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AMENDED IN SENATE JUNE 21, 2016
AMENDED IN SENATE MARCH 31, 2016
AMENDED IN ASSEMBLY JANUARY 4, 2016
AMENDED IN ASSEMBLY APRIL 14, 2015
AMENDED IN ASSEMBLY MARCH 26, 2015
CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

ASSEMBLY BILL

No. 488

Introduced by Assembly Member Gonzalez
(Coauthor: Senator Hueso)

February 23, 2015

An act to amend ~~Sections 12926 and 12940~~ *Section 12926* of of, and to add *Section 12926.05* to, the Government Code, relating to employment discrimination.

LEGISLATIVE COUNSEL'S DIGEST

AB 488, as amended, Gonzalez. Employment discrimination.

Existing law, the California Fair Employment and Housing Act, protects the right to seek, obtain, and hold employment without discrimination because of race, religious creed, physical disability, mental disability, sex, age, and sexual orientation, among other characteristics. The act prohibits various forms of employment discrimination, including discharging or refusing to hire or to select for training programs on a prohibited basis. The act prescribes requirements for filing complaints of employment discrimination with the Department of Fair Employment and Housing and charges this department with

investigating and determining whether or not to bring a civil action on behalf of the complainant, among other duties. The act exempts employers from remedies for specified unlawful employment practices, including when the discrimination is on the basis of physical or mental disability and the disability prevents the employee from safely performing essential duties even with reasonable accommodations. The act excludes from the definition of “employee,” any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility. A special license permits the employment of individuals with disabilities at a wage less than the legal minimum wage.

~~This bill would redefine “employee” to no longer exclude any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility, thereby applying employment discrimination protections to these individuals. This bill would authorize an individual employed under a special license in a nonprofit sheltered workshop, day program, or rehabilitation facility to bring an action under the act for any form of harassment or discrimination prohibited by the act. The bill would provide an employer against whom the individual brings this action with an affirmative defense by proving, by a preponderance of evidence, that the challenged action was permitted by statute or regulation and was necessary to serve employees with disabilities under a special license. The bill would exempt an employer who obtains employer’s obtaining a special license, or hires or employs hiring or employing a qualified individual at a wage less than the minimum wage in conformity with a special license, from the act’s provisions prohibiting discrimination based on disability. The bill would provide that the definition of employee was not intended to permit the harassment of, or discrimination against, an individual employed under a special license in a nonprofit sheltered workshop, day program, or rehabilitation facility.~~

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 12926 of the Government Code is
2 amended to read:

1 12926. As used in this part in connection with unlawful
2 practices, unless a different meaning clearly appears from the
3 context:

4 (a) “Affirmative relief” or “prospective relief” includes the
5 authority to order reinstatement of an employee, awards of backpay,
6 reimbursement of out-of-pocket expenses, hiring, transfers,
7 reassignments, grants of tenure, promotions, cease and desist
8 orders, posting of notices, training of personnel, testing, expunging
9 of records, reporting of records, and any other similar relief that
10 is intended to correct unlawful practices under this part.

11 (b) “Age” refers to the chronological age of any individual who
12 has reached his or her 40th birthday.

13 (c) ~~“Employee”~~ *Except as provided by Section 12926.05,*
14 *“employee”* does not include any individual employed by his or
15 her parents, spouse, or ~~child~~. *child or any individual employed*
16 *under a special license in a nonprofit sheltered workshop or*
17 *rehabilitation facility.*

18 (d) “Employer” includes any person regularly employing five
19 or more persons, or any person acting as an agent of an employer,
20 directly or indirectly, the state or any political or civil subdivision
21 of the state, and cities, except as follows:

22 “Employer” does not include a religious association or
23 corporation not organized for private profit.

24 (e) “Employment agency” includes any person undertaking for
25 compensation to procure employees or opportunities to work.

26 (f) “Essential functions” means the fundamental job duties of
27 the employment position the individual with a disability holds or
28 desires. “Essential functions” does not include the marginal
29 functions of the position.

30 (1) A job function may be considered essential for any of several
31 reasons, including, but not limited to, any one or more of the
32 following:

33 (A) The function may be essential because the reason the
34 position exists is to perform that function.

35 (B) The function may be essential because of the limited number
36 of employees available among whom the performance of that job
37 function can be distributed.

38 (C) The function may be highly specialized, so that the
39 incumbent in the position is hired for his or her expertise or ability
40 to perform the particular function.

- 1 (2) Evidence of whether a particular function is essential
2 includes, but is not limited to, the following:
- 3 (A) The employer’s judgment as to which functions are essential.
4 (B) Written job descriptions prepared before advertising or
5 interviewing applicants for the job.
6 (C) The amount of time spent on the job performing the function.
7 (D) The consequences of not requiring the incumbent to perform
8 the function.
9 (E) The terms of a collective bargaining agreement.
10 (F) The work experiences of past incumbents in the job.
11 (G) The current work experience of incumbents in similar jobs.
- 12 (g) (1) “Genetic information” means, with respect to any
13 individual, information about any of the following:
- 14 (A) The individual’s genetic tests.
15 (B) The genetic tests of family members of the individual.
16 (C) The manifestation of a disease or disorder in family members
17 of the individual.
18 (2) “Genetic information” includes any request for, or receipt
19 of, genetic services, or participation in clinical research that
20 includes genetic services, by an individual or any family member
21 of the individual.
22 (3) “Genetic information” does not include information about
23 the sex or age of any individual.
- 24 (h) “Labor organization” includes any organization that exists
25 and is constituted for the purpose, in whole or in part, of collective
26 bargaining or of dealing with employers concerning grievances,
27 terms or conditions of employment, or of other mutual aid or
28 protection.
- 29 (i) “Medical condition” means either of the following:
- 30 (1) Any health impairment related to or associated with a
31 diagnosis of cancer or a record or history of cancer.
32 (2) Genetic characteristics. For purposes of this section, “genetic
33 characteristics” means either of the following:
- 34 (A) Any scientifically or medically identifiable gene or
35 chromosome, or combination or alteration thereof, that is known
36 to be a cause of a disease or disorder in a person or his or her
37 offspring, or that is determined to be associated with a statistically
38 increased risk of development of a disease or disorder, and that is
39 presently not associated with any symptoms of any disease or
40 disorder.

1 (B) Inherited characteristics that may derive from the individual
2 or family member, that are known to be a cause of a disease or
3 disorder in a person or his or her offspring, or that are determined
4 to be associated with a statistically increased risk of development
5 of a disease or disorder, and that are presently not associated with
6 any symptoms of any disease or disorder.

7 (j) “Mental disability” includes, but is not limited to, all of the
8 following:

9 (1) Having any mental or psychological disorder or condition,
10 such as intellectual disability, organic brain syndrome, emotional
11 or mental illness, or specific learning disabilities, that limits a
12 major life activity. For purposes of this section:

13 (A) “Limits” shall be determined without regard to mitigating
14 measures, such as medications, assistive devices, or reasonable
15 accommodations, unless the mitigating measure itself limits a
16 major life activity.

17 (B) A mental or psychological disorder or condition limits a
18 major life activity if it makes the achievement of the major life
19 activity difficult.

20 (C) “Major life activities” shall be broadly construed and shall
21 include physical, mental, and social activities and working.

22 (2) Any other mental or psychological disorder or condition not
23 described in paragraph (1) that requires special education or related
24 services.

25 (3) Having a record or history of a mental or psychological
26 disorder or condition described in paragraph (1) or (2), which is
27 known to the employer or other entity covered by this part.

28 (4) Being regarded or treated by the employer or other entity
29 covered by this part as having, or having had, any mental condition
30 that makes achievement of a major life activity difficult.

31 (5) Being regarded or treated by the employer or other entity
32 covered by this part as having, or having had, a mental or
33 psychological disorder or condition that has no present disabling
34 effect, but that may become a mental disability as described in
35 paragraph (1) or (2).

36 “Mental disability” does not include sexual behavior disorders,
37 compulsive gambling, kleptomania, pyromania, or psychoactive
38 substance use disorders resulting from the current unlawful use of
39 controlled substances or other drugs.

1 (k) “Military and veteran status” means a member or veteran
2 of the United States Armed Forces, United States Armed Forces
3 Reserve, the United States National Guard, and the California
4 National Guard.

5 (l) “On the bases enumerated in this part” means or refers to
6 discrimination on the basis of one or more of the following: race,
7 religious creed, color, national origin, ancestry, physical disability,
8 mental disability, medical condition, genetic information, marital
9 status, sex, age, sexual orientation, or military and veteran status.

10 (m) “Physical disability” includes, but is not limited to, all of
11 the following:

12 (1) Having any physiological disease, disorder, condition,
13 cosmetic disfigurement, or anatomical loss that does both of the
14 following:

15 (A) Affects one or more of the following body systems:
16 neurological, immunological, musculoskeletal, special sense
17 organs, respiratory, including speech organs, cardiovascular,
18 reproductive, digestive, genitourinary, hemic and lymphatic, skin,
19 and endocrine.

20 (B) Limits a major life activity. For purposes of this section:

21 (i) “Limits” shall be determined without regard to mitigating
22 measures such as medications, assistive devices, prosthetics, or
23 reasonable accommodations, unless the mitigating measure itself
24 limits a major life activity.

25 (ii) A physiological disease, disorder, condition, cosmetic
26 disfigurement, or anatomical loss limits a major life activity if it
27 makes the achievement of the major life activity difficult.

28 (iii) “Major life activities” shall be broadly construed and
29 includes physical, mental, and social activities and working.

30 (2) Any other health impairment not described in paragraph (1)
31 that requires special education or related services.

32 (3) Having a record or history of a disease, disorder, condition,
33 cosmetic disfigurement, anatomical loss, or health impairment
34 described in paragraph (1) or (2), which is known to the employer
35 or other entity covered by this part.

36 (4) Being regarded or treated by the employer or other entity
37 covered by this part as having, or having had, any physical
38 condition that makes achievement of a major life activity difficult.

39 (5) Being regarded or treated by the employer or other entity
40 covered by this part as having, or having had, a disease, disorder,

1 condition, cosmetic disfigurement, anatomical loss, or health
2 impairment that has no present disabling effect but may become
3 a physical disability as described in paragraph (1) or (2).

4 (6) “Physical disability” does not include sexual behavior
5 disorders, compulsive gambling, kleptomania, pyromania, or
6 psychoactive substance use disorders resulting from the current
7 unlawful use of controlled substances or other drugs.

8 (n) Notwithstanding subdivisions (j) and (m), if the definition
9 of “disability” used in the federal Americans with Disabilities Act
10 of 1990 (Public Law 101-336) would result in broader protection
11 of the civil rights of individuals with a mental disability or physical
12 disability, as defined in subdivision (j) or (m), or would include
13 any medical condition not included within those definitions, then
14 that broader protection or coverage shall be deemed incorporated
15 by reference into, and shall prevail over conflicting provisions of,
16 the definitions in subdivisions (j) and (m).

17 (o) “Race, religious creed, color, national origin, ancestry,
18 physical disability, mental disability, medical condition, genetic
19 information, marital status, sex, age, sexual orientation, or military
20 and veteran status” includes a perception that the person has any
21 of those characteristics or that the person is associated with a
22 person who has, or is perceived to have, any of those
23 characteristics.

24 (p) “Reasonable accommodation” may include either of the
25 following:

26 (1) Making existing facilities used by employees readily
27 accessible to, and usable by, individuals with disabilities.

28 (2) Job restructuring, part-time or modified work schedules,
29 reassignment to a vacant position, acquisition or modification of
30 equipment or devices, adjustment or modifications of examinations,
31 training materials or policies, the provision of qualified readers or
32 interpreters, and other similar accommodations for individuals
33 with disabilities.

34 (q) “Religious creed,” “religion,” “religious observance,”
35 “religious belief,” and “creed” include all aspects of religious
36 belief, observance, and practice, including religious dress and
37 grooming practices. “Religious dress practice” shall be construed
38 broadly to include the wearing or carrying of religious clothing,
39 head or face coverings, jewelry, artifacts, and any other item that
40 is part of the observance by an individual of his or her religious

1 creed. “Religious grooming practice” shall be construed broadly
2 to include all forms of head, facial, and body hair that are part of
3 the observance by an individual of his or her religious creed.

4 (r) (1) “Sex” includes, but is not limited to, the following:

5 (A) Pregnancy or medical conditions related to pregnancy.

6 (B) Childbirth or medical conditions related to childbirth.

7 (C) Breastfeeding or medical conditions related to breastfeeding.

8 (2) “Sex” also includes, but is not limited to, a person’s gender.

9 “Gender” means sex, and includes a person’s gender identity and
10 gender expression. “Gender expression” means a person’s
11 gender-related appearance and behavior whether or not
12 stereotypically associated with the person’s assigned sex at birth.

13 (s) “Sexual orientation” means heterosexuality, homosexuality,
14 and bisexuality.

15 (t) “Supervisor” means any individual having the authority, in
16 the interest of the employer, to hire, transfer, suspend, lay off,
17 recall, promote, discharge, assign, reward, or discipline other
18 employees, or the responsibility to direct them, or to adjust their
19 grievances, or effectively to recommend that action, if, in
20 connection with the foregoing, the exercise of that authority is not
21 of a merely routine or clerical nature, but requires the use of
22 independent judgment.

23 (u) “Undue hardship” means an action requiring significant
24 difficulty or expense, when considered in light of the following
25 factors:

26 (1) The nature and cost of the accommodation needed.

27 (2) The overall financial resources of the facilities involved in
28 the provision of the reasonable accommodations, the number of
29 persons employed at the facility, and the effect on expenses and
30 resources or the impact otherwise of these accommodations upon
31 the operation of the facility.

32 (3) The overall financial resources of the covered entity, the
33 overall size of the business of a covered entity with respect to the
34 number of employees, and the number, type, and location of its
35 facilities.

36 (4) The type of operations, including the composition, structure,
37 and functions of the workforce of the entity.

38 (5) The geographic separateness or administrative or fiscal
39 relationship of the facility or facilities.

1 (v) “National origin” discrimination includes, but is not limited
2 to, discrimination on the basis of possessing a driver’s license
3 granted under Section 12801.9 of the Vehicle Code.

4 SEC. 2. Section 12926.05 is added to the Government Code,
5 to read:

6 12926.05. (a) An individual employed under a special license
7 pursuant to Section 1191 or 1191.5 of the Labor Code in a
8 nonprofit sheltered workshop, day program, or rehabilitation
9 facility may bring an action under this part for any form of
10 harrassment or discrimination prohibited by this part.

11 (b) If an individual specified in subdivision (a) brings an action
12 against an employer for any form of harassment or discrimination
13 prohibited by this part, the employer has an affirmative defense
14 to the action by proving, by a preponderance of evidence, both of
15 the following:

16 (1) The challenged activity was permitted by statute or
17 regulation.

18 (2) The challenged activity was necessary to serve employees
19 with disabilities under a special license pursuant to Section 1191
20 or 1191.5 of the Labor Code.

21 (c) Nothing in this part relating to discrimination on account
22 of disability shall subject an employer to legal liability for
23 obtaining a license pursuant to Section 1191.5 of the Labor Code
24 or paying an individual with a physical or mental disability less
25 than minimum wage pursuant to either Section 1191 or Section
26 1191.5 of the Labor Code.

27 (d) The Legislature finds and declares that the definition of
28 employee in subdivision (c) of Section 12926 was not intended to
29 permit the harassment of, or discrimination against, an individual
30 employed under a special license pursuant to Section 1191 or
31 1191.5 of the Labor Code in a nonprofit sheltered workshop, day
32 program, or rehabilitation facility.

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**All matter omitted in this version of the bill
appears in the bill as amended in the
Senate, June 21, 2016. (JR11)**

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