

AMENDED IN ASSEMBLY MAY 1, 2014

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 1443

Introduced by Assembly Member Skinner
(Principal coauthor: Assembly Member Roger Hernández)
(Coauthors: Assembly Members Bonilla, Campos, Chesbro, Frazier,
and Stone and Stone, Weber, and Yamada)

January 6, 2014

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

LEGISLATIVE COUNSEL'S DIGEST

AB 1443, as amended, 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~~, *termination, training, or other terms or treatment* of that person in an unpaid internship, *or any other program to provide unpaid experience for that person in the workplace or industry*, or the harassment of an unpaid intern *or volunteer*, 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:

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, genetic information, marital status, sex, gender,
10 gender identity, gender expression, age, sexual orientation, or
11 military and veteran status of any person, to refuse to hire or
12 employ the person or to refuse to select the person for a training
13 program leading to employment, or to bar or to discharge the
14 person from employment or from a training program leading to
15 employment, or to discriminate against the person in compensation
16 or in terms, conditions, or privileges of employment.

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

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

1 condition, is unable to perform his or her essential duties, or cannot
2 perform those duties in a manner that would not endanger the
3 employee's health or safety or the health or safety of others even
4 with reasonable accommodations.

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

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

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

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

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

26 (B) The provisions of this part relating to discrimination on the
27 basis of age do not prohibit an employer from providing health
28 benefits or health care reimbursement plans to retired persons that
29 are altered, reduced, or eliminated when the person becomes
30 eligible for Medicare health benefits. This subparagraph applies
31 to all retiree health benefit plans and contractual provisions or
32 practices concerning retiree health benefits and health care
33 reimbursement plans in effect on or after January 1, 2011.

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

1 against any person because of the race, religious creed, color,
2 national origin, ancestry, physical disability, mental disability,
3 medical condition, genetic information, marital status, sex, gender,
4 gender identity, gender expression, age, sexual orientation, or
5 military and veteran status of the person in the election of officers
6 of the labor organization or in the selection of the labor
7 organization's staff or to discriminate in any way against any of
8 its members or against any employer or against any person
9 employed by an employer.

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

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

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

1 or severity of a physical disability, mental disability, or medical
2 condition.

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

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

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

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

29 (g) For any employer, labor organization, or employment agency
30 to harass, discharge, expel, or otherwise discriminate against any
31 person because the person has made a report pursuant to Section
32 11161.8 of the Penal Code that prohibits retaliation against hospital
33 employees who report suspected patient abuse by health facilities
34 or community care facilities.

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

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

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

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

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

39 (4) (A) For purposes of this subdivision only, "employer" means
40 any person regularly employing one or more persons or regularly

1 receiving the services of one or more persons providing services
2 pursuant to a contract, or any person acting as an agent of an
3 employer, directly or indirectly, the state, or any political or civil
4 subdivision of the state, and cities. The definition of “employer”
5 in subdivision (d) of Section 12926 applies to all provisions of this
6 section other than this subdivision.

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

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

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

18 (A) The person has the right to control the performance of the
19 contract for services and discretion as to the manner of
20 performance.

21 (B) The person is customarily engaged in an independently
22 established business.

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

27 (k) For an employer, labor organization, employment agency,
28 apprenticeship training program, or any training program leading
29 to employment, to fail to take all reasonable steps necessary to
30 prevent discrimination and harassment from occurring.

31 (l) (1) For an employer or other entity covered by this part to
32 refuse to hire or employ a person or to refuse to select a person
33 for a training program leading to employment or to bar or to
34 discharge a person from employment or from a training program
35 leading to employment, or to discriminate against a person in
36 compensation or in terms, conditions, or privileges of employment
37 because of a conflict between the person’s religious belief or
38 observance and any employment requirement, unless the employer
39 or other entity covered by this part demonstrates that it has explored
40 any available reasonable alternative means of accommodating the

1 religious belief or observance, including the possibilities of
2 excusing the person from those duties that conflict with his or her
3 religious belief or observance or permitting those duties to be
4 performed at another time or by another person, but is unable to
5 reasonably accommodate the religious belief or observance without
6 undue hardship, as defined in subdivision (u) of Section 12926,
7 on the conduct of the business of the employer or other entity
8 covered by this part. Religious belief or observance, as used in
9 this section, includes, but is not limited to, observance of a Sabbath
10 or other religious holy day or days, reasonable time necessary for
11 travel prior and subsequent to a religious observance, and religious
12 dress practice and religious grooming practice as described in
13 subdivision (q) of Section 12926. *This subdivision shall also apply*
14 *to an apprenticeship training program, an unpaid internship, and*
15 *any other program to provide unpaid experience for a person in*
16 *the workplace or industry.*

17 (2) An accommodation of an individual's religious dress practice
18 or religious grooming practice is not reasonable if the
19 accommodation requires segregation of the individual from other
20 employees or the public.

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

26 (m) For an employer or other entity covered by this part to fail
27 to make reasonable accommodation for the known physical or
28 mental disability of an applicant or employee. Nothing in this
29 subdivision or in paragraph (1) or (2) of subdivision (a) shall be
30 construed to require an accommodation that is demonstrated by
31 the employer or other covered entity to produce undue hardship,
32 as defined in subdivision (u) of Section 12926, to its operation.

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

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

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