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

LEGISLATIVE COUNSEL’S DIGEST

AB 2043, as introduced, Gonzalez. Unlawful business practices: employer liability: contracted supervisor.

Existing law, the California Fair Employment and Housing Act, among other things, prohibits an employer, a labor organization, an employment agency, an apprenticeship training program, or any training program leading to employment from harassing, based upon enumerated protected characteristics, such as race or gender, an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract.

This bill would also make a client employer responsible for the acts of a contracted supervisor, as those terms are defined, for specified prohibited harassment under these provisions.


The people of the State of California do enact as follows:

SECTION 1. Section 12940 of the Government Code is amended to read:

12940. It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based
upon applicable security regulations established by the 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, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status 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, if the employee, because of a physical or mental disability, is unable to perform the employee’s 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.

(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 the employee’s 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 the employee’s 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.

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

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

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

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

(b) For a labor organization, 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 any person, to exclude,
expel, or restrict from its membership the person, or to provide
only second-class or segregated membership or to discriminate
against any person 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 the person in the election of officers
of the labor organization or in the selection of the labor
organization’s staff or to discriminate in any way against any of
its members or against any employer or against any person
employed by an employer.

(c) For any person to discriminate against any person in the
selection, termination, training, or other terms or treatment of that
person in any apprenticeship training program, any other training
program leading to employment, an unpaid internship, or another
limited duration program to provide unpaid work experience for
that person 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 the person discriminated against.

(d) For any employer or employment agency to print or circulate
or cause to be printed or circulated any publication, or to make
any nonjob-related inquiry of an employee or applicant, either
verbal or through use of an application form, that expresses,
directly or indirectly, any limitation, specification, or discrimination
as to 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, or any intent
to make any such limitation, specification, or discrimination. This
part does not prohibit an employer or employment agency from
inquiring into the age of an applicant, or from specifying age
limitations, if the law compels or provides for that action.

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

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

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

(f) (1) Except as provided in paragraph (2), for any employer
or employment agency to require any medical or psychological
examination of an employee, to make any medical or psychological
inquiry of an employee, to make any inquiry whether an employee
has a mental disability, physical disability, or medical condition,
or to make any inquiry regarding the nature or severity of a physical
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,
aprenticeship 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, sexual
orientation, or military and veteran status, to harass an employee,
an applicant, an unpaid intern or volunteer, or a person providing
services pursuant to a contract. Harassment of an employee, an
applicant, an unpaid intern or volunteer, 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 harassment of employees, applicants, unpaid interns or
volunteers, or persons providing services pursuant to a contract in
the workplace, if 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 extent of the employer's control and
any other legal responsibility that the employer may have with
respect to the conduct of those nonemployees shall be considered.
An entity shall take all reasonable steps to prevent harassment
from occurring. Loss of tangible job benefits shall not be necessary
in order to establish harassment.

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

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

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

(B) Notwithstanding subparagraph (A), for purposes of this
subdivision, “employer” does not include a religious association
or corporation not organized for private profit, except as provided
in Section 12926.2.
(C) For purposes of this subdivision, “harassment” because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. Sexually harassing conduct need not be motivated by sexual desire.

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

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

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

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

(6) A client employer is also responsible for the acts of a contracted supervisor with respect to harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace.

(A) For purposes of this subdivision, “client employer” means a private business entity, regardless of its form, that obtains workers to perform labor within the usual course of business from a contractor. “Client employer” does not include a business entity with fewer than 25 workers, including those hired directly and those obtained by a contractor, or a business entity with 5 or fewer workers supplied by a contractor.

(B) For purposes of this subdivision, “contracted supervisor” means a person providing services pursuant to a contract who supervises one or more employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract.

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

(l) (1) For an employer or other entity covered by this part 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 to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in
compensation or in terms, conditions, or privileges of employment because of a conflict between the person’s religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with the person’s religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship, as defined in subdivision (u) of Section 12926, on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, reasonable time necessary for travel prior and subsequent to a religious observance, and religious dress practice and religious grooming practice as described in subdivision (q) of Section 12926. This subdivision shall also apply to an apprenticeship training program, an unpaid internship, and any other program to provide unpaid experience for a person in the workplace or industry.

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

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

(4) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

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

(2) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

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

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

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