

1 **ANTIDISCRIMINATION AND WORKPLACE**

2 **ACCOMMODATIONS REVISIONS**

3 2016 GENERAL SESSION

4 STATE OF UTAH

5 **Chief Sponsor: Todd Weiler**

6 House Sponsor: Rebecca P. Edwards

8 **LONG TITLE**

9 **General Description:**

10 This bill modifies provisions related to accommodations at the workplace.

11 **Highlighted Provisions:**

12 This bill:

- 13 ▶ addresses a public employer accommodation for breastfeeding;
- 14 ▶ amends the definition provision;
- 15 ▶ provides for reasonable accommodations for an employee under certain

16 circumstances related to pregnancy, childbirth, breastfeeding, or related conditions;

17 and

- 18 ▶ makes technical changes.

19 **Money Appropriated in this Bill:**

20 None

21 **Other Special Clauses:**

22 None

23 **Utah Code Sections Affected:**

24 AMENDS:

25 **34-49-202**, as enacted by Laws of Utah 2015, Chapter 156

26 **34A-5-102**, as last amended by Laws of Utah 2015, Chapters 13 and 23

27 **34A-5-106**, as last amended by Laws of Utah 2015, Chapter 13

28

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

30 Section 1. Section **34-49-202** is amended to read:

31 **34-49-202. Reasonable breaks and private room required.**

32 (1) (a) A public employer shall:

33 (i) provide for at least one year after the birth of a public employee's child reasonable
34 breaks for each time the public employee needs to breast feed or express milk; and

35 (ii) consult with the public employee to determine the frequency and duration of the
36 breaks.

37 (b) A break required under Subsection (1)(a) shall, to the extent possible, run
38 concurrent with any other break period otherwise provided to the public employee.

39 (2) (a) A public employer shall provide for a public employee a room or other location
40 in close proximity to the public employee's work area.

41 (b) The room described in Subsection (2)(a):

42 (i) may not be a bathroom or toilet stall; and

43 (ii) shall:

44 (A) be maintained in a clean and sanitary condition;

45 (B) provide privacy shielded from the view of and intrusion from coworkers or the
46 public;

47 (C) be available at the times and for a duration required by the public employee as
48 determined in consultation with the public employee under Subsection (1)(a)(ii); and

49 (D) have an electrical outlet.

50 (c) (i) Notwithstanding Subsection (2)(a), an employer is not required to comply with
51 the requirements of Subsections (2)(a) and (b) if compliance would create an undue hardship
52 on the operations of the employer.

53 (ii) For purposes of Subsection (2)(c)(i), an undue hardship is a requirement that would
54 cause the employer significant difficulty or expense when considered in relation to the size,
55 financial resources, nature, or structure of the employer's operations.

56 (3) (a) A public employer shall provide access to a clean and well-maintained
57 refrigerator or freezer for the temporary storage of the public employee's breast milk.

58 (b) Notwithstanding Subsection (3)(a), a public employer with a public employee not
59 working in an office building may, in the alternative, provide a nonelectric insulated container
60 for storage of the public employee's breast milk.

61 Section 2. Section **34A-5-102** is amended to read:

62 **34A-5-102. Definitions -- Unincorporated entities.**

63 (1) As used in this chapter:

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

65 (b) "Apprenticeship" means a program for the training of apprentices including a
66 program providing the training of those persons defined as apprentices by Section [35A-6-102](#).

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

69 (i) is necessary to the operation; or

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

71 (d) "Court" means:

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

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

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

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

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

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

81 (i) (i) "Employer" means:

82 (A) the state;

83 (B) a political subdivision;

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

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

88 (ii) "Employer" does not include:

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

92 (B) any corporation or association constituting an affiliate, a wholly owned subsidiary,
93 or an agency of any religious organization, religious corporation sole, religious association, or
94 religious society; or

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

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

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

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

99 (1)(j)(i).

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

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

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

110 (i) collective bargaining;

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

112 or

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

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

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

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

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

121 (p) "Person" means:

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

124 (ii) the state; and

125 (iii) a political subdivision of the state.

126 (q) "Pregnancy, childbirth, or pregnancy-related conditions" includes breastfeeding or
127 medical conditions related to breastfeeding.

128 (r) "Presiding officer" means the same as that term is defined in Section [63G-4-103](#).

129 (s) "Prohibited employment practice" means a practice specified as discriminatory, and
130 therefore unlawful, in Section [34A-5-106](#).

131 (t) "Religious leader" means an individual who is associated with, and is an authorized
132 representative of, a religious organization or association or a religious corporation sole,
133 including a member of clergy, a minister, a pastor, a priest, a rabbi, an imam, or a spiritual
134 advisor.

135 (u) "Retaliate" means the taking of adverse action by an employer, employment
136 agency, labor organization, apprenticeship program, on-the-job training program, or vocational
137 school against one of its employees, applicants, or members because the employee, applicant,
138 or member:

139 (i) opposes an employment practice prohibited under this chapter; or

140 (ii) files charges, testifies, assists, or participates in any way in a proceeding,
141 investigation, or hearing under this chapter.

142 (v) "Sexual orientation" means an individual's actual or perceived orientation as
143 heterosexual, homosexual, or bisexual.

144 (w) "Undue hardship" means an action that requires significant difficulty or expense
145 when considered in relation to factors such as the size of the entity, the entity's financial
146 resources, and the nature and structure of the entity's operation.

147 [~~w~~] (x) "Unincorporated entity" means an entity organized or doing business in the
148 state that is not:

- 149 (i) an individual;
- 150 (ii) a corporation; or
- 151 (iii) publicly traded.

152 [~~x~~] (y) "Vocational school" means a school or institution conducting a course of
153 instruction, training, or retraining to prepare individuals to follow an occupation or trade, or to
154 pursue a manual, technical, industrial, business, commercial, office, personal services, or other
155 nonprofessional occupations.

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

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

- 164 (i) is an active manager of the unincorporated entity;
- 165 (ii) directly or indirectly holds at least an 8% ownership interest in the unincorporated
166 entity; or
- 167 (iii) is not subject to supervision or control in the performance of work by:
 - 168 (A) the unincorporated entity; or
 - 169 (B) a person with whom the unincorporated entity contracts.

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

171 (i) "active manager";

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

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

174 Section 3. Section **34A-5-106** is amended to read:

175 **34A-5-106. Discriminatory or prohibited employment practices -- Permitted**
176 **practices.**

177 (1) It is a discriminatory or prohibited employment practice to take an action described
178 in Subsections (1)(a) through ~~(f)~~ (g).

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

182 (A) race;

183 (B) color;

184 (C) sex;

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

186 (E) age, if the individual is 40 years of age or older;

187 (F) religion;

188 (G) national origin;

189 (H) disability;

190 (I) sexual orientation; or

191 (J) gender identity.

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

194 (A) education;

195 (B) training;

196 (C) ability, with or without reasonable accommodation;

197 (D) moral character;

- 198 (E) integrity;
- 199 (F) disposition to work;
- 200 (G) adherence to reasonable rules and regulations; and
- 201 (H) other job related qualifications required by an employer.

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

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

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

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

212 (b) An employment agency may not:

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

- 216 (A) race;
- 217 (B) color;
- 218 (C) sex;
- 219 (D) pregnancy, childbirth, or pregnancy-related conditions;
- 220 (E) religion;
- 221 (F) national origin;
- 222 (G) age, if the individual is 40 years of age or older;
- 223 (H) disability;
- 224 (I) sexual orientation; or
- 225 (J) gender identity; or

226 (ii) comply with a request from an employer for referral of an applicant for
227 employment if the request indicates either directly or indirectly that the employer discriminates
228 in employment on account of:

- 229 (A) race;
- 230 (B) color;
- 231 (C) sex;
- 232 (D) pregnancy, childbirth, or pregnancy-related conditions;
- 233 (E) religion;
- 234 (F) national origin;
- 235 (G) age, if the individual is 40 years of age or older;
- 236 (H) disability;
- 237 (I) sexual orientation; or
- 238 (J) gender identity.

239 (c) (i) A labor organization may not for a reason listed in Subsection (1)(c)(ii):

- 240 (A) exclude an individual otherwise qualified from full membership rights in the labor
241 organization;
- 242 (B) expel the individual from membership in the labor organization; or
- 243 (C) otherwise discriminate against or harass a member of the labor organization in full
244 employment of work opportunity, or representation.

245 (ii) A labor organization may not take an action listed in this Subsection (1)(c) because
246 of:

- 247 (A) race;
- 248 (B) sex;
- 249 (C) pregnancy, childbirth, or pregnancy-related conditions;
- 250 (D) religion;
- 251 (E) national origin;
- 252 (F) age, if the individual is 40 years of age or older;
- 253 (G) disability;

254 (H) sexual orientation; or

255 (I) gender identity.

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

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

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

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

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

266 (A) race;

267 (B) color;

268 (C) religion;

269 (D) sex;

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

271 (F) national origin;

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

273 (H) disability;

274 (I) sexual orientation; or

275 (J) gender identity.

276 (e) A person, whether or not an employer, an employment agency, a labor organization,
277 or an employee or member of an employer, employment agency, or labor organization, may
278 not:

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

281 (ii) obstruct or prevent a person from complying with this chapter, or any order issued

282 under this chapter; or

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

284 (f) (i) An employer, labor organization, joint apprenticeship committee, or vocational
285 school providing, coordinating, or controlling an apprenticeship program or providing,
286 coordinating, or controlling an on-the-job-training program, instruction, training, or retraining
287 program may not:

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

- 291 (I) race;
- 292 (II) color;
- 293 (III) sex;
- 294 (IV) pregnancy, childbirth, or pregnancy-related conditions;
- 295 (V) religion;
- 296 (VI) national origin;
- 297 (VII) age, if the individual is 40 years of age or older;
- 298 (VIII) disability;
- 299 (IX) sexual orientation; or
- 300 (X) gender identity;

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

- 303 (I) race;
- 304 (II) color;
- 305 (III) sex;
- 306 (IV) pregnancy, childbirth, or pregnancy-related conditions;
- 307 (V) religion;
- 308 (VI) national origin;
- 309 (VII) age, if the individual is 40 years of age or older;

310 (VIII) disability;

311 (IX) sexual orientation; or

312 (X) gender identity;

313 (C) discriminate against a qualified person in the terms, conditions, or privileges of a

314 program described in Subsection (1)(f)(i)(A), because of:

315 (I) race;

316 (II) color;

317 (III) sex;

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

319 (V) religion;

320 (VI) national origin;

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

322 (VIII) disability;

323 (IX) sexual orientation; or

324 (X) gender identity; or

325 (D) except as provided in Subsection (1)(f)(ii), print, publish, or cause to be printed or

326 published, a notice or advertisement relating to employment by the employer, or membership in

327 or a classification or referral for employment by a labor organization, or relating to a

328 classification or referral for employment by an employment agency, indicating a preference,

329 limitation, specification, or discrimination based on:

330 (I) race;

331 (II) color;

332 (III) sex;

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

334 (V) religion;

335 (VI) national origin;

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

337 (VIII) disability;

- 338 (IX) sexual orientation; or
- 339 (X) gender identity.
- 340 (ii) Notwithstanding Subsection (1)(f)(i)(D), if the following is a bona fide
- 341 occupational qualification for employment, a notice or advertisement described in Subsection
- 342 (1)(f)(i)(D) may indicate a preference, limitation, specification, or discrimination based on:
- 343 (A) race;
- 344 (B) color;
- 345 (C) religion;
- 346 (D) sex;
- 347 (E) pregnancy, childbirth, or pregnancy-related conditions;
- 348 (F) age;
- 349 (G) national origin;
- 350 (H) disability;
- 351 (I) sexual orientation; or
- 352 (J) gender identity.
- 353 (g) Subject to Subsection (7), an employer may not:
- 354 (i) refuse to provide reasonable accommodations for an employee related to pregnancy,
- 355 childbirth, breastfeeding, or related conditions:
- 356 (A) if the employee requests a reasonable accommodation; and
- 357 (B) unless the employer demonstrates that the accommodation would create an undue
- 358 hardship on the operations of the employer;
- 359 (ii) require an employee to terminate employment if another reasonable
- 360 accommodation can be provided for the employee's pregnancy, childbirth, breastfeeding, or
- 361 related conditions unless the employer demonstrates that the accommodation would create an
- 362 undue hardship on the operations of the employer; or
- 363 (iii) deny employment opportunities to an employee, if the denial is based on the need
- 364 of the employer to make reasonable accommodations related to the pregnancy, childbirth,
- 365 breastfeeding, or related conditions of an employee unless the employer demonstrates that the

366 accommodation would create an undue hardship on the operations of the employer.

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

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

371 (b) the variance of insurance premiums or coverage on account of age; or

372 (c) a restriction on the activities of a person licensed in accordance with Title 32B,
373 Alcoholic Beverage Control Act, with respect to an individual who is under 21 years of age.

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

375 (i) for an employer to hire and employ an employee, for an employment agency to
376 classify or refer for employment an individual, for a labor organization to classify its
377 membership or to classify or refer for employment an individual, or for an employer, labor
378 organization, or joint labor-management committee controlling an apprenticeship or other
379 training or retraining program to admit or employ an individual in the program on the basis of
380 religion, sex, pregnancy, childbirth, or pregnancy-related conditions, age, national origin,
381 disability, sexual orientation, or gender identity in those certain instances when religion, sex,
382 pregnancy, childbirth, or pregnancy-related conditions, age, if the individual is 40 years of age
383 or older, national origin, disability, sexual orientation, or gender identity is a bona fide
384 occupational qualification reasonably necessary to the normal operation of that particular
385 business or enterprise;

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

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

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

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

394 (A) the employer's:
395 (I) spouse;
396 (II) child; or
397 (III) son-in-law or daughter-in-law;
398 (B) a person for whom the employer is or would be liable to furnish financial support if
399 the person were unemployed;
400 (C) a person to whom the employer during the preceding six months furnishes more
401 than one-half of total financial support regardless of whether or not the employer was or is
402 legally obligated to furnish support; or
403 (D) a person whose education or training is substantially financed by the employer for
404 a period of two years or more.
405 (b) Nothing in this chapter applies to a business or enterprise on or near an Indian
406 reservation with respect to a publicly announced employment practice of the business or
407 enterprise under which preferential treatment is given to an individual because that individual
408 is a native American Indian living on or near an Indian reservation.
409 (c) Nothing in this chapter may be interpreted to require an employer, employment
410 agency, labor organization, vocational school, joint labor-management committee, or
411 apprenticeship program subject to this chapter to grant preferential treatment to an individual or
412 to a group because of the race, color, religion, sex, age, national origin, disability, sexual
413 orientation, or gender identity of the individual or group on account of an imbalance that may
414 exist with respect to the total number or percentage of persons of a race, color, religion, sex,
415 age, national origin, disability, sexual orientation, or gender identity employed by an employer,
416 referred or classified for employment by an employment agency or labor organization, admitted
417 to membership or classified by a labor organization, or admitted to or employed in, any
418 apprenticeship or other training program, in comparison with the total number or percentage of
419 persons of that race, color, religion, sex, age, national origin, disability, sexual orientation, or
420 gender identity in any community or county or in the available work force in any community or
421 county.

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

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

429 (a) under Subsection (6); and

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

431 (6) Nothing in this section prohibits compulsory retirement of an employee who has
432 attained at least 65 years of age, and who, for the two-year period immediately before
433 retirement, is employed in a bona fide executive or a high policymaking position, if:

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

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

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

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

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

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

444 (iii) an explanatory statement as to the medical advisability of the reasonable
445 accommodation.

446 (c) Notwithstanding Subsections (1)(g) and (7)(a), an employer may not require an
447 employee to obtain a certification from the employee's health care provider for more frequent
448 restroom, food, or water breaks.

449 (d) An employer is not required under Subsection (1)(g) or this Subsection (7) to

450 permit an employee to have the employee's child at the workplace for purposes of
451 accommodating pregnancy, childbirth, breastfeeding, or related conditions.

452 (e) An employer shall include in an employee handbook, or post in a conspicuous place
453 in the employer's place of business, written notice concerning an employee's rights to
454 reasonable accommodations for pregnancy, childbirth, breastfeeding, or related conditions.