

Date of Hearing: May 3, 2022

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 2182 (Wicks) – As Amended April 27, 2022

SUBJECT: DISCRIMINATION: FAMILY RESPONSIBILITIES

KEY ISSUES:

- 1) SHOULD THE PROTECTED CHARACTERISTICS LISTED IN THE EMPLOYMENT DISCRIMINATION PROVISIONS OF THE FAIR EMPLOYMENT AND HOUSING ACT BE EXPANDED TO INCLUDE “FAMILY RESPONSIBILITY,” AS DEFINED?
- 2) SHOULD AN EMPLOYER MAKE ACCOMMODATIONS FOR AN EMPLOYEE WHO HAS FAMILY OBLIGATIONS ARISING FROM A SCHOOL OR CARE FACILITY CLOSING, SO LONG AS SUCH ACCOMMODATION DOES NOT CREATE A DEMONSTRATED UNDUE BURDEN ON THE EMPLOYER?

SYNOPSIS

The Fair Employment and Housing Act (FEHA), among other things, prohibits employment discrimination on the basis of a number of “protected characteristics,” including race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. This bill would expand this list of protected characteristics to include “family responsibilities,” which is defined to mean an obligation to provide ongoing care to a minor child or “care recipient,” defined as a person’s family or household member who relies upon the employee for medical care or to meet the needs of daily living. By adding this provision, an employee would have a cause of action against an employer who discriminated against the employee, or took any adverse employment action, because of the employee’s family responsibilities.

Existing FEHA regulations require an employer to make “reasonable accommodations” for an applicant or employee with a known physical or mental disability, so long as the accommodation does not impose an undue burden on the employer. This bill would similarly require an employer to make an effective accommodation for an employee’s obligations arising from an unforeseen need to care for a minor child or care recipient whose school or place of care is closed or otherwise unavailable. Consistent with existing law, the employer would only be required to do so if the accommodation would not impose an undue burden on the employer. This bill is supported by many labor, civil rights, and women’s organizations; it is opposed by the California Chamber of Commerce and a broad coalition of business and employer groups. The bill recently passed out of the Assembly Labor & Employment Committee on a 4-2 vote.

SUMMARY: Expands the list of protected characteristics, for purposes of defining unlawful employment discrimination under the Fair Employment and Housing Act (FEHA), to include “family responsibilities,” and makes corresponding changes, as specified. Specifically, **this bill:**

- 1) Expands the list of protected characteristics in the employment discrimination provisions of FEHA to include “family responsibility.”

- 2) Defines the following for the purpose of this bill:
 - a) “Family responsibilities” means the obligations of an employee or applicant to provide care for a minor child or care recipient;
 - b) “Care recipient” means a family member or household member of an employee or applicant who relies on the employee or applicant for medical care or for assistance with activities of daily living; and
 - c) “Family member” means a spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or any other individual related by blood or whose close association with the employee or applicant is the equivalent of a family relationship.
- 3) Makes it an unlawful employment practice for an employer, when an employer becomes aware of a need for an accommodation due to obligations arising from a need to care for a minor child or care recipient because of an unforeseen closure or unforeseen unavailability of a minor child’s or care recipient’s school or care provider to fail to provide an effective accommodation for the employee’s caregiving obligations, unless it would impose an undue hardship on the employer. Provides a non-exhaustive list of potentially effective accommodations.
- 4) Makes it an unlawful employment practice for an employer to retaliate or otherwise discriminate against a person for requesting accommodation pursuant to 3), regardless of whether the request was granted.

EXISTING LAW:

- 1) Makes it an unlawful employment practice, under FEHA, for an employer to refuse to hire, discharge from employment, or otherwise discriminate against a person in compensation or in the terms, conditions, or privileges of employment, on account of that person’s race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status. (Government Code Section 12940 (a).)
- 2) Makes it an unlawful employment practice, under FEHA, for any employer to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee, or to fail to engage in a timely, good faith, interactive process with the employee or the applicant to determine effective reasonable accommodations, if any, in response to a request for a reasonable accommodation by an employee or applicant. Specifies, however, that nothing in these provisions shall require an accommodation that the employer demonstrates would work an undue hardship, as defined. (Government Code Section 12940 (m), (n), (u).)
- 3) Makes it unlawful, under the California Family Rights Act, for an employer to refuse to grant a request by an employee with more than 12 months service to take up to 12 weeks of paid or unpaid leave in any 12-month period for family care and medical leave, as defined. (Government Code Section 12945.2.)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: According to the author, all employees, but women in particular, experience conflicts between family responsibilities on the one hand, and job responsibilities on the other. The author notes that, “women disproportionately take on caregiving responsibilities. We are seeing more women putting their careers on the backburner, in order to care for their families throughout the pandemic.” Not surprisingly, the U.S. Bureau of Labor Statistics recently reported that 80 percent of the nearly 1.1 million workers who dropped out of the labor force in September of 2020 were women. As such, the author believes, “California must create a workplace that allows women to regain and maintain employment long after the pandemic. [AB 2182] prohibits discrimination against employees based on their family responsibilities, ensuring job security while tending to their family’s needs.”

What this bill does and does not do, as proposed to be amended. In order to better protect employees with family responsibilities from workplace discrimination based on these responsibilities, this bill does two things. First, it adds “family responsibilities” to the list of “protected characteristics” in the employment provisions of FEHA. Existing protected characteristics include race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. In short, this bill would make it unlawful to refuse to hire, terminate, or take other adverse actions against an employee because of the employee’s family responsibilities. The bill defines “family responsibilities” to mean the obligations of an employee “to provide direct and ongoing care for a minor child or a care recipient.” A “care recipient” is, in turn, defined to mean a person who both (1) is a family member or a person who resides in the employee’s household, and (2) relies on the employee for medical care or to meet the needs of daily living. In sum, by making “family responsibilities” a protected characteristic under FEHA, the bill would allow a person who suffered an adverse action – and where the employee’s families responsibilities was a substantial factor in the adverse action – to file a discrimination claim, and possibly a civil action, against the employer.

Second, this bill would require employers, once they are aware of an employee’s qualifying unforeseen circumstance, to provide an effective accommodation unless it would impose an undue burden on the employer. For example: an employee receives a call in the middle of their work day informing them that their child’s day care center has had to close due to a COVID outbreak. After alerting their employer, that employee would be entitled to an accommodation that would allow them to address their *unexpected or unforeseen* child or other care recipient need. The employer, as the bill makes clear, would only be obligated to provide such an accommodation so long as it *does not create an undue hardship*. In light of some of the concerns raised by the opposition, it is critical to stress the narrowness of the reasonable accommodation provision. It does not apply to *any* need to care for a minor child or care recipient; it only requires the employer to make an effective accommodation in limited circumstances: where the obligation arises because the child’s school or the care recipient’s place of care is closed or otherwise unavailable *and* when it does not cause an undue burden on the employer. Needless to say, the burden placed on parents and caretakers when schools and care facilities unexpectedly close has become quite obvious during the COVID pandemic. However, even in the absence of a pandemic, school and care facilities may unexpectedly close for any number of reasons, and it seems reasonable for employees to request time off to address these issues, without fear of losing their job or facing some other adverse action.

It is also important to note that the accommodation provision in this bill does not require an employer to make accommodations for expected or *permanent* conditions. For example, a person who is hired to work a nine-to-five shift could not expect to be allowed to leave each day at 3:00 pm because their child's school, or an adult family member's care facility closes at 3:30 pm. The bill would require an accommodation only for *unforeseen or unexpected* closure or unavailability of a care provider. Because the incidents covered by the bill are temporary in nature, employers would not be required to provide any form of ongoing or permanent accommodation to an employee's regular schedule. Stated differently, a more permanent change, such as a long-term closure, would, after a certain point, no longer be unforeseen and would therefore fall outside the scope of this bill.

The California Chamber of Commerce and its broad coalition also claim that “even if the employee did not request time off as an accommodation and simply took time off, whenever they wanted, scheduled or unscheduled, the employer could not discipline or terminate the employee for the time off without facing potential litigation under FEHA for discrimination based on family responsibilities.” This is simply not true. Under existing law, and reinforced by the language of this bill, an employer is only required to provide an effective accommodation, subject to the limitations identified previously, once they are aware of an employee's qualifying condition. Therefore, an employee who “simply took time off” without alerting their employer to the underlying need or requesting an accommodation would arguably not be protected under the bill's provisions. The Chamber further asserts that under this bill, “if [...] schools close again due to COVID-19 surges, all working parents would likely be entitled to unlimited time off or daily schedule changes.” This, like the previous claim, is unsupported. The bill only requires the employer to make an effective accommodation to the extent that it would not impose an “undue burden” on the employer. Requiring an employer to grant any employee with a minor child “unlimited time off or daily schedule changes” would most certainly impose an undue burden on the employer. Finally, the Chamber points to the use of “unforeseen” as a vague term that would result in “any denial of time off as an accommodation [exposing] the employer to costly litigation.” The Committee believes the use of the terms “unforeseen” and “unexpected” are sufficiently clear based on their general definition – something that is not anticipated or predicted.

Comparing AB 2182 to AB 1119 (Wicks, 2021). The author presented AB 1119 to this Committee last year, which was substantively similar to the current AB 2182. However, both the coalition of opposition as well as the previous Committee identified a concern with this year's iteration regarding the feasibility of engaging in the interactive process for the situations considered by this bill. The interactive process can be, but is not always, an extensive dialogue between the employer and employee designed to identify an accommodation to an employee's work environment in order to allow them to complete their duties while managing any number of medical or personal conditions. The immediate and temporary nature of the situations contemplated by this bill, however, would foreclose much of the back and forth typical of the interactive process. An employee whose child needed to be cared for due to a sudden closure of their daycare provider would not benefit from a lengthy back and forth with their employer.

The most recent set of amendments appear to address this concern. Rather than adding a new circumstance for which an employee may engage in the same interactive process to identify a reasonable accommodation, the author has created a new section dedicated to the right of an employee to be accommodated in the event of an unforeseen or unexpected lack of childcare or care provider. Further, the bill identifies a non-exhaustive list of potential accommodations, such

as allowing for remote work, exchanging shifts with another employee, or allowing the employee to use accrued paid time off. Acknowledging the difference between the situations contemplated by this bill from the conditions addressed by existing reasonable accommodations and interactive process procedures, these amendments mirror existing reasonable accommodation structures, but propose a viable alternative to fit the “unforeseen or unexpected” nature of the requests, and further clarify the scope of the bill. Further, the amendments provide a reasonable set of examples for effective accommodations. It is difficult to imagine how the new requirements imposed by this bill, as tempered as they are by the requirement that they are only available for unforeseen circumstances and only so long as they do not create an undue burden on the employer, will cause the extreme hardship the opposition seems to suggest they will create. On the contrary, it appears reasonable, particularly in light of the past two years’ worth of challenges faced by families throughout the state, to offer accommodations as narrowly tailored as those suggested by the bill that would allow workers to care for their families in these limited situations.

Existing Laws Protecting Employees with Family Obligations. As the Chamber of Commerce correctly notes in its letter of opposition, existing law does indeed give employees other rights to care for family members. Most notably, the California Family Rights Act (CFRA), which is part of FEHA, allows eligible employees to take 12-weeks of paid or unpaid job-protected leave, during any 12-month period, for the birth of a child or to care for an immediate family member with a serious health condition. (Government Code Section 12945.2.) Provisions of the Labor Code also permit employees to take time off, without facing an adverse action, in other contexts as well. For example, Labor Code Sections 230 and 230.1 prohibit employers from discharging, discriminating, or retaliating against an employee who is a victim of domestic violence, sexual assault, or stalking, and who needs to take time off to obtain legal relief or to ensure health or safety of themselves or a child. Labor Code 230.8 requires an employer who employs twenty-five or more employees to allow an employee, who is a parent of a minor child, to take up to forty hours of unpaid leave each year for certain child-related activities, including to address a child care or school emergency, so long as the employee provides reasonable notice to the employer. Arguably, Labor Code Section 230.8 may overlap in some circumstances – such as emergency school closings – but the provision in this bill also extends to care facilities for adult family members. Overall, however, the accommodation provided by this bill seems consistent with existing laws that allow employees to take time off to address unforeseen personal and family matters.

ARGUMENTS IN SUPPORT: This bill is co-sponsored by the California Employment Lawyers Association (CELA), Equal Rights Advocates (ERA), and Legal Aid at Work. The co-sponsors support this bill because it will “prohibit discrimination against employees based on their family responsibilities and would provide workers with reasonable accommodations for obligations arising from needing to care for a minor child or care recipient due to the unforeseen closure or unavailability of a school or care provider.” The co-sponsors cite U.S. Department of Labor data showing that in about 60% of two-parent households with minor children, both parents work. Another one-in-six Americans working full- or part-time also must care for an elderly or disabled family member. The co-sponsors contend that as more people face these obligations, as employers become more aware of them, and as job markets tighten, the risk that persons with family responsibilities will face employment discrimination, or even termination, becomes greater. The co-sponsors conclude that, “AB 2182 addresses family responsibilities discrimination by simply prohibiting the disparate treatment of employees because of their family responsibilities. In other words, the bill prohibits employers from treating a worker

adversely based on assumptions or stereotypes associated with their family responsibilities. Specifically, the bill would add “family responsibilities” to the list of protected characteristics (e.g., race, sexual orientation, marital status, religion, etc.) that are already prohibited bases of discrimination under the employment provisions of the Fair Employment and Housing Act (FEHA).”

The co-sponsors also stress the importance of the provision of this bill requiring “reasonable accommodations” when obligations arise from an unforeseen need to care for a minor child or care recipient whose school or place of care is closed or otherwise unavailable. The co-sponsors write that this bill “will also help provide support for working parents who are managing child care responsibilities because of school or care facility closures. With pandemic-related school and day care closures, more working parents are juggling child care duties while they work.” In short, this bill will allow employees to meet important family responsibilities without sacrificing economic security.

ARGUMENTS IN OPPOSITION: The California Chamber of Commerce, writing on behalf of a broad coalition of business and employer groups, contend that creating a new protected class of employees with “family responsibilities” will allow the large number of employees who fall within that category a basis for challenging any adverse employment action. The Chamber contends that AB 2182 also “imposes a burdensome new accommodation requirement on small businesses to provide employees with time off any time school or a care center is unavailable.” The Chamber also notes that because FEHA applies to employers with five or more employees and includes a costly private right of action, it will “result in a significant burden for businesses, especially small businesses.”

In addition to these more general concerns, the Chamber points to a number of more specific issues, including the lack of any “cap” on the protected leave requirement; and the relationship between these new requirements and existing employer duties to provide unpaid sick leave under the California Family Rights Act (CFRA), the Family Medical Leave Act, and other statutes that guarantee time off to attend to school matters or care for victims of domestic violence, stalking, and sexual abuse. The Chamber contends that small employers, in particular, cannot afford, at this time, any additional “costly mandates” and expensive litigation.

Recent similar or related legislation. AB 1119 (Wicks, 2021) was substantively similar to this bill. It died on the Assembly Appropriations Suspense file.

AB 1041 (Wicks, 2021) would have, for purposes of the CFRA, expanded the persons that may be cared for by an employee to include an individual related by blood or whose close association with the employee is the equivalent of a family relationship. That bill died on the Senate Floor.

REGISTERED SUPPORT / OPPOSITION:

Support

California Employment Lawyers Association (co-sponsor)
Equal Rights Advocates (co-sponsor)
Legal Aid at Work (co-sponsor)
Access Reproductive Justice
ACLU California Action
Association of California Caregiver Resource Centers

BreastfeedLA
Business & Professional Women of Nevada County
California Alliance for Retired Americans
California Breastfeeding Coalition
California Catholic Conference
California Immigrant Policy Center
California Labor Federation
California Latinas for Reproductive Justice
California Partnership to End Domestic Violence
California Teachers Association
California WIC Association
California Women Lawyers
California Women's Law Center
California Work & Family Coalition
Child Care Law Center
Citizens for Choice
Courage California
Friends Committee on Legislation of California
Girls Republic
Human Impact Partners
Jewish Center for Justice
LA Alliance for A New Economy
LA Best Babies Network
NARAL Pro-Choice California
National Association of Social Workers, California Chapter
National Council of Jewish Women Los Angeles
National Council of Jewish Women-California
Orange County Equality Coalition
Prevention Institute
Public Counsel
ROC CA
Stronger California Advocates Network
Women Lawyers of Sacramento
Women's Foundation California
Worksafe

Opposition

Associated General Contractors
Auto Care Association
Brea Chamber of Commerce
California Apartment Association
California Association of Joint Powers Authority
California Association of Winegrape Growers
California Beer and Beverage Distributors
California Building Industry Association
California Chamber of Commerce
California Farm Bureau
California Food Producers

California Grocers Association
California Hospital Association
California Landscape Contractors Association
California Manufacturers and Technology Association
California New Car Dealers Association
California Railroads
California Restaurant Association
California Retailers Association
California State Council of the Society for Human Resource Management (CALSHRM)
Carlsbad Chamber of Commerce
CAWA – Representing the Automotive Parts Industry
Civil Justice Association of California
Construction Employers' Association
Corona Chamber of Commerce
Danville Area Chamber of Commerce
El Dorado Hills Chamber of Commerce
Encinitas Chamber of Commerce
Family Business Association of California
Family Winemakers of California
Folsom Chamber of Commerce
Fountain Valley Chamber of Commerce
Fremont Chamber of Commerce
Fresno Chamber of Commerce
Garden Grover Chamber of Commerce
Gilroy Chamber of Commerce
Greater Bakersfield Chamber of Commerce
Greater Coachella Valley Chamber of Commerce
Greater Conejo Valley Chamber of Commerce
Greater High Desert Chamber of Commerce
Greater Riverside Chamber of Commerce
Housing Contractors of California
Imperial Valley Regional Chamber of Commerce
Kern County Hispanic Chamber of Commerce
La Canada Flintridge Chamber of Commerce
Laguna Niguel Chamber of Commerce
Lodi Chamber of Commerce
Long Beach Area Chamber of Commerce
Los Angeles Area Chamber of Commerce
Mission Viejo Chamber of Commerce
Murrieta Wildomar Chamber of Commerce
National Federation of Independent Business
Newport Beach Chamber of Commerce
North Orange County Chamber
North San Diego Chamber of Commerce
Oceanside Chamber of Commerce
Official Police Garages of Los Angeles
Orange County Business Council
Pleasanton Chamber of Commerce
Plumbing-Heating-Cooling Contractors Association of California

Public Risk Innovation, Solutions, and Management (PRISM)
Rancho Cordova Area Chamber of Commerce
Redondo Beach Chamber of Commerce
San Gabriel Valley Economic Partnership
Santa Ana Chamber of Commerce
Santa Maria Valley Chamber of Commerce
Santa Rosa Metro Chamber of Commerce
Simi Valley Chamber of Commerce
South Bay Association of Chambers of Commerce
Southwest California Legislative Council
Torrance Area Chamber of Commerce
Tulare Chamber of Commerce
West Ventura County Business Alliance
Western Car Wash Association
Wilmington Chamber of Commerce
Wine Institute

Analysis Prepared by: Manuela Boucher-de la Cadena / JUD. / (916) 319-2334