

ASSEMBLY BILL

No. 1395

**Introduced by Committee on Labor and Employment (Swanson
(Chair), Alejo, Allen, Furutani, and Yamada)**

February 28, 2011

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

LEGISLATIVE COUNSEL'S DIGEST

AB 1395, as introduced, Committee on Labor and Employment. Discrimination in employment.

Existing law, the California Fair Employment and Housing Act, 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.

This bill would make nonsubstantive changes to these provisions.

Vote: majority. Appropriation: no. Fiscal committee: no.
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:

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

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

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

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

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

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

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

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

16 (B) The provisions of this part relating to discrimination on the
17 basis of age do not prohibit an employer from providing health
18 benefits or health care reimbursement plans to retired persons that
19 are altered, reduced, or eliminated when the person becomes
20 eligible for Medicare health benefits. This subparagraph applies
21 to all retiree health benefit plans and contractual provisions or
22 practices concerning retiree health benefits and health care
23 reimbursement plans in effect on ~~on~~ or after January 1, 2011.

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

37 (c) For any person to discriminate against any person in the
38 selection or training of that person in any apprenticeship training
39 program or any other training program leading to employment
40 because of the race, religious creed, color, national origin, ancestry,

1 physical disability, mental disability, medical condition, marital
2 status, sex, age, or sexual orientation of the person discriminated
3 against.

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

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

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

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

36 (f) (1) Except as provided in paragraph (2), for any employer
37 or employment agency to require any medical or psychological
38 examination of an employee, to make any medical or psychological
39 inquiry of an employee, to make any inquiry whether an employee
40 has a mental disability, physical disability, or medical condition,

1 or to make any inquiry regarding the nature or severity of a physical
2 disability, mental disability, or medical condition.

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

10 (g) For any employer, labor organization, or employment agency
11 to harass, discharge, expel, or otherwise discriminate against any
12 person because the person has made a report pursuant to Section
13 11161.8 of the Penal Code that prohibits retaliation against hospital
14 employees who report suspected patient abuse by health facilities
15 or community care facilities.

16 (h) For any employer, labor organization, employment agency,
17 or person to discharge, expel, or otherwise discriminate against
18 any person because the person has opposed any practices forbidden
19 under this part or because the person has filed a complaint, testified,
20 or assisted in any proceeding under this part.

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

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

1 action. In reviewing cases involving the acts of nonemployees, the
2 extent of the employer's control and any other legal responsibility
3 which the employer may have with respect to the conduct of those
4 nonemployees shall be considered. An entity shall take all
5 reasonable steps to prevent harassment from occurring. Loss of
6 tangible job benefits shall not be necessary in order to establish
7 harassment.

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

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

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

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

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

31 (5) For purposes of this subdivision, "a person providing services
32 pursuant to a contract" means a person who meets all of the
33 following criteria:

34 (A) The person has the right to control the performance of the
35 contract for services and discretion as to the manner of
36 performance.

37 (B) The person is customarily engaged in an independently
38 established business.

39 (C) The person has control over the time and place the work is
40 performed, supplies the tools and instruments used in the work,

1 and performs work that requires a particular skill not ordinarily
2 used in the course of the employer's work.

3 (k) For an employer, labor organization, employment agency,
4 apprenticeship training program, or any training program leading
5 to employment, to fail to take all reasonable steps necessary to
6 prevent discrimination and harassment from occurring.

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

27 (m) For an employer or other entity covered by this part to fail
28 to make reasonable accommodation for the known physical or
29 mental disability of an applicant or employee. Nothing in this
30 subdivision or in paragraph (1) or (2) of subdivision (a) shall be
31 construed to require an accommodation that is demonstrated by
32 the employer or other covered entity to produce undue hardship
33 to its operation.

34 (n) For an employer or other entity covered by this part to fail
35 to engage in a timely, good faith, interactive process with the
36 employee or applicant to determine effective reasonable
37 accommodations, if any, in response to a request for reasonable
38 accommodation by an employee or applicant with a known physical
39 or mental disability or known medical condition.

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

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