

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

AB 2011 (Bauer-Kahan)  
Version: May 13, 2024  
Hearing Date: June 4, 2024  
Fiscal: Yes  
Urgency: No  
ID

**SUBJECT**

Unlawful employment practices: small employer family leave mediation program:  
reproductive loss leave

**DIGEST**

This bill eliminates the sunset provisions for the small employer family leave mediation pilot program and expands its scope to include reproductive loss leave, among other changes to the program.

**EXECUTIVE SUMMARY**

The California Family Rights Act (CFRA) provides Californians 12 weeks of job-protected, unpaid leave for caring for a new child, a family member with a serious health condition, or for themselves when they have a serious health condition. California law also provides for up to five days of job-protected, unpaid bereavement leave following the death of a family member. In 2023, the California Legislature enacted reproductive loss leave to provide up to five days of job-protected, unpaid leave following a reproductive loss event, as defined. CFRA and bereavement loss initially applied only to employers with 50 or more employees. However, in 2020, both programs were expanded to employers with five or more employees. At the same time, the Legislature created the small employer family leave mediation pilot program to provide small employers that have between five and 19 employees with a mandatory mediation program for alleged violations of CFRA or bereavement leave. The pilot program is set to expire January 1, 2025 pursuant to its sunset provisions. AB 2011 would eliminate this sunset provision, making the small employer family leave mediation pilot program permanent, expand the program to include claims of violations of the reproductive loss leave provisions, and would make other changes to the program's operation. AB 2011 is sponsored by the California Chamber of Commerce, and is supported by a large coalition of business associations and organizations. The committee received no timely opposition.

**PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) Establishes the Family Medical Leave Act (FMLA) to provide most employees the right to take up to 12 weeks of job-protected, unpaid time off work for the birth or adoption of a child, due to a serious health condition of the employee, for an exigency arising out of the fact that the employee's close relative is a military member on active duty, and for the employee to care for a close relative with a serious health condition. (28 U.S.C. § 2601 et seq.) Applies these provisions to private employers that employ 50 or more employees during each of 20 or more calendar workweeks in the current or preceding year. (28 U.S.C. § 2611.)
- 2) Establishes the Fair Employment and Housing Act (FEHA) to prohibit discrimination or harassment in employment or the provision of housing accommodations on the basis of age, ancestry, color, race or ethnicity, creed, gender or sexual orientation, national origin, religion, or disability. Prohibits denial of specified leave, retaliation for asserting rights to such leave, or refusing to rehire an employee returning from such leave by certain employers and the state or its subdivisions. (Gov. Code § 12900 et seq.)
- 3) Establishes the Civil Rights Department (CRD) to combat discrimination in housing and employment. Specifies that the CRD has the power to receive, investigate, conciliate, mediate, and prosecute complaints alleging practices made unlawful by FEHA. (Gov. Code § 12900 et seq.)
- 4) Establishes the California Family Rights Act (CFRA) and makes it an unlawful employment practice 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 specified 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; to take leave because of the employee's own serious health condition; or for a qualifying exigency related to the employee's close family's active duty as a member of the Armed Forces, as specified. Provides that these provisions only apply to employers with five or more employees, and to employees who have held their job for at least a year and worked at least 1,250 hours in the previous 12-month period. (Gov. Code § 12945.2.)
- 5) Provides that it is an unlawful employment practice for an employer to refuse to grant a request by an employee to take up to five days of reproductive loss leave following a reproductive loss event, as defined. Provides that it is an unlawful employment practice to retaliate against an employee for exercising their right to reproductive loss leave, as specified, and to interfere with, restrain, or deny the

exercise of any right under its provisions. Provides that a covered employee is one who has been employed by the employer for at least 30 days prior to the commencement of the leave, and specifies that a covered employer is one who employs five or more employees, or is the state or any political or civil subdivision. (Gov. Code § 12945.6.)

- 6) Provides that it is an unlawful employment practice for an employer to refuse to grant an employee's request for up to five days of bereavement leave following the death of a family member. Applies these provisions to an employee who has worked for their employer for at least 30 days prior to the commencement of the leave, and to employers with five or more employees, and the state or any political or civil subdivision. (Gov. Code § 12945.7.)
- 7) Requires CRD to create a small employer family leave mediation pilot program for employers with between five and 19 employees. Provides that CRD must notify an employee seeking an immediate right-to-sue letter for an alleged violation of CFRA or bereavement leave of the mediation program, and that CRD must notify all named respondents of the alleged violation and the mediation program. Specifies that, if either the employer or the employee requests mediation within 30 days of receiving notice from CRD of the alleged violations, the employee may not pursue a civil action until mediation is deemed complete or unsuccessful, as specified. Specifies that CRD must initiate mediation within 60 days of receipt of a request to mediate or receipt of the notification to respondents, whichever is later. (Gov. Code § 12945.21.)
- 8) Specifies that mediation is deemed complete when: neither the employee nor the employer requests mediation within 30 days of receipt of notification from CRD of the claims, or both parties agree not to mediate; the employer fails to respond to the notification or mediation request within 30 days of receipt of the notification; CRD fails to initiate mediation within 60 days of its receipt of the request for mediation or the receipt of notification; or if CRD notifies the parties that it has determined that further mediation would be fruitless, both parties agree further mediation would be fruitless, one of the parties fails to submit information requested by the other party that is reasonably necessary or fair for the other party to obtain, or the mediator determines that the core facts of the employee's complaint are not related to CFRA or bereavement leave. (Gov. Code § 12945.21(d).)
- 9) Specifies that mediation is unsuccessful when the claim is not resolved within 30 days of CRD's initiation of mediation, unless CRD notifies both parties that it has determined that more time is needed for the mediation to be successful. (Gov. Code § 12945.21(d)(2).)

This bill:

- 1) Extends the small employer family leave mediation program to disputes under the reproductive loss leave provision of Government Code Section 12945.6.
- 2) Provides that one additional basis for mediation to be deemed complete is when the mediator determines that the employer has fewer than 5 employees, or more than 19. Specifies that this basis shall not apply when the parties disagree about whether the employer has between 5 and 19 employees, and the mediator is unable to determine that the employer has between 5 and 19 employees.
- 3) Eliminates the small employer family leave mediation pilot program's sunset provisions to make the program permanent.

### COMMENTS

#### 1. Author's statement

According to the author:

The Small Employer Family Leave Mediation [program] protects small businesses while maintaining labor rights. AB 2011 permanently establishes the program and provides an ongoing resource for small businesses and employees. This program has been a proven meaningful resource for successfully mediating discrepancies between small businesses and their employees. This project has paid respective complainants \$688,250 in total for successful settlements.

#### 2. The California Family Rights Act

In 1993, the California Legislature enacted the California Family Rights Act (CFRA, also known as the Moore-Brown-Roberti Family Rights Act). (SB 193 (Marks), Ch. 580, Stats. 1993.) The CFRA was meant to ensure that Californians do not have to choose between their jobs and helping and attending to ill family members by providing job security when they must take leave for urgent family matters. It provides 12 weeks of guaranteed unpaid leave for an employee in any 12-month period for bonding with a new child, attending to their own serious medical needs, or for caring for a close relative with a serious medical condition. (Gov. Code § 12945.2.) During any of this leave, the employee is guaranteed to be able to return to their job, and their employer cannot fire them for taking the protected leave under CFRA. However, CFRA limited its applicability to only certain employees and employers. To be eligible, an employee must have held their job for at least a year, and must have worked at least 1,250 hours for the employer in the previous 12 months. (Gov. Code § 12945.2(a).) Originally, CFRA also limited its applicability to private employers with 50 or more employees. (AB 77 (Moore), Ch. 462, Stats. 1991.) A violation of CFRA's provisions is enforced through the

Civil Rights Department (CRD), with an aggrieved employee able to bring a lawsuit independently against their employer if given a “right to sue” letter by CRD.

CFRA is part of a constellation of state and federal programs that allow for an employee to take various types and amounts of leave. Federally, the Family Medical Leave Act (FMLA) also provides most employees the right to take up to 12 weeks of job-protected, unpaid time off work for the birth or adoption of a child, for a serious health condition of the employee, for an exigency arising out of the fact that the employee’s close relative is a military member on active duty, and for the employee to care for a close relative with a serious health condition. (28 U.S.C. § 2601 et seq.) FMLA’s leave provisions only apply to private employers that employ 50 or more employees during each of 20 or more calendar workweeks in the current or preceding year. (28 U.S.C. § 2611.) FMLA and CFRA leaves may be required to be taken concurrently in certain circumstances.

In addition to CFRA leave, California provides a variety of other types of protected leave. When a Californian is disabled by pregnancy, childbirth, or a related medical condition, they also are allowed to take up to four months of job-protected Pregnancy Disability Leave (PDL). (Gov. Code § 12945.) Under AB 1949, enacted by the Legislature in 2022, an employee who has worked at least 30 days for an employer with five or more employees is entitled to up to five days of bereavement leave upon the death of a family member within three months of the family member’s death. (AB 1949 (Low), Ch. 767, Stats. 2022.) In 2023, the Legislature additionally enacted AB 848 (Rubio, Ch. 724, Stats. 2023), which provides up to five days of job-protected reproductive loss leave for when the employee experiences a failed adoption, a failed surrogacy, miscarriage, stillbirth, or unsuccessful assisted reproduction. (Gov. Code § 12945.6.) AB 848’s reproductive loss leave applies to an employee who has been employed for at least 30 days by an employer with five or more employees. (*Id.*)

### 3. The 2020 expansion of CFRA and the creation of the small employer family leave mediation pilot program

In 2020, the Legislature expanded CFRA’s applicability from employers with 50 employees to those with 5 or more. (SB 1383 (Jackson), Ch. 86, Stats. 2020.) At the same time that the California Legislature passed SB 1383 to expand CFRA protections to more small businesses, the Legislature included in budget trailer bill AB 1867 the creation of the small employer family leave mediation pilot program to minimize the risk of costly litigation to small businesses posed by CFRA’s expansion. (AB 1867 (Committee on Budget), Ch. 45, Stats. 2020.) The small employer family leave mediation pilot program applies to employers with between 5 and 19 employees, and requires that mediation be completed before an employee may sue their employer over a violation of CFRA or bereavement leave. (Gov. Code § 12945.21.)

Under the small employer family leave mediation pilot program, either employer or the employee may request mediation through CRD within 30 days of receiving notice from

CRD of the alleged violation and requirement for mediation. (*Id.*) CRD must initiate mediation within 60 days of receiving a request for mediation, and an employee is prohibited from pursuing any civil action unless mediation is not initiated, or the mediation is complete or deemed unsuccessful. Mediation is deemed complete when: neither the employee nor the employer requests mediation within 30 days of receipt of the required notice, or the parties agree not to enter into mediation; the employer fails to respond to a notification or mediation request within 30 days of receipt; CRD fails to initiate mediation within 60 days; or CRD notifies the parties that it has determined that further mediation would be fruitless, the parties agree that further mediation would be fruitless, or one of the parties failed to submit reasonably necessary information requested by the other party. (Gov. Code § 12945.21(d)(1).) Mediation is also considered complete when the mediator determines that the core facts of the employee's complaint are unrelated to CFRA or bereavement leave. Mediation is considered unsuccessful when the claim is not resolved within 30 days of CRD's initiation of mediation, unless CRD has notified the parties that more time is needed for the mediation to be successful. (Gov. Code § 12945.21(d)(2).)

The small employer family leave mediation pilot program also included a number of provisions meant to ensure that employees could still pursue claims if mediation fails, and to help ensure that unrelated claims otherwise not subject to mediation are not dragged into mediation. It specifies that the statute of limitations for any claim under CFRA or the bereavement leave provisions, as well as related claims not under those sections, are tolled until mediation is complete or deemed unsuccessful. (Gov. Code § 12945.21(c)(1).) It also specifies that, if a request by an employee for an immediate right to sue includes other violations of the provisions on prohibited discrimination, the mediation process shall only apply to the claim alleging a violation of CFRA or bereavement leave, though it also specifies that it does not prohibit the parties from voluntarily choosing to mediate all alleged violations.<sup>1</sup> (Gov. Code § 12945.21(f).)

When the small employer family leave mediation pilot program was initially created, it was envisioned as a pilot program, and given a sunset date of January 1, 2024. (AB 1867 (Budget), Ch. 87, Stats. 2020.) In 2023, AB 1756 extended its sunset to January 1, 2025. (AB 1756 (Judiciary), Ch. 478, Stats. 2023.)

4. AB 2011 indefinitely extends the small employer family leave mediation program, and expands its reach to reproductive loss leave

AB 2011 eliminates the sunset provisions originally placed in the small employer family leave mediation pilot program, such that it becomes permanent. In addition, AB 2011

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<sup>1</sup> This last provision and the late amendments that created it were the source of late opposition to AB 1033 from employee and disability rights groups. Their concerns were mainly that the provision would create a system where employees are required to bring their other, non-CFRA claims into mediation, or give up their CFRA and bereavement leave claims altogether, as engaging in mediation on only one claim otherwise would be impractical, frustrating, and ineffective.

expands the scope of the program to apply to reproductive loss leave as well as the already-covered CFRA and bereavement leave. The author argues that the small employer family leave mediation pilot program has been a proven meaningful resource for successfully mediating disputes in support for its permanent extension. The author asserts that, since the program's inception in 2021, there have been 55 complaints referred to the program, 31 of which were mediated. They also highlight that 17 of these complaints were successfully settled, resulting in total settlement amounts of \$688,250 for employees.

In addition to these changes, AB 2011 makes a minor change to when mediation is deemed complete. It reworks part of the current provisions, and adds a provision that provides that mediation is deemed complete when the mediator determines that the employer has fewer than 5, or more than 19, employees, such that they do not qualify for the mediation program. This new provision exempts from this provision for when mediation is deemed complete the instance where the parties disagree about whether the employer has between 5 and 19 employees, and the mediator is unable to determine the employer's number of employees.

The small employer family leave mediation pilot program was created to help smaller businesses navigate and mitigate potential costs from the expansion of CFRA and bereavement leave to smaller employers. The mediation program was designed as a tool for resolving CFRA and bereavement leave claims without the cost of litigation. The argument for the creation of such a cost-saving measure was that smaller employers do not have the resources or funds to defend themselves in court for their violations of the law.

## 5. Arguments in support

According to the California Chamber of Commerce, which is the sponsor of AB 2011:

In 2020, SB 1383 (Jackson) expanded the family leave requirements under the California Family Rights Act (CFRA). Beginning January 1, 2021, CFRA went from applying to employers with 50 or more employees to small employers with just 5 or more employees. SB 1383 also expanded the family members for which an employee could take leave under CFRA to provide care.

The regulations governing CFRA are lengthy and complex. Small employers do not have the means to hire human resources professionals or counsel to advise them on the details. The private right of action in CFRA means any mistake exposes small businesses to lawsuits that could quickly put them out of business.

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")<sup>1</sup> to establish a small employer mediation pilot program. All family

leave claims brought against small employers with five to nineteen employees could be sent to mediation, instead of directly to court. In 2021, AB 1033 (Bauer-Kahan) improved the processes within the program and AB 1949 (Low) added bereavement leave to the scope of the program. The program is set to sunset on January 1, 2025.

Since its inception, the program has been successful. More than half of the mediated cases have resulted in settlement with hundreds of thousands of dollars going directly to workers. We believe this mediation option has been an important way to protect small businesses while maintaining labor rights. The Legislature should make this program permanent and expand its scope to include reproductive loss leave, which is a new leave requirement that also applies to small businesses.

### SUPPORT

California Chamber of Commerce (sponsor)  
Associated General Contractors of California  
Associated General Contractors, San Diego Chapter  
California Apartment Association  
California Association of Winegrape Growers  
California Attractions and Parks Association  
California Beer & Beverage Distributors  
California Credit Union League  
California Farm Bureau  
California Fuels and Convenience Alliance  
California Landscape Contractors Association  
California Lodging Industry Association  
California Manufactures and Technology Association (CMTA)  
California Restaurant Association  
California Self Storage Association  
California Special Districts Association  
California State Council of the Society for Human Resource Management (CalSHRM)  
California Trucking Association  
Coalition of Small and Disabled Veteran Businesses  
Danville Area Chamber of Commerce  
El Dorado County Chamber of Commerce  
El Dorado Hills Chamber of Commerce  
Elk Grove Chamber of Commerce  
Family Business Association of California  
Family Winemakers of California  
Folsom Chamber of Commerce  
Flasher Barricade Association  
Fremont Chamber of Commerce

Garden Grove Chamber of Commerce  
Greater Riverside Chambers of Commerce  
Independent Lodging Industry Association  
Lincoln Area Chamber of Commerce  
Los Angeles Area Chamber of Commerce  
Oceanside Chamber of Commerce  
Rancho Cordova Chamber of Commerce  
Redondo Beach Chamber of Commerce  
Rocklin Chamber of Commerce  
San Marcos Chamber of Commerce  
San Pedro Chamber of Commerce  
Santee Chamber of Commerce  
Shingle Springs/Cameron Park Chamber of Commerce  
South Bay Association of Chambers of Commerce  
Torrance Area Chamber of Commerce  
United Chamber Advocacy Network (UCAN)  
Valley Industry & Commerce Association  
Western Carwash Association  
Western Electrical Contractors Association (WECA)  
Women Lawyers of Sacramento  
Yorba Linda Chamber of Commerce  
Yuba Sutter Chamber of Commerce

### **OPPOSITION**

None received

### **RELATED LEGISLATION**

Pending Legislation: None known.

Prior Legislation:

AB 848 (Rubio, Ch. 724, Stats. 2023) created reproductive loss leave to provide up to five days of job-protected reproductive loss leave for when an employee experiences a failed adoption, a failed surrogacy, miscarriage, stillbirth, or unsuccessful assisted reproduction. The bill also applied reproductive loss leave to an employee who has been employed for at least 30 days by an employer with five or more employees.

AB 1756 (Judiciary, Ch. 478, Stats. 2023) extended the sunset for the small employer family leave mediation pilot program from January 1, 2024 to January 1, 2025, among a variety of other changes to different provisions of unrelated law.

AB 1949 (Low, Ch. 767, Stats. 2022) established that an employee who has worked at least 30 days for an employer with five or more employees is entitled to up to five days of bereavement leave within three months of the family member's death, upon the death of a family member.

AB 1033 (Bauer-Kahan, Ch. 327, Stats. 2021) expanded CFRA to cover care for a parent-in-law, and reworked the small employer family leave mediation pilot program to require CRD notify employers of an employee's claim and an employer's right to request mediation under the pilot program.

AB 1867 (Budget, Ch. 87, Stats. 2020) created the small employer family leave mediation pilot program requiring parties to engage in CRD-run mediation of claims of CFRA and bereavement leave violations, if requested by one of the parties, among other unrelated changes to other provisions of law. Established a January 1, 2024 sunset date to the pilot program.

AB 1383 (Jackson, Ch. 86, Stats. 2020) expanded CFRA's applicability from employers with 50 employees to those with 5 or more.

**PRIOR VOTES:**

Assembly Floor (Ayes 72, Noes 0)

Assembly Appropriations Committee (Ayes 14, Noes 0)

Assembly Judiciary Committee (Ayes 12, Noes 0)

Assembly Labor and Employment Committee (Ayes 7, Noes 0)

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