

AMENDED IN SENATE APRIL 1, 2013

SENATE BILL

No. 655

Introduced by Senator Wright

February 22, 2013

An act to amend Sections 12940 and 12965 of the Government Code, relating to ~~medical fraud~~ employment.

LEGISLATIVE COUNSEL'S DIGEST

SB 655, as amended, Wright. ~~Medical fraud.~~ *Fair Employment and Housing Act: unlawful practices.*

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, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation. Existing law authorizes a person claiming to be aggrieved by an alleged unlawful practice under these provisions to file a complaint with the Department of Fair Employment and Housing and authorizes the department to bring a civil action on the behalf of the person in the case of a failure to eliminate an unlawful practice under these provisions.

This bill would provide, in a claim of an unlawful practice under these provisions, that even if an employer proves as an affirmative defense that it would have taken the same adverse action against an employee based on lawful reasons, a claim of unfair practice may still be established if the plaintiff can prove that an unlawful motive on the part of the employer was a substantial factor, as defined, in the conduct that caused harm to the employee. The bill would also provide for

injunctive relief, recovery of a prevailing plaintiff's noneconomic damages, a specified civil penalty to be paid by the employer to the plaintiff, and for attorney's and expert's fees against an employer who violates these provisions.

~~Existing law prohibits medical fraud.~~

~~This bill would state the intent of the Legislature to provide additional investigative tools and other appropriate changes in the law to enhance the prosecution of medical fraud.~~

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:

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, or sexual orientation of
11 any person, to refuse to hire or employ the person or to refuse to
12 select the person for a training program leading to employment,
13 or to bar or to discharge the person from employment or from a
14 training program leading to employment, or to discriminate against
15 the person in compensation or in terms, conditions, or privileges
16 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.

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

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

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

20 (B) Prohibit bona fide health plans from providing additional
21 or greater benefits to employees with dependents than to those
22 employees without or with fewer dependents.

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

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

35 (B) The provisions of this part relating to discrimination on the
36 basis of age do not prohibit an employer from providing health
37 benefits or health care reimbursement plans to retired persons that
38 are altered, reduced, or eliminated when the person becomes
39 eligible for Medicare health benefits. This subparagraph applies
40 to all retiree health benefit plans and contractual provisions or

1 practices concerning retiree health benefits and health care
2 reimbursement plans in effect on or after January 1, 2011.

3 (6) (A) *For purposes of a claim of an unlawful practice under*
4 *this subdivision, if an employer proves as an affirmative defense*
5 *that it would have taken the same adverse employment action*
6 *against an employee, at the same time, for lawful reasons, absent*
7 *consideration of the protected characteristic, the employee may*
8 *still prevail on a claim of an unlawful practice if the employee can*
9 *prove that a protected characteristic was a substantial factor in*
10 *the adverse employment action.*

11 (B) *For purposes of this subdivision, “substantial factor” means*
12 *that a reasonable person would conclude that the factor*
13 *contributed to the harm. It must be more than a remote or trivial*
14 *factor but need not be the only cause of the harm to the employee.*

15 (C) *An employee who prevails in a claim under this paragraph*
16 *is limited to the remedies provided in paragraph (2) of subdivision*
17 *(b) of Section 12965.*

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

33 (c) For any person to discriminate against any person in the
34 selection or training of that person in any apprenticeship training
35 program or any other training program leading to employment
36 because of the race, religious creed, color, national origin, ancestry,
37 physical disability, mental disability, medical condition, genetic
38 information, marital status, sex, gender, gender identity, gender
39 expression, age, or sexual orientation of the person discriminated
40 against.

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

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

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

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

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

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

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

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

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

(j) (1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because 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, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the

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

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

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

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

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

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

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

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

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

38 (C) The person has control over the time and place the work is
39 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) (1) For an employer or other entity covered by this part to
8 refuse to hire or employ a person or to refuse to select a person
9 for a training program leading to employment or to bar or to
10 discharge a person from employment or from a training program
11 leading to employment, or to discriminate against a person in
12 compensation or in terms, conditions, or privileges of employment
13 because of a conflict between the person's religious belief or
14 observance and any employment requirement, unless the employer
15 or other entity covered by this part demonstrates that it has explored
16 any available reasonable alternative means of accommodating the
17 religious belief or observance, including the possibilities of
18 excusing the person from those duties that conflict with his or her
19 religious belief or observance or permitting those duties to be
20 performed at another time or by another person, but is unable to
21 reasonably accommodate the religious belief or observance without
22 undue hardship, as defined in subdivision (t) of Section 12926, on
23 the conduct of the business of the employer or other entity covered
24 by this part. Religious belief or observance, as used in this section,
25 includes, but is not limited to, observance of a Sabbath or other
26 religious holy day or days, reasonable time necessary for travel
27 prior and subsequent to a religious observance, and religious dress
28 practice and religious grooming practice as described in subdivision
29 (p) of Section 12926.

30 (2) An accommodation of an individual's religious dress practice
31 or religious grooming practice is not reasonable if the
32 accommodation requires segregation of the individual from other
33 employees or the public.

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

39 (m) For an employer or other entity covered by this part to fail
40 to make reasonable accommodation for the known physical or

1 mental disability of an applicant or employee. Nothing in this
2 subdivision or in paragraph (1) or (2) of subdivision (a) shall be
3 construed to require an accommodation that is demonstrated by
4 the employer or other covered entity to produce undue hardship,
5 as defined in subdivision (t) of Section 12926, to its operation.

6 (n) For an employer or other entity covered by this part to fail
7 to engage in a timely, good faith, interactive process with the
8 employee or applicant to determine effective reasonable
9 accommodations, if any, in response to a request for reasonable
10 accommodation by an employee or applicant with a known physical
11 or mental disability or known medical condition.

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

15 *SEC. 2. Section 12965 of the Government Code is amended to*
16 *read:*

17 12965. (a) In the case of failure to eliminate an unlawful
18 practice under this part through conference, conciliation, mediation,
19 or persuasion, or in advance thereof if circumstances warrant, the
20 director in his or her discretion may bring a civil action in the name
21 of the department on behalf of the person claiming to be aggrieved.
22 Prior to filing a civil action, the department shall require all parties
23 to participate in mandatory dispute resolution in the department's
24 internal dispute resolution division free of charge to the parties in
25 an effort to resolve the dispute without litigation. In any civil
26 action, the person claiming to be aggrieved shall be the real party
27 in interest and shall have the right to participate as a party and be
28 represented by his or her own counsel. The civil action shall be
29 brought in any county in which unlawful practices are alleged to
30 have been committed, in the county in which records relevant to
31 the alleged unlawful practices are maintained and administered,
32 or in the county in which the person claiming to be aggrieved
33 would have worked or would have had access to public
34 accommodation, but for the alleged unlawful practices. If the
35 defendant is not found in any of these counties, the action may be
36 brought within the county of the defendant's residence or principal
37 office.

38 For any complaint treated by the director as a group or class
39 complaint for purposes of investigation, conciliation, mediation,
40 or civil action pursuant to Section 12961, a civil action shall be

1 brought, if at all, within two years after the filing of the complaint.
2 For any complaint alleging a violation of Section 51.7 of the Civil
3 Code, a civil action shall be brought, if at all, within two years
4 after the filing of the complaint. For all other complaints, a civil
5 action shall be brought, if at all, within one year after the filing of
6 a complaint. If the director determines, pursuant to Section 12961,
7 that a complaint investigated as a group or class complaint under
8 Section 12961 is to be treated as a group or class complaint for
9 purposes of conciliation, mediation, or civil action as well, that
10 determination shall be made and shall be communicated in writing
11 within one year after the filing of the complaint to each person,
12 employer, labor organization, employment agency, or public entity
13 alleged in the complaint to have committed an unlawful practice.
14 (b) (1) If a civil action is not brought by the department within
15 150 days after the filing of a complaint, or if the department earlier
16 determines that no civil action will be brought, the department
17 shall promptly notify, in writing, the person claiming to be
18 aggrieved that the department shall issue, on his or her request,
19 the right-to-sue notice. This notice shall indicate that the person
20 claiming to be aggrieved may bring a civil action under this part
21 against the person, employer, labor organization, or employment
22 agency named in the verified complaint within one year from the
23 date of that notice. If the person claiming to be aggrieved does not
24 request a right-to-sue notice, the department shall issue the notice
25 upon completion of its investigation, and not later than one year
26 after the filing of the complaint. A city, county, or district attorney
27 in a location having an enforcement unit established on or before
28 March 1, 1991, pursuant to a local ordinance enacted for the
29 purpose of prosecuting HIV/AIDS discrimination claims, acting
30 on behalf of any person claiming to be aggrieved due to HIV/AIDS
31 discrimination, may also bring a civil action under this part against
32 the person, employer, labor organization, or employment agency
33 named in the notice. The superior courts of the State of California
34 shall have jurisdiction of those actions, and the aggrieved person
35 may file in these courts. An action may be brought in any county
36 in the state in which the unlawful practice is alleged to have been
37 committed, in the county in which the records relevant to the
38 practice are maintained and administered, or in the county in which
39 the aggrieved person would have worked or would have had access
40 to the public accommodation but for the alleged unlawful practice,

but if the defendant is not found within any of these counties, an action may be brought within the county of the defendant's residence or principal office. A copy of any complaint filed pursuant to this part shall be served on the principal offices of the department. The remedy for failure to send a copy of a complaint is an order to do so. Those actions may not be filed as class actions or may not be maintained as class actions by the person or persons claiming to be aggrieved where those persons have filed a civil class action in the federal courts alleging a comparable claim of employment discrimination against the same defendant or defendants. In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees.

(2) If an employee establishes that an employer committed an unlawful practice under the provisions of paragraph (6) of subdivision (a) of Section 12940, the employer shall be liable for an amount to be determined by a jury, or a court sitting without a jury, for noneconomic damages resulting from the adverse employment action and a statutory penalty of twenty-five thousand dollars (\$25,000) to be awarded directly to the employee. A court may also grant as relief any other declaratory or injunctive relief that, in the judgment of the court, will effectuate the purpose of this part. This relief may include, but is not limited to, a requirement that the employer conduct training for all employees, supervisors, and management on the requirements of this part, the rights and remedies of those who allege a violation of this article, and the employer's internal grievance procedures. The court may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees.

(c) A court may grant as relief in any action filed pursuant to subdivision (a) any relief a court is empowered to grant in a civil action brought pursuant to subdivision (b), in addition to any other relief that, in the judgment of the court, will effectuate the purpose of this part. This relief may include a requirement that the employer conduct training for all employees, supervisors, and management on the requirements of this part, the rights and remedies of those who allege a violation of this part, and the employer's internal grievance procedures. In addition, in order to vindicate the purposes and policies of this part, a court may assess against the defendant,

1 if the civil complaint or amended civil complaint so prays, a civil
2 penalty of up to twenty-five thousand dollars (\$25,000) to be
3 awarded to a person denied any right provided for by Section 51.7
4 of the Civil Code, as an unlawful practice prohibited under this
5 part.

6 (d) (1) Notwithstanding subdivision (b), the one-year statute
7 of limitations, commencing from the date of the right-to-sue notice
8 by the Department of Fair Employment and Housing, to the person
9 claiming to be aggrieved, shall be tolled when all of the following
10 requirements have been met:

11 (A) A charge of discrimination or harassment is timely filed
12 concurrently with the Equal Employment Opportunity Commission
13 and the Department of Fair Employment and Housing.

14 (B) The investigation of the charge is deferred by the
15 Department of Fair Employment and Housing to the Equal
16 Employment Opportunity Commission.

17 (C) A right-to-sue notice is issued to the person claiming to be
18 aggrieved upon deferral of the charge by the Department of Fair
19 Employment and Housing to the Equal Employment Opportunity
20 Commission.

21 (2) The time for commencing an action for which the statute of
22 limitations is tolled under paragraph (1) expires when the federal
23 right-to-sue period to commence a civil action expires, or one year
24 from the date of the right-to-sue notice by the Department of Fair
25 Employment and Housing, whichever is later.

26 (3) This subdivision is intended to codify the holding in *Downs*
27 *v. Department of Water and Power of City of Los Angeles* (1997)
28 58 Cal.App.4th 1093.

29 (e) (1) Notwithstanding subdivision (b), the one-year statute
30 of limitations, commencing from the date of the right-to-sue notice
31 by the Department of Fair Employment and Housing, to the person
32 claiming to be aggrieved, shall be tolled when all of the following
33 requirements have been met:

34 (A) A charge of discrimination or harassment is timely filed
35 concurrently with the Equal Employment Opportunity Commission
36 and the Department of Fair Employment and Housing.

37 (B) The investigation of the charge is deferred by the Equal
38 Employment Opportunity Commission to the Department of Fair
39 Employment and Housing.

1 (C) After investigation and determination by the Department
2 of Fair Employment and Housing, the Equal Employment
3 Opportunity Commission agrees to perform a substantial weight
4 review of the determination of the department or conducts its own
5 investigation of the claim filed by the aggrieved person.

6 (2) The time for commencing an action for which the statute of
7 limitations is tolled under paragraph (1) shall expire when the
8 federal right-to-sue period to commence a civil action expires, or
9 one year from the date of the right-to-sue notice by the Department
10 of Fair Employment and Housing, whichever is later.

11 SECTION 1. The Legislature finds and declares the following:

12 ~~(a) Medical programs cost the state approximately~~
13 ~~\$40,000,000,000 in General Fund moneys, which amounts to~~
14 ~~approximately one quarter of the total state budget revenue. These~~
15 ~~programs provides health coverage for one in six Californians.~~

16 ~~(b) State revenue resources are limited and additional state funds~~
17 ~~may be required to implement the mandates of the federal Patient~~
18 ~~Protection and Affordable Care Act (42 U.S.C. Sec. 18051).~~

19 ~~(c) Medical fraud represents a significant drain and loss of~~
20 ~~General Fund moneys that could otherwise be used to expand~~
21 ~~coverage or provide better reimbursement rates for doctors.~~

22 ~~(d) It is the intent of the Legislature to provide additional~~
23 ~~investigative tools and other appropriate changes in the law to~~
24 ~~enhance the prosecution of medical fraud and reduce the enormous~~
25 ~~related drain on the General Fund revenue.~~