

ASSEMBLY BILL

No. 2043

Introduced by Assembly Member Gonzalez

February 3, 2020

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.

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

1 upon applicable security regulations established by the United
2 States or the State of California:

3 (a) For an employer, because of the race, religious creed, color,
4 national origin, ancestry, physical disability, mental disability,
5 medical condition, genetic information, marital status, sex, gender,
6 gender identity, gender expression, age, sexual orientation, or
7 military and veteran status of any person, to refuse to hire or
8 employ the person or to refuse to select the person for a training
9 program leading to employment, or to bar or to discharge the
10 person from employment or from a training program leading to
11 employment, or to discriminate against the person in compensation
12 or in terms, conditions, or privileges of employment.

13 (1) This part does not prohibit an employer from refusing to
14 hire or discharging an employee with a physical or mental
15 disability, or subject an employer to any legal liability resulting
16 from the refusal to employ or the discharge of an employee with
17 a physical or mental disability, if the employee, because of a
18 physical or mental disability, is unable to perform the employee's
19 essential duties even with reasonable accommodations, or cannot
20 perform those duties in a manner that would not endanger the
21 employee's health or safety or the health or safety of others even
22 with reasonable accommodations.

23 (2) This part does not prohibit an employer from refusing to
24 hire or discharging an employee who, because of the employee's
25 medical condition, is unable to perform the employee's essential
26 duties even with reasonable accommodations, or cannot perform
27 those duties in a manner that would not endanger the employee's
28 health or safety or the health or safety of others even with
29 reasonable accommodations. Nothing in this part shall subject an
30 employer to any legal liability resulting from the refusal to employ
31 or the discharge of an employee who, because of the employee's
32 medical condition, is unable to perform the employee's essential
33 duties, or cannot perform those duties in a manner that would not
34 endanger the employee's health or safety or the health or safety
35 of others even with reasonable accommodations.

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

38 (A) Affect the right of an employer to reasonably regulate, for
39 reasons of supervision, safety, security, or morale, the working of

1 spouses in the same department, division, or facility, consistent
2 with the rules and regulations adopted by the commission.

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

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

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

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

26 (b) For a labor organization, because of the race, religious creed,
27 color, national origin, ancestry, physical disability, mental
28 disability, medical condition, genetic information, marital status,
29 sex, gender, gender identity, gender expression, age, sexual
30 orientation, or military and veteran status of any person, to exclude,
31 expel, or restrict from its membership the person, or to provide
32 only second-class or segregated membership or to discriminate
33 against any person because of the race, religious creed, color,
34 national origin, ancestry, physical disability, mental disability,
35 medical condition, genetic information, marital status, sex, gender,
36 gender identity, gender expression, age, sexual orientation, or
37 military and veteran status of the person in the election of officers
38 of the labor organization or in the selection of the labor
39 organization's staff or to discriminate in any way against any of

1 its members or against any employer or against any person
2 employed by an employer.

3 (c) For any person to discriminate against any person in the
4 selection, termination, training, or other terms or treatment of that
5 person in any apprenticeship training program, any other training
6 program leading to employment, an unpaid internship, or another
7 limited duration program to provide unpaid work experience for
8 that person because of the race, religious creed, color, national
9 origin, ancestry, physical disability, mental disability, medical
10 condition, genetic information, marital status, sex, gender, gender
11 identity, gender expression, age, sexual orientation, or military
12 and veteran status of the person discriminated against.

13 (d) For any employer or employment agency to print or circulate
14 or cause to be printed or circulated any publication, or to make
15 any nonjob-related inquiry of an employee or applicant, either
16 verbal or through use of an application form, that expresses,
17 directly or indirectly, any limitation, specification, or discrimination
18 as to race, religious creed, color, national origin, ancestry, physical
19 disability, mental disability, medical condition, genetic information,
20 marital status, sex, gender, gender identity, gender expression,
21 age, sexual orientation, or military and veteran status, or any intent
22 to make any such limitation, specification, or discrimination. This
23 part does not prohibit an employer or employment agency from
24 inquiring into the age of an applicant, or from specifying age
25 limitations, if the law compels or provides for that action.

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

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

38 (3) Notwithstanding paragraph (1), an employer or employment
39 agency may require a medical or psychological examination or
40 make a medical or psychological inquiry of a job applicant after

1 an employment offer has been made but prior to the
2 commencement of employment duties, provided that the
3 examination or inquiry is job related and consistent with business
4 necessity and that all entering employees in the same job
5 classification are subject to the same examination or inquiry.

6 (f) (1) Except as provided in paragraph (2), for any employer
7 or employment agency to require any medical or psychological
8 examination of an employee, to make any medical or psychological
9 inquiry of an employee, to make any inquiry whether an employee
10 has a mental disability, physical disability, or medical condition,
11 or to make any inquiry regarding the nature or severity of a physical
12 disability, mental disability, or medical condition.

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

20 (g) For any employer, labor organization, or employment agency
21 to harass, discharge, expel, or otherwise discriminate against any
22 person because the person has made a report pursuant to Section
23 11161.8 of the Penal Code that prohibits retaliation against hospital
24 employees who report suspected patient abuse by health facilities
25 or community care facilities.

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

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

34 (j) (1) For an employer, labor organization, employment agency,
35 apprenticeship training program or any training program leading
36 to employment, or any other person, because of race, religious
37 creed, color, national origin, ancestry, physical disability, mental
38 disability, medical condition, genetic information, marital status,
39 sex, gender, gender identity, gender expression, age, sexual
40 orientation, or military and veteran status, to harass an employee,

1 an applicant, an unpaid intern or volunteer, or a person providing
2 services pursuant to a contract. Harassment of an employee, an
3 applicant, an unpaid intern or volunteer, or a person providing
4 services pursuant to a contract by an employee, other than an agent
5 or supervisor, shall be unlawful if the entity, or its agents or
6 supervisors, knows or should have known of this conduct and fails
7 to take immediate and appropriate corrective action. An employer
8 may also be responsible for the acts of nonemployees, with respect
9 to harassment of employees, applicants, unpaid interns or
10 volunteers, or persons providing services pursuant to a contract in
11 the workplace, if the employer, or its agents or supervisors, knows
12 or should have known of the conduct and fails to take immediate
13 and appropriate corrective action. In reviewing cases involving
14 the acts of nonemployees, the extent of the employer's control and
15 any other legal responsibility that the employer may have with
16 respect to the conduct of those nonemployees shall be considered.
17 An entity shall take all reasonable steps to prevent harassment
18 from occurring. Loss of tangible job benefits shall not be necessary
19 in order to establish harassment.

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

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

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

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

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

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

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

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

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

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

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

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

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

36 (l) (1) For an employer or other entity covered by this part to
37 refuse to hire or employ a person or to refuse to select a person
38 for a training program leading to employment or to bar or to
39 discharge a person from employment or from a training program
40 leading to employment, or to discriminate against a person in

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

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

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

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

36 (m) (1) For an employer or other entity covered by this part to
37 fail to make reasonable accommodation for the known physical
38 or mental disability of an applicant or employee. Nothing in this
39 subdivision or in paragraph (1) or (2) of subdivision (a) shall be
40 construed to require an accommodation that is demonstrated by

1 the employer or other covered entity to produce undue hardship,
2 as defined in subdivision (u) of Section 12926, to its operation.

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

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.