

ASSEMBLY BILL

No. 1443

Introduced by Assembly Member Skinner
(Coauthors: Assembly Members Bonilla, Campos, Chesbro, Frazier,
and Stone)

January 6, 2014

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

LEGISLATIVE COUNSEL'S DIGEST

AB 1443, as introduced, Skinner. Harassment: unpaid interns.

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, abridgment, or harassment on account of 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. Existing law makes these provisions applicable to employers, labor organizations, employment agencies, and specified training programs.

This bill would provide that discrimination against any person in the selection or training of that person in an unpaid internship, or the harassment of an unpaid intern, on account of the factors described above is an unlawful employment practice.

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

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

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

12940. It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United 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, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status 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

1 employee's health or safety or the health or safety of others even
2 with reasonable accommodations.

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

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

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

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

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

24 (B) The provisions of this part relating to discrimination on the
25 basis of age do not prohibit an employer from providing health
26 benefits or health care reimbursement plans to retired persons that
27 are altered, reduced, or eliminated when the person becomes
28 eligible for Medicare health benefits. This subparagraph applies
29 to all retiree health benefit plans and contractual provisions or
30 practices concerning retiree health benefits and health care
31 reimbursement plans in effect 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, genetic information, marital status,
35 sex, gender, gender identity, gender expression, age, sexual
36 orientation, or military and veteran status of any person, to exclude,
37 expel, or restrict from its membership the person, or to provide
38 only second-class or segregated membership or to discriminate
39 against any person because of the race, religious creed, color,
40 national origin, ancestry, physical disability, mental disability,

1 medical condition, genetic information, marital status, sex, gender,
2 gender identity, gender expression, age, sexual orientation, or
3 military and veteran status of the person in the election of officers
4 of the labor organization or in the selection of the labor
5 organization's staff or to discriminate in any way against any of
6 its members or against any employer or against any person
7 employed by an employer.

8 (c) For any person to discriminate against any person in the
9 selection or training of that person in any apprenticeship training
10 program or any other training program leading to employment,
11 *including an unpaid internship*, because of the race, religious creed,
12 color, national origin, ancestry, physical disability, mental
13 disability, medical condition, genetic information, marital status,
14 sex, gender, gender identity, gender expression, age, sexual
15 orientation, or military and veteran status of the person
16 discriminated against.

17 (d) For any employer or employment agency to print or circulate
18 or cause to be printed or circulated any publication, or to make
19 any nonjob-related inquiry of an employee or applicant, either
20 verbal or through use of an application form, that expresses,
21 directly or indirectly, any limitation, specification, or discrimination
22 as to race, religious creed, color, national origin, ancestry, physical
23 disability, mental disability, medical condition, genetic information,
24 marital status, sex, gender, gender identity, gender expression,
25 age, sexual orientation, or military and veteran status, or any intent
26 to make any such limitation, specification, or discrimination. This
27 part does not prohibit an employer or employment agency from
28 inquiring into the age of an applicant, or from specifying age
29 limitations, where the law compels or provides for that action.

30 (e) (1) Except as provided in paragraph (2) or (3), for any
31 employer or employment agency to require any medical or
32 psychological examination of an applicant, to make any medical
33 or psychological inquiry of an applicant, to make any inquiry
34 whether an applicant has a mental disability or physical disability
35 or medical condition, or to make any inquiry regarding the nature
36 or severity of a physical disability, mental disability, or medical
37 condition.

38 (2) Notwithstanding paragraph (1), an employer or employment
39 agency may inquire into the ability of an applicant to perform

1 job-related functions and may respond to an applicant's request
2 for reasonable accommodation.

3 (3) Notwithstanding paragraph (1), an employer or employment
4 agency may require a medical or psychological examination or
5 make a medical or psychological inquiry of a job applicant after
6 an employment offer has been made but prior to the
7 commencement of employment duties, provided that the
8 examination or inquiry is job related and consistent with business
9 necessity and that all entering employees in the same job
10 classification are subject to the same examination or inquiry.

11 (f) (1) Except as provided in paragraph (2), for any employer
12 or employment agency to require any medical or psychological
13 examination of an employee, to make any medical or psychological
14 inquiry of an employee, to make any inquiry whether an employee
15 has a mental disability, physical disability, or medical condition,
16 or to make any inquiry regarding the nature or severity of a physical
17 disability, mental disability, or medical condition.

18 (2) Notwithstanding paragraph (1), an employer or employment
19 agency may require any examinations or inquiries that it can show
20 to be job related and consistent with business necessity. An
21 employer or employment agency may conduct voluntary medical
22 examinations, including voluntary medical histories, which are
23 part of an employee health program available to employees at that
24 worksite.

25 (g) For any employer, labor organization, or employment agency
26 to harass, discharge, expel, or otherwise discriminate against any
27 person because the person has made a report pursuant to Section
28 11161.8 of the Penal Code that prohibits retaliation against hospital
29 employees who report suspected patient abuse by health facilities
30 or community care facilities.

31 (h) For any employer, labor organization, employment agency,
32 or person to discharge, expel, or otherwise discriminate against
33 any person because the person has opposed any practices forbidden
34 under this part or because the person has filed a complaint, testified,
35 or assisted in any proceeding under this part.

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

39 (j) (1) For an employer, labor organization, employment agency,
40 apprenticeship training program or any training program leading

1 to employment, or any other person, because of race, religious
2 creed, color, national origin, ancestry, physical disability, mental
3 disability, medical condition, genetic information, marital status,
4 sex, gender, gender identity, gender expression, age, sexual
5 orientation, or military and veteran status, to harass an employee,
6 an applicant, *an unpaid intern*, or a person providing services
7 pursuant to a contract. Harassment of an employee, an applicant,
8 *an unpaid intern*, or a person providing services pursuant to a
9 contract by an employee, other than an agent or supervisor, shall
10 be unlawful if the entity, or its agents or supervisors, knows or
11 should have known of this conduct and fails to take immediate
12 and appropriate corrective action. An employer may also be
13 responsible for the acts of nonemployees, with respect to sexual
14 harassment of employees, applicants, *unpaid interns*, or persons
15 providing services pursuant to a contract in the workplace, where
16 the employer, or its agents or supervisors, knows or should have
17 known of the conduct and fails to take immediate and appropriate
18 corrective action. In reviewing cases involving the acts of
19 nonemployees, the extent of the employer's control and any other
20 legal responsibility that the employer may have with respect to the
21 conduct of those nonemployees shall be considered. An entity shall
22 take all reasonable steps to prevent harassment from occurring.
23 Loss of tangible job benefits shall not be necessary in order to
24 establish harassment.

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

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

33 (4) (A) For purposes of this subdivision only, "employer" means
34 any person regularly employing one or more persons or regularly
35 receiving the services of one or more persons providing services
36 pursuant to a contract, or any person acting as an agent of an
37 employer, directly or indirectly, the state, or any political or civil
38 subdivision of the state, and cities. The definition of "employer"
39 in subdivision (d) of Section 12926 applies to all provisions of this
40 section other than this subdivision.

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

5 (C) For purposes of this subdivision, “harassment” because of
6 sex includes sexual harassment, gender harassment, and harassment
7 based on pregnancy, childbirth, or related medical conditions.
8 Sexually harassing conduct need not be motivated by sexual desire.

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

12 (A) The person has the right to control the performance of the
13 contract for services and discretion as to the manner of
14 performance.

15 (B) The person is customarily engaged in an independently
16 established business.

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

21 (k) For an employer, labor organization, employment agency,
22 apprenticeship training program, or any training program leading
23 to employment, to fail to take all reasonable steps necessary to
24 prevent discrimination and harassment from occurring.

25 (l) (1) For an employer or other entity covered by this part to
26 refuse to hire or employ a person or to refuse to select a person
27 for a training program leading to employment or to bar or to
28 discharge a person from employment or from a training program
29 leading to employment, or to discriminate against a person in
30 compensation or in terms, conditions, or privileges of employment
31 because of a conflict between the person’s religious belief or
32 observance and any employment requirement, unless the employer
33 or other entity covered by this part demonstrates that it has explored
34 any available reasonable alternative means of accommodating the
35 religious belief or observance, including the possibilities of
36 excusing the person from those duties that conflict with his or her
37 religious belief or observance or permitting those duties to be
38 performed at another time or by another person, but is unable to
39 reasonably accommodate the religious belief or observance without
40 undue hardship, as defined in subdivision (u) of Section 12926,

1 on the conduct of the business of the employer or other entity
2 covered by this part. Religious belief or observance, as used in
3 this section, includes, but is not limited to, observance of a Sabbath
4 or other religious holy day or days, reasonable time necessary for
5 travel prior and subsequent to a religious observance, and religious
6 dress practice and religious grooming practice as described in
7 subdivision (q) of Section 12926.

8 (2) An accommodation of an individual's religious dress practice
9 or religious grooming practice is not reasonable if the
10 accommodation requires segregation of the individual from other
11 employees or the public.

12 (3) An accommodation is not required under this subdivision
13 if it would result in a violation of this part or any other law
14 prohibiting discrimination or protecting civil rights, including
15 subdivision (b) of Section 51 of the Civil Code and Section 11135
16 of this code.

17 (m) For an employer or other entity covered by this part to fail
18 to make reasonable accommodation for the known physical or
19 mental disability of an applicant or employee. Nothing in this
20 subdivision or in paragraph (1) or (2) of subdivision (a) shall be
21 construed to require an accommodation that is demonstrated by
22 the employer or other covered entity to produce undue hardship,
23 as defined in subdivision (u) of Section 12926, to its operation.

24 (n) For an employer or other entity covered by this part to fail
25 to engage in a timely, good faith, interactive process with the
26 employee or applicant to determine effective reasonable
27 accommodations, if any, in response to a request for reasonable
28 accommodation by an employee or applicant with a known physical
29 or mental disability or known medical condition.

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

33 (p) Nothing in this section shall be interpreted as preventing the
34 ability of employers to identify members of the military or veterans
35 for purposes of awarding a veteran's preference as permitted by
36 law.