

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 848 (Rubio)
Version: March 21, 2023
Hearing Date: April 25, 2023
Fiscal: Yes
Urgency: No
AM

SUBJECT

Employment: leave for loss related to reproduction or adoption

DIGEST

This bill makes it an unlawful employment practice for an employer of five or more employees to refuse to grant a request by an eligible employee for up to five days of reproductive loss leave following a miscarriage, unsuccessful assisted reproduction, failed adoption, failed surrogacy, diagnosis negatively impacting pregnancy, diagnosis negatively impacting fertility, or stillbirth, as provided.

EXECUTIVE SUMMARY

Reproductive loss can be a very traumatizing event for a person to experience and emotionally process. Miscarriages, unfortunately, are very common and happen on average in 1 out of every 5 pregnancies, which is estimated to be between 750,000 and 1 million pregnancies yearly.¹ Additionally, data indicates that 10 percent of adoptions fail between placement and finalization for various reasons.² IVF success rates depend on numerous factors, but generally, first-time IVF success rates are between 25 to 30 percent. This bill is intended to protect the jobs of Californians who experience the trauma of a miscarriage, failed adoption, or other reproductive loss event by creating a reproductive loss leave benefit program. The bill is sponsored by the Junior Leagues of California State Public Affairs Committee and Forever Footprints and supported by various organizations. The bill is opposed by the California Chamber of Commerce. This bill passed the Senate Committee on Labor, Public Employment and Retirement by a vote of 5 to 0.

¹ Laura Geggel, *Most Americans Believe Miscarriage Myths*, Live Science (Aug. 4, 2022), <https://www.livescience.com/50790-miscarriage-misconceptions.html>.

² *What if My Adoption Fails?*, AdoptiveFamilies, <https://www.adoptivefamilies.com/adoption-process/what-if-my-adoption-fails/#:~:text=Statistics%20indicate%20that%20about%2010,are%20not%20equipped%20to%20support>.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the Department of Fair Employment and Housing (DFEH) to combat discrimination in housing and employment. Specifies that DFEH has the power to receive, investigate, conciliate, mediate, and prosecute complaints alleging practices made unlawful by the Fair Employment and Housing Act (FEHA). (Gov. Code § 12900-12930.)
- 1) Makes it an unlawful employment practice, under the California Family Rights Act (CFRA), for an employer to refuse to grant a request by a qualified employee to take up to a total of 12 workweeks in any 12-month period for family care and medical leave.
 - a) 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.)
- 2) Makes it an unlawful employment practice for an employer to refuse to grant a request by any employee to take up to five days of bereavement leave upon the death of specified family members.
 - a) The leave does not need to be consecutive and must be completed within three months of the date of the death of the family member.
 - b) The bereavement leave is required to be taken pursuant to any existing bereavement leave policy of the employer and, if none exists, the bereavement leave may be unpaid, except that an employee may use vacation, personal leave, accrued and available sick leave, or compensatory time off that is otherwise available to the employee. (Gov. Code § 12945.7.)
- 3) Makes it an unlawful employment practice for an employer to refuse to allow an employee disabled by pregnancy, childbirth, or a related medical condition to take a leave for a reasonable period of time not to exceed four months and thereafter return to work, as specified. The employee is entitled to utilize any accrued vacation leave during this period of time. (Gov. Code § 12945).

This bill:

- 1) Makes it an unlawful employment practice for an employer to refuse to grant a request by any employee to take up to five days of reproductive loss leave following a miscarriage, unsuccessful assisted reproduction, failed adoption, failed surrogacy, diagnosis negatively impacting pregnancy, diagnosis negatively impacting fertility, or stillbirth.

2) Defines the following terms:

- a) "Assisted reproduction" means a method of achieving pregnancy through artificial insemination or embryo transfer, including gamete and embryo donation.
- b) "Diagnosis negatively impacting fertility" means a diagnosis that negatively impacts the likelihood of biological conception of a child for an individual, the individual's current spouse or domestic partner, or any other individual who would have been a parent of a child born of the individual who received the diagnosis.
- c) "Diagnosis negatively impacting pregnancy" means a diagnosis that negatively impacts the pregnancy of an individual, an individual's current spouse or domestic partner, or any person who would have been a parent of a child born as a result of the pregnancy.
- d) "Employee" means a person employed by the employer for at least 30 days prior to the commencement of the leave.
- e) "Employer" means either of the following:
- f) A person who employs five or more persons, as specified.
- g) The state and any political or civil subdivision of the state, including, but not limited to, cities and counties.
- h) "Failed adoption" means a failed adoption match or an adoption that is not finalized because it is contested by another party. This event applies to a person who would have been a parent of the adoptee if the adoption had been completed.
- i) "Failed surrogacy" means the unsuccessful completion of a surrogacy or establishment of a surrogacy agreement. This event applies to a person who would have been a parent of a child born as a result of the surrogacy.
- j) "Miscarriage" means a miscarriage by a person, by the person's current spouse or domestic partner, or by another individual if the person would have been a parent of a child born as a result of the pregnancy.
- k) "Stillbirth" means a stillbirth resulting from a person's pregnancy, the pregnancy of a person's current spouse or domestic partner, or another individual, if the person would have been a parent of a child born as a result of the pregnancy that ended in stillbirth.
- l) "Unsuccessful assisted reproduction" means an unsuccessful round of intrauterine insemination or of an assisted reproductive technology procedure. This event applies to the individual, the individual's current spouse or domestic partner, or another individual, if that individual would have been a parent of a child born as a result of the pregnancy.

3) Makes it an unlawful employment practice for an employer to refuse to hire, or to discharge, demote, fine, suspend, expel, or discriminate against, an individual because of either of the following:

- a) An individual's exercise of the right to reproductive loss leave.

- b) An individual's giving information or testimony as to their own reproductive loss leave, or another person's reproductive loss leave, in an inquiry or proceeding related to rights guaranteed under this section.
- 4) Makes it an unlawful employment practice for an employer to interfere with, restrain, or deny the exercise of, or attempt to exercise, any right provided under these provisions.
 - 5) Requires the employer to maintain the confidentiality of any employee requesting leave under these provisions. Any information provided to the employer must be maintained as confidential and cannot be disclosed except to internal personnel or counsel, as necessary, or as required by law.
 - 6) Provides that an employee's right to reproductive loss leave is to be construed as a separate and distinct right from any right under FEHA.
 - 7) Provides, pursuant to the California Constitution, that the people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies are required to be open to public scrutiny. (Cal. const. art. I, § 3(b)(1).)
 - a) Requires a statute to be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. (Cal. const. art. I, § 3(b)(1).)
 - b) Requires a statute that limits the public's right of access to be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest. (Cal. const. art. I, § 3(b)(1).)
 - 8) Governs the disclosure of information collected and maintained by public agencies pursuant to the CPRA. (Gov. Code §§ 7920.000 et seq.)
 - a) States that the Legislature, mindful of the individual right to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Gov. Code § 7921.000.)
 - b) Defines "public records" as any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. (Gov. Code § 7920.530.)
 - c) Provides that all public records are accessible to the public upon request, unless the record requested is exempt from public disclosure. (Gov. Code § 7922.530.)

COMMENTS

1. Stated need for the bill

The author writes:

Reproductive loss is one of the most traumatizing events a person can experience, and unfortunately, it is far too common. Every year in the United States, nearly a million families experience the heartbreak of a pregnancy loss due to miscarriage. And many other families know the trauma that comes from an adoption agreement falling apart or an unsuccessful IVF treatment. SB 848 will ensure that families experiencing reproductive loss have the time they need to process their grief and heal.

California leads the nation on several types of workplace leave programs, including providing up to 5 days of job-protected bereavement leave after the death of a close family member. However, these leave programs fail to cover reproductive loss events. Several other state and local governments have recently passed legislation to provide leave for reproductive loss events, while many private employers have voluntarily adopted policies to provide this leave for their employees.

SB 848 would protect the jobs of Californians who experience the trauma of a miscarriage, failed adoption, or other reproductive loss event by creating a Reproductive Loss Leave benefit providing qualified employees with up to 5 days of job-protected leave. The bill would require the leave be completed within three months of the reproductive loss and prohibit an employer from discriminating against or firing an employee for exercising their right to Reproductive Loss Leave. By passing SB 848, we can make a significant difference in the lives of every Californian who has experienced the grief of reproductive loss.

2. Existing leave provisions

Federal and California law recognize that there are times in life when an employee must miss work in order to attend to the health and welfare of a family member. Of particular note, the California Family Rights Act (CFRA) allows employees to take up to 12 weeks of family leave to care for a newborn child or to care for family members suffering from a serious medical condition. (Gov. Code § 12945.2.) Similarly, the federal Family Medical Leave Act (FMLA) grants most employees the right to take up to 12 weeks unpaid time off work to care for a qualifying family member with a serious health condition. (29 U.S.C. § 2612.) However, under both CFRA and FMLA, an employee's right to take job-protected time off to care for a qualifying family member only applies while the qualifying family member is alive. In response to this gap, the Legislature last year passed AB 1949 (Low, Ch. 767, Stats. 2022) making it an unlawful employment

practice for an employer to refuse to grant a request by a qualified employee to take up to five days of bereavement leave upon the death of a family member.

3. The leave available under this bill

To give California workers assurance that they will have the time they need to deal with the often traumatizing and emotional experience caused by miscarriage, unsuccessful assisted reproduction, a failed adoption or surrogacy, a diagnosis negatively impacting pregnancy or fertility, or a stillbirth, this bill would establish a right to job-protected reproductive loss leave. To protect small businesses who must have everyone present in order to operate, the bill only covers employers with five or more workers. This is consistent with the scope of CFRA and bereavement leave. Employees would not be eligible immediately upon hire; they would have to accumulate 30 days of service first. Once they qualified for the leave, employees would be able to take up to five days off for reproductive loss. The bill specifies that the five days need not be taken consecutively, but a worker cannot drag things out indefinitely: the bill requires the leave to be taken within three months of the reproductive loss event.

The five days of job-protected reproductive loss leave guaranteed by this bill would be unpaid, but they would essentially layer over whatever paid leave policies the employer already offers. For example, if an employer currently provides two days of paid leave for reproductive loss an employee would be entitled to those two paid days plus an additional three unpaid days if this bill is enacted. Employees who did not want to take unpaid leave could also substitute other forms of paid time off for their reproductive loss leave. An employer under the bill includes both private employers and government employers.

4. Enforcement and remedies

The bill proposes to place the right to reproductive loss leave alongside CFRA made bereavement leave in FEHA. (Gov. Code §§ 12900-12930.) An employer's failure to allow a worker to take reproductive loss leave as required under the bill would constitute an unlawful employment practice, as would any adverse action taken against an employee for exercising their right to that leave. Aggrieved workers could bring administrative complaints about violations to DFEH for investigation and resolution. After filing their administrative complaint, employees would also have the option of requesting a right to sue letter from DFEH and initiating a complaint in court.

5. Confidentiality provisions and limitation on access to public records

In recognition of the fact that information regarding reproductive loss is sensitive and private, the bill provides that an employer is required to maintain the confidentiality of any employee requesting leave under this bill's provisions, and that any information

provided to the employer is to be maintained as confidential and is not to be disclosed, except to internal personnel or counsel, as necessary, or as required by law.

California generally recognizes that public access to information concerning the conduct of the people's business is a fundamental and necessary right. At the same time, the state recognizes that this right must be balanced against the right to privacy. The general right of access to public records may, therefore, be limited where records include personal information. As this bill provides to government employers, it may limit access to public records by requiring the employer to keep certain information confidential and not disclose it. In light of the sensitive nature of information surrounding reproductive loss, the potential limiting of access to public records in this bill seems warranted.

6. Statements in support

The Junior Leagues of California State Public Affairs Committee and Forever Footprints, sponsors of the bill, write in support stating:

Pregnancy and fertility loss is common and is suffered by millions of women across the state, with approximately half of all pregnancies ending in miscarriage. Existing family leave programs are limited in scope and access and do not fully apply to all persons impacted. SB 848 would ensure employees are allowed to take up to five days of reproductive loss leave following a miscarriage, unsuccessful assisted reproduction, failed adoption, failed surrogacy, diagnosis negatively impacting pregnancy, diagnosis negatively impacting fertility, or stillbirth. This would additionally apply to the individual's spouse or domestic partner, or another co-parenting individual, if that individual would have been a parent of a child had they been successful.

7. Statements in opposition

The California Chamber of Commerce (CalChamber) is opposed unless amended writing:

SB 848 seeks to create a second bereavement leave statute specific to events concerning reproduction and fertility. This new leave right is separate from any other leave provided for in current law. We are understanding of the emotional toll that these events can take on an employee, however, we have concerns about the breadth of the bill. While one more leave may not seem burdensome in isolation, it must be viewed in the context of the more than 20 leaves that currently exist or were mandated during the last few years as a result of the pandemic.

They are seeking two specific amendments: (1) a narrowing of what events can trigger reproductive loss leave, and (2) implementation of a cap on the total amount of leave that can be taken within a 12-month period. CalChamber considers some of the proposed events covered under the bill to be overly broad, such as a diagnosis that negatively impacts fertility. They state “there are a multitude of conditions that could be viewed as negatively impacting fertility, even if ultimately there is little to no impact. Some of the terminology is also vague, such as a “failed adoption match”. It is unclear if this includes someone who applied for adoption and did not match or only if there was an established match that falls through.” They also write that some of the “qualifying events can occur monthly or every few months, which would result in a large quantity of leave. Employers always have the ability to voluntarily provide leave in these instances, but an uncapped mandate is difficult to accommodate, especially for small businesses. “

SUPPORT

Junior Leagues of California State Public Affairs Committee (sponsor)

Forever Footprints (sponsor)

American Society for Reproductive Medicine

California Nurses Association

California Teachers Association

Ella Baker Center for Human Rights

LA Best Babies Network

Legal Aid at Work

NARAL Pro-Choice California

National Association of Social Workers, California Chapter

Return to Zero: HOPE

Sharing Parents

STAR Legacy Foundation

OPPOSITION

California Chamber of Commerce

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 1949 (Low, Ch. 767, Stats. 2022) provides specified California workers with up to five days of job-protected leave from work to grieve and to attend to logistical matters in the event of the death of a close family member, as defined.

PRIOR VOTES:

Senate Committee on Labor, Public Employment and Retirement (5 Ayes, 0 Noes)
