

ASSEMBLY BILL

No. 2773

**Introduced by Committee on Labor and Employment (Monning
(Chair), Eng, Furutani, Ma, and Portantino)**

March 1, 2010

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

LEGISLATIVE COUNSEL'S DIGEST

AB 2773, as introduced, Committee on Labor and Employment. Discrimination in employment.

Existing law, the 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, marital status, sex, age, or sexual orientation.

This bill would make nonsubstantive changes to these provisions.

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 ~~shall be~~ is an unlawful employment practice, unless
4 based upon a bona fide occupational qualification, or, except where
5 based upon applicable security regulations established by the
6 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, marital status, sex, age, or sexual orientation 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 employee's health or safety or the health or safety of others even with reasonable accommodations.

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

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

1 (B) Prohibit bona fide health plans from providing additional
2 or greater benefits to employees with dependents than to those
3 employees without or with fewer dependents.

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

8 (5) ~~Nothing in this part prohibits~~ *This part does not prohibit*
9 an employer from refusing to employ an individual because of his
10 or her age if the law compels or provides for that refusal.
11 Promotions within the existing staff, hiring or promotion on the
12 basis of experience and training, rehiring on the basis of seniority
13 and prior service with the employer, or hiring under an established
14 recruiting program from high schools, colleges, universities, or
15 trade schools do not, in and of themselves, constitute unlawful
16 employment practices.

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

30 (c) For any person to discriminate against any person in the
31 selection or training of that person in any apprenticeship training
32 program or any other training program leading to employment
33 because of the race, religious creed, color, national origin, ancestry,
34 physical disability, mental disability, medical condition, marital
35 status, sex, age, or sexual orientation of the person discriminated
36 against.

37 (d) For any employer or employment agency to print or circulate
38 or cause to be printed or circulated any publication, or to make
39 any non-job-related inquiry of an employee or applicant, either
40 verbal or through use of an application form, that expresses,

1 directly or indirectly, any limitation, specification, or discrimination
2 as to race, religious creed, color, national origin, ancestry, physical
3 disability, mental disability, medical condition, marital status, sex,
4 age, or sexual orientation, or any intent to make any such limitation,
5 specification, or discrimination. ~~Nothing in this part prohibits~~ *This*
6 *part does not prohibit* an employer or employment agency from
7 inquiring into the age of an applicant, or from specifying age
8 limitations, where the law compels or provides for that action.

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

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

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

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

36 (2) Notwithstanding paragraph (1), an employer or employment
37 agency may require any examinations or inquiries that it can show
38 to be job-related and consistent with business necessity. An
39 employer or employment agency may conduct voluntary medical
40 examinations, including voluntary medical histories, which are

1 part of an employee health program available to employees at that
2 worksite.

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

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

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

17 (j) (1) For an employer, labor organization, employment agency,
18 apprenticeship training program or any training program leading
19 to employment, or any other person, because of race, religious
20 creed, color, national origin, ancestry, physical disability, mental
21 disability, medical condition, marital status, sex, age, or sexual
22 orientation, to harass an employee, an applicant, or a person
23 providing services pursuant to a contract. Harassment of an
24 employee, an applicant, or a person providing services pursuant
25 to a contract by an employee, other than an agent or supervisor,
26 shall be unlawful if the entity, or its agents or supervisors, knows
27 or should have known of this conduct and fails to take immediate
28 and appropriate corrective action. An employer may also be
29 responsible for the acts of nonemployees, with respect to sexual
30 harassment of employees, applicants, or persons providing services
31 pursuant to a contract in the workplace, where the employer, or
32 its agents or supervisors, knows or should have known of the
33 conduct and fails to take immediate and appropriate corrective
34 action. In reviewing cases involving the acts of nonemployees, the
35 extent of the employer's control and any other legal responsibility
36 which the employer may have with respect to the conduct of those
37 nonemployees shall be considered. An entity shall take all
38 reasonable steps to prevent harassment from occurring. Loss of
39 tangible job benefits shall not be necessary in order to establish
40 harassment.

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

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

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

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

21 (C) For purposes of this subdivision, “harassment” because of
22 sex includes sexual harassment, gender harassment, and harassment
23 based on pregnancy, childbirth, or related medical conditions.

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

27 (A) The person has the right to control the performance of the
28 contract for services and discretion as to the manner of
29 performance.

30 (B) The person is customarily engaged in an independently
31 established business.

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

36 (k) For an employer, labor organization, employment agency,
37 apprenticeship training program, or any training program leading
38 to employment, to fail to take all reasonable steps necessary to
39 prevent discrimination and harassment from occurring.

1 (l) For an employer or other entity covered by this part to refuse
2 to hire or employ a person or to refuse to select a person for a
3 training program leading to employment or to bar or to discharge
4 a person from employment or from a training program leading to
5 employment, or to discriminate against a person in compensation
6 or in terms, conditions, or privileges of employment because of a
7 conflict between the person's religious belief or observance and
8 any employment requirement, unless the employer or other entity
9 covered by this part demonstrates that it has explored any available
10 reasonable alternative means of accommodating the religious belief
11 or observance, including the possibilities of excusing the person
12 from those duties that conflict with his or her religious belief or
13 observance or permitting those duties to be performed at another
14 time or by another person, but is unable to reasonably
15 accommodate the religious belief or observance without undue
16 hardship on the conduct of the business of the employer or other
17 entity covered by this part. Religious belief or observance, as used
18 in this section, includes, but is not limited to, observance of a
19 Sabbath or other religious holy day or days, and reasonable time
20 necessary for travel prior and subsequent to a religious observance.

21 (m) For an employer or other entity covered by this part to fail
22 to make reasonable accommodation for the known physical or
23 mental disability of an applicant or employee. Nothing in this
24 subdivision or in paragraph (1) or (2) of subdivision (a) shall be
25 construed to require an accommodation that is demonstrated by
26 the employer or other covered entity to produce undue hardship
27 to its operation.

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

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