

AMENDED IN SENATE JUNE 16, 2014

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, Weber, and Yamada)
(Coauthors: Senators Beall and Leno)

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, termination, training, or other terms or treatment of that person in an unpaid internship, ~~or any other~~ *another limited duration* program to provide unpaid *work* experience for that ~~person in the workplace or~~

~~industry, person~~, 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

1 accommodations. Nothing in this part shall subject an employer
2 to any legal liability resulting from the refusal to employ or the
3 discharge of an employee who, because of the employee's medical
4 condition, is unable to perform his or her essential duties, or cannot
5 perform those duties in a manner that would not endanger the
6 employee's health or safety or the health or safety of others even
7 with reasonable accommodations.

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

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

14 (B) Prohibit bona fide health plans from providing additional
15 or greater benefits to employees with dependents than to those
16 employees without or with fewer dependents.

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

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

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

37 (b) For a labor organization, because of the race, religious creed,
38 color, national origin, ancestry, physical disability, mental
39 disability, medical condition, genetic information, marital status,
40 sex, gender, gender identity, gender expression, age, sexual

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

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

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

37 (e) (1) Except as provided in paragraph (2) or (3), for any
38 employer or employment agency to require any medical or
39 psychological examination of an applicant, to make any medical
40 or psychological inquiry of an applicant, to make any inquiry

1 whether an applicant has a mental disability or physical disability
2 or medical condition, or to make any inquiry regarding the nature
3 or severity of a physical disability, mental disability, or medical
4 condition.

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

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

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

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

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

37 (h) For any employer, labor organization, employment agency,
38 or person to discharge, expel, or otherwise discriminate against
39 any person because the person has opposed any practices forbidden

1 under this part or because the person has filed a complaint, testified,
2 or assisted in any proceeding under this part.

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

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

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

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

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

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

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

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

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

23 (B) The person is customarily engaged in an independently
24 established business.

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

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

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

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

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

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

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

35 (n) For an employer or other entity covered by this part to fail
36 to engage in a timely, good faith, interactive process with the
37 employee or applicant to determine effective reasonable
38 accommodations, if any, in response to a request for reasonable
39 accommodation by an employee or applicant with a known physical
40 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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