

RESOLUTION 8-04-2002

DIGEST

Unfair Labor Practices: Denial of Parental Leave for Adoptive Parents.

Amends Government Code section 12945 to extend the employment protections afforded to biological mothers to adoptive parents who are the primary caregiver of the adopted child.

RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

Reasons:

Amends Government Code section 12945 to extend the employment protections afforded to biological mothers to adoptive parents who are the primary caregiver of the adopted child. This resolution should be disapproved because the policy considerations behind section 12945 do not apply to adoptive parents.

The resolution's purpose, which is to allow adoptive parents to take parental leave without repercussions by their employer, should be encouraged. Nevertheless, this resolution is too broad and is inconsistent with the purpose of this statutory scheme. Section 12945 was originally enacted because of the medical conditions arising out of pregnancy and childbirth. Adoptive parents do not have the same medical conditions that necessitate the protections afforded biological mothers under section 12945.

For employers with 50 or more employees, adoptive parents are already provided with leave rights equivalent to birth parents. The federal Family and Medical Leave Act and California Family Rights Act entitle adoptive parents to take unpaid, job-protected leave for up to 12 work weeks in a 12-month period. By contrast, this resolution would impact all employers, regardless of size, and as such, has a much broader impact than either of those acts.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Government Code section 12945 as follows:

1 § 12945

2 It shall be an unlawful employment practice, unless based upon a bona fide
3 occupational qualification:

4 (a) For any employer, because of the pregnancy, childbirth, or related medical
5 condition of any female employee, or because of the adoption of a child, other than the
6 employee's stepchild, by any employee to refuse to promote ~~her~~ the employee or to refuse to
7 select ~~her~~ the employee for a training program leading to promotion, provided ~~she~~ the employee
8 is able to complete the training program at least three months prior to the anticipated date of
9 departure for ~~her~~ pregnancy leave or leave to adopt a child, or to discharge ~~her~~ the employee
10 from employment or from a training program leading to promotion, or to discriminate against
11 ~~her~~ the employee in compensation or in terms, conditions, or privileges of employment.

12 (b) For any employer to refuse to allow a female employee affected by pregnancy,
13 childbirth, or related medical conditions or to refuse to allow any employee affected by
14 adoption of a child by the employee other than the employee's stepchild, provided that
15 employee is the primary caregiver of said child either:

16 (1) To receive the same benefits or privileges of employment granted by that employer
17 to other persons not so affected who are similar in their ability or inability to work, including to
18 take disability or sick leave or any other accrued leave that is made available by the employer
19 to temporarily disabled employees. For purposes of this section, pregnancy, childbirth, and

20 related medical conditions are treated as any other temporary disability. However, no
21 employer shall be required to provide a female employee disability leave on account of normal
22 pregnancy, childbirth, or related medical condition for a period exceeding six weeks. This
23 section shall not be construed to require an employer to provide his or her employees with
24 health insurance coverage for the medical costs of pregnancy, childbirth, or related medical
25 conditions. The inclusion in any health insurance coverage of any provisions or coverage
26 relating to medical costs of pregnancy, childbirth, or related medical conditions shall not be
27 construed to require the inclusion of any other provisions or coverage, nor shall coverage of any
28 related medical conditions be required by virtue of coverage of any medical costs of pregnancy,
29 childbirth, or other related medical conditions.

30 (2) To take a leave on account of pregnancy or adoption of a child other than the
31 employee's stepchild, provided the employee is the primary caregiver of said child for a
32 reasonable period of time not to exceed four months. The employee shall be entitled to utilize
33 any accrued vacation leave and any accrued sick leave during this period of time. Reasonable
34 period of time ~~means~~ includes that period during which ~~the~~ a female employee is disabled on
35 account of pregnancy, childbirth, or related medical conditions. This paragraph shall not be
36 construed to limit the provisions of paragraph (1) of subdivision (b). An employer may require
37 any employee who plans to take a leave pursuant to this subdivision to give the employer
38 reasonable notice of the date the leave shall commence and the estimated duration of the leave.

39 (c)(1) For any employer, including both employers subject to and not subject to Title
40 VII of the federal Civil Rights Act of 1964, to refuse to provide reasonable accommodation for
41 an employee for conditions related to pregnancy, childbirth, or related medical conditions, if she
42 so requests, with the advice of her health care provider.

43 (2) For any employer, including both employers subject to and not subject to
44 Title VII of the federal Civil Rights Act of 1964, who has a policy, practice, or collective
45 bargaining agreement requiring or authorizing the transfer of temporarily disabled employees to
46 less strenuous or hazardous positions for the duration of the disability to refuse to transfer a
47 pregnant female employee who so requests.

48 (3) For any employer, including both employers subject to and not subject to Title VII
49 of the federal Civil Rights Act of 1964, to refuse to temporarily transfer a pregnant female
50 employee to a less strenuous or hazardous position for the duration of her pregnancy if she so
51 requests, with the advice of her physician, where that transfer can be reasonably
52 accommodated. However, no employer shall be required by this section to create additional
53 employment that the employer would not otherwise have created, nor shall the employer be
54 required to discharge any employee, transfer any employee with more seniority, or promote any
55 employee who is not qualified to perform the job.

56 (d) This section shall not be construed to affect any other provision of law relating to
57 sex discrimination or pregnancy, or in any way to diminish the coverage of pregnancy,
58 childbirth, or medical conditions related to pregnancy or childbirth under any other provisions of
59 this part, including subdivision (a) of Section 12940.

60 (e) Except for subdivision (c) and paragraph (2) of subdivision (b), this
61 section is inapplicable to any employer subject to Title VII of the federal Civil Rights Act of
62 1964.

(Proposed new language underlined; language to be deleted stricken.)

PROPOSER: Women Lawyers of Los Angeles

STATEMENT OF REASONS:

Existing Law: Government Code § 12945 makes it an unlawful employment practice for employers to discriminate against female employees because of pregnancy, childbirth, or related conditions. The current statute also guarantees female employees the right to take maternity leave for a reasonable

period not to exceed four months and makes it an unlawful employment practice for employers to refuse to allow female employees such leave.

This Resolution: Would make employees who adopt children eligible for the same protections currently guaranteed to biological mothers provided the employee is the primary caregiver of the adopted child and the child is not the employee's stepchild.

The Problem: Current legislation works an anomalous and unfair result by providing birth mothers, but not adoptive mothers, the right to take maternity leave and by making it an unlawful employment practice to discriminate against birth mothers but not adoptive mothers. Current legislation also works an anomalous and unfair result by providing no protection at all for an employee, regardless of gender, who adopts a child and becomes the primary caregiver of said child. The proposed change is consistent with numerous other state statutes that require employers to provide the same maternity leave benefits to adoptive parents as that provided to birth parents. (See, e.g., S.D. Codified Laws § 3-6-7; Mass. Gen. Laws 149 § 105D; Wash. Rev. Code § 49.12.360; Minn. Stat. § 181.941; R.I. Gen. Laws § 28-48-11.). In fact, this resolution is more conservative than most of these statutes, which typically extend parental leave rights to men and women following the birth or adoption of a child, without regard to whether or not the employee is the primary caregiver of the child. The proposed legislation is also consistent with other California statutes equating biological and adopted children as well as recent federal legislation protecting the rights of adopted families.

Every child, biological or adopted, deserves a chance to bond with his or her new family, and there is no rational reason for conferring greater benefits on biological children and their parents. No employee should suffer adverse consequences for having a child, whether that child is biological or adopted.

IMPACT STATEMENT

The proposed legislation does not affect any other law, statute, or rule.

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COUNTER ARGUMENT

SACRAMENTO COUNTY BAR ASSOCIATION

Regardless of one's feelings regarding parental leave, the proposed resolution is bad policy because it seeks to grant more rights to employees who adopt a child than are available for employees who give birth to their own biological child. Under the proposed resolution, all employees-male and female-who adopt a child would be entitled to up to four months' unpaid leave regardless of medical necessity, size of employer, or the employee's length of service with the employer. However, leave under this statute for employees who give birth to their own biological child would still be limited to only female employees who also have been medically certified as disabled due to pregnancy, childbirth, or related medical condition. The four months' leave would not be available to male employees whose wives have just delivered, nor would it be available to female employees who are not disabled due to pregnancy, childbirth, or related medical condition for the entire four month period.

Leave for adoption is already addressed in the federal and state family care leave statutes, which provide the same amount of unpaid leave to employees (male and female) who are caring for a newborn child and those who are caring for a newly adopted child. If the amount of family care leave

and/or its eligibility requirements are to be expanded, the appropriate place to do so would be by amendment(s) to the California Family Rights Act, not the pregnancy disability leave statute.

SAN DIEGO COUNTY BAR ASSOCIATION

The idea is great, and this resolution is all positive from the employee's perspective. The prohibition against discrimination based on an employee's adoption of a child is also not an undue burden on the employer, but the equal right to leave may well be. The reasons for maternity leave by a biological mother are in fact greater and different from the reasons that might exist for a newly adoptive parent. This delegation would approve this resolution in principle if the references to leave are stricken: all proposed new language at lines 11, 16-18 and 35-36. The deletions and additions at lines 38 and 39 do not relate to the inclusion of adoptive parents, and are not objectionable.