SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 523 (Leyva)
Version: August 25, 2022
Hearing Date: August 30, 2022
Fiscal: Yes
Urgency: No
TSG

PURSUANT TO SENATE RULE 29.10(d)

SUBJECT

Contraceptive Equity Act of 2022

DIGEST

This bill prohibits employment-related discrimination on the basis of reproductive health decisionmaking, and, beginning in 2024, modifies several aspects of the laws governing health benefits plans and health insurance policies in order to expand coverage, reduce costs, and lower barriers to reproductive health services.

EXECUTIVE SUMMARY

California law already guarantees Californians significant freedom to access reproductive healthcare services at relatively low cost and with limited bureaucratic barriers. In a few respects, however, California law still falls short of ensuring that all Californians have the freedom and ability to exercise full control over their reproductive health decisions. This bill endeavors to address these shortcomings through a series of modifications to the laws governing health benefits plans and health insurance policies in ways that expand coverage, reduce consumer costs, and lower barriers for access to reproductive health services, including ensuring that vasectomies are treated similarly to other forms of reproductive health care. Additionally, the bill prohibits employment-related discrimination on the basis of reproductive health decisionmaking.

The bill is sponsored by Access Health, NARAL Pro-Choice California, and the National Health Law Program. Support comes from health professionals, civil rights organizations, and other proponents of expanded reproductive health access and liberty. Opposition comes from some health benefit plan and health insurance provider associations who argue that increased mandates will make health care coverage more expensive, as well as from some entities that favor more limited reproductive freedom who primarily assert that the bill infringes on the right to free exercise of religion. The bill passed off of the Assembly Floor by a vote of 62-11. If the bill passes out of this Committee, it will proceed to the Senate Floor for a concurrence vote.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Prohibits employment discrimination, under the Fair Employment and Housing Act (FEHA), based upon 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 of any person. (Gov. Code §§ 12920, 12921, 12926, 12931, 12940, 12944, and 12993.)

2) Specifies that, for purposes of FEHA, "sex" includes:
   a) pregnancy or medical conditions related to pregnancy;
   b) childbirth or medical conditions related to childbirth; and
   c) breastfeeding or medical conditions related to breastfeeding. (Gov. Code § 12926(r)(1).)

3) Specifies that, for purposes of FEHA, an "employer" includes:
   a) any person regularly employing five or more persons;
   b) any person acting as an agent for an employer; and
   c) any political or civil subdivision of the state, and cities. (Gov. Code § 12926(d).)

4) Exempts non-profit religious associations or corporations from FEHA generally, but does apply FEHA to a religious corporation or association with respect to employees who perform other than religious duties at a health care facility operated by the religious corporation or association, as specified. (Gov. Code §§ 12926(d) and 12926.2(c).)

5) Permits a nonprofit public benefit corporation formed by, or affiliated with, a particular religion and operating an educational facility as its sole or primary activity to restrict employment, including promotion, in any or all employment categories to individuals of a particular religion. However, such a nonprofit public benefit corporation shall be subject to FEHA in all other respects, including, but not limited to, the prohibitions against discrimination made unlawful by FEHA. (Gov. Code § 12926.2 (f)(1-2).)

6) Establishes the Public Employees' Medical and Hospital Care Act tasking the CalPERS board of directors to contract with carriers for health benefit plans or approve health benefit plans offered by employee organizations, with the purpose of providing public employees with health plan benefits similar to those available in private industry and promoting and preserving public employee health. (Gov. Code §§ 22750 *et seq*.)

7) Sets minimum standards for public employee's health benefits plans; minimum standards for health carriers; and minimum scope and content of basic health benefits plans, as specified. (2 C.C.R. §§ 599.508 – 599.510).

8) Provides state regulation of health plans, as defined, through the Department of Managed Health Care's (DMHC) licensing authority under the Knox-Keene Act and regulates health insurance policies, as defined, through the California Department of Insurance (CDI) (Health & Saf. Code §§ 1340 *et seq.* and Insur. Code §§ 106 *et seq*.).

This bill:

1) Makes a series of legislative findings and declarations to the effect that:
   a) California has a history of expanding access to birth control to avoid unintended pregnancies;
   b) these policies have been successful;
   c) there are still shortcomings and equities in these policies;
   d) vasectomies are particularly effective and cost-effective as a method for avoiding unintended pregnancies;
   e) the Legislature's intends, through this bill, to reduce sexual and reproductive health disparities and ensure greater health equity by providing a pathway for more Californians to get the contraceptive care they want, when they need it, without inequitable delays or cost barriers; and
   f) the Legislature intends for the relevant California departments and agencies to work in concert to ensure compliance with this bill.

2) Defines "reproductive health decisionmaking," for purposes of the FEHA, to include, among other things, a decision to use or access a particular drug, device, product, or medical service for reproductive health.

3) Adds "reproductive health decisionmaking" to the FEHA's list of protected categories on the basis of which it is unlawful to engage in employment discrimination.

4) Specifies that that the addition of "reproductive health decisionmaking" to FEHA's protected categories shall not be construed to mean that the existing protected category "sex" does not include reproductive health decisionmaking.

5) Makes it an unlawful employment practice for an employer to require the disclosure of information related to an applicant or an employee's reproductive health decisionmaking as a condition of employment, continued employment, or a benefit of employment.

6) Mandates expanded contraceptive coverage and reductions in costs and other barriers to accessing reproductive health services, as specified, for all health plans

and health insurance policies regulated by the Department of Managed Health Care and the California Insurance Code (CIC), as specified, beginning in 2024.

7) Prohibits CalPERS, the University of California, and California State University from approving a health benefit plan contract for employees that does not comply with the bill's contraceptive coverage requirements, beginning in 2024, as specified.

COMMENTS

1. Intent and scope of the full bill

Existing California law contains a series of requirements meant to ensure widespread and equal access to reproductive healthcare services. However, according to the author and sponsors of this bill, there remain a variety of ways in which these laws fall short of that mark. As set forth in the bill's legislative findings and declarations, the intent of the bill is "to reduce sexual and reproductive health disparities and ensure greater health equity by providing a pathway for more Californians to get the contraceptive care they want, when they need it – without inequitable delays or cost barriers."

The bill seeks to achieve this intent through a series of proposed modifications to existing law. In broad strokes, those modifications would: (1) expand the scope of reproductive health services that health benefits plans and health insurance policies must cover; (2) reduce financial and/or procedural barriers that otherwise limit consumers' access to reproductive healthcare services under health benefit plans or health insurance policies, including ensuring that vasectomies are treated similarly to other forms of reproductive care; (3) require California institutions of higher learning not to approve health benefits plans or health insurance policies for students, faculty, staff, and administration at California colleges and universities unless they comply with these mandates; and (4) direct CalPERS not to approve health benefits plans or health insurance policies for public employees unless they comply with these mandates. Most of these provisions would take effect beginning in 2024. These aspects of the bill have been analyzed in detail by the employment and health policy committees of both houses.

Of particular relevance to this Committee, the bill has also long contained a provision prohibiting an employer from taking adverse action against an employee on the basis of that employee's reproductive healthcare decisions. As detailed further in Comments 2 and 3, below, recent amendments to the bill retain this basic concept, but now seek to achieve it through modification of the Fair Employment and Housing Act (FEHA) in the Government Code, rather than through the addition of a new section within the Labor Code.

2. Procedural posture

On August 15, 2022, amendments were taken which revise the bill's prohibition on employment discrimination on the basis of reproductive health decisionmaking. Whereas the bill had previously added that prohibition to the Labor Code, the amendments incorporated the prohibition within the text of the Fair Employment and Housing Act (FEHA) in the Government Code instead. Specifically, the bill now adds "reproductive health decisionmaking" to the list of things that FEHA protects from employment discrimination.

3. Ramifications of putting the anti-discrimination provisions within FEHA instead of the Labor Code

In general, moving this bill's prohibition on employment discrimination based on reproductive health decision-making from the Labor Code to FEHA does not dramatically change the substantive impact of the bill. Both before and after the change, the primary thrust of this component of the bill is to underscore that most California employers cannot treat their employees differently based on the employee's choices regarding their reproductive health.

In a number of nuanced ways, however, shifting the bill's prohibition on employment discrimination based on reproductive health decision-making from the Labor Code to FEHA does result in significant differences in how the prohibition will be enforced and to whom it applies. Those differences are briefly summarized below:

a) Avoids duplication of administrative enforcement

Through its prohibition on employment discrimination based on "sex," FEHA already protects the reproductive health choices of most California workers. The California Civil Rights Department (until recently known as the Department of Fair Employment and Housing) is in charge of administrative enforcement of FEHA. By contrast, the California Labor Commissioner is tasked with administrative enforcement of the Labor Code.

Had the bill's prohibition on reproductive healthcare-based employment discrimination remained in the Labor Code, it would have raised the prospect that allegations of discrimination arising from the same or similar events could have been brought before both the Civil Rights Department and the Labor Commissioner. Such a system would have been inefficient from an enforcement perspective and burdensome for the parties involved. Moreover, dual track enforcement systems would have raised the risk that the two agencies could have come to conflicting conclusions. Moving the bill's prohibition on reproductive health-based employment discrimination into FEHA eliminates these concerns.

b) Applies to a broader range of entities within the employment context, though not to very small employers

Unless a provision in the Labor Code explicitly states otherwise, it only applies to private employers. FEHA, by contrast, applies more broadly in the employment context. To begin with, public employers including the State and the Legislature are subject to FEHA. (Gov. Code § 12926(d).) Moreover, FEHA applies to apprenticeship programs, unions, and licensing boards, among other entities. As a result, placing the prohibition on reproductive health-based employment discrimination within the context of FEHA will generally provide workers with a more robust set of workplace protections.

On the other hand, the Labor Code applies to private employers regardless of size, whereas FEHA only partially applies to employers with fewer than five employees. Specifically, for most of its anti-discrimination purposes, FEHA defines an "employer" as anyone who regularly employs five or more persons. (Gov. Code § 12926(d).) Thus, very small employers are not liable for many forms of discrimination under FEHA. As a result, even if this bill is enacted, employees of very small employers would have no basis for bringing a legal claim for discrimination based on their reproductive health care choices under FEHA.[1] However, even an employee at a small employer would have a viable claim under FEHA if they suffered workplace harassment on account of a reproductive healthcare decision, because FEHA's anti-harassment provisions apply to all employers, regardless of size. (Gov. Code 12940(j)(4)(A).)

c) Protects workers from perceptions and associations as well

As it read before the prohibition on reproductive health-based employment discrimination was moved into FEHA, the bill would only have protected employees and their dependents. FEHA, by contrast, shields workers from discrimination not only on the basis that the workers themselves actually belong to a particular protected category, but also on the basis that the employer *perceives* the worker to belong to a particular protected category or *associates* the worker with someone who belongs to a particular protected category. (Gov. Code § 12926(o).) As a result, workers will have greater protections against discrimination now that the bill is incorporated into FEHA. Now, workers whose employer merely suspects them of utilizing particular reproduction health care services will be protected, whether the employer's hunch is accurate or not. Similarly, if a worker chooses to help a friend or family member to make reproductive health decisions that the employer disapproves of, that worker will be shielded by FEHA's associational protections.

[1] It bears observing that the worker might well have viable claims under a number of alternative legal theories, however. (*See, e.g.,* Lab. Code §§ 96(k) and 98.6.)

d) Comes with built-in exceptions for non-profit religious institutions

The Labor Code generally applies to all employers. For constitutional reasons discussed further in Comment 4, below, the courts have ruled that religious employers have a limited exemption from anti-discrimination laws where the employee in question occupies a "ministerial" role and adherence with the anti-discrimination law in question conflicts with the employer's religious doctrine. (*Our Lady of Guadalupe Sch. v. Morrissey-Berru* (2020) ___U.S.___ [140 S.Ct. 2049]; *Hope International University v. Superior Court* (2004) 119 Cal.App.4th 719, 734). Recognizing this exception, the prohibition on reproductive health-based employment discrimination previously contained in this bill included a corresponding carve out for religious employers. Now that the prohibition has been moved into FEHA, no such customized carve out is needed because FEHA already contains a relevant exception. Specifically, FEHA's definition of "employer" excludes most non-profit religious associations or corporations. (Gov. Code §§ 12926(d); 12926.2.) To the degree that this exception does not fully encompass the constitutionally-based ministerial exception to FEHA, the ministerial exception would still presumably operate as a backstop. Accordingly, the bill does not appear to infringe upon religious employers' right to free exercise.

e) Requirement to file an administrative complaint.

Claims alleging Labor Code violations can usually be brought either in court or through the filing of an administrative complaint with the California Labor Commissioner. FEHA, by contrast, contains a requirement that the complainant has to initiate the case administratively by filing a claim with the Civil Rights Department. (Gov. Code §§ 12960, 12965.) Thus, moving this bill's prohibition on reproductive health-based employment discrimination from the Labor Code into FEHA imposes this additional step and the corresponding deadlines to file complaints on aggrieved workers. As a practical matter, however, complainants can and often do elect to obtain an immediate right-to-sue letter from the Civil Rights Department. As the phrase suggests, such a letter enables the complainant to proceed in court should they decide to do so.

f) No enforcement through the Private Attorney General Act

Finally, only Labor Code provisions may be enforced through the Private Attorney General Act (PAGA). (Lab. Code § 2698 et seq.) Accordingly, moving this bill's prohibition on reproductive care-based employment discrimination out of the Labor Code and into FEHA means that it cannot be enforced through PAGA actions.

4. Constitutional considerations

The U.S. Supreme Court has ruled that, though not spelled out explicitly in the federal Constitution, all people in the country have a constitutional right to privacy, including decisions regarding their reproductive health care. (*See, e.g. Griswold v. Connecticut*

(1965) 381 U.S. 479; *Eisenstadt v. Baird* (1972) 405 U.S. 438.)[2] California's State Constitution goes further, explicitly stating that all Californians have an "inalienable" right to privacy. (Cal. Const., art. 1, Sec. 1.) California's courts have determined that this state constitutional right to privacy shields Californians not just from government intrusions, but from private sector intrusions as well. (*Schmidt v. Superior Court* (1987) 43 Cal. 3d 1060.) This includes private employers. (*Wilkinson v. Times Mirror Corp.* (1989) 215 Cal.App.3d 1034, 1040-44; *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 16-20.) Since this bill's primary purpose is to ensure that all Californians have the freedom and ability to make reproductive health care decisions as they choose with minimal interference from their health plans, insurance carriers, or employers, it appears to align with federal and state constitutional principles.

Nonetheless, some opponents of the bill argue that it would infringe on religious employers' constitutional right to free exercise of religion. (U.S. Const., amend. 1.) While there are indications that change may be coming,[3] for the time being the U.S. Supreme Court's interpretation of the Free Exercise Clause holds that a neutral law of general applicability is constitutionally sound so long as it does not single out religious behavior for punishment and is not motivated by a desire to interfere with religion. (*Employment Division v. Smith* (1990) 494 U.S. 872.) This bill appears to meet the *Smith* test. It is a neutral law and generally applicable. It does not single out religious behavior for punishment, but rather forbids all employers from interfering with the reproductive health decisions of their employees. In fact, because recent amendments have placed the bill's prohibition on reproductive health-based employment discrimination within FEHA, non-profit religious institutions are exempt from the mandate in most instances. (Gov. Code § 12926(d).) In the event that the U.S. Supreme Court overrules *Smith* and requires the state to provide additional justification for a law such as the one proposed by this legislation, the bill includes findings and declarations setting forth some of the reasoning for why the bill is necessary.

Relatedly, the courts have determined that, in the context of employment discrimination law, there is a constitutionally-based "ministerial exception." Under the ministerial exception, religious employers have a limited exemption from anti-discrimination laws where the employee in question occupies a "ministerial" role and adherence with the anti-discrimination law in question would conflict with the employer's religious doctrine. (*Our Lady of Guadalupe Sch. v. Morrissey-Berru* (2020) ___U.S.___ [140 S.Ct. 2049]; *Hope International University v. Superior Court* (2004) 119

---

[2] While the reasoning behind the U.S. Supreme Court's recent ruling in *Dobbs v. Jackson Women's Health Org.* (2022) 142 S.Ct. 2228 calls into question whether this right to privacy remains on solid legal footing, the majority opinion in that case emphasized that its ruling was limited to the context of abortion. (*Ibid* at 2258.)

[3] In *Fulton v. City of Philadelphia* (2021) 141 S.Ct. 1868, the U.S. Supreme Court majority declined to overturn *Smith*. However, three dissenting justices indicated their belief that *Smith* should be overruled and two concurring justices expressed reservations about *Smith's* continuing viability while indicating uncertainty about the appropriate alternative standard.

Cal.App.4th 719, 734). In this case, because FEHA exempts most non-profit religious institutions entirely (there are some exceptions for hospital employees), it is unlikely that a conflict would arise. In the improbable event of such a conflict, presumably the ministerial exemption would still apply.

Finally, though the policy debate at issue in this bill contains some similarity to the case of *Burwell v. Hobby Lobby* (2014) 134 S.Ct. 2751, the holding in that case is not applicable to this bill. In *Hobby Lobby*, the U.S. Supreme Court struck down certain provisions of the Affordable Care Act (sometimes referred to as "Obamacare") which required private employers to cover birth control coverage as part of their employee's health insurance benefits options. The basis for that conclusion was not the Free Exercise Clause, however, but rather the Religious Freedom Restoration Act (RFRA). RFRA is a federal law passed with the express intent of overturning the impact of the *Smith* decision. RFRA purports to restore strict scrutiny as the standard for judicial review of statutes burdening the free exercise of religion. (43 U.S.C. Sec. 2000bb.)

Due to a different U.S. Supreme Court ruling, however, RFRA does not apply to state and local governments. (*City of Boerne v. Flores* (1997) 521 U.S. 507.) Consequently, as to a state statute, such as the one proposed by this bill, it is the *Smith* decision's holding regarding the Free Exercise Clause, not *Hobby Lobby*, that controls.

5. Arguments in support of the bill

According to the author:

> SB 523—the Contraceptive Equity Act of 2022—seeks to expand and modernize birth control access in California, and ensure greater contraceptive equity statewide, regardless of an individual's gender or insurance coverage status.

As one of the sponsors of the bill, NARAL Pro Choice California writes:

> It's time for California to modernize and expand our contraceptive equity laws to reduce barriers to contraceptive care, improve sexual and reproductive health outcomes, and create greater health equity. […] Birth control is essential health care and all Californians should be able to equally access the method that is right for them, regardless of their income, insurance status or where they work. […] The Contraceptive Equity Act of 2022 will make California's contraceptive equity laws gender neutral, require coverage of over-the-counter birth control options to increase access to time sensitive care, extend contraceptive coverage benefits to millions of Californians including state workers, university employees, and college students, and clearly prohibit employers from

> discriminating against their employees based on their contraceptive and reproductive health decisions.

In support, the California Black Health Network writes:

> The recent Supreme Court decision eliminating the constitutional right to abortion care has made access to contraception paramount. The SCOTUS ruling also opened doors to future attacks on the right to use birth control. The Governor and State Legislature have stated their commitment to bolstering sexual and reproductive health care access in California. In addition, the FDA currently reviews an application to make birth control pills available over the counter. Now is the time to modernize and expand our contraceptive equity laws to reduce barriers to birth control, improve sexual and reproductive health outcomes, create more significant health equity, and ensure California becomes a true Reproductive Freedom State.

6. Arguments in opposition to the bill

In opposition to the bill, the California Association of Health Plans, the Association of California Life and Health Insurance Companies, and America's Health Insurance Plans jointly write:

> California is rightly focused on achieving both universal coverage and cost containment at a time when the national conversation has shifted toward lower costs through less comprehensive options. Health plans and insurers stand ready to offer solutions that will expand access and improve affordability, but new benefit mandates are not the answer. Now is the time to focus on stability and affordability for all Californians

In further opposition to the bill, the Right to Life League writes:

> What began as a bill to compel health care insurance plans to fund all manner of contraception is now a bill to expand the scope of the California Fair Employment and Housing Act ("FEHA"), adding new category of "reproductive health care decisionmaking" to the already long list of protected classes for purposes of housing and employment discrimination. These recent modifications to the bill attempt to weaponize the FEHA to target pro-life entities for employment discrimination. The bill violates the First Amendment right to freedom of religion, including employers' rights to require employees adhere to specific religious beliefs and behaviors.

SUPPORT

Access Health (sponsor)
NARAL Pro-Choice California (sponsor)
National Health Law Program (sponsor)
Access Reproductive Justice
American Academy of Pediatrics, California
American Association of University Women
American Civil Liberties Union Northern California/Southern California/San Diego and Imperial Counties
American College of Obstetricians and Gynecologists, District IX
APLA Health
Bienestar Human Services
Business and Professional Women of Nevada County
Black Women for Wellness Action Project
California Academy of Family Physicians
California Alliance for Retired Americans
California Black Health Network
California Faculty Association
California Health+ Advocates
California Hepatitis Alliance
California Latinas for Reproductive Justice
California Nurse Midwives Association
California Society of Health-System Pharmacists
California State Parent Teacher Association
California Women's Law Center
CAPSLO Center for Health and Prevention
The Center for Health and Prevention
Citizens for Choice
Community Clinic Association of Los Angeles County
Courage California
End the Epidemics: Californians Mobilizing to End HIV, Viral Hepatitis, STIs, and Overdose
End Hep C San Francisco
Essential Health Access
Khmer Girls in Action
Los Angeles LGBT Center
The Los Angeles Trust for Children's Health
MPact/Fijate Bien Program
National Center for Youth Law
National Council of Jewish Women – California
National Council of Jewish Women – Los Angeles
Plan C
Planned Parenthood Affiliates of California

Religious Coalition for Reproductive Choice California
San Francisco AIDS Foundation
Training in Early Abortion for Comprehensive Healthcare
Unite for Reproductive and Gender Equity
Women Organized to Respond to Life-Threatening Diseases
The Women's Building
Women's Foundation of California
Women's Health Specialists

OPPOSITION

America's Health Insurance Plans
Association of California Life and Health Insurance Companies
California Association of Health Plans
California Catholic Conference
Right to Life League

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 569 (Gonzalez, 2017) would have prohibited California private sector employers from: (1) taking any adverse employment action against an employee based on that employee's reproductive health care decisions; and (2) forcing an employee to sign a code of conduct or similar document that purports to deny employees the right to make their own reproductive health care decisions. The bill would also have required that employee handbooks notify employees of their rights and remedies under its terms. In his message vetoing AB 569, Governor Brown wrote: "The California Fair Employment and Housing Act has long banned such adverse actions, except for religious institutions. I believe these types of claims should remain within the jurisdiction of the Department of Fair Employment and Housing."

SB 999 (Pavley, Ch. 499, Stats. 2016) required a pharmacist to dispense, at a patient's request, up to a 12-month supply of an FDA-approved, self-administered hormonal contraceptive pursuant to a valid prescription that specifies an initial quantity followed by periodic refills.

SB 1053 (Mitchell, Ch. 576, Stats. 2014) required most health plans and insurers to cover a variety of FDA-approved contraceptive drugs, devices, and products for women, as well as related counseling and follow-up services and voluntary sterilization procedures. The bill also prohibited cost-sharing, restrictions, or delays in the provision of covered services, but allows cost-sharing and utilization management procedures if a therapeutic equivalent drug or device is offered by the plan with no cost sharing.

PRIOR VOTES:

Assembly Floor (Ayes 62, Noes 11)
Assembly Appropriations Committee (Ayes 13, Noes 3)
Assembly Health Committee (Ayes 11, Noes 2)
Assembly Labor and Employment Committee (Ayes 5, Noes 1)
Senate Floor (Ayes 32, Noes 5)
Senate Appropriations Committee (Ayes 5, Noes 2)
Senate Appropriations Committee (Ayes 7, Noes 0)
Senate Health Committee (Ayes 8, Noes 2)
Senate Labor, Public Employment and Retirement Committee (Ayes 4, Noes 0)

****