede a valid collective bargaining
3 agreement that governs the return to work of that
4 employee.

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

19 ~~(m)–~~

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

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

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

31 ~~(n)–~~

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

36 ~~(o)–~~

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 ~~(p)~~

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

6 ~~(q)~~

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

13 ~~(r)~~

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

21 ~~(s)~~

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

26 (A) The employee is a salaried employee who is
27 among the highest paid 10 percent of the employer's
28 employees who are employed within 75 miles of the
29 worksite at which that employee is employed.

30 (B) The refusal is necessary to prevent substantial and
31 grievous economic injury to the operations of the
32 employer.

33 (C) The employer notifies the employee of the intent
34 to refuse reinstatement at the time the employer
35 determines the refusal is necessary under subparagraph
36 (B).

37 (2) In any case in which the leave has already
38 commenced, the employer shall give the employee a
39 reasonable opportunity to return to work following the
40 notice prescribed by subparagraph (C).



1 ~~(t)~~
2 (s) Leave taken by an employee pursuant to this
3 section shall run concurrently with leave taken pursuant
4 to the FMLA, except for any leave taken under the FMLA
5 for disability on account of pregnancy, childbirth, or
6 related medical conditions. The aggregate amount of
7 leave taken under this section or the FMLA, or both,
8 except for leave taken for disability on account of
9 pregnancy, childbirth, or related medical conditions,
10 shall not exceed 12 workweeks in a 12-month period. An
11 employee is entitled to take, in addition to the leave
12 provided for under this section and the FMLA, the leave
13 provided for in Section 12945, if the employee is otherwise
14 qualified for that leave.

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