

**WORKPLACE PROTECTION AMENDMENTS**

2018 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Rebecca P. Edwards**

Senate Sponsor: \_\_\_\_\_

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**LONG TITLE**

**General Description:**

This bill amends the Utah Antidiscrimination Act.

**Highlighted Provisions:**

This bill:

- ▶ amends the definition of employer;
- ▶ requires certain claims involving employers with fewer than 15 employees to proceed to an evidentiary hearing without a division investigation;
- ▶ provides additional state remedies for claims involving employers with fewer than 15 employees; 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 2016, Chapters 330 and 370

**34A-5-102.5**, as enacted by Laws of Utah 2015, Chapter 13

**34A-5-107**, as last amended by Laws of Utah 2016, Chapter 132

**34A-5-108**, as last amended by Laws of Utah 2008, Chapter 382



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

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

**34A-5-102. Definitions -- Unincorporated entities -- Joint employers -- Franchisors.**

(1) As used in this chapter:

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

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

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

(i) is necessary to the operation; or

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

(d) "Court" means:

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

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

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

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

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

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

(i) (i) "Employer" means:

(A) the state;

(B) a political subdivision;

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

(D) a person employing ~~[+5]~~ one or more employees within the state for each working day in each of 20 calendar weeks or more in the current or preceding calendar year.

(ii) "Employer" does not include:

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

62 (B) any corporation or association constituting an affiliate, a wholly owned subsidiary,  
63 or an agency of any religious organization, religious corporation sole, religious association, or  
64 religious society; or

65 (C) the Boy Scouts of America or ~~its~~ councils, chapters, or subsidiaries of the Boy  
66 Scouts of America.

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

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

69 (ii) holding the person out to be equipped to take an action described in Subsection  
70 (1)(j)(i).

71 (k) "Federal executive agency" means an executive agency, as defined in 5 U.S.C. Sec.  
72 105, of the federal government.

73 (l) "Franchise" means the same as that term is defined in 16 C.F.R. Sec. 436.1.

74 (m) "Franchisee" means the same as that term is defined in 16 C.F.R. Sec. 436.1.

75 (n) "Franchisor" means the same as that term is defined in 16 C.F.R. Sec. 436.1.

76 (o) (i) "Gender identity" has the meaning provided in the Diagnostic and Statistical  
77 Manual (DSM-5).

78 (ii) A person's gender identity can be shown by providing evidence, including~~[-but not~~  
79 ~~limited to,]~~ medical history, care or treatment of the gender identity, consistent and uniform  
80 assertion of the gender identity, or other evidence that the gender identity is sincerely held, part  
81 of a person's core identity, and not being asserted for an improper purpose.

82 (p) "Joint apprenticeship committee" means an association of representatives of a labor  
83 organization and an employer providing, coordinating, or controlling an apprentice training  
84 program.

85 (q) "Labor organization" means an organization that exists for the purpose in whole or  
86 in part of:

87 (i) collective bargaining;

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

89 or

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

91 (r) "National origin" means the place of birth, domicile, or residence of an individual or  
92 of an individual's ancestors.

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

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

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

98 (t) "Person" means:

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

101 (ii) the state; and

102 (iii) a political subdivision of the state.

103 (u) "Pregnancy, childbirth, or pregnancy-related conditions" includes breastfeeding or  
104 medical conditions related to breastfeeding.

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

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

108 (x) "Religious leader" means an individual who is associated with, and is an authorized  
109 representative of, a religious organization or association or a religious corporation sole,  
110 including a member of clergy, a minister, a pastor, a priest, a rabbi, an imam, or a spiritual  
111 advisor.

112 (y) "Retaliate" means the taking of adverse action by an employer, employment agency,  
113 labor organization, apprenticeship program, on-the-job training program, or vocational school  
114 against one of its employees, applicants, or members because the employee, applicant, or  
115 member:

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

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

119 (z) "Sexual orientation" means an individual's actual or perceived orientation as  
120 heterosexual, homosexual, or bisexual.

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

124 (bb) "Unincorporated entity" means an entity organized or doing business in the state  
125 that is not:

- 126 (i) an individual;
- 127 (ii) a corporation; or
- 128 (iii) publicly traded.

129 (cc) "Vocational school" means a school or institution conducting a course of  
130 instruction, training, or retraining to prepare individuals to follow an occupation or trade, or to  
131 pursue a manual, technical, industrial, business, commercial, office, personal services, or other  
132 nonprofessional occupations.

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

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

- 141 (i) is an active manager of the unincorporated entity;
- 142 (ii) directly or indirectly holds at least an 8% ownership interest in the unincorporated  
143 entity; or
- 144 (iii) is not subject to supervision or control in the performance of work by:
  - 145 (A) the unincorporated entity; or
  - 146 (B) a person with whom the unincorporated entity contracts.

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

- 148 (i) "active manager";
- 149 (ii) "directly or indirectly holds at least an 8% ownership interest"; and
- 150 (iii) "subject to supervision or control in the performance of work."

151 (3) For purposes of determining whether two or more persons are considered joint

152 employers under this chapter, an administrative ruling of a federal executive agency may not be  
153 considered a generally applicable law unless that administrative ruling is determined to be  
154 generally applicable by a court of law, or adopted by statute or rule.

155 (4) (a) For purposes of this chapter, a franchisor is not considered to be an employer of:

156 (i) a franchisee; or

157 (ii) a franchisee's employee.

158 (b) With respect to a specific claim for relief under this chapter made by a franchisee or  
159 a franchisee's employee, this Subsection (4) does not apply to a franchisor under a franchise  
160 that exercises a type or degree of control over the franchisee or the franchisee's employee not  
161 customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks  
162 and brand.

163 Section 2. Section **34A-5-102.5** is amended to read:

164 **34A-5-102.5. Supremacy over local regulations -- No special class created for**  
165 **other purposes.**

166 (1) [~~Consistent with the requirements of Subsection 34A-5-107(15), this~~] This chapter  
167 supersedes and preempts any ordinance, regulation, standard, or other legal action by a local  
168 government entity, a state entity, or the governing body of a political subdivision that relates to  
169 the prohibition of discrimination in employment.

170 (2) This chapter shall not be construed to create a special or protected class for any  
171 purpose other than employment.

172 Section 3. Section **34A-5-107** is amended to read:

173 **34A-5-107. Procedure for aggrieved person to file claim -- Investigations --**  
174 **Adjudicative proceedings -- Settlement -- Reconsideration -- Determination.**

175 (1) (a) A person claiming to be aggrieved by a discriminatory or prohibited  
176 employment practice may, or that person's attorney or agent may, make, sign, and file with the  
177 division a request for agency action.

178 (b) A request for agency action shall be verified under oath or affirmation.

179 (c) A request for agency action made under this section shall be filed within 180 days  
180 after the alleged discriminatory or prohibited employment practice occurs.

181 (d) The division may transfer a request for agency action [~~filed~~], that an employer with  
182 15 or more employees files with the division pursuant to this section, to the federal Equal

183 Employment Opportunity Commission in accordance with a work-share agreement that is:

184 (i) between the division and the Equal Employment Opportunity Commission; and

185 (ii) in effect on the day on which the request for agency action is transferred.

186 (2) An employer, labor organization, joint apprenticeship committee, or vocational  
187 school who has an employee or member who refuses or threatens to refuse to comply with this  
188 chapter may file with the division a request for agency action asking the division for assistance  
189 to obtain the employee's or member's compliance by conciliation or other remedial action.

190 (3) (a) Before a hearing is set or held as part of ~~[any]~~ an adjudicative proceeding, the  
191 division shall promptly assign an investigator to attempt a settlement between the parties by  
192 conference, conciliation, or persuasion.

193 (b) If no settlement is reached~~[-]~~ and the employer employs:

194 (i) fewer than 15 employees:

195 (A) the division shall notify the parties that attempts at settlement have ceased;

196 (B) the division may not conduct an investigation described under Subsection (3)(c);

197 (C) the director or director's designee may not issue a determination and order

198 described in Subsection (4) or (5); and

199 (D) the person requesting agency action may file a request for an evidentiary hearing  
200 before a presiding officer, as described under Subsections (7) through (10), within 30 days after  
201 the day on which the division notifies the parties in accordance with Subsection (3)(b)(i)(A); or

202 (ii) 15 or more employees, the investigator shall make a prompt impartial investigation  
203 of all allegations made in the request for agency action.

204 (c) The division and its staff, agents, and employees:

205 (i) shall conduct ~~[every]~~ the investigation in fairness to ~~[all]~~ the parties and agencies  
206 involved; and

207 (ii) may not attempt a settlement between the parties if it is clear that no discriminatory  
208 or prohibited employment practice has occurred.

209 (d) An aggrieved party may withdraw the request for agency action ~~[prior to]~~ before the  
210 issuance of a final order.

211 (4) (a) If the initial attempts at settlement are unsuccessful, and the investigator  
212 uncovers insufficient evidence during the investigation to support the allegations of a  
213 discriminatory or prohibited employment practice set out in the request for agency action, the

214 investigator shall formally report these findings to the director or the director's designee.

215 (b) Upon receipt of the investigator's report described in Subsection (4)(a), the director  
216 or the director's designee may issue a determination and order for dismissal of the adjudicative  
217 proceeding.

218 (c) A party may make a written request to the Division of Adjudication for an  
219 evidentiary hearing to review de novo the director's or the director's designee's determination  
220 and order within 30 days [~~of the date~~] after the day on which the determination and order for  
221 dismissal is issued.

222 (d) If the director or the director's designee receives no timely request for a hearing, the  
223 determination and order issued by the director or the director's designee becomes the final order  
224 of the commission.

225 (5) (a) If the initial attempts at settlement are unsuccessful and the investigator  
226 uncovers sufficient evidence during the investigation to support the allegations of a  
227 discriminatory or prohibited employment practice set out in the request for agency action, the  
228 investigator shall formally report these findings to the director or the director's designee.

229 (b) (i) Upon receipt of the investigator's report described in Subsection (5)(a), the  
230 director or the director's designee may issue a determination and order based on the  
231 investigator's report.

232 (ii) A determination and order issued under this Subsection (5)(b) shall:

233 (A) direct the respondent to cease any discriminatory or prohibited employment  
234 practice; and

235 (B) provide relief to the aggrieved party as the director or the director's designee  
236 determines is appropriate.

237 (c) A party may file a written request to the Division of Adjudication for an evidentiary  
238 hearing to review de novo the director's or the director's designee's determination and order  
239 within 30 days [~~of the date~~] after the day on which the determination and order is issued.

240 (d) If the director or the director's designee receives no timely request for a hearing, the  
241 determination and order issued by the director or the director's designee in accordance with  
242 Subsection (5)(b) becomes the final order of the commission.

243 (6) In an adjudicative proceeding to review the director's or the director's designee's  
244 determination that a prohibited employment practice has occurred, the division shall present the



245 factual and legal basis of the determination [~~or~~] and order issued under Subsection (5).

246 (7) (a) Before [~~the~~] commencement of an evidentiary hearing:

247 (i) the party filing the request for agency action may reasonably and fairly amend any  
248 allegation; and

249 (ii) the respondent may amend its answer.

250 (b) An amendment permitted under this Subsection (7) may be made:

251 (i) during or after a hearing; and

252 (ii) only with permission of the presiding officer.

253 (8) (a) If, upon reviewing all the evidence at a hearing, the presiding officer finds that a  
254 respondent has not engaged in a discriminatory or prohibited employment practice, the  
255 presiding officer shall issue an order dismissing the request for agency action containing the  
256 allegation of a discriminatory or prohibited employment practice.

257 (b) The presiding officer may order that the respondent be reimbursed by the  
258 complaining party for the respondent's [~~attorneys'~~] attorney fees and costs.

259 (9) If, upon reviewing all the evidence at the hearing, the presiding officer finds that a  
260 respondent has engaged in a discriminatory or prohibited employment practice, the presiding  
261 officer shall issue an order requiring the respondent to:

262 (a) cease any discriminatory or prohibited employment practice; and

263 (b) provide relief to the complaining party, including:

264 [~~(i) reinstatement;~~]

265 (i) (A) reinstatement; or

266 (B) if the respondent employs fewer than 15 employees, front pay for up to two years;

267 (ii) back pay and benefits;

268 (iii) attorney fees; [~~and~~]

269 (iv) costs[-]; and

270 (v) if the respondent employs fewer than 15 employees, additional damages described  
271 under 42 U.S.C. Sec. 1981a, in an amount not to exceed \$25,000.

272 (10) If a discriminatory practice described in Subsection (9) includes discrimination in  
273 matters of compensation, the presiding officer may provide, to the complaining party, in  
274 addition to the amount available to the complaining party under Subsection (9)(b), an  
275 additional amount equal to the amount of back pay available to the complaining party under

276 Subsection (9)(b)(ii) unless a respondent shows that:

277 (a) the act or omission that gave rise to the order was in good faith; and

278 (b) the respondent had reasonable grounds to believe that the act or omission was not  
279 discrimination in matters of compensation under this chapter.

280 (11) Conciliation between the parties is to be urged and facilitated at all stages of the  
281 adjudicative process.

282 (12) (a) Either party may file with the Division of Adjudication a written request for  
283 review before the commissioner or Appeals Board of the order issued by the presiding officer  
284 in accordance with:

285 (i) Section 63G-4-301; and

286 (ii) Chapter 1, Part 3, Adjudicative Proceedings.

287 (b) If there is no timely request for review, the order issued by the presiding officer  
288 becomes the final order of the commission.

289 (13) An order of the commission under Subsection (12)(a) is subject to judicial review  
290 as provided in:

291 (a) Section 63G-4-403; and

292 (b) Chapter 1, Part 3, Adjudicative Proceedings.

293 (14) The commission may make rules concerning procedures under this chapter in  
294 accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

295 (15) The commission and its staff may not divulge or make public information gained  
296 from an investigation, settlement negotiation, or proceeding before the commission except as  
297 provided in Subsections (15)(a) through (d).

298 (a) Information used by the director or the director's designee in making a  
299 determination may be provided to all interested parties for the purpose of preparation for and  
300 participation in proceedings before the commission.

301 (b) General statistical information may be disclosed provided the identities of the  
302 individuals or parties are not disclosed.

303 (c) Information may be disclosed for inspection by the attorney general or other legal  
304 representatives of the state or the commission.

305 (d) Information may be disclosed for information and reporting requirements of the  
306 federal government.

307 (16) The procedures contained in this section are the exclusive remedy under state law  
308 for employment discrimination based upon:

- 309 (a) race;
- 310 (b) color;
- 311 (c) sex;
- 312 (d) retaliation;
- 313 (e) pregnancy, childbirth, or pregnancy-related conditions;
- 314 (f) age;
- 315 (g) religion;
- 316 (h) national origin;
- 317 (i) disability;
- 318 (j) sexual orientation; or
- 319 (k) gender identity.

320 (17) (a) The commencement of an action under federal law for relief based upon ~~an~~  
321 any act prohibited by this chapter bars the commencement or continuation of an adjudicative  
322 proceeding before the commission in connection with the same claim under this chapter.

323 (b) The transfer of a request for agency action to the Equal Employment Opportunity  
324 Commission in accordance with Subsection (1)(d) is considered the commencement of an  
325 action under federal law for purposes of Subsection (17)(a).

326 (c) Nothing in this Subsection (17) is intended to alter, amend, modify, or impair the  
327 exclusive remedy provision set forth in Subsection (16).

328 Section 4. Section **34A-5-108** is amended to read:

329 **34A-5-108. Judicial enforcement of division findings.**

330 (1) The commission or the attorney general at the request of the commission shall  
331 commence an action under Section **63G-4-501** for civil enforcement of a final order of the  
332 commission issued under ~~[Subsection]~~ Section 34A-5-107~~[(11)]~~ if:

333 (a) the order finds that there is reasonable cause to believe that a respondent has  
334 engaged or is engaging in discriminatory or prohibited employment practices made unlawful by  
335 this chapter;

336 (b) counsel to the commission or the attorney general determines after reasonable  
337 inquiry that the order is well grounded in fact and is warranted by existing law;

338 (c) the respondent has not received an order of automatic stay or discharge from the  
339 United States Bankruptcy Court; and

340 (d) (i) the commission has not accepted a conciliation agreement to which the  
341 aggrieved party and respondent are parties; or

342 (ii) the respondent has not conciliated or complied with the final order of the  
343 commission within 30 days from the date the order is issued.

344 (2) If the respondent seeks judicial review of the final order under Section [63G-4-403](#),  
345 pursuant to Section [63G-4-405](#) the commission may stay seeking civil enforcement pending the  
346 completion of the judicial review.

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**Legislative Review Note**  
**Office of Legislative Research and General Counsel**