

**ASSEMBLY BILL**

**No. 2039**

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**Introduced by Assembly Member Swanson**

February 23, 2012

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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, (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.

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:

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

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

21 (c) For purposes of this section:

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

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

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

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

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

30 (A) ~~Any~~ *A* person who directly employs 50 or more persons to  
31 perform services for a wage or salary.

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

3 ~~(3)~~

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

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

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

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

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

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

25 ~~(5)~~

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

28 ~~(6)~~

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

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

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

4 (7)

5 (8) "Parent" means a biological, foster, or adoptive parent, a  
6 stepparent, a *parent-in-law*, a legal guardian, or other person who  
7 stood in loco parentis to the employee when the employee was a  
8 child.

9 (8)

10 (9) "*Parent-in-law*" means the parent of a spouse or a domestic  
11 partner.

12 (10) "Serious health condition" means an illness, injury,  
13 impairment, or physical or mental condition that involves either  
14 of the following:

15 (A) Inpatient care in a hospital, hospice, or residential health  
16 care facility.

17 (B) Continuing treatment or continuing supervision by a health  
18 care provider.

19 (11) "*Sibling*" means a person related to another person by  
20 blood, adoption, or affinity through a common legal or biological  
21 parent.

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

25 (e) An employee taking a leave permitted by subdivision (a)  
26 may elect, or an employer may require the employee, to substitute,  
27 for leave allowed under subdivision (a), any of the employee's  
28 accrued vacation leave or other accrued time off during this period  
29 or any other paid or unpaid time off negotiated with the employer.  
30 If an employee takes a leave because of the employee's own serious  
31 health condition, the employee may also elect, or the employer  
32 may also require the employee, to substitute accrued sick leave  
33 during the period of the leave. However, an employee shall not  
34 use sick leave during a period of leave in connection with the birth,  
35 adoption, or foster care of a child, or to care for a *parent*,  
36 *grandparent*, *sibling*, *child*, ~~parent~~ *grandchild*, *domestic partner*,  
37 or spouse with a serious health condition, unless mutually agreed  
38 to by the employer and the employee.

39 (f) (1) During any period that an eligible employee takes leave  
40 pursuant to subdivision (a) or takes leave that qualifies as leave

1 taken under the FMLA, the employer shall maintain and pay for  
2 coverage under a “group health plan,” as defined in *paragraph (1)*  
3 *of subsection (b) of Section ~~5000(b)(1)~~ 5000 of Title 26 of the*  
4 Internal Revenue Code, for the duration of the leave, not to exceed  
5 12 workweeks in a 12-month period, commencing on the date  
6 leave taken under the FMLA commences, at the level and under  
7 the conditions coverage would have been provided if the employee  
8 had continued in employment continuously for the duration of the  
9 leave. Nothing in the preceding sentence shall preclude an  
10 employer from maintaining and paying for coverage under a “group  
11 health plan” beyond 12 workweeks. An employer may recover the  
12 premium that the employer paid as required by this subdivision  
13 for maintaining coverage for the employee under the group health  
14 plan if both of the following conditions occur:

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

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

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

1 a break in service, for purposes of longevity, seniority under any  
 2 collective bargaining agreement, or any employee benefit plan.

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

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

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

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

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

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

34 (B) The probable duration of the condition.

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

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

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

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

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

12 (B) The probable duration of the condition.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

38 (A) The employee is a salaried employee who is among the  
 39 highest paid 10 percent of the employer’s employees who are

1 employed within 75 miles of the worksite at which that employee  
2 is employed.

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

5 (C) The employer notifies the employee of the intent to refuse  
6 reinstatement at the time the employer determines the refusal is  
7 necessary under subparagraph (B).

8 (2) In any case in which the leave has already commenced, the  
9 employer shall give the employee a reasonable opportunity to  
10 return to work following the notice prescribed by subparagraph  
11 (C).

12 (s) Leave taken by an employee pursuant to this section shall  
13 run concurrently with leave taken pursuant to the FMLA, except  
14 for any leave taken under the FMLA for disability on account of  
15 pregnancy, childbirth, or related medical conditions. The aggregate  
16 amount of leave taken under this section or the FMLA, or both,  
17 except for leave taken for disability on account of pregnancy,  
18 childbirth, or related medical conditions, shall not exceed 12  
19 workweeks in a 12-month period. An employee is entitled to take,  
20 in addition to the leave provided for under this section and the  
21 FMLA, the leave provided for in Section 12945, if the employee  
22 is otherwise qualified for that leave.

23 (t) It shall be an unlawful employment practice for an employer  
24 to interfere with, restrain, or deny the exercise of, or the attempt  
25 to exercise, any right provided under this section.