

ASSEMBLY BILL

No. 1814

Introduced by Assembly Member Buchanan

February 11, 2010

An act to amend Section 12940 of the Government Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 1814, as introduced, Buchanan. Discrimination in employment.

Existing law, the Fair Employment and Housing Act (FEHA), protects and safeguards the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation. FEHA provides that it does not prohibit an employer from refusing to employ an individual because of his or her age if the law compels or provides for that refusal.

This bill would provide that FEHA does not prohibit an employer from providing health benefits or health care reimbursement plans to retired persons that are altered, reduced, or eliminated when the retiree becomes eligible for Medicare benefits. The bill would further provide that this provision is declaratory of existing law.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 12940 of the Government Code is
2 amended to read:

1 12940. It ~~shall be~~ *is* an unlawful employment practice, unless
2 based upon a bona fide occupational qualification, or, except where
3 based upon applicable security regulations established by the
4 United States or the State of California:

5 (a) For an employer, because of the race, religious creed, color,
6 national origin, ancestry, physical disability, mental disability,
7 medical condition, marital status, sex, age, or sexual orientation
8 of any person, to refuse to hire or employ the person or to refuse
9 to select the person for a training program leading to employment,
10 or to bar or to discharge the person from employment or from a
11 training program leading to employment, or to discriminate against
12 the person in compensation or in terms, conditions, or privileges
13 of employment.

14 (1) This part does not prohibit an employer from refusing to
15 hire or discharging an employee with a physical or mental
16 disability, or subject an employer to any legal liability resulting
17 from the refusal to employ or the discharge of an employee with
18 a physical or mental disability, where the employee, because of
19 his or her physical or mental disability, is unable to perform his
20 or her essential duties even with reasonable accommodations, or
21 cannot perform those duties in a manner that would not endanger
22 his or her health or safety or the health or safety of others even
23 with reasonable accommodations.

24 (2) This part does not prohibit an employer from refusing to
25 hire or discharging an employee who, because of the employee's
26 medical condition, is unable to perform his or her essential duties
27 even with reasonable accommodations, or cannot perform those
28 duties in a manner that would not endanger the employee's health
29 or safety or the health or safety of others even with reasonable
30 accommodations. Nothing in this part shall subject an employer
31 to any legal liability resulting from the refusal to employ or the
32 discharge of an employee who, because of the employee's medical
33 condition, is unable to perform his or her essential duties, or cannot
34 perform those duties in a manner that would not endanger the
35 employee's health or safety or the health or safety of others even
36 with reasonable accommodations.

37 (3) Nothing in this part relating to discrimination on account of
38 marital status shall do either of the following:

39 (A) Affect the right of an employer to reasonably regulate, for
40 reasons of supervision, safety, security, or morale, the working of

1 spouses in the same department, division, or facility, consistent
2 with the rules and regulations adopted by the commission.

3 (B) Prohibit bona fide health plans from providing additional
4 or greater benefits to employees with dependents than to those
5 employees without or with fewer dependents.

6 (4) Nothing in this part relating to discrimination on account of
7 sex shall affect the right of an employer to use veteran status as a
8 factor in employee selection or to give special consideration to
9 ~~Vietnam-era~~ Vietnam-era veterans.

10 (5) ~~Nothing in this part prohibits~~ (A) *This part does not prohibit*
11 an employer from refusing to employ an individual because of his
12 or her age if the law compels or provides for that refusal.
13 Promotions within the existing staff, hiring or promotion on the
14 basis of experience and training, rehiring on the basis of seniority
15 and prior service with the employer, or hiring under an established
16 recruiting program from high schools, colleges, universities, or
17 trade schools do not, in and of themselves, constitute unlawful
18 employment practices.

19 (B) *This part does not prohibit an employer from providing*
20 *health benefits or health care reimbursement plans to retired*
21 *persons that are altered, reduced, or eliminated when the person*
22 *becomes eligible for Medicare health benefits. This subparagraph*
23 *is declaratory of existing law and applies to all retiree health*
24 *benefit plans and contractual provisions or practices concerning*
25 *retiree health benefits in effect on the effective date of the statute*
26 *that enacted this subparagraph.*

27 (b) For a labor organization, because of the race, religious creed,
28 color, national origin, ancestry, physical disability, mental
29 disability, medical condition, marital status, sex, age, or sexual
30 orientation of any person, to exclude, expel, or restrict from its
31 membership the person, or to provide only second-class or
32 segregated membership or to discriminate against any person
33 because of the race, religious creed, color, national origin, ancestry,
34 physical disability, mental disability, medical condition, marital
35 status, sex, age, or sexual orientation of the person in the election
36 of officers of the labor organization or in the selection of the labor
37 organization's staff or to discriminate in any way against any of
38 its members or against any employer or against any person
39 employed by an employer.

1 (c) For any person to discriminate against any person in the
2 selection or training of that person in any apprenticeship training
3 program or any other training program leading to employment
4 because of the race, religious creed, color, national origin, ancestry,
5 physical disability, mental disability, medical condition, marital
6 status, sex, age, or sexual orientation of the person discriminated
7 against.

8 (d) For any employer or employment agency to print or circulate
9 or cause to be printed or circulated any publication, or to make
10 any non-job-related inquiry of an employee or applicant, either
11 verbal or through use of an application form, that expresses,
12 directly or indirectly, any limitation, specification, or discrimination
13 as to race, religious creed, color, national origin, ancestry, physical
14 disability, mental disability, medical condition, marital status, sex,
15 age, or sexual orientation, or any intent to make any such limitation,
16 specification, or discrimination. ~~Nothing in this part prohibits~~ *This*
17 *part does not prohibit* an employer or employment agency from
18 inquiring into the age of an applicant, or from specifying age
19 limitations, where the law compels or provides for that action.

20 (e) (1) Except as provided in paragraph (2) or (3), for any
21 employer or employment agency to require any medical or
22 psychological examination of an applicant, to make any medical
23 or psychological inquiry of an applicant, to make any inquiry
24 whether an applicant has a mental disability or physical disability
25 or medical condition, or to make any inquiry regarding the nature
26 or severity of a physical disability, mental disability, or medical
27 condition.

28 (2) Notwithstanding paragraph (1), an employer or employment
29 agency may inquire into the ability of an applicant to perform
30 job-related functions and may respond to an applicant's request
31 for reasonable accommodation.

32 (3) Notwithstanding paragraph (1), an employer or employment
33 agency may require a medical or psychological examination or
34 make a medical or psychological inquiry of a job applicant after
35 an employment offer has been made but prior to the
36 commencement of employment duties, provided that the
37 examination or inquiry is job-related and consistent with business
38 necessity and that all entering employees in the same job
39 classification are subject to the same examination or inquiry.

1 (f) (1) Except as provided in paragraph (2), for any employer
2 or employment agency to require any medical or psychological
3 examination of an employee, to make any medical or psychological
4 inquiry of an employee, to make any inquiry whether an employee
5 has a mental disability, physical disability, or medical condition,
6 or to make any inquiry regarding the nature or severity of a physical
7 disability, mental disability, or medical condition.

8 (2) Notwithstanding paragraph (1), an employer or employment
9 agency may require any examinations or inquiries that it can show
10 to be job-related and consistent with business necessity. An
11 employer or employment agency may conduct voluntary medical
12 examinations, including voluntary medical histories, which are
13 part of an employee health program available to employees at that
14 worksite.

15 (g) For any employer, labor organization, or employment agency
16 to harass, discharge, expel, or otherwise discriminate against any
17 person because the person has made a report pursuant to Section
18 11161.8 of the Penal Code that prohibits retaliation against hospital
19 employees who report suspected patient abuse by health facilities
20 or community care facilities.

21 (h) For any employer, labor organization, employment agency,
22 or person to discharge, expel, or otherwise discriminate against
23 any person because the person has opposed any practices forbidden
24 under this part or because the person has filed a complaint, testified,
25 or assisted in any proceeding under this part.

26 (i) For any person to aid, abet, incite, compel, or coerce the
27 doing of any of the acts forbidden under this part, or to attempt to
28 do so.

29 (j) (1) For an employer, labor organization, employment agency,
30 apprenticeship training program or any training program leading
31 to employment, or any other person, because of race, religious
32 creed, color, national origin, ancestry, physical disability, mental
33 disability, medical condition, marital status, sex, age, or sexual
34 orientation, to harass an employee, an applicant, or a person
35 providing services pursuant to a contract. Harassment of an
36 employee, an applicant, or a person providing services pursuant
37 to a contract by an employee, other than an agent or supervisor,
38 shall be unlawful if the entity, or its agents or supervisors, knows
39 or should have known of this conduct and fails to take immediate
40 and appropriate corrective action. An employer may also be

1 responsible for the acts of nonemployees, with respect to sexual
2 harassment of employees, applicants, or persons providing services
3 pursuant to a contract in the workplace, where the employer, or
4 its agents or supervisors, knows or should have known of the
5 conduct and fails to take immediate and appropriate corrective
6 action. In reviewing cases involving the acts of nonemployees, the
7 extent of the employer’s control and any other legal responsibility
8 which the employer may have with respect to the conduct of those
9 nonemployees shall be considered. An entity shall take all
10 reasonable steps to prevent harassment from occurring. Loss of
11 tangible job benefits shall not be necessary in order to establish
12 harassment.

13 (2) The provisions of this subdivision are declaratory of existing
14 law, except for the new duties imposed on employers with regard
15 to harassment.

16 (3) An employee of an entity subject to this subdivision is
17 personally liable for any harassment prohibited by this section that
18 is perpetrated by the employee, regardless of whether the employer
19 or covered entity knows or should have known of the conduct and
20 fails to take immediate and appropriate corrective action.

21 (4) (A) For purposes of this subdivision only, “employer” means
22 any person regularly employing one or more persons or regularly
23 receiving the services of one or more persons providing services
24 pursuant to a contract, or any person acting as an agent of an
25 employer, directly or indirectly, the state, or any political or civil
26 subdivision of the state, and cities. The definition of “employer”
27 in subdivision (d) of Section 12926 applies to all provisions of this
28 section other than this subdivision.

29 (B) Notwithstanding subparagraph (A), for purposes of this
30 subdivision, “employer” does not include a religious association
31 or corporation not organized for private profit, except as provided
32 in Section 12926.2.

33 (C) For purposes of this subdivision, “harassment” because of
34 sex includes sexual harassment, gender harassment, and harassment
35 based on pregnancy, childbirth, or related medical conditions.

36 (5) For purposes of this subdivision, “a person providing services
37 pursuant to a contract” means a person who meets all of the
38 following criteria:

1 (A) The person has the right to control the performance of the
2 contract for services and discretion as to the manner of
3 performance.

4 (B) The person is customarily engaged in an independently
5 established business.

6 (C) The person has control over the time and place the work is
7 performed, supplies the tools and instruments used in the work,
8 and performs work that requires a particular skill not ordinarily
9 used in the course of the employer's work.

10 (k) For an employer, labor organization, employment agency,
11 apprenticeship training program, or any training program leading
12 to employment, to fail to take all reasonable steps necessary to
13 prevent discrimination and harassment from occurring.

14 (l) For an employer or other entity covered by this part to refuse
15 to hire or employ a person or to refuse to select a person for a
16 training program leading to employment or to bar or to discharge
17 a person from employment or from a training program leading to
18 employment, or to discriminate against a person in compensation
19 or in terms, conditions, or privileges of employment because of a
20 conflict between the person's religious belief or observance and
21 any employment requirement, unless the employer or other entity
22 covered by this part demonstrates that it has explored any available
23 reasonable alternative means of accommodating the religious belief
24 or observance, including the possibilities of excusing the person
25 from those duties that conflict with his or her religious belief or
26 observance or permitting those duties to be performed at another
27 time or by another person, but is unable to reasonably
28 accommodate the religious belief or observance without undue
29 hardship on the conduct of the business of the employer or other
30 entity covered by this part. Religious belief or observance, as used
31 in this section, includes, but is not limited to, observance of a
32 Sabbath or other religious holy day or days, and reasonable time
33 necessary for travel prior and subsequent to a religious observance.

34 (m) For an employer or other entity covered by this part to fail
35 to make reasonable accommodation for the known physical or
36 mental disability of an applicant or employee. Nothing in this
37 subdivision or in paragraph (1) or (2) of subdivision (a) shall be
38 construed to require an accommodation that is demonstrated by
39 the employer or other covered entity to produce undue hardship
40 to its operation.

1 (n) For an employer or other entity covered by this part to fail
2 to engage in a timely, good faith, interactive process with the
3 employee or applicant to determine effective reasonable
4 accommodations, if any, in response to a request for reasonable
5 accommodation by an employee or applicant with a known physical
6 or mental disability or known medical condition.

7 (o) For an employer or other entity covered by this part, to
8 subject, directly or indirectly, any employee, applicant, or other
9 person to a test for the presence of a genetic characteristic.