

**ASSEMBLY BILL**

**No. 2386**

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**Introduced by Assembly Member Allen**  
**(Coauthor: Assembly Member Bonnie Lowenthal)**  
(Coauthor: Senator Evans)

February 24, 2012

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An act to amend Section 12926 of the Government Code, relating to discrimination.

LEGISLATIVE COUNSEL'S DIGEST

AB 2386, as introduced, Allen. Employment and housing discrimination: sex: breastfeeding.

Under the California Fair Employment and Housing Act, it is unlawful to engage in specified discriminatory practices in employment or housing accommodations on the basis of sex. Under existing law, "sex," for purposes of the act, includes gender, pregnancy, childbirth, and medical conditions related to pregnancy or childbirth.

This bill would provide that, for purposes of the act, the term "sex" also includes breastfeeding or medical conditions related to breastfeeding.

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 12926 of the Government Code is  
2     amended to read:

1 12926. As used in this part in connection with unlawful  
2 practices, unless a different meaning clearly appears from the  
3 context:

4 (a) “Affirmative relief” or “prospective relief” includes the  
5 authority to order reinstatement of an employee, awards of backpay,  
6 reimbursement of out-of-pocket expenses, hiring, transfers,  
7 reassignments, grants of tenure, promotions, cease and desist  
8 orders, posting of notices, training of personnel, testing, expunging  
9 of records, reporting of records, and any other similar relief that  
10 is intended to correct unlawful practices under this part.

11 (b) “Age” refers to the chronological age of any individual who  
12 has reached his or her 40th birthday.

13 (c) “Employee” does not include any individual employed by  
14 his or her parents, spouse, or child, or any individual employed  
15 under a special license in a nonprofit sheltered workshop or  
16 rehabilitation facility.

17 (d) “Employer” includes any person regularly employing five  
18 or more persons, or any person acting as an agent of an employer,  
19 directly or indirectly, the state or any political or civil subdivision  
20 of the state, and cities, except as follows:

21 “Employer” does not include a religious association or  
22 corporation not organized for private profit.

23 (e) “Employment agency” includes any person undertaking for  
24 compensation to procure employees or opportunities to work.

25 (f) “Essential functions” means the fundamental job duties of  
26 the employment position the individual with a disability holds or  
27 desires. “Essential functions” does not include the marginal  
28 functions of the position.

29 (1) A job function may be considered essential for any of several  
30 reasons, including, but not limited to, any one or more of the  
31 following:

32 (A) The function may be essential because the reason the  
33 position exists is to perform that function.

34 (B) The function may be essential because of the limited number  
35 of employees available among whom the performance of that job  
36 function can be distributed.

37 (C) The function may be highly specialized, so that the  
38 incumbent in the position is hired for his or her expertise or ability  
39 to perform the particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to, the following:

(A) The employer's judgment as to which functions are essential.

(B) Written job descriptions prepared before advertising or interviewing applicants for the job.

(C) The amount of time spent on the job performing the function.

(D) The consequences of not requiring the incumbent to perform the function.

(E) The terms of a collective bargaining agreement.

(F) The work experiences of past incumbents in the job.

(G) The current work experience of incumbents in similar jobs.

(g) (1) "Genetic information" means, with respect to any individual, information about any of the following:

(A) The individual's genetic tests.

(B) The genetic tests of family members of the individual.

(C) The manifestation of a disease or disorder in family members of the individual.

(2) "Genetic information" includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.

(3) "Genetic information" does not include information about the sex or age of any individual.

(h) "Labor organization" includes any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection.

(i) "Medical condition" means either of the following:

(1) Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer.

(2) Genetic characteristics. For purposes of this section, "genetic characteristics" means either of the following:

(A) Any scientifically or medically identifiable gene or chromosome, or combination or alteration thereof, that is known to be a cause of a disease or disorder in a person or his or her offspring, or that is determined to be associated with a statistically increased risk of development of a disease or disorder, and that is presently not associated with any symptoms of any disease or disorder.

(B) Inherited characteristics that may derive from the individual or family member, that are known to be a cause of a disease or disorder in a person or his or her offspring, or that are determined to be associated with a statistically increased risk of development of a disease or disorder, and that are presently not associated with any symptoms of any disease or disorder.

(j) “Mental disability” includes, but is not limited to, all of the following:

(1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. For purposes of this section:

(A) “Limits” shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(B) A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult.

(C) “Major life activities” shall be broadly construed and shall include physical, mental, and social activities and working.

(2) Any other mental or psychological disorder or condition not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a mental or psychological disorder or condition described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability as described in paragraph (1) or (2).

“Mental disability” does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

1 (k) “On the bases enumerated in this part” means or refers to  
2 discrimination on the basis of one or more of the following: race,  
3 religious creed, color, national origin, ancestry, physical disability,  
4 mental disability, medical condition, genetic information, marital  
5 status, sex, age, or sexual orientation.

6 (l) “Physical disability” includes, but is not limited to, all of the  
7 following:

8 (1) Having any physiological disease, disorder, condition,  
9 cosmetic disfigurement, or anatomical loss that does both of the  
10 following:

11 (A) Affects one or more of the following body systems:  
12 neurological, immunological, musculoskeletal, special sense  
13 organs, respiratory, including speech organs, cardiovascular,  
14 reproductive, digestive, genitourinary, hemic and lymphatic, skin,  
15 and endocrine.

16 (B) Limits a major life activity. For purposes of this section:

17 (i) “Limits” shall be determined without regard to mitigating  
18 measures such as medications, assistive devices, prosthetics, or  
19 reasonable accommodations, unless the mitigating measure itself  
20 limits a major life activity.

21 (ii) A physiological disease, disorder, condition, cosmetic  
22 disfigurement, or anatomical loss limits a major life activity if it  
23 makes the achievement of the major life activity difficult.

24 (iii) “Major life activities” shall be broadly construed and  
25 includes physical, mental, and social activities and working.

26 (2) Any other health impairment not described in paragraph (1)  
27 that requires special education or related services.

28 (3) Having a record or history of a disease, disorder, condition,  
29 cosmetic disfigurement, anatomical loss, or health impairment  
30 described in paragraph (1) or (2), which is known to the employer  
31 or other entity covered by this part.

32 (4) Being regarded or treated by the employer or other entity  
33 covered by this part as having, or having had, any physical  
34 condition that makes achievement of a major life activity difficult.

35 (5) Being regarded or treated by the employer or other entity  
36 covered by this part as having, or having had, a disease, disorder,  
37 condition, cosmetic disfigurement, anatomical loss, or health  
38 impairment that has no present disabling effect but may become  
39 a physical disability as described in paragraph (1) or (2).

(6) “Physical disability” does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(m) Notwithstanding subdivisions (j) and (l), if the definition of “disability” used in the federal Americans with Disabilities Act of 1990 (P.L. 101-336) would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (j) or (l), or would include any medical condition not included within those definitions, then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (j) and (l).

(n) “Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, or sexual orientation” includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

(o) “Reasonable accommodation” may include either of the following:

(1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.

(2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(p) “Religious creed,” “religion,” “religious observance,” “religious belief,” and “creed” include all aspects of religious belief, observance, and practice.

(q) “Sex” includes, but is not limited to, pregnancy, childbirth, *breastfeeding*, or medical conditions related to pregnancy or childbirth, *or breastfeeding*. “Sex” also includes, but is not limited to, a person’s gender. “Gender” means sex, and includes a person’s gender identity and gender expression. “Gender expression” means a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.

1 (r) “Sexual orientation” means heterosexuality, homosexuality,  
2 and bisexuality.

3 (s) “Supervisor” means any individual having the authority, in  
4 the interest of the employer, to hire, transfer, suspend, layoff, recall,  
5 promote, discharge, assign, reward, or discipline other employees,  
6 or the responsibility to direct them, or to adjust their grievances,  
7 or effectively to recommend that action, if, in connection with the  
8 foregoing, the exercise of that authority is not of a merely routine  
9 or clerical nature, but requires the use of independent judgment.

10 (t) “Undue hardship” means an action requiring significant  
11 difficulty or expense, when considered in light of the following  
12 factors:

13 (1) The nature and cost of the accommodation needed.

14 (2) The overall financial resources of the facilities involved in  
15 the provision of the reasonable accommodations, the number of  
16 persons employed at the facility, and the effect on expenses and  
17 resources or the impact otherwise of these accommodations upon  
18 the operation of the facility.

19 (3) The overall financial resources of the covered entity, the  
20 overall size of the business of a covered entity with respect to the  
21 number of employees, and the number, type, and location of its  
22 facilities.

23 (4) The type of operations, including the composition, structure,  
24 and functions of the workforce of the entity.

25 (5) The geographic separateness, administrative, or fiscal  
26 relationship of the facility or facilities.