

RESOLUTION 10-02-2007

DIGEST

Employee Medical Leave: Protected Leave to Donate Organs, Tissue, or Blood Marrow

Amends Government Code section 12945.2 to provide unpaid medical leave to employees to donate, or to undergo testing to donate, an organ, tissue, or bone marrow.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Government Code section 12945.2 to provide unpaid medical leave to employees to donate, or to undergo testing to donate, an organ, tissue, or bone marrow. This resolution should be approved in principle because it makes a modest change to existing law regarding family and medical leave for a laudable, health-related purpose.

Currently, the California Family Rights Act (“CFRA”) (which is the state equivalent of the federal Family and Medical Leave Act (“FMLA”)) guarantees unpaid family/medical leave to employees of larger employers who meet certain eligibility requirements. One of the requirements for medical leave is that the employee, or a family member, has a “serious health condition.” “Serious health condition” is defined by statute, regulation, and case law and extends to a wide variety of conditions, including cosmetic surgery.

Although it is arguable that the definition of “serious health condition” already extends to procedures related to donating an organ, tissue or bone marrow at least in some instances, this resolution would remove any doubt and would ensure that all medical procedures conducted for this purpose would be covered. This modest amendment to the CFRA is consistent with the legislative intent (and ensuing case law) of providing short-term, unpaid leave to employees of larger employers without risking job loss when they need to be absent from work due to significant medical reasons. Furthermore, none of the other employee eligibility requirements for CFRA leave would be affected by this resolution.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Government Code section 12945.2 to read as follows:

- 1 §12945.2
- 2 (a) Except as provided in subdivision (b), it shall be an unlawful employment
- 3 practice for any employer, as defined in paragraph (2) of subdivision (c), to refuse to grant a
- 4 request by any employee with more than 12 months of service with the employer, and who
- 5 has at least 1,250 hours of service with the employer during the previous 12-month period,
- 6 to take up to a total of 12 workweeks in any 12-month period for family care and medical

7 leave. Family care and medical leave requested pursuant to this subdivision shall not be
8 deemed to have been granted unless the employer provides the employee, upon granting the
9 leave request, a guarantee of employment in the same or a comparable position upon the
10 termination of the leave. The commission shall adopt a regulation specifying the elements
11 of a reasonable request.

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

16 (c) For purposes of this section:

17 (1) "Child" means a biological, adopted, or foster child, a stepchild, a legal ward,
18 or a child of a person standing in loco parentis who is either of the following:

19 (A) Under 18 years of age.

20 (B) An adult dependent child.

21 (2) "Employer" means either of the following:

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

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

25 (3) "Family care and medical leave" means any of the following:

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

29 (B) Leave to care for a parent or a spouse who has a serious health condition.

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

33 (D) Leave for the employee to donate an organ, tissue, peripheral blood stem cells,
34 or bone marrow, leave to undergo testing to determine whether the employee is qualified to
35 make such a donation.

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

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

41 (6) "Health care provider" means any of the following:

42 (A) An individual holding either a physician's and surgeon's certificate issued
43 pursuant to Article 4 (commencing with Section 2080) of Chapter 5 of Division 2 of the
44 Business and Professions Code, an osteopathic physician's and surgeon's certificate issued
45 pursuant to Article 4.5 (commencing with Section 2099.5) of Chapter 5 of Division 2 of the
46 Business and Professions Code, or an individual duly licensed as a physician, surgeon, or
47 osteopathic physician or surgeon in another state or jurisdiction, who directly treats or
48 supervises the treatment of the serious health condition.

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

51 (7) "Parent" means a biological, foster, or adoptive parent, a stepparent, a legal
52 guardian, or other person who stood in loco parentis to the employee when the employee
53 was a child.

54 (8) "Serious health condition" means an illness, injury, impairment, or physical or
55 mental condition that involves either of the following:

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

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

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

60 (e) An employee taking a leave permitted by subdivision (a) may elect, or an
61 employer may require the employee, to substitute, for leave allowed under subdivision (a),
62 any of the employee's accrued vacation leave or other accrued time off during this period or
63 any other paid or unpaid time off negotiated with the employer. If an employee takes a
64 leave because of the employee's own serious health condition, the employee may also elect,
65 or the employer may also require the employee, to substitute accrued sick leave during the
66 period of the leave. However, an employee shall not use sick leave during a period of leave
67 in connection with the birth, adoption, or foster care of a child, or to care for a child, parent,
68 or spouse with a serious health condition, unless mutually agreed to by the employer and the
69 employee.

70 (f) (1) During any period that an eligible employee takes leave pursuant to
71 subdivision (a) or takes leave that qualifies as leave taken under the FMLA, the employer
72 shall maintain and pay for coverage under a "group health plan," as defined in Section
73 5000(b) (1) of the Internal Revenue Code of 1986, for the duration of the leave, not to
74 exceed 12 workweeks in a 12-month period, commencing on the date leave taken under the
75 FMLA commences, at the level and under the conditions coverage would have been
76 provided if the employee had continued in employment continuously for the duration of the
77 leave. Nothing in the preceding sentence shall preclude an employer from maintaining and
78 paying for coverage under a "group health plan" beyond 12 workweeks. An employer may
79 recover the premium that the employer paid as required by this subdivision for maintaining
80 coverage for the employee under the group health plan if both of the following conditions
81 occur:

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

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

87 (2) Any employee taking leave pursuant to subdivision (a) shall continue to be
88 entitled to participate in employee health plans for any period during which coverage is not
89 provided by the employer under paragraph (1), employee benefit plans, including life, short-
90 term, or long-term disability or accident insurance, pension and retirement plans, and
91 supplemental unemployment benefit plans to the same extent and under the same conditions
92 as apply to an unpaid leave taken for any purpose other than those described in subdivision
93 (a). In the absence of these conditions an employee shall continue to be entitled to
94 participate in these plans and, in the case of health and welfare employee benefit plans,
95 including life, short-term, or long-term disability or accident insurance, or other similar
96 plans, the employer may, at his or her discretion, require the employee to pay premiums, at

97 the group rate, during the period of leave not covered by any accrued vacation leave, or
98 other accrued time off, or any other paid or unpaid time off negotiated with the employer, as
99 a condition of continued coverage during the leave period. However, the nonpayment of
100 premiums by an employee shall not constitute a break in service, for purposes of longevity,
101 seniority under any collective bargaining agreement, or any employee benefit plan.

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

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

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

116 (i) If the employee's need for leave pursuant to this section is foreseeable due to a
117 planned medical treatment or supervision or donation of an organ, tissue, or bone marrow,
118 the employee shall make a reasonable effort to schedule the treatment or supervision to
119 avoid disruption to the operations of the employer, subject to the approval of the health care
120 provider of the individual requiring the treatment or supervision.

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

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

126 (B) The probable duration of the condition.

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

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

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

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

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

141 (B) The probable duration of the condition.

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

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

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

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

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

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

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

167 (l) (1) An employer may require that an employee's request for leave to donate an
168 organ, tissue, or bone marrow be supported by a certification issued by the health care
169 provider of the employee or the individual receiving the donation. That certification shall be
170 sufficient if it includes all of the following:

171 (A) The date on which the testing or donation is to occur.

172 (B) The probable duration of the employee's recuperation following the testing or
173 donation.

174 (C) A statement that, due to the testing or donation, the employee is unable to
175 perform the function of his or her position.

176 (2) Upon expiration of the time estimated by the health care provider in
177 subparagraph (B) of paragraph (1), the employer may require the employee to obtain
178 recertification, in accordance with the procedure provided in paragraph (1), if additional
179 leave is required.

180 ~~(4)(m)~~ It shall be an unlawful employment practice for an employer to refuse to
181 hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of
182 any of the following:

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

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

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

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

194 ~~(o)~~(p) The provisions of this section shall be construed as separate and distinct
195 from those of Section 12945.

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

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

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

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

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

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

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

217 ~~(s)~~(t) Leave taken by an employee pursuant to this section shall run concurrently
218 with leave taken pursuant to the FMLA, except for any leave taken under the FMLA for
219 disability on account of pregnancy, childbirth, or related medical conditions. The aggregate
220 amount of leave taken under this section or the FMLA, or both, except for leave taken for
221 disability on account of pregnancy, childbirth, or related medical conditions, shall not
222 exceed 12 workweeks in a 12-month period. An employee is entitled to take, in addition to
223 the leave provided for under this section and the FMLA, the leave provided for in Section
224 12945, if the employee is otherwise qualified for that leave.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

Existing Law: Provides that employees of larger employers, who meet certain requirements, may take protected leave for their own serious medical condition or to care for a member of the employee's immediate family who suffers from a serious medical condition.

This Resolution: Would extend the existing leave to employees who require time off to donate organs, tissue, or bone marrow or to be tested to determine if the employee is a suitable donor.

The Problem: The California Family Rights Act protects any employee who needs time off due to his or her own serious medical condition. Some employers and commentators believe that the definition of "serious medical condition" does not include any elective procedure, including organ, tissue, and marrow donation, because the employee is completely healthy before undergoing the procedure.

Organ, tissue, and marrow donations are life saving procedures and, every day, thousands of patients are searching for a donor. This resolution will ensure that donors, who may undergo painful surgery and recovery for a complete stranger, are not also placing their jobs at risk.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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