

ANTIDISCRIMINATION ACT REVISIONS

2016 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Todd Weiler

House Sponsor: Rebecca P. Edwards

LONG TITLE

General Description:

This bill modifies the Utah Antidiscrimination Act.

Highlighted Provisions:

This bill:

- ▶ amends the definition provision;
- ▶ provides for reasonable accommodations for an employee for the known limitations related to pregnancy, childbirth, breastfeeding, or related conditions unless it creates an undue hardship for the employer; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

34A-5-102, as last amended by Laws of Utah 2015, Chapters 13 and 23

34A-5-106, as last amended by Laws of Utah 2015, Chapter 13

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **34A-5-102** is amended to read:



28 **34A-5-102. Definitions -- Unincorporated entities.**

29 (1) As used in this chapter:

30 (a) "Affiliate" means the same as that term is defined in Section 16-6a-102.

31 (b) "Apprenticeship" means a program for the training of apprentices including a
32 program providing the training of those persons defined as apprentices by Section 35A-6-102.

33 (c) "Bona fide occupational qualification" means a characteristic applying to an
34 employee that:

35 (i) is necessary to the operation; or

36 (ii) is the essence of the employee's employer's business.

37 (d) "Court" means:

38 (i) the district court in the judicial district of the state in which the asserted unfair
39 employment practice occurs; or

40 (ii) if the district court is not in session at that time, a judge of the court described in
41 Subsection (1)(d)(i).

42 (e) "Director" means the director of the division.

43 (f) "Disability" means a physical or mental disability as defined and covered by the
44 Americans with Disabilities Act of 1990, 42 U.S.C. Sec. 12102.

45 (g) "Division" means the Division of Antidiscrimination and Labor.

46 (h) "Employee" means a person applying with or employed by an employer.

47 (i) (i) "Employer" means:

48 (A) the state;

49 (B) a political subdivision;

50 (C) a board, commission, department, institution, school district, trust, or agent of the
51 state or a political subdivision of the state; or

52 (D) a person employing 15 or more employees within the state for each working day in
53 each of 20 calendar weeks or more in the current or preceding calendar year.

54 (ii) "Employer" does not include:

55 (A) a religious organization, a religious corporation sole, a religious association, a
56 religious society, a religious educational institution, or a religious leader, when that individual
57 is acting in the capacity of a religious leader;

58 (B) any corporation or association constituting an affiliate, a wholly owned subsidiary,

59 or an agency of any religious organization, religious corporation sole, religious association, or
60 religious society; or

61 (C) the Boy Scouts of America or its councils, chapters, or subsidiaries.

62 (j) "Employment agency" means a person:

63 (i) undertaking to procure employees or opportunities to work for any other person; or

64 (ii) holding the person out to be equipped to take an action described in Subsection

65 (1)(j)(i).

66 (k) "Gender identity" has the meaning provided in the Diagnostic and Statistical
67 Manual (DSM-5). A person's gender identity can be shown by providing evidence, including,
68 but not limited to, medical history, care or treatment of the gender identity, consistent and
69 uniform assertion of the gender identity, or other evidence that the gender identity is sincerely
70 held, part of a person's core identity, and not being asserted for an improper purpose.

71 (l) "Joint apprenticeship committee" means an association of representatives of a labor
72 organization and an employer providing, coordinating, or controlling an apprentice training
73 program.

74 (m) "Labor organization" means an organization that exists for the purpose in whole or
75 in part of:

76 (i) collective bargaining;

77 (ii) dealing with employers concerning grievances, terms or conditions of employment;

78 or

79 (iii) other mutual aid or protection in connection with employment.

80 (n) "National origin" means the place of birth, domicile, or residence of an individual
81 or of an individual's ancestors.

82 (o) "On-the-job-training" means a program designed to instruct a person who, while
83 learning the particular job for which the person is receiving instruction:

84 (i) is also employed at that job; or

85 (ii) may be employed by the employer conducting the program during the course of the
86 program, or when the program is completed.

87 (p) "Person" means:

88 (i) one or more individuals, partnerships, associations, corporations, legal
89 representatives, trusts or trustees, or receivers;

- 90 (ii) the state; and
- 91 (iii) a political subdivision of the state.
- 92 (q) "Pregnancy, childbirth, or pregnancy-related conditions" includes breastfeeding or
93 medical conditions related to breastfeeding.
- 94 (r) "Presiding officer" means the same as that term is defined in Section 63G-4-103.
- 95 (s) "Prohibited employment practice" means a practice specified as discriminatory, and
96 therefore unlawful, in Section 34A-5-106.
- 97 (t) "Religious leader" means an individual who is associated with, and is an authorized
98 representative of, a religious organization or association or a religious corporation sole,
99 including a member of clergy, a minister, a pastor, a priest, a rabbi, an imam, or a spiritual
100 advisor.
- 101 (u) "Retaliate" means the taking of adverse action by an employer, employment
102 agency, labor organization, apprenticeship program, on-the-job training program, or vocational
103 school against one of its employees, applicants, or members because the employee, applicant,
104 or member:
 - 105 (i) opposes an employment practice prohibited under this chapter; or
 - 106 (ii) files charges, testifies, assists, or participates in any way in a proceeding,
107 investigation, or hearing under this chapter.
- 108 (v) "Sexual orientation" means an individual's actual or perceived orientation as
109 heterosexual, homosexual, or bisexual.
- 110 (w) "Undue hardship" means an action that requires significant difficulty or expense
111 when considered in relation to factors such as the size of the entity, its financial resources, and
112 the nature and structure of its operation.
- 113 [~~w~~] (x) "Unincorporated entity" means an entity organized or doing business in the
114 state that is not:
 - 115 (i) an individual;
 - 116 (ii) a corporation; or
 - 117 (iii) publicly traded.
- 118 [~~x~~] (y) "Vocational school" means a school or institution conducting a course of
119 instruction, training, or retraining to prepare individuals to follow an occupation or trade, or to
120 pursue a manual, technical, industrial, business, commercial, office, personal services, or other

121 nonprofessional occupations.

122 (2) (a) For purposes of this chapter, an unincorporated entity that is required to be
123 licensed under Title 58, Chapter 55, Utah Construction Trades Licensing Act, is presumed to
124 be the employer of each individual who, directly or indirectly, holds an ownership interest in
125 the unincorporated entity.

126 (b) Pursuant to rules made by the commission in accordance with Title 63G, Chapter 3,
127 Utah Administrative Rulemaking Act, an unincorporated entity may rebut the presumption
128 under Subsection (2)(a) for an individual by establishing by clear and convincing evidence that
129 the individual:

130 (i) is an active manager of the unincorporated entity;

131 (ii) directly or indirectly holds at least an 8% ownership interest in the unincorporated
132 entity; or

133 (iii) is not subject to supervision or control in the performance of work by:

134 (A) the unincorporated entity; or

135 (B) a person with whom the unincorporated entity contracts.

136 (c) As part of the rules made under Subsection (2)(b), the commission may define:

137 (i) "active manager";

138 (ii) "directly or indirectly holds at least an 8% ownership interest"; and

139 (iii) "subject to supervision or control in the performance of work."

140 Section 2. Section **34A-5-106** is amended to read:

141 **34A-5-106. Discriminatory or prohibited employment practices -- Permitted**
142 **practices.**

143 (1) It is a discriminatory or prohibited employment practice to take an action described
144 in Subsections (1)(a) through [~~(f)~~] (g).

145 (a) (i) An employer may not refuse to hire, promote, discharge, demote, or terminate a
146 person, or to retaliate against, harass, or discriminate in matters of compensation or in terms,
147 privileges, and conditions of employment against a person otherwise qualified, because of:

148 (A) race;

149 (B) color;

150 (C) sex;

151 (D) pregnancy, childbirth, or pregnancy-related conditions;

- 152 (E) age, if the individual is 40 years of age or older;
- 153 (F) religion;
- 154 (G) national origin;
- 155 (H) disability;
- 156 (I) sexual orientation; or
- 157 (J) gender identity.

158 (ii) A person may not be considered "otherwise qualified," unless that person possesses
159 the following required by an employer for any particular job, job classification, or position:

- 160 (A) education;
- 161 (B) training;
- 162 (C) ability, with or without reasonable accommodation;
- 163 (D) moral character;
- 164 (E) integrity;
- 165 (F) disposition to work;
- 166 (G) adherence to reasonable rules and regulations; and
- 167 (H) other job related qualifications required by an employer.

168 (iii) (A) As used in this chapter, "to discriminate in matters of compensation" means
169 the payment of differing wages or salaries to employees having substantially equal experience,
170 responsibilities, and skill for the particular job.

171 (B) Notwithstanding Subsection (1)(a)(iii)(A):

172 (I) nothing in this chapter prevents an increase in pay as a result of longevity with the
173 employer, if the salary increase is uniformly applied and available to all employees on a
174 substantially proportional basis; and

175 (II) nothing in this section prohibits an employer and employee from agreeing to a rate
176 of pay or work schedule designed to protect the employee from loss of Social Security payment
177 or benefits if the employee is eligible for those payments.

178 (b) An employment agency may not:

179 (i) refuse to list and properly classify for employment, or refuse to refer an individual
180 for employment, in a known available job for which the individual is otherwise qualified,
181 because of:

182 (A) race;

- 183 (B) color;
- 184 (C) sex;
- 185 (D) pregnancy, childbirth, or pregnancy-related conditions;
- 186 (E) religion;
- 187 (F) national origin;
- 188 (G) age, if the individual is 40 years of age or older;
- 189 (H) disability;
- 190 (I) sexual orientation; or
- 191 (J) gender identity; or
- 192 (ii) comply with a request from an employer for referral of an applicant for
- 193 employment if the request indicates either directly or indirectly that the employer discriminates
- 194 in employment on account of:
 - 195 (A) race;
 - 196 (B) color;
 - 197 (C) sex;
 - 198 (D) pregnancy, childbirth, or pregnancy-related conditions;
 - 199 (E) religion;
 - 200 (F) national origin;
 - 201 (G) age, if the individual is 40 years of age or older;
 - 202 (H) disability;
 - 203 (I) sexual orientation; or
 - 204 (J) gender identity.
- 205 (c) (i) A labor organization may not for a reason listed in Subsection (1)(c)(ii):
- 206 (A) exclude an individual otherwise qualified from full membership rights in the labor
- 207 organization;
- 208 (B) expel the individual from membership in the labor organization; or
- 209 (C) otherwise discriminate against or harass a member of the labor organization in full
- 210 employment of work opportunity, or representation.
- 211 (ii) A labor organization may not take an action listed in this Subsection (1)(c) because
- 212 of:
 - 213 (A) race;

- 214 (B) sex;
- 215 (C) pregnancy, childbirth, or pregnancy-related conditions;
- 216 (D) religion;
- 217 (E) national origin;
- 218 (F) age, if the individual is 40 years of age or older;
- 219 (G) disability;
- 220 (H) sexual orientation; or
- 221 (I) gender identity.

222 (d) (i) Unless based upon a bona fide occupational qualification, or required by and
223 given to an agency of government for a security reason, an employer, employment agency, or
224 labor organization may not do the following if the statement, advertisement, publication, form,
225 or inquiry violates Subsection (1)(d)(ii):

226 (A) print, circulate, or cause to be printed or circulated a statement, advertisement, or
227 publication;

228 (B) use a form of application for employment or membership; or

229 (C) make any inquiry in connection with prospective employment or membership.

230 (ii) This Subsection (1)(d) applies to a statement, advertisement, publication, form, or
231 inquiry that directly expresses a limitation, specification, or discrimination as to:

232 (A) race;

233 (B) color;

234 (C) religion;

235 (D) sex;

236 (E) pregnancy, childbirth, or pregnancy-related conditions;

237 (F) national origin;

238 (G) age, if the individual is 40 years of age or older;

239 (H) disability;

240 (I) sexual orientation; or

241 (J) gender identity.

242 (e) A person, whether or not an employer, an employment agency, a labor organization,
243 or an employee or member of an employer, employment agency, or labor organization, may
244 not:

245 (i) aid, incite, compel, or coerce the doing of an act defined in this section to be a
246 discriminatory or prohibited employment practice;

247 (ii) obstruct or prevent a person from complying with this chapter, or any order issued
248 under this chapter; or

249 (iii) attempt, either directly or indirectly, to commit an act prohibited in this section.

250 (f) (i) An employer, labor organization, joint apprenticeship committee, or vocational
251 school providing, coordinating, or controlling an apprenticeship program or providing,
252 coordinating, or controlling an on-the-job-training program, instruction, training, or retraining
253 program may not:

254 (A) deny to, or withhold from, any qualified person the right to be admitted to or
255 participate in an apprenticeship training program, on-the-job-training program, or other
256 occupational instruction, training, or retraining program because of:

257 (I) race;

258 (II) color;

259 (III) sex;

260 (IV) pregnancy, childbirth, or pregnancy-related conditions;

261 (V) religion;

262 (VI) national origin;

263 (VII) age, if the individual is 40 years of age or older;

264 (VIII) disability;

265 (IX) sexual orientation; or

266 (X) gender identity;

267 (B) discriminate against or harass a qualified person in that person's pursuit of a
268 program described in Subsection (1)(f)(i)(A) because of:

269 (I) race;

270 (II) color;

271 (III) sex;

272 (IV) pregnancy, childbirth, or pregnancy-related conditions;

273 (V) religion;

274 (VI) national origin;

275 (VII) age, if the individual is 40 years of age or older;

276 (VIII) disability;
277 (IX) sexual orientation; or
278 (X) gender identity;
279 (C) discriminate against a qualified person in the terms, conditions, or privileges of a
280 program described in Subsection (1)(f)(i)(A), because of:
281 (I) race;
282 (II) color;
283 (III) sex;
284 (IV) pregnancy, childbirth, or pregnancy-related conditions;
285 (V) religion;
286 (VI) national origin;
287 (VII) age, if the individual is 40 years of age or older;
288 (VIII) disability;
289 (IX) sexual orientation; or
290 (X) gender identity; or
291 (D) except as provided in Subsection (1)(f)(ii), print, publish, or cause to be printed or
292 published, a notice or advertisement relating to employment by the employer, or membership in
293 or a classification or referral for employment by a labor organization, or relating to a
294 classification or referral for employment by an employment agency, indicating a preference,
295 limitation, specification, or discrimination based on:
296 (I) race;
297 (II) color;
298 (III) sex;
299 (IV) pregnancy, childbirth, or pregnancy-related conditions;
300 (V) religion;
301 (VI) national origin;
302 (VII) age, if the individual is 40 years of age or older;
303 (VIII) disability;
304 (IX) sexual orientation; or
305 (X) gender identity.
306 (ii) Notwithstanding Subsection (1)(f)(i)(D), if the following is a bona fide

307 occupational qualification for employment, a notice or advertisement described in Subsection
 308 (1)(f)(i)(D) may indicate a preference, limitation, specification, or discrimination based on:

- 309 (A) race;
- 310 (B) color;
- 311 (C) religion;
- 312 (D) sex;
- 313 (E) pregnancy, childbirth, or pregnancy-related conditions;
- 314 (F) age;
- 315 (G) national origin;
- 316 (H) disability;
- 317 (I) sexual orientation; or
- 318 (J) gender identity.

319 (g) Subject to Subsection (7), an employer may not:

320 (i) refuse to provide reasonable accommodations for an employee for the known
 321 limitations related to pregnancy, childbirth, breastfeeding, or related conditions:

322 (A) if the employee requests ~~the~~ a reasonable accommodation; and

323 (B) unless the employer demonstrates that the accommodation would create an undue
 324 hardship on the operations of the employer;

325 (ii) require an employee to terminate employment if another reasonable
 326 accommodation can be provided to the known limitations related to the employee's pregnancy,
 327 childbirth, breastfeeding, or related conditions unless the employer demonstrates that the
 328 accommodation would create an undue hardship on the operations of the employer; or

329 (iii) deny employment opportunities to an employee, if the denial is based on the need
 330 of the employer to make reasonable accommodations to the known limitations related to the
 331 pregnancy, childbirth, breastfeeding, or related conditions of ~~a job applicant or~~ an
 331a employee unless

332 the employer demonstrates that the accommodation would create an undue hardship on the
 333 operations of the employer.

334 (2) Subsections (1)(a) through (1)(~~f~~)(g) may not be construed to prevent:

335 (a) the termination of employment of an individual who, with or without reasonable
 336 accommodation, is physically, mentally, or emotionally unable to perform the duties required
 337 by that individual's employment;

338 (b) the variance of insurance premiums or coverage on account of age; or
339 (c) a restriction on the activities of a person licensed in accordance with Title 32B,
340 Alcoholic Beverage Control Act, with respect to an individual who is under 21 years of age.

341 (3) (a) It is not a discriminatory or prohibited employment practice:

342 (i) for an employer to hire and employ an employee, for an employment agency to
343 classify or refer for employment an individual, for a labor organization to classify its
344 membership or to classify or refer for employment an individual, or for an employer, labor
345 organization, or joint labor-management committee controlling an apprenticeship or other
346 training or retraining program to admit or employ an individual in the program on the basis of
347 religion, sex, pregnancy, childbirth, or pregnancy-related conditions, age, national origin,
348 disability, sexual orientation, or gender identity in those certain instances when religion, sex,
349 pregnancy, childbirth, or pregnancy-related conditions, age, if the individual is 40 years of age
350 or older, national origin, disability, sexual orientation, or gender identity is a bona fide
351 occupational qualification reasonably necessary to the normal operation of that particular
352 business or enterprise;

353 (ii) for a school, college, university, or other educational institution to hire and employ
354 an employee of a particular religion if:

355 (A) the school, college, university, or other educational institution is, in whole or in
356 substantial part, owned, supported, controlled, or managed by a particular religious corporation,
357 association, or society; or

358 (B) the curriculum of the school, college, university, or other educational institution is
359 directed toward the propagation of a particular religion;

360 (iii) for an employer to give preference in employment to:

361 (A) the employer's:

362 (I) spouse;

363 (II) child; or

364 (III) son-in-law or daughter-in-law;

365 (B) a person for whom the employer is or would be liable to furnish financial support if
366 the person were unemployed;

367 (C) a person to whom the employer during the preceding six months furnishes more
368 than one-half of total financial support regardless of whether or not the employer was or is

369 legally obligated to furnish support; or

370 (D) a person whose education or training is substantially financed by the employer for
371 a period of two years or more.

372 (b) Nothing in this chapter applies to a business or enterprise on or near an Indian
373 reservation with respect to a publicly announced employment practice of the business or
374 enterprise under which preferential treatment is given to an individual because that individual
375 is a native American Indian living on or near an Indian reservation.

376 (c) Nothing in this chapter may be interpreted to require an employer, employment
377 agency, labor organization, vocational school, joint labor-management committee, or
378 apprenticeship program subject to this chapter to grant preferential treatment to an individual or
379 to a group because of the race, color, religion, sex, age, national origin, disability, sexual
380 orientation, or gender identity of the individual or group on account of an imbalance that may
381 exist with respect to the total number or percentage of persons of a race, color, religion, sex,
382 age, national origin, disability, sexual orientation, or gender identity employed by an employer,
383 referred or classified for employment by an employment agency or labor organization, admitted
384 to membership or classified by a labor organization, or admitted to or employed in, any
385 apprenticeship or other training program, in comparison with the total number or percentage of
386 persons of that race, color, religion, sex, age, national origin, disability, sexual orientation, or
387 gender identity in any community or county or in the available work force in any community or
388 county.

389 (4) It is not a discriminatory or prohibited practice with respect to age to observe the
390 terms of a bona fide seniority system or any bona fide employment benefit plan such as a
391 retirement, pension, or insurance plan that is not a subterfuge to evade the purposes of this
392 chapter, except that an employee benefit plan may not excuse the failure to hire an individual.

393 (5) Notwithstanding Subsection (4), or another statute to the contrary, a person may not
394 be subject to involuntary termination or retirement from employment on the basis of age alone,
395 if the individual is 40 years of age or older, except:

396 (a) under Subsection (6); and

397 (b) when age is a bona fide occupational qualification.

398 (6) Nothing in this section prohibits compulsory retirement of an employee who has
399 attained at least 65 years of age, and who, for the two-year period immediately before

400 retirement, is employed in a bona fide executive or a high policymaking position, if:

401 (a) that employee is entitled to an immediate nonforfeitable annual retirement benefit
402 from the employee's employer's pension, profit-sharing, savings, or deferred compensation
403 plan, or any combination of those plans; and

404 (b) the benefit described in Subsection (6)(a) equals, in the aggregate, at least \$44,000.

405 (7) (a) For purposes of Subsection (1)(g), an employer may require an employee to
406 provide a certification from the employee's health care provider concerning the medical
407 advisability of a reasonable accommodation.

408 (b) A certification under Subsection (7)(a) shall include:

409 (i) the date the reasonable accommodation becomes medically advisable;

410 (ii) the probable duration of the reasonable accommodation; and

411 (iii) an explanatory statement as to the medical advisability of the reasonable
412 accommodation.

413 (c) Notwithstanding Subsections (1)(g) and (7)(a), an employer may not require an
414 employee to obtain a certification from the employee's health care provider, nor may an
415 employer claim undue hardship, for the following accommodations ~~§~~ → **for the known limitations**
415a **related to pregnancy, childbirth, or related conditions** ← ~~§~~ :

416 (i) more frequent restroom, food, ~~§~~ → **[and]** or ← ~~§~~ water breaks; or

417 (ii) limits on lifting over 20 pounds.

418 (d) An employer shall include in an employee handbook, or post in a conspicuous place
419 in the employer's place of business, written notice concerning an employee's rights to
420 reasonable accommodation for a known limitation related to pregnancy, childbirth,
421 breastfeeding, or related conditions.

Legislative Review Note
Office of Legislative Research and General Counsel