

AMENDED IN ASSEMBLY APRIL 13, 2010

CALIFORNIA LEGISLATURE—2009—10 REGULAR SESSION

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 amended, 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:

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

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

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

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

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

3 (A) Affect the right of an employer to reasonably regulate, for
4 reasons of supervision, safety, security, or morale, the working of
5 spouses in the same department, division, or facility, consistent
6 with the rules and regulations adopted by the commission.

7 (B) Prohibit bona fide health plans from providing additional
8 or greater benefits to employees with dependents than to those
9 employees without or with fewer dependents.

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

14 (5) (A) This part does not prohibit an employer from refusing
15 to employ an individual because of his or her age if the law
16 compels or provides for that refusal. Promotions within the existing
17 staff, hiring or promotion on the basis of experience and training,
18 rehiring on the basis of seniority and prior service with the
19 employer, or hiring under an established recruiting program from
20 high schools, colleges, universities, or trade schools do not, in and
21 of themselves, constitute unlawful employment practices.

22 (B) ~~This—The provisions of this part—does relating to~~
23 ~~discrimination on the basis of age do not prohibit an employer~~
24 ~~from providing health benefits or health care reimbursement plans~~
25 ~~to retired persons that are altered, reduced, or eliminated when the~~
26 ~~person becomes eligible for Medicare health benefits. This~~
27 ~~subparagraph is declaratory of existing law and applies to all retiree~~
28 ~~health benefit plans and contractual provisions or practices~~
29 ~~concerning retiree health benefits and health care reimbursement~~
30 ~~plans in effect on the effective date of the statute that enacted this~~
31 ~~subparagraph on or after January 1, 2011.~~

32 (b) For a labor organization, because of the race, religious creed,
33 color, national origin, ancestry, physical disability, mental
34 disability, medical condition, marital status, sex, age, or sexual
35 orientation of any person, to exclude, expel, or restrict from its
36 membership the person, or to provide only second-class or
37 segregated membership or to discriminate against any person
38 because of the race, religious creed, color, national origin, ancestry,
39 physical disability, mental disability, medical condition, marital
40 status, sex, age, or sexual orientation of the person in the election

1 of officers of the labor organization or in the selection of the labor
2 organization’s staff or to discriminate in any way against any of
3 its members or against any employer or against any person
4 employed by an employer.

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

12 (d) For any employer or employment agency to print or circulate
13 or cause to be printed or circulated any publication, or to make
14 any non-job-related inquiry of an employee or applicant, either
15 verbal or through use of an application form, that expresses,
16 directly or indirectly, any limitation, specification, or discrimination
17 as to race, religious creed, color, national origin, ancestry, physical
18 disability, mental disability, medical condition, marital status, sex,
19 age, or sexual orientation, or any intent to make any such limitation,
20 specification, or discrimination. This part does not prohibit an
21 employer or employment agency from inquiring into the age of
22 an applicant, or from specifying age limitations, where the law
23 compels or provides for that action.

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

32 (2) Notwithstanding paragraph (1), an employer or employment
33 agency may inquire into the ability of an applicant to perform
34 job-related functions and may respond to an applicant’s request
35 for reasonable accommodation.

36 (3) Notwithstanding paragraph (1), an employer or employment
37 agency may require a medical or psychological examination or
38 make a medical or psychological inquiry of a job applicant after
39 an employment offer has been made but prior to the
40 commencement of employment duties, provided that the

1 examination or inquiry is job-related and consistent with business
2 necessity and that all entering employees in the same job
3 classification are subject to the same examination or inquiry.

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

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

18 (g) For any employer, labor organization, or employment agency
19 to harass, discharge, expel, or otherwise discriminate against any
20 person because the person has made a report pursuant to Section
21 11161.8 of the Penal Code that prohibits retaliation against hospital
22 employees who report suspected patient abuse by health facilities
23 or community care facilities.

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

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

32 (j) (1) For an employer, labor organization, employment agency,
33 apprenticeship training program or any training program leading
34 to employment, or any other person, because of race, religious
35 creed, color, national origin, ancestry, physical disability, mental
36 disability, medical condition, marital status, sex, age, or sexual
37 orientation, to harass an employee, an applicant, or a person
38 providing services pursuant to a contract. Harassment of an
39 employee, an applicant, or a person providing services pursuant
40 to a contract by an employee, other than an agent or supervisor,

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

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

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

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

32 (B) Notwithstanding subparagraph (A), for purposes of this
33 subdivision, "employer" does not include a religious association
34 or corporation not organized for private profit, except as provided
35 in Section 12926.2.

36 (C) For purposes of this subdivision, "harassment" because of
37 sex includes sexual harassment, gender harassment, and harassment
38 based on pregnancy, childbirth, or related medical conditions.

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

4 (A) The person has the right to control the performance of the
5 contract for services and discretion as to the manner of
6 performance.

7 (B) The person is customarily engaged in an independently
8 established business.

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

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

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

37 (m) For an employer or other entity covered by this part to fail
38 to make reasonable accommodation for the known physical or
39 mental disability of an applicant or employee. Nothing in this
40 subdivision or in paragraph (1) or (2) of subdivision (a) shall be

1 construed to require an accommodation that is demonstrated by
2 the employer or other covered entity to produce undue hardship
3 to its operation.

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

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