

AMENDED IN ASSEMBLY MARCH 26, 2015

CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

ASSEMBLY BILL

No. 1383

Introduced by Assembly Member Jones

February 27, 2015

An act to amend Section 12940 ~~of of~~, and to add Article 3 (commencing with Section 12958) to Chapter 6 of Part 2.8 of Division 3 of Title 2 of, the Government Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 1383, as amended, Jones. ~~Unlawful employment practices.~~ *Veterans preferences: voluntary policy.*

Under the California Fair Employment and Housing Act, it is an unlawful employment practice for an employer, unless based upon a bona fide occupational qualification or applicable security regulations established by the United States or the State of California, to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment, or to bar or discharge a person from employment or a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment 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 that person. *The California Fair Employment and Housing Act provides that nothing in that act relating to discrimination on account of sex affects the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam-era veterans.*

~~This bill would make nonsubstantive changes to those provisions.~~
enact the Voluntary Veterans' Preference Employment Policy Act to authorize a private employer to establish and maintain a written veterans' preference employment policy to give a voluntary preference for hiring or retaining a veteran over another qualified applicant or employee. The bill would provide that the granting of a veterans' preference pursuant to this article shall be deemed not to violate any local or state equal employment opportunity law or regulation, including, but not limited to, the antidiscrimination provisions of the California Fair Employment and Housing Act. The Voluntary Veterans' Preference Employment Policy Act would become operative on an unspecified date in 2016. The bill would provide that nothing in the California Fair Employment and Housing Act relating to discrimination affects the right of an employer to use veteran status as a factor in hiring decisions if the employer maintains a veterans' preference employment policy established in accordance with the Voluntary Veterans' Preference Employment Policy Act.

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~ 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

1 disability, or subject an employer to any legal liability resulting
2 from the refusal to employ or the discharge of an employee with
3 a physical or mental disability, where the employee, because of
4 his or her physical or mental disability, is unable to perform his
5 or her essential duties even with reasonable accommodations, or
6 cannot perform those duties in a manner that would not endanger
7 his or her health or safety or the health or safety of others even
8 with reasonable accommodations.

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

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

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

28 (B) Prohibit bona fide health plans from providing additional
29 or greater benefits to employees with dependents than to those
30 employees without or with fewer dependents.

31 (4) Nothing in this part relating to ~~discrimination on account of~~
32 ~~sex~~ shall affect the right of an employer to use veteran status as a
33 factor in ~~employee selection or to give special consideration to~~
34 ~~Vietnam-era veterans.~~ *hiring decisions if the employer maintains*
35 *a veterans' preference employment policy established in*
36 *accordance with Article 3 (commencing with Section 12958).*

37 (5) (A) This part does not prohibit an employer from refusing
38 to employ an individual because of his or her age if the law
39 compels or provides for that refusal. Promotions within the existing
40 staff, hiring or promotion on the basis of experience and training,

1 rehiring on the basis of seniority and prior service with the
2 employer, or hiring under an established recruiting program from
3 high schools, colleges, universities, or trade schools do not, in and
4 of themselves, constitute unlawful employment practices.

5 (B) The provisions of this part relating to discrimination on the
6 basis of age do not prohibit an employer from providing health
7 benefits or health care reimbursement plans to retired persons that
8 are altered, reduced, or eliminated when the person becomes
9 eligible for Medicare health benefits. This subparagraph applies
10 to all retiree health benefit plans and contractual provisions or
11 practices concerning retiree health benefits and health care
12 reimbursement plans in effect on or after January 1, 2011.

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

29 (c) For any person to discriminate against any person in the
30 selection, termination, training, or other terms or treatment of that
31 person in any apprenticeship training program, any other training
32 program leading to employment, an unpaid internship, or another
33 limited duration program to provide unpaid work experience for
34 that person because of the race, religious creed, color, national
35 origin, ancestry, physical disability, mental disability, medical
36 condition, genetic information, marital status, sex, gender, gender
37 identity, gender expression, age, sexual orientation, or military
38 and veteran status of the person discriminated against.

39 (d) For any employer or employment agency to print or circulate
40 or cause to be printed or circulated any publication, or to make

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

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

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

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

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

39 (2) Notwithstanding paragraph (1), an employer or employment
40 agency may require any examinations or inquiries that the employer

1 or employment agency can show to be job related and consistent
 2 with business necessity. An employer or employment agency may
 3 conduct voluntary medical examinations, including voluntary
 4 medical histories that are part of an employee health program
 5 available to employees at that worksite.

6 (g) For any employer, labor organization, or employment agency
 7 to harass, discharge, expel, or otherwise discriminate against any
 8 person because the person has made a report pursuant to Section
 9 11161.8 of the Penal Code, which prohibits retaliation against
 10 hospital employees who report suspected patient abuse by health
 11 facilities or community care facilities.

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

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

20 (j) (1) For an employer, labor organization, employment agency,
 21 apprenticeship training program, or any training program leading
 22 to employment, or any other person, because of race, religious
 23 creed, color, national origin, ancestry, physical disability, mental
 24 disability, medical condition, genetic information, marital status,
 25 sex, gender, gender identity, gender expression, age, sexual
 26 orientation, or military and veteran status, to harass an employee,
 27 an applicant, an unpaid intern or volunteer, or a person providing
 28 services pursuant to a contract. Harassment of an employee, an
 29 applicant, an unpaid intern or volunteer, or a person providing
 30 services pursuant to a contract by an employee, other than an agent
 31 or supervisor, shall be unlawful if the entity, or its agents or
 32 supervisors, knows or should have known of this conduct and fails
 33 to take immediate and appropriate corrective action. An employer
 34 may also be responsible for the acts of nonemployees, with respect
 35 to sexual harassment of employees, applicants, unpaid interns or
 36 volunteers, or persons providing services pursuant to a contract in
 37 the workplace, where the employer, or its agents or supervisors,
 38 knows or should have known of the conduct and fails to take
 39 immediate and appropriate corrective action. In reviewing cases
 40 involving the acts of nonemployees, the extent of the employer's

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

6 (2) This subdivision is declaratory of existing law, except for
7 the new duties imposed on employers with regard to harassment.

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

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

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

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

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

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

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

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

1 (k) For an employer, labor organization, employment agency,
2 apprenticeship training program, or any training program leading
3 to employment, to fail to take all reasonable steps necessary to
4 prevent discrimination and harassment from occurring.

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

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

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

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

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

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

17 (p) Nothing in this section shall be interpreted as preventing the
18 ability of employers to identify members of the military or veterans
19 for purposes of awarding a veteran’s preference as permitted by
20 law.

21 *SEC. 2. Article 3 (commencing with Section 12958) is added*
22 *to Chapter 6 of Part 2.8 of Division 3 of Title 2 of the Government*
23 *Code, to read:*

24
25 *Article 3. Voluntary Veterans’ Preference Employment Policies*

26
27 *12958. This article shall be known, and may be cited, as the*
28 *“Voluntary Veterans’ Preference Employment Policy Act.”*

29 *12958.1. As used in this article:*

30 (a) *“DD 214” means United States Department of Defense*
31 *Form 214 or a similarly effective form issued by that department*
32 *relating to separation from military service.*

33 (b) *“Private employer” means a business entity in the private*
34 *sector of this state with one or more employees.*

35 (c) *“Veteran” means a person who served on active duty in the*
36 *Armed Forces of the United States who was discharged or released*
37 *with an honorable discharge.*

38 (d) *“Veterans’ preference employment policy” means a private*
39 *employer’s voluntary preference for hiring or retaining a veteran*
40 *over another qualified applicant or employee.*

1 12958.2. (a) Notwithstanding any other law, a private
2 employer may establish and maintain a written veterans'
3 preference employment policy.
4 (b) An employer with a veterans' preference employment policy
5 may require that a veteran submit a DD 214 to be eligible for the
6 preference.
7 (c) The granting of a veterans' preference pursuant to this
8 article shall be deemed not to violate any local or state equal
9 employment opportunity law or regulation, including, but not
10 limited to, this chapter.
11 (d) The Department of Veterans Affairs shall assist any private
12 employer in determining if an applicant is a veteran to the extent
13 permitted by law.
14 12958.3. This article shall become operative on _____, 2016.