SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 1033 (Bauer-Kahan)
Version: April 29, 2021
Hearing Date: June 29, 2021
Fiscal: Yes
Urgency: No
TSG

SUBJECT

California Family Rights Act: parent-in-law: small employer family leave mediation: pilot program

DIGEST

This bill modifies procedural aspects of the Department of Fair Employment and Housing's (DFEH's) pilot program for mediating family leave disputes between small businesses and their employees in order to ensure that employers are aware of their option to force employees to participate. In addition, the bill clarifies that employers covered under the California Family Rights Act (CFRA) must grant eligible employees up to 12 weeks of job-protected time off from work annually for the purpose of providing care to a parent-in-law with a serious medical condition.

EXECUTIVE SUMMARY

CFRA provides eligible employees in the state with up to 12 weeks of job-protected time off from work in any 12-month period to bond with a new child, to deal with a serious medical condition of their own, or to take care of a close relative with a serious medical condition. CFRA was recently expanded to apply to small businesses with as few as five employees. To give these small businesses an opportunity to resolve CFRA-related disputes before they wind up in court, California established a pilot mediation program under the auspices of DFEH. According to the proponents of this bill, however, the existing procedure for the mediation program does not necessarily provide small employers with sufficient notice of their right to demand mediation for them to exercise that option. This bill modifies the procedures to ensure that small businesses are made aware of their right to request mediation earlier in the process. Separately, the bill clarifies that parents-in-law are among the close relatives that an eligible employee is entitled to time off under CFRA to care for.

The bill is sponsored by the California Chamber of Commerce. Support comes from employers, trade associations, employers, and regional chambers of commerce. There is no opposition. If passed by this Committee, the bill will next be heard by the Senate Committee on Labor, Public Employment and Retirement.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Establishes the DFEH to combat discrimination in housing and employment. Specifies that the DFEH has the power to receive, investigate, conciliate, mediate, and prosecute complaints alleging practices made unlawful by FEHA. (Gov. Code §§ 12900-12930.)

2) Makes it an unlawful employment practice, under CFRA, for an employer to refuse to grant a request from an eligible employee to take up to a total of 12 weeks off in any 12-month period for family care and medical leave. Defines "family care and medical leave" for this provision to mean taking leave to care for a new child; to care for a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner who has a serious health condition; or to take leave because of the employee's own serious health condition, as specified. (Gov. Code § 12945.2.)

3) Requires DFEH to create a small employer family leave mediation pilot program for employers with between five and 19 employees. Allows an employer or employee, within a specified time after DFEH has issued a right-to-sue notice to an employee, to request to participate in the mediation pilot project. Specifies that if either the employer or the employee requests mediation, as prescribed, the employee may not pursue a civil action until mediation is deemed complete, as specified. (Gov. Code § 12945.21.)

4) Defines "parent-in-law" to mean the parent of a spouse or domestic partner. (Gov. Code § 12945.2(b)(11).)

This bill:

1) Requires DFEH to notify small business employees who have requested an immediate right-to-sue letter based on complaint against their employer alleging a CFRA violation that the employee must inform DFEH's mediation program of the employee's intent to file a civil action in court prior to filing that action.

2) Instructs DFEH to respond to contact from an employee informing DFEH of the employee's intention to file a lawsuit by notifying all respondents in the alleged violation that mediation is required before the employee files a civil action if mediation is requested by the employer or the employee.

3) Directs DFEH's mediation program to terminate its activity if neither the employer nor employee requests mediation within 30 days of issuing the notice pursuant to (2), above.

4) Provides that if DFEH receives a request for mediation from the employee or employer within 30 days of receipt of notification, as specified, DFEH shall initiate the mediation within 60 days of its receipt of the request, or the receipt of the notification by all named respondents, whichever is later.

5) Provides that once mediation has been initiated, the mediator shall notify the employee of their right to request information, as specified, and the mediation shall help facilitate any other reasonable requests for information that may be necessary for either party to present their claim in mediation.

6) Tolls the statute of limitations applicable to the employee's claim from the date that the employee contacts the DFEH mediation program until the mediation is complete or deemed unsuccessful.

7) Provides that a mediation is deemed complete when any of the following occur:
   a) neither the employee nor the employer requests the mediation within 30 days of receipt by all named respondents or both parties agree not to participate in mediation;
   b) the employer fails to respond to the notification or mediation request within 30 days of receipt;
   c) the DFEH fails to initiate the mediation within 60 days of its receipt of the request for mediation or the receipt by all named respondents of the notification, whichever is later; or
   d) the DFEH notifies the parties that is has determined that further mediation would be fruitless, both parties agree that further mediation would be fruitless, or one of the parties failed to submit information requested by the other party and deemed by the mediator to be reasonably necessary or fair for the other party to obtain.

8) Specifies that a mediation is unsuccessful if the claim is not resolved within 30 days of mediation, unless DFEH determines that more time is needed to make mediation successful.

9) Provides that a respondent or defendant in a civil action that did not receive a notification pursuant to (2), above, is entitled to a stay of any pending civil action or arbitration until mediation is complete or deemed unsuccessful.

10) Specifies that the provisions above shall not apply to any requests for an immediate right to sue that includes other violations of the Fair Employment and Housing Act (FEHA).

11) Clarifies that parents-in-law are among the persons who may be cared for by an employee seeking to take family leave pursuant to CFRA.

COMMENTS

1. About the California Family Rights Act

CFRA is California's family and medical leave law. It helps to ensure that Californians are not forced to choose between their job security and attending to their family's most pressing needs.

Specifically, CFRA provides 12 workweeks of job-protected time off from work in any 12 month period if an employee needs the time off to bond with a new child, attend to their own serious medical needs, or care for a close relative with a serious medical condition. (Gov. Code § 12945.2.) Not all employers must comply with CFRA. Private employers with fewer than five employees are exempt. (Gov. Code § 12945.2(b)(3).) Similarly, not all employees are eligible for CFRA's benefits. To be eligible for job-protected time off under CFRA, an employee must have held the job for at least a year and worked at least 1,250 hours for the employer in the 12 months before the request for time off. (Gov. Code § 12945.2(a).) There are slightly modified eligibility rules for certain airline employees. (Gov. Code § 12945.2(r).)

2. How this bill modifies the California Family Rights Act

As discussed in Comment 1, above, CFRA enables eligible California employees to take job-protected time off to care for close relatives who have a serious medical condition. After expansion pursuant to SB 1383 (Jackson, Ch. 86, Stats. 2020), the list of relatives that employees can take time off to care for includes: a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner. SB 1383 also included definition of "parent-in-law" but, according to the sponsors of this bill, SB 1383 inadvertently left the term parent-in-law off the list of family members that an employee could take leave to care for. As a result, there has been some confusion about whether employers must provide employees job-protected time off under CFRA to care for a parent-in-law with a serious medical condition. This bill would clarify that they do.

3. About the pilot mediation program for mediating California Family Rights Act disputes involving small businesses

When California expanded CFRA to cover smaller employers pursuant to SB 1383, opponents of the change argued that, if the change had to happen, the expansion should at least be accompanied by a mandatory mediation program. The idea was that a mandatory mediation program would give small employers the chance to resolve disputes over family leave before employees took the step of filing a lawsuit in court, since taking that step would likely raise the costs for everyone involved. To give this concept a try, at the same time that CFRA was expanded, California established a pilot

mandatory mediation program for CFRA disputes under the auspices of DFEH. (AB 1867 (Assem. Com. on Budget, Ch. 45, Stats. 2020).)[1]

As currently designed, either the employer or the employee can obligate all parties to participate in the DFEH mediation program by so requesting within 30 days of receiving a copy of a right-to-sue letter in the case. The issuance of a right-to-sue letter is an indication that the employee has informed DFEH that the employee no longer wishes to pursue its complaint through DFEH's administrative processes and would, instead, like the option of suing in court.

4. How this bill would modify the pilot mediation program for mediating California Family Rights Act disputes involving small businesses

The proponents of this bill point out that employers do not always receive a copy of the right-to-sue letter in a matter until after the case has been filed in court. Moreover, even if the employer receives a copy of the right-to-sue letter before a lawsuit is filed, the right to sue letter itself does not necessarily inform the employer that they have a right to demand that everyone participate in a mediation before a lawsuit can be filed. Thus, the current procedure behind the pilot mediation program does not necessarily ensure that employers know that they can force their employees to go through the mediation process. As a result, according to the author and proponents, small businesses may forgo their option of hailing their employees into mandatory mediation not because the small business is not interested in mediating the dispute, but simply because the small business is not aware that forcing their employee into mediation is a possibility.

To address that problem, this bill revises the procedural requirements that a small business employee must go through before filing a lawsuit in court based on a dispute about the right to family leave under CFRA. Specifically, in situations where a small business employee bypasses DFEH's administrative investigation and adjudication process by requesting an immediate right-to-sue letter from DFEH, the bill requires the small business employee to contact DFEH before they proceed to file their lawsuit. If the employee files a lawsuit without contacting DFEH, the employer can obtain a stay of the lawsuit until the employee does contact DFEH. In response to this contact, DFEH

[1] From a public policy perspective, the utility of mandatory mediation can be questioned. The usual premise underlying mediation is that both sides desire to hear the other out and come to a mutually satisfactory resolution. If either one of the parties to the dispute does not want to be involved in mediation, however, then forcing that party to go through the motions anyway may be not be the best use of everyone's time. Where, as in the case of this pilot mediation program, a public entity is providing the mediation service, forcing unwilling participants to go through the motions of a mediation process may not be the best use of taxpayer money, either. In considering whether to extend this mandatory mediation pilot program in the future, the Legislature may wish to examine how often it resulted in resolution of cases where the employee would not have participated unless forced to do so, rather than just looking at whether the program resolved cases generally. Only a more searching analysis of this type could reveal whether making mediation mandatory is beneficial or simply a waste of time and money.

must then inform all of the parties involved that they can force everyone to participate in DFEH's mediation process by requesting it within 30 days.

If DFEH receives such a request, it must conduct the mediation within 60 days and help the parties to obtain "reasonable information" that they might need to present their arguments at the mediation.

The bill also sets forth the circumstances in which the mediation process terminates, allowing the employee to proceed with the lawsuit.

5. Arguments in support of the bill

According to the author:

> AB 1033 will allow us to avoid costly litigations and ensure there is a quick resolution for all parties by revising the small employer paid family leave program.

As sponsor of the bill, the California Chamber of Commerce, in coordination with 30 other organizations, writes:

> To alleviate SB 1383's threat of litigation for small businesses, budget trailer bill AB 1867 of 2020 required the Department of Fair Employment and Housing ("DFEH") to establish a small employer mediation pilot program. […] However, employers often have no idea mediation is available. […] Small businesses therefore cannot take advantage of this program. […] AB 1033 fixes these issues […].
>
> AB 1033 also adds parents-in-law to the list of family members in CFRA for which an employee can use leave to provide care. "Parent-in-law" was added as a defined term to CFRA by SB 1383, but was inadvertently omitted from the list of family members that an employee could take leave to care for identified in Government Code Section 12945.2 (b)(4)(B). That omission left employers uncertain about whether they are required to provide employees time off under CFRA to provide care for a parent-in-law. This bill would clarify that issue.

SUPPORT

California Chamber of Commerce (sponsor)
California Manufacturers and Technology Association
California Restaurant Association
California Special Districts Association
California State Council of the Society for Human Resource Management

Carlsbad Chamber of Commerce
Coalition of Small and Disabled Veterans
Flasher Barricade Association
Garden Grove Chamber of Commerce
Greater Conejo Valley Chamber of Commerce
Greater High Desert Chamber of Commerce
Hollywood Chamber of Commerce
Lodi Chamber of Commerce
Long Beach Area Chamber of Commerce
Murrieta/Wildomar Chamber of Commerce
North Orange County Chamber
Oceanside Chamber of Commerce
Official Police Garages of Los Angeles
Pleasanton Chamber of Commerce
Plumbing-Heating-Cooling Contractors Association of California
Rancho Cordova Area Chamber of Commerce
Redondo Beach Chamber of Commerce
Roseville Area Chamber of Commerce
San Gabriel Valley Economic Partnership
Santa Maria Valley Chamber of Commerce
South Bay Association of Chambers of Commerce
Southwest California Legislative Council
Torrance Area Chamber of Commerce
Tulare Chamber of Commerce
Western Electrical Contractors Association

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 1383 (Jackson, Ch. 86, Stats. 2020) expanded to CFRA to cover employers with five or more employees. The bill also added a definition of parent-in-law, but did not specify whether or not employers subject to CFRA must provide workers with job-protected leave to care for a parent-in-law with a serious medical condition.

AB 1867 (Assem. Com. on Budget, Ch. 45, Stats. 2020) established a program within DFEH for the purpose of mediating family leaves disputes between small employers and their employees.

SB 63 (Jackson, Ch. 686, Stats. 2017) enacted the New Parent Leave Act prohibiting an employer, of 20 or more employees, from refusing to allow an eligible employee to take up to 12 weeks of job protected parental leave to bond with a new child within one year of the child's birth, adoption or foster care placement. SB 63 included a pilot program within DFEH to mediate between small employers and their employees with respect to parental leave disputes.

PRIOR VOTES:

Assembly Floor (Ayes 78, Noes 0)
Assembly Appropriations Committee (Ayes 16, Noes 0)
Assembly Judiciary Committee (Ayes 11, Noes 0)
Assembly Labor and Employment Committee (Ayes 7, Noes 0)

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