

Date of Hearing: March 21, 2023

ASSEMBLY COMMITTEE ON JUDICIARY
Brian Maienschein, Chair
AB 524 (Wicks) – As Amended March 15, 2023

SUBJECT: DISCRIMINATION: FAMILY CAREGIVER STATUS

KEY ISSUE: SHOULD THE PROTECTED CHARACTERISTICS LISTED IN THE EMPLOYMENT DISCRIMINATION PROVISIONS OF THE FAIR EMPLOYMENT AND HOUSING ACT BE EXPANDED TO INCLUDE “FAMILY CAREGIVER STATUS,” AS DEFINED?

SYNOPSIS

Balancing the demands of a career or work schedule against family or caregiving responsibilities is a story dating back decades, and one that has proven particularly inhibiting to women and caregivers in the work force. On the one hand, the modern cost of living no longer allows for most two-parent families to have only one parent in the workforce while the other cares for children or other family members. On the other, the ever-increasing cost of child care or the demands of caring for an elderly parent or other family member often forces parents to make difficult decisions regarding their work schedules. Individuals faced with additional caregiving obligations may often face discrimination in the workplace, including in hiring, scheduling, or termination decisions.

In order to provide more robust protection to employees who serve as caregivers from workplace discrimination based on these responsibilities, this bill adds “family caregiver status” to the list of “protected characteristics” in the employment provisions of FEHA. 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 caregiver status.

This bill is sponsored by the California Employment Lawyers’ Association (CELA), Equal Rights Advocates (ERA), The California Work and Family Coalition, and Legal Aid at Work. It is supported by a large coalition of workers’ rights and various other advocacy groups. The bill is opposed by the California Chamber of Commerce. Should this bill be approved by this Committee, it would be referred to the Assembly Committee on Labor and Employment.

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 caregiver status.” Specifically, **this bill:**

- 1) Expands the list of protected characteristics in the employment discrimination provisions of the Fair Employment and Housing Act (FEHA) to include “family caregiver status.”
- 2) Defines “family caregiver status” to mean a person who contributes to the care of one or more family members.
- 3) Defines “family member” to mean a spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or any other individual related by blood or whose association with the employee is the equivalent of a family relationship.

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, reproductive health decisionmaking, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status. (Government Code Section 12940 (a).)
- 2) Makes it unlawful, under the California Family Rights Act, for an employer to refuse to grant a request by an employer 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 fiscal.

COMMENTS: Balancing the demands of a career or work schedule against family or caregiving responsibilities is a story dating back decades, and one that has proven particularly inhibiting to women and caregivers in the work force. On the one hand, the modern cost of living no longer allows for most two-parent families to have only one parent in the workforce while the other cares for children or other family members. On the other, the ever-increasing cost of child care or the demands of caring for an elderly parent or other family member often forces parents to make difficult decisions regarding their work schedules. Both of these scenarios assume several conveniences. First, that there are at least two able-bodied adults who are able to maintain at least part-time employment. Second, that either adult has any flexibility within their work schedule to be able to accommodate other caregiving obligations. The reality is that such luck and flexibility is hard to come by, and has been made even more difficult since the onset of the pandemic.

According to a 2021 report from the Bureau of Labor Statistics, 62.3% of married-couple families saw both parents employed. However, broken down between mothers and fathers with children under 18, 2021 saw 92.5% of fathers participate in the work force, while only 71.2% of mothers did. (*Employment Characteristics of Families – 2021*, Bureau of Labor Statistics (April 20, 2022) at p. 2, available at <https://www.bls.gov/news.release/pdf/famee.pdf> at p. 2.) Further, mothers of children under 6 years old participated in the workforce at a rate of only 65.6%, compared to 93.9% for fathers. These numbers reflect the general trend of women assuming child care responsibilities over fathers. The pandemic further deepened the divide between working parents, exacerbated already challenging realities for women in the workforce, and highlighted the inequitable division of labor many women face. The U.S. Bureau of Labor Statistics also reported that “the employment situation deteriorated considerably more for women than for men during the early part of the pandemic,” demonstrating the particularly acute effect that a lack of childcare sources such as in-person schooling rendered. (*Unemployment rises in 2020, as the country battles the COVID-19 pandemic*, Monthly Labor Review, Bureau of Labor Statistics (June 2021) available at <https://www.bls.gov/opub/mlr/2021/article/unemployment-rises-in-2020-as-the-country-battles-the-covid-19-pandemic.htm>.)

The issue extends beyond those who have to provide care to young children. Approximately 20% of Californians reported serving as a caregiver to an adult friend or family member. (*Caregiving for Friends and Family – A Public Health Issue*, The Centers for Disease Control and Prevention

(July 30, 2019) available at <https://www.cdc.gov/aging/caregiving/caregiver-brief.html>.) Additionally, of the nearly 40.4 million individuals nationwide who provided unpaid eldercare between 2017 and 2018, nearly 60% were women. (*Unpaid Eldercare in the United States – 2017 – 2018*, Bureau of Labor Statistics (November 22, 2019) available at <https://www.bls.gov/news.release/elcare.nr0.htm>).

While it is optimistic to assume that employers would not make hiring, scheduling, or other personnel decisions based on an employee or prospective employee’s caregiving responsibilities, that may not always be the case. It is not difficult to imagine that an employer may decide, for example, not to hire an applicant who mentions having children at home for which they are the primary caregiver, based on the concern that the applicant may decide to prioritize their family or request time off to care for their children. This type of bias is one that is likely to be exacerbated based on certain characteristics, such as race, gender, or income level. In fact, working mothers and pregnant people are the most likely to experience discrimination in hiring or employment, with the numbers increasing significantly for low wage workers and people of color. (*Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, U.S. Equal Employment Opportunity Commission (May 2007) available at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities#discrwomen>.)

According to the author:

Family caregiver discrimination claims are often addressed by other existing laws - like those prohibiting discrimination because an employee has a family member with a disability, or prohibiting retaliation for taking family and medical leave. Adding family caregiver status to existing discrimination law would provide important clarification to employers that family caregiver status is protected by law.

In a time when employees are struggling to balance their jobs and caring for their families, disparate treatment because of their status as a caregiver should not be a reason for termination or other adverse employment action.

This bill. In order to provide more robust protection to employees who serve as caregivers from workplace discrimination based on these responsibilities, this bill adds “family caregiver status” 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 caregiver status. The bill defines “family caregiver status” to mean a person who contributes to the care of one or more family members, including a spouse, child, parent, sibling grandparent, grandchild, domestic partner, or any other person whose relationship with the employee is equivalent of a familial relationship. 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.

Comparing this bill to AB 2182 (Wicks, 2022) and AB 1119 (Wicks, 2021). The author presented AB 2182 in 2022 and AB 1119 in 2021. Both bills were substantively similar to this

bill, with one exception. Both AB 1119 and AB 2182 included a reasonable accommodation provision, whereby an employee falling under the definition of “family caregiver” and individual with “family responsibilities,” respectively, could request an accommodation from their employer in order to allow them to continue in the position, so long as the accommodation did not create an undue burden on the employer. This provision is not present in the current bill, however, and as such poses even less of a challenge to employers. This bill would only prohibit employers from engaging in any form of discrimination against an employee who falls under the definition of “family caregiver,” *due to their status as a family caregiver*. That is to say that while an employer would be prohibited from refusing to hire a parent because they are a single parent and an employer is concerned that they would need to leave work early or otherwise tend to their child, this bill would not obligate an employer to engage in a dialogue as to whether they can provide that same employee with a modified schedule in order to allow the parent to pick their child up from school. In sum, this year’s bill is significantly narrower in scope than previous iterations.

Opponents to this legislation argue that by creating a new protected category of “family caregiver status,” this bill will create a *de facto* accommodation requirement. The California Chamber of Commerce writes, “[a]ny action taken by an employer could be challenged as discrimination based on family caregiver status. If an employee requests a schedule change or time off that is denied and they subsequently violate an attendance policy or are terminated for refusing to work a different schedule, they will surely sue alleging discrimination.” It is true that an employer may, in fact, face a claim in this form. However, such an employer would appear to have a fairly strong defense, assuming there were no incidents or indicators of actual discrimination on the basis of family caregiver status. Additionally, while the concern of potential litigation is noted, the reality is that such potential is present in countless forms for all businesses. In fact, the threat of litigation is arguably an inherent part of owning a business. The responsibility to lessen that burden is not one that should fall to employees by removing or failing to increase their legal protections.

Finally, despite the opponents’ claim that the proposed legislation creates a “de facto” obligation on the employers to provide an accommodation, this version in fact opted not to include such language. The reasonable accommodation procedures, found at Section 12940 (m) - (n), are not modified in any way by this bill. Therefore, one could reasonably argue that because the existing law explicitly identifying an employer’s obligations regarding reasonable accommodations and the interactive process are *not* modified to include “family caregiver status,” an employer is in no way legally obligated to consider a reasonable accommodation for such an employee. Assuming the employer does not engage in any otherwise discriminatory behaviors on the basis of the employee’s caregiver status, the employer would *not be liable under the provisions of this bill*.

Existing Laws Protecting Employees with Family Obligations. The Chamber correctly identifies that existing law gives 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 the 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. The protections provided by this bill seem consistent with existing laws that allow employees to take time off to address certain personal and family matters.

ARGUMENTS IN SUPPORT: The sponsors of this measure write in strong support and state:

Caregiver bias generally stems from assumptions about how caregivers will act (such as mothers will prioritize their families over work) or how they should act (such as fathers should not take time off from work to care for their children). Most commonly, employers assume caregivers will not be committed to their jobs, and therefore are not as valuable. These assumptions affect personnel decisions, including who gets hired, laid off, terminated, hired, and promoted.

Family caregiver discrimination affects employees of every income level, race, gender, and industry. Working mothers and pregnant people, though, are most likely to experience this type of discrimination, with low wage earners and people of color disproportionately impacted. One study found mothers were 79% less likely to be recommended for hire, half as likely to be promoted, and offered an average of \$11,000 less in salary for the same position as similarly qualified non-mothers.

Caregiver discrimination even occurs at the hiring stage, where research shows that many employers are biased against job applicants who have temporarily stayed at home with their children. Research shows that adverse treatment continues through employment. For example, mothers of young children often report that they are chosen first for layoffs, while less-senior workers are chosen to stay on. They find they are passed over for promotion or have job offers rescinded when companies learn about their caregiving responsibilities. Fathers who take paternity leave are often criticized or stigmatized for taking time off work. And employees who have new eldercare responsibilities are suddenly hyper-scrutinized in a way they never were before.

AB 524 addresses family caregiver discrimination by simply prohibiting the disparate treatment of employees because of their family caregiver status. In other words, the bill prohibits employers from treating a worker adversely based on assumptions or stereotypes associated with their family caregiving. Specifically, the bill would add family caregiver 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 American Association of Retired Persons (AARP) also writes:

AARP research has revealed that there are 4.4 million family caregivers in California providing care for loved ones who require long-term services and supports (LTSS). Family caregivers are the backbone of our state's system of LTSS, providing 4.1 billion hours of care each year at an estimated economic value of \$81 billion. Moreover, the "Caregiving in the US" report from 2020 found that 63 percent of family caregivers are still working, and that 26 percent have difficulty coordinating care – an increase from 19 percent in 2015. The fragmented nature of California's system of LTSS means that family caregivers –especially

those who are working and who do not qualify for Medicaid – have no one else to rely on when a loved one needs care.

Even before the COVID-19 pandemic, family caregivers served a critical role in mitigating the growing strain on our LTSS system, in part by expanding the caregiver pool. The negative effects of working and caregiving simultaneously are especially profound in African American, Latino, Asian and rural communities. As Americans continue to live longer, family members are providing ever more complex care at home – and often for longer periods of time. A family caregiver should not have to choose between caring for a loved one and potential negative consequences at work.

ARGUMENTS IN OPPOSITION: This bill is opposed by the California Chamber of Commerce. In opposition they write:

The California Chamber of Commerce respectfully OPPOSES AB 524 (Wicks). AB 524 creates a broad new protected class under FEHA: employees with family caregiver status. This broad group would include any employee who “contributes” to the care of any person of their choosing. This would encompass essentially every worker and creates an automatic basis for an individual in that new classification to challenge any adverse employment action, opening up a floodgate of litigation. Further, this new classification would be used to essentially require employers, including small businesses, to accommodate all caregiving needs beyond what is already required under existing law or else they may face a discrimination claim. Between litigation exposure and forced accommodations, AB 524 will increase the cost of doing business in California and the costs of goods and services.

“Family Caregiver Status” Is Broadly Defined and Is a Subjective Determination

AB 524 proposes to add any individual with “family caregiver status” as a new protected class under FEHA. That term is extremely broad. It is defined to include any worker who “contribut[es] to the care of one or more family members.” A “family member” is not limited to an actual family member. Rather, it includes any person who the employee subjectively considers to be like family. This could include a neighbor or an employee’s child’s friend. Every employee could arguably fall into the category of a family caregiver. Proponents of AB 524 claim that adding family caregiver status to FEHA is a simply a “clarification” of existing laws, but that is not true. AB 524 is a significant expansion of FEHA and has been rejected by this Legislature for the last two years. Because whether an employee contributes to the care of another or whether someone is like family to them are subjective determinations, the employer has no ability to dispute an employee designating themselves as having family caregiver status. Any dispute would open the employer up to costly litigation. Further, adding this broad, new classification to the list under FEHA would limit an employer’s ability to enforce employment policies, including attendance policies. Any action taken by the employer could be challenged as discrimination based on “family caregiver status.” For example, 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 risking potential litigation under FEHA for discrimination based on family caregiver status. This will significantly limit an employer’s ability to address discipline issues in the workplace, maintain stability, and eradicate any issues without costly litigation.

REGISTERED SUPPORT / OPPOSITION:

Support

California Employment Lawyers Association (co-sponsor)
California Work & Family Coalition (co-sponsor)
Equal Rights Advocates (co-sponsor)
Legal Aid At Work (co-sponsor)
AARP
BreastfeedLA
CA Work & Family Coalition
California Breastfeeding Coalition
California Catholic Conference
California Immigrant Policy Center
California Pan-ethnic Health Network
California Partnership to End Domestic Violence
California WIC Association
California Women's Law Center
Caring Across Generations
Child Care Law Center
Citizens for Choice
Consumer Attorneys of California
Family Caregiver Alliance (FCA)
Family Values @ Work
Friends Committee on Legislation of California
Human Impact Partners
Jewish Center for Justice
Justice in Aging
LA Best Babies Network
LA Raza Centro Legal
Los Angeles Alliance for A New Economy
Lutheran Office of Public Policy - California
NARAL Pro-choice California
National Association of Social Workers, California Chapter
National Council of Jewish Women Los Angeles
National Multiple Sclerosis Society, MS-can
Orange County Equality Coalition
Our Family Coalition
Public Counsel
Restaurant Opportunities Center of The Bay
Santa Clara County Wage Theft Coalition
Tech Equity
Techequity Collaborative
UFCW - Western States Council
Worksafe

Opposition

California Chamber of Commerce

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