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

LEGISLATIVE COUNSEL’S DIGEST

AB 2039, 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.
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.


The people of the State of California do enact as follows:

SECTION 1. Section 12945.2 of the Government Code is amended to read:

12945.2. (a) Except as provided in subdivision (b), it shall be unlawful employment practice for any employer, as defined in paragraph (2) (3) of subdivision (c), to refuse to grant a request by any employee with more than 12 months of service with the employer, and who has at least 1,250 hours of service with the employer during the previous 12-month period, to take up to a total of 12 workweeks in any 12-month period for family care and medical leave. Family care and medical leave requested pursuant to this subdivision shall not be deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position upon the termination of the leave. The commission shall adopt a regulation specifying the elements of a reasonable request.

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

(c) For purposes of this section:

(1) “Child” means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis who is either of the following:
   (A) Under 18 years of age.
   (B) An adult dependent child.

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

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

(A) Any person who directly employs 50 or more persons to perform services for a wage or salary.
(B) The state, and any political or civil subdivision of the state and cities.

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

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

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

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

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

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

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

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

(A) An individual holding either a physician’s and surgeon’s certificate issued pursuant to Article 4 (commencing with Section 2080) of Chapter 5 of Division 2 of the Business and Professions Code, an osteopathic physician’s and surgeon’s certificate issued pursuant to Article 4.5 (commencing with Section 2099.5) of Chapter 5 of Division 2 of the Business and Professions Code, or an individual duly licensed as a physician, surgeon, or osteopathic physician or surgeon in another state or jurisdiction, who directly 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) “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) “Parent-in-law” means the parent of a spouse or a domestic partner.

(9) “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.

(10) “Sibling” means a person related to another person by blood, adoption, or affinity through a common legal or biological parent.

(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 parent, grandparent, sibling, child, parent, 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 paragraph (1) of subsection (b) of Section 5000(b)(1) of Title 26 of the Internal Revenue Code, 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 insurance or 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 insurance or 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, for purposes of longevity, seniority under any
collective bargaining agreement, or any employee benefit plan.

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

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

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

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

(j) (1) An employer may require that an employee’s request
for leave to care for a parent, grandparent, sibling, child, a spouse
grandchild, domestic partner, or a parent spouse who has a serious
health condition be supported by a certification issued by the health
care provider of the individual requiring care. That certification
shall be sufficient if it includes all of the following:

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

(B) The probable duration of the condition.

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

(D) A statement that the serious health condition warrants the
participation of a family member to provide care during a period
of the treatment or supervision of the individual requiring care.
(2) Upon expiration of the time estimated by the health care provider in subparagraph (C) of paragraph (1), the employer may require the employee to obtain recertification, in accordance with the procedure provided in paragraph (1), if additional leave is required.

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

(A) The date on which the serious health condition commenced.
(B) The probable duration of the condition.
(C) A statement that, due to the serious health condition, the employee is unable to perform the function of his or her position.

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

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

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

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

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

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

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

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

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

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

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

(o) This section shall be construed as separate and distinct from
Section 12945.

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

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

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

(A) The employee is a salaried employee who is among the
highest paid 10 percent of the employer’s employees who are
employed within 75 miles of the worksite at which that employee
is employed.
(B) The refusal is necessary to prevent substantial and grievous
economic injury to the operations of the employer.
(C) The employer notifies the employee of the intent to refuse
reinstatement at the time the employer determines the refusal is
necessary under subparagraph (B).
(2) In any case in which the leave has already commenced, the
employer shall give the employee a reasonable opportunity to
return to work following the notice prescribed by subparagraph
(C).
(s) Leave taken by an employee pursuant to this section shall
run concurrently with leave taken pursuant to the FMLA, except
for any leave taken under the FMLA for disability on account of
pregnancy, childbirth, or related medical conditions. The aggregate
amount of leave taken under this section or the FMLA, or both,
except for leave taken for disability on account of pregnancy,
childbirth, or related medical conditions, shall not exceed 12
workweeks in a 12-month period. An employee is entitled to take,
in addition to the leave provided for under this section and the
FMLA, the leave provided for in Section 12945, if the employee
is otherwise qualified for that leave.
(t) It shall be an unlawful employment practice for an employer
to interfere with, restrain, or deny the exercise of, or the attempt
to exercise, any right provided under this section.