

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1993

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HOUSE BILL 53*

Short Title: Family and Medical Leave Act.

(Public)

Sponsors: Representatives Kennedy; Barnes, D. Brown, Colton, Cummings, Cunningham, Easterling, Fitch, Gist, Gottovi, Green, Hackney, Hensley, Holt, Judy Hunt, H. Hunter, Jarrell, Jeffus, McAllister, Michaux, Oldham, Stamey, Wainwright, and Wright.

Referred to: Business and Labor.

February 4, 1993

A BILL TO BE ENTITLED

AN ACT TO ENTITLE EMPLOYEES TO FAMILY AND MEDICAL LEAVE.

The General Assembly of North Carolina enacts:

Section 1. Chapter 95 of the General Statutes is amended by adding a new Article to read:

"ARTICLE 23.

"FAMILY AND MEDICAL LEAVE ACT.

"§ 95-270. Purpose.

The purpose of this act is to promote the stability and economic security of North Carolina families and individuals by ensuring that leave from work is available for compelling family reasons and for eligible medical reasons, while accommodating the legitimate interests of employers.

"§ 95-271. Definitions.

The following definitions apply in this Article:

- (1) Child. A biological or adopted daughter or son who is either (i) under 18 years old, or (ii) 18 years old or older and incapable of self-care because of a mental or physical disability.
- (2) Commissioner. The Commissioner of Labor or the Commissioner's authorized representative.
- (3) Employee. Any individual who is employed by an employer, has been employed by the employer for at least 12 months, and was employed

1 by the employer for at least 1,250 hours of service during the previous
2 12-month period. The term does not include an employee who is
3 employed at a worksite at which the employer employs less than 50
4 employees if the total number of employees employed by the employer
5 within 75 miles of that worksite is less than 50.

6 (4) Employer. Any individual, firm, partnership, corporation,
7 organization, or governmental agency that (i) employs 50 or more
8 employees for each working day during each of 20 or more calendar
9 workweeks in the current calendar year, or (ii) employed 50 or more
10 employees for each working day during each of 20 or more calendar
11 workweeks in the preceding calendar year. The term includes any
12 person who acts directly or indirectly in the interest of an employer in
13 relation to an employee and any successor in interest of an employer.

14 (5) Employment benefits. All benefits, other than salary or wages, that the
15 employer provides or makes available to the employee, and to which
16 the employee is entitled. The term includes group life insurance,
17 health insurance, disability insurance, sick leave, annual leave,
18 educational benefits, and pensions, regardless of whether the benefits
19 are provided by a practice or written policy of an employer or by an
20 employee benefit plan.

21 (6) Health care provider. A licensed physician who is authorized to
22 practice medicine or surgery by the state in which the physician
23 practices, or any other individual whom the Commissioner determines
24 to be capable of providing health care services for the purposes of this
25 Article.

26 (7) Parent. The term includes a biological or adoptive parent or an
27 individual who stood in **loco parentis** to an employee when the
28 employee was a child.

29 (8) Reduced work schedule. Leave that reduces the usual number of hours
30 per workweek, or hours per workday, of an employee.

31 (9) Serious health condition. An illness, injury, impairment, or physical or
32 mental condition that involves either (i) inpatient care in a hospital,
33 hospice, or residential medical care facility, or (ii) continuing
34 treatment by a health care provider.

35 **§ 95-272. General leave requirements.**

36 (a) Entitlement to leave. – Subject to G.S. 95-272, an employee is entitled to a
37 total of 12 workweeks of leave during any 12-month period for the following reasons:

38 (1) For the employee to care for the employee's child after the child's
39 birth, if the leave is taken within 12 months after the birth;

40 (2) For the employee to care for a child placed with the employee for
41 adoption, if the leave is taken within 12 months of the date of
42 placement;

43 (3) For the employee to care for the employee's child, spouse, or parent,
44 where that child, spouse, or parent has a serious health condition; or

1 (4) Because the employee has a serious health condition that makes the
2 employee unable to perform the functions of the employee's position.

3 (b) Intermittent leave. – The employee may not take leave under subdivision
4 (a)(1) or (a)(2) intermittently unless the employee and employer agree otherwise. The
5 employee may take intermittent leave under subdivision (a)(3) or (a)(4) where
6 medically necessary. If an employee seeks intermittent leave under subdivision (a)(3)
7 or (a)(4) that is foreseeable, based on planned medical treatment, the employer may
8 require the employee to transfer temporarily to an available alternative position offered
9 by the employer for which the employee is qualified and that (i) has equivalent pay and
10 benefits, and (ii) better accommodates recurring periods of leave than the employee's
11 regular employment position.

12 (c) Reduced work schedule. – On agreement between the employer and the
13 employee, the employee may take leave under subsection (a) on a reduced work
14 schedule. That reduced work schedule shall not result in a reduction in the total amount
15 of leave to which the employee is entitled under subsection (a).

16 (d) Unpaid leave. – Family leave may consist of unpaid leave, with the following
17 provisos:

18 (1) If an employer provides paid family leave for fewer than 12
19 workweeks, the additional weeks of leave added to attain the 12
20 workweek total may be unpaid.

21 (2) An employee or employer may elect to substitute any of the
22 employee's accrued paid vacation leave, personal leave, or family
23 leave for leave provided under subdivision (a)(1), (a)(2), or (a)(3) for
24 any part of the 12-week period.

25 (3) An employee or employer may elect to substitute any of the
26 employee's accrued paid vacation leave, personal leave, or medical or
27 sick leave for leave provided under subdivision (a)(3) or (a)(4) for any
28 part of the 12-week period. However, nothing in this Article requires
29 an employer to provide paid sick leave or paid medical leave in any
30 situation in which the employer would not normally provide that leave.

31 (e) Foreseeable leave: birth or adoption. – Where the necessity for family leave
32 under subdivision (a)(1) or (a)(2) is foreseeable based on an expected birth or adoption,
33 the employee shall give the employer no less than 30 days' notice of the intention to
34 take leave, subject to the actual date of the birth or adoption. If the date of the birth or
35 adoption requires leave to begin in less than 30 days, the employee shall provide such
36 notice as is practicable.

37 (f) Foreseeable leave: planned medical treatment. – Where the necessity for
38 leave under subdivision (a)(3) or (a)(4) is foreseeable based on planned medical
39 treatment, the employee shall:

40 (1) Make a reasonable effort to schedule the treatment so as not unduly to
41 disrupt the employer's operations, subject to the approval of the
42 employee's health care provider or the health care provider of the
43 employee's child, spouse, or parent; and

1 (2) Provide the employer with no less than 30 days' notice of the intention
2 to take leave, subject to the actual date of the treatment.

3 (g) Spouses employed by same employer. – Where a husband and wife are both
4 entitled to take leave and are employed by the same employer, the employer may limit
5 the aggregate number of workweeks of leave to which both may be entitled to 12
6 workweeks during any 12-month period, if the leave is taken under subdivision (a)(1) or
7 (a)(2) or to care for a sick parent under subdivision (a)(3).

8 **"§ 95-273. Certification.**

9 (a) In general. – An employer may require that a claim for leave under G.S. 95-
10 271(a)(3) or (a)(4) be supported by a certification issued by the health care provider of
11 the employee or of the employee's child, spouse, or parent, as appropriate. The
12 employee shall provide, in a timely manner, a copy of the certification to the employer.

13 (b) Sufficiency of certification. – Certification provided under subsection (a) is
14 sufficient if it states:

15 (1) The date on which the serious health condition began;

16 (2) The probable duration of the condition;

17 (3) The appropriate medical facts within the knowledge of the health care
18 provider regarding the condition;

19 (4) Where the leave is under G.S. 95-271(a)(3), a statement that the
20 employee is needed to care for the child, spouse, or parent, and an
21 estimate of the amount of time that the employee is needed to provide
22 care;

23 (5) Where the leave is under G.S. 95-271(a)(4), a statement that the
24 employee is unable to perform the functions of the employee's
25 position; and

26 (6) Where certification is necessary for intermittent leave for planned
27 medical treatment, the dates on which the treatment is expected to be
28 given and the duration of the treatment.

29 (c) Second opinion. – Where the employer has reason to doubt the validity of the
30 certification provided under subsection (a), the employer may require the employee to
31 get, at the employer's expense, the opinion of a second health care provider designated
32 or approved by the employer concerning any information certified under subsection (b).
33 The second health care provider shall not be a person employed on a regular basis by
34 the employer.

35 (d) Third opinion. – Where the second opinion described in subsection (c) differs
36 from the opinion in the original certification provided under subsection (a), the
37 employer may require the employee to get, at the employer's expense, the opinion of a
38 third health care provider designated or approved jointly by the employer and the
39 employee concerning the information certified under subsection (b). The third opinion
40 is final and is binding on the employer and the employee.

41 (e) Recertification. – The employer may require that the employee get
42 subsequent recertifications on a reasonable basis, at the employer's expense.

43 **"§ 95-274. Employment and benefits protection.**

1 (a) Entitlement to restoration. – An employee who takes leave under this Article
2 is entitled, on return from leave:

3 (1) To be restored by the employer to the employment position held by the
4 employee when the leave began; or

5 (2) To be restored to an equivalent employment position with equivalent
6 employment benefits, pay, and other terms and conditions of
7 employment.

8 (b) No loss of benefits. – The taking of leave under this Article shall not result in
9 the loss of any employment benefit accrued before the date on which the leave began.

10 However, nothing in this section shall be construed to entitle any restored employee to
11 (i) the accrual of any seniority or employment benefits during any period of leave; or
12 (ii) any right, benefit, or position of employment other than any right, benefit, or
13 position to which the employee would have been entitled had the employee not taken
14 the leave.

15 (c) Employer's policy. – As a condition of restoration under subsection (a), the
16 employer may require the employee's adherence to a uniformly applied practice or
17 policy that requires each employee to receive certification from the employee's health
18 care provider that the employee is able to resume work. However, nothing in this
19 subsection supercedes a valid local law or a collective bargaining agreement that
20 governs the return to work of employees taking leave under G.S. 95-271(a)(4).

21 (d) Reporting during leave. – Nothing in this section shall be deemed to prohibit
22 an employer from requiring an employee on leave under this Article to report at
23 reasonable intervals to the employer on the employee's status and intention to return to
24 work.

25 (e) Exemption of certain employees. – An employer may deny restoration under
26 subsection (a) to an employee if:

27 (1) The employee is a salaried employee who is among the highest paid
28 ten percent (10%) of the employees employed by the employer within
29 75 miles of the facility at which the employee is employed;

30 (2) Denial of restoration is necessary to prevent substantial and grievous
31 economic injury to the employer's operations;

32 (3) The employer notifies the employee of the employer's intent to deny
33 restoration on the basis in subdivision (2) when the employer
34 determines that the injury would occur; and

35 (4) In any case in which the leave has begun, the employee elects not to
36 return to employment after receiving the notice.

37 **"§ 95-275. Maintenance of health benefits.**

38 (a) Employer's duty. – Except as provided in subsection (b), during any period
39 that an employee takes leave under this Article, the employer shall maintain coverage
40 for the employee under any group health plan for the duration of leave at the level and
41 under the conditions that coverage would have been provided if the employee had
42 continued in employment continuously from the date the employee began the leave until
43 the date the employee is restored under G.S. 95-273(a).

1 **(b) Recovery of premiums.** – The employer may recover the premium that the
2 employer paid for maintaining the employee's coverage under subsection (a) if the
3 employee fails to return from leave after the period of leave to which the employee is
4 entitled has expired for a reason other than:

5 **(1)** The continuation, recurrence, or onset of a serious health condition
6 that entitles the employee to leave under G.S. 95-271(a)(3) or (a)(4); or

7 **(2)** Other circumstances beyond the employee's control.

8 **(c) Certification.** – An employer may require that a claim that an employee is
9 unable to return to work because of the continuation, recurrence, or onset of the serious
10 health condition described in subdivision (b)(1) be supported by:

11 **(1)** A certification issued by the employee's health care provider, in the
12 case of an employee unable to return to work because of a condition
13 specified in G.S. 95-271(a)(4); or

14 **(2)** A certification issued by the health care provider of the child, spouse,
15 or parent of the employee, in the case of an employee unable to return
16 to work because of a condition specified in G.S. 95-271(a)(3).

17 The employee shall provide, in a timely manner, a copy of the certification to the
18 employer.

19 **(d) Sufficiency of certification.** – The certification described in subdivision (c)(1)
20 is sufficient if it states that a serious health condition prevented the employee from
21 being able to perform the functions of the employee's position on the date that the
22 employee's leave expired. The certification described in subdivision (c)(2) is sufficient
23 if it states that the employee is needed to care for the employee's child, spouse, or parent
24 who has a serious health condition on the date that the employee's leave expired.

25 **"§ 95-276. Discrimination prohibited.**

26 **(a) Actions prohibited.** – No employer shall interfere with, restrain, or deny the
27 exercise of, or the attempt to exercise, any right provided under this Article. Except as
28 provided in G.S. 95-271, no employer shall discharge, demote, transfer, reassign, deny
29 employment, or in any other similar manner discriminate against any individual for
30 opposing any practice made unlawful by this Article or for exercising any right made
31 lawful by this Article.

32 **(b) Protected activity.** – No person shall discharge or in any other manner
33 discriminate against any individual because the individual does any of the following:

34 **(1)** Files any civil action, or institutes or causes to be instituted any civil
35 proceeding, under or related to this Article;

36 **(2)** Gives, or is about to give, any information in connection with any
37 inquiry or proceeding relating to any right provided under this Article;
38 or

39 **(3)** Testifies, or is about to testify, in any inquiry or proceeding relating to
40 any right provided under this Article.

41 **"§ 95-277. Civil action; action by Commissioner; remedies.**

42 **(a) Action by employee.** – One or more employees may bring a civil action in the
43 superior court of the county where the violation occurred, where one or more
44 complainants reside, or where the respondent resides or has its principal place of

1 business. The employee may bring the action on behalf of other employees similarly
2 situated.

3 (b) Action by Commissioner. – At the employee's request, the Commissioner
4 may bring a civil action in the superior court of the county where the violation occurred,
5 where one or more complainants reside, or where the respondent resides or has its
6 principal place of business. Any sums that the Commissioner recovers on behalf of the
7 employee shall be held in a special deposit account and shall be paid promptly and
8 directly to the affected employee. When the Commissioner conducts such an action on
9 behalf of, or at the request of, the employee, the employee retains the right to approve or
10 reject proposed settlements. Before initiating any action under this section, the
11 Commissioner shall exhaust all administrative remedies, including giving the employer
12 notice of the pending action and the opportunity to be heard on the matters at issue.

13 (c) Penalty. – Where the court finds that an employer violated G.S. 95-275, the
14 court shall award to the employee the amount of one hundred dollars (\$100.00) per day
15 for each working day that:

16 (1) The employee is denied the employee's rights under G.S. 95-275(a), or

17 (2) Follows the date on which the employee is discharged or otherwise
18 discriminated against as described in G.S. 95-275(b); and

19 the employer is liable for interest at the legal rate set forth in G.S. 24-1, from the date
20 each amount first became due.

21 (d) Types of relief. – The employee or the Commissioner may seek and the court
22 may award any or all of the following types of relief:

23 (1) An injunction to enjoin continued violation of this Article.

24 (2) Reinstatement of the employee to the same position held before the
25 violation of this Article.

26 (3) Compensation for lost wages, lost benefits, and other economic losses
27 that were proximately caused by the retaliatory action or
28 discrimination.

29 (4) Any other equitable relief that the court deems appropriate, including,
30 without limitation, employment, reinstatement, transfer, reassignment,
31 and promotion.

32 (e) Liquidated damages. – In addition to the amounts awarded under subsection
33 (c), the court shall award liquidated damages in an amount equal to the amount found to
34 be due as provided in subsection (c). If the employer shows to the court's satisfaction
35 that the act or omission constituting the violation was in good faith and that the
36 employer had reasonable grounds for believing that the act or omission was not a
37 violation of this Article, the court may, in its discretion, award no liquidated damages or
38 may award any amount of liquidated damages not exceeding the amount found due as
39 provided in subsection (d).

40 (f) Costs. – The court shall award to the plaintiff and assess against the defendant
41 the reasonable costs and expenses, including attorneys' fees, of the plaintiff in bringing
42 an action under this section. If the court determines that the plaintiff's action is
43 frivolous, it may award to the defendant and assess against the plaintiff the reasonable

1 costs and expenses, including attorneys' fees, of the defendant in defending the action
2 under this section.

3 (g) Default judgment. – In an action brought by the Commissioner in which a
4 default judgment is entered, the clerk shall order the defendant to pay attorneys' fees of
5 three hundred dollars (\$300.00).

6 (h) Jury trial. – In any action under this section which includes a claim under
7 subsection (b), the plaintiff has the right to trial by jury.

8 (i) Statute of limitations. – Actions under this section must be brought within
9 two years following the date of the last event constituting the alleged violation for
10 which the action is brought. Where an action is brought for a willful violation of G.S.
11 95-275, the action may be brought within three years of the date of the last event
12 constituting the alleged violation for which the action is brought.

13 **"§ 95-278. Notice.**

14 (a) Employer's duty to post. – Each employer shall post and keep posted, in
15 conspicuous places on the employer's premises where notices to employees and
16 applications for employment are customarily posted, a notice, to be prepared or
17 approved by the Commissioner, setting forth excerpts from, or summaries of, the
18 pertinent provisions of this act and information pertaining to rights and remedies.

19 (b) Penalty. – Any employer that willfully violates this section shall be assessed a
20 civil money penalty not to exceed one hundred dollars (\$100.00) for each separate
21 offense. For purposes of this subsection, each 72-hour period in violation shall
22 constitute a separate offense.

23 **"§ 95-279. Regulations.**

24 No later than 60 days after the date of ratification of this act, the Commissioner shall
25 prescribe regulations and advisory guidelines that are necessary to carry out and
26 promote full compliance with this act. The Commissioner shall thereafter have the
27 authority to augment, modify, and revise regulations and guidelines that are necessary to
28 carry out and promote full compliance with the provisions of this act.

29 **"§ 95-280. Effect of Article on other rights.**

30 Nothing in this Article shall be deemed to diminish the rights or remedies of any
31 employee under any collective bargaining agreement, employment contract, other
32 statutory rights or remedies, or at common law.

33 **"§ 95-281. Encouragement of more generous leave policies.**

34 Nothing in this Article shall be deemed to discourage employers from adopting or
35 retaining leave policies more generous than any policies that comply with the
36 requirements under this Article."

37 Sec. 2. This act becomes effective six months after ratification. However, in
38 the case of a collective bargaining agreement in effect on the effective date, this act
39 shall apply on the earlier of either (i) the date of the termination of the agreement; or (ii)
40 the date that occurs 12 months after the date of ratification.