

AMENDED IN SENATE APRIL 15, 2013

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 employment.

LEGISLATIVE COUNSEL'S DIGEST

SB 655, as amended, Wright. 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 *that*, in a claim of an unlawful practice under these provisions, ~~that even if the employee prevails if the employee has proven that a protected characteristic was a substantial factor, as defined, in the adverse employment action.~~ 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 remedies available to the employee would be limited as provided.* 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 employee, and for attorney's and expert's fees against an employer who violates 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 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 the employee shall prevail if the employee has*
5 *proven that a protected characteristic was a substantial factor in*
6 *the adverse employment action. If an employer proves as an*
7 *affirmative defense that it would have taken the same adverse*
8 *employment action against an employee, at the same time, for*
9 *lawful reasons, absent consideration of the protected characteristic,*
10 ~~the employee may still prevail on a claim of an unlawful practice~~
11 ~~if the employee can prove that a protected characteristic was a~~
12 ~~substantial factor in the adverse employment action. the remedies~~
13 ~~available to the employee shall be limited to the remedies provided~~
14 ~~in paragraph (2) of subdivision (b) of Section 12965.~~

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

19 ~~(C) An employee who prevails in a claim under this paragraph~~
20 ~~is limited to the remedies provided in paragraph (2) of subdivision~~
21 ~~(b) of Section 12965.~~

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

37 (c) For any person to discriminate against any person in the
38 selection or training of that person in any apprenticeship training
39 program or any other training program leading to employment
40 because of the race, religious creed, color, national origin, ancestry,

1 physical disability, mental disability, medical condition, genetic
2 information, marital status, sex, gender, gender identity, gender
3 expression, age, or sexual orientation of the person discriminated
4 against.

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

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

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

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

38 (f) (1) Except as provided in paragraph (2), for any employer
39 or employment agency to require any medical or psychological
40 examination of an employee, to make any medical or psychological

1 inquiry of an employee, to make any inquiry whether an employee
2 has a mental disability, physical disability, or medical condition,
3 or to make any inquiry regarding the nature or severity of a physical
4 disability, mental disability, or medical condition.

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

12 (g) For any employer, labor organization, or employment agency
13 to harass, discharge, expel, or otherwise discriminate against any
14 person because the person has made a report pursuant to Section
15 11161.8 of the Penal Code that prohibits retaliation against hospital
16 employees who report suspected patient abuse by health facilities
17 or community care facilities.

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

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

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

1 pursuant to a contract in the workplace, where the employer, or
2 its agents or supervisors, knows or should have known of the
3 conduct and fails to take immediate and appropriate corrective
4 action. In reviewing cases involving the acts of nonemployees, the
5 extent of the employer’s control and any other legal responsibility
6 that the employer may have with respect to the conduct of those
7 nonemployees shall be considered. An entity shall take all
8 reasonable steps to prevent harassment from occurring. Loss of
9 tangible job benefits shall not be necessary in order to establish
10 harassment.

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

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

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

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

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

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

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

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

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

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

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

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

38 (3) An accommodation is not required under this subdivision
39 if it would result in a violation of this part or any other law
40 prohibiting discrimination or protecting civil rights, including

1 subdivision (b) of Section 51 of the Civil Code and Section 11135
2 of this code.

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

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

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

19 SEC. 2. Section 12965 of the Government Code is amended
20 to read:

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

1 brought within the county of the defendant's residence or principal
2 office.

3 For any complaint treated by the director as a group or class
4 complaint for purposes of investigation, conciliation, mediation,
5 or civil action pursuant to Section 12961, a civil action shall be
6 brought, if at all, within two years after the filing of the complaint.
7 For any complaint alleging a violation of Section 51.7 of the Civil
8 Code, a civil action shall be brought, if at all, within two years
9 after the filing of the complaint. For all other complaints, a civil
10 action shall be brought, if at all, within one year after the filing of
11 a complaint. If the director determines, pursuant to Section 12961,
12 that a complaint investigated as a group or class complaint under
13 Section 12961 is to be treated as a group or class complaint for
14 purposes of conciliation, mediation, or civil action as well, that
15 determination shall be made and shall be communicated in writing
16 within one year after the filing of the complaint to each person,
17 employer, labor organization, employment agency, or public entity
18 alleged in the complaint to have committed an unlawful practice.

19 (b) (1) If a civil action is not brought by the department within
20 150 days after the filing of a complaint, or if the department earlier
21 determines that no civil action will be brought, the department
22 shall promptly notify, in writing, the person claiming to be
23 aggrieved that the department shall issue, on his or her request,
24 the right-to-sue notice. This notice shall indicate that the person
25 claiming to be aggrieved may bring a civil action under this part
26 against the person, employer, labor organization, or employment
27 agency named in the verified complaint within one year from the
28 date of that notice. If the person claiming to be aggrieved does not
29 request a right-to-sue notice, the department shall issue the notice
30 upon completion of its investigation, and not later than one year
31 after the filing of the complaint. A city, county, or district attorney
32 in a location having an enforcement unit established on or before
33 March 1, 1991, pursuant to a local ordinance enacted for the
34 purpose of prosecuting HIV/AIDS discrimination claims, acting
35 on behalf of any person claiming to be aggrieved due to HIV/AIDS
36 discrimination, may also bring a civil action under this part against
37 the person, employer, labor organization, or employment agency
38 named in the notice. The superior courts of the State of California
39 shall have jurisdiction of those actions, and the aggrieved person
40 may file in these courts. An action may be brought in any county

1 in the state in which the unlawful practice is alleged to have been
2 committed, in the county in which the records relevant to the
3 practice are maintained and administered, or in the county in which
4 the aggrieved person would have worked or would have had access
5 to the public accommodation but for the alleged unlawful practice,
6 but if the defendant is not found within any of these counties, an
7 action may be brought within the county of the defendant's
8 residence or principal office. A copy of any complaint filed
9 pursuant to this part shall be served on the principal offices of the
10 department. The remedy for failure to send a copy of a complaint
11 is an order to do so. Those actions may not be filed as class actions
12 or may not be maintained as class actions by the person or persons
13 claiming to be aggrieved where those persons have filed a civil
14 class action in the federal courts alleging a comparable claim of
15 employment discrimination against the same defendant or
16 defendants. ~~In civil actions brought under this section, the court,
17 in its discretion, may award to the prevailing party, including the
18 department, reasonable attorney's fees and costs, including expert
19 witness fees.~~

20 (2) ~~If~~ *In a civil action brought pursuant to this subdivision, if*
21 *an employee establishes that an employer committed an unlawful*
22 *practice under the provisions of paragraph (6) of subdivision (a)*
23 *of Section 12940, the employer shall be liable for an amount to be*
24 *determined by a jury, or a court sitting without a jury, for*
25 *noneconomic damages resulting from the adverse employment*
26 *action and shall grant, in addition to any other available remedy,*
27 *a statutory penalty of twenty-five thousand dollars (\$25,000) to*
28 *be awarded directly to the employee. A court may also grant as*
29 *relief any other declaratory or injunctive relief that, in the judgment*
30 *of the court, will effectuate the purpose of this part. This relief*
31 *may include, but is not limited to, a requirement that the employer*
32 *conduct training for all employees, supervisors, and management*
33 *on the requirements of this part, the rights and remedies of those*
34 *who allege a violation of this article, and the employer's internal*
35 *grievance procedures. The court may award to the prevailing party,*
36 *including the department, reasonable attorney's fees and costs,*
37 *including expert witness fees. An employee who prevails in a civil*
38 *action brought pursuant to this subdivision shall not be entitled*
39 *to reinstatement or back pay.*

1 (c) A court may grant as relief in any action filed pursuant to
2 subdivision (a) any relief a court is empowered to grant in a civil
3 action brought pursuant to subdivision (b), in addition to any other
4 relief that, in the judgment of the court, will effectuate the purpose
5 of this part. This relief may include a requirement that the employer
6 conduct training for all employees, supervisors, and management
7 on the requirements of this part, the rights and remedies of those
8 who allege a violation of this part, and the employer's internal
9 grievance procedures. In addition, in order to vindicate the purposes
10 and policies of this part, a court may assess against the defendant,
11 if the civil complaint or amended civil complaint so prays, a civil
12 penalty of up to twenty-five thousand dollars (\$25,000) to be
13 awarded to a person denied any right provided for by Section 51.7
14 of the Civil Code, as an unlawful practice prohibited under this
15 part.

16 (d) *In a civil action brought under this section, the court may*
17 *award to the prevailing party, including the department, reasonable*
18 *attorney's fees and costs, including expert witness fees.*

19 ~~(d)~~

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

25 (A) A charge of discrimination or harassment is timely filed
26 concurrently with the Equal Employment Opportunity Commission
27 and the Department of Fair Employment and Housing.

28 (B) The investigation of the charge is deferred by the
29 Department of Fair Employment and Housing to the Equal
30 Employment Opportunity Commission.

31 (C) A right-to-sue notice is issued to the person claiming to be
32 aggrieved upon deferral of the charge by the Department of Fair
33 Employment and Housing to the Equal Employment Opportunity
34 Commission.

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

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

4 (e)

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

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

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

16 (C) After investigation and determination by the Department
17 of Fair Employment and Housing, the Equal Employment
18 Opportunity Commission agrees to perform a substantial weight
19 review of the determination of the department or conducts its own
20 investigation of the claim filed by the aggrieved person.

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

O