

**UTAH ANTIDISCRIMINATION ACT
AMENDMENTS**

2003 GENERAL SESSION

STATE OF UTAH

Sponsor: Scott K. Jenkins

This act modifies the Utah Antidiscrimination Act to reduce the membership of the Antidiscrimination and Labor Advisory Committee. This act amends what constitutes discriminatory or unfair employment practices and amends provisions related to the procedure for assured persons to file claims. This act makes technical changes.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

17-33-10, as last amended by Chapter 375, Laws of Utah 1997

34A-5-105, as last amended by Chapter 69, Laws of Utah 2000

34A-5-106, as last amended by Chapter 161, Laws of Utah 1999

34A-5-107, as last amended by Chapter 161, Laws of Utah 1999

34A-5-108, as renumbered and amended by Chapter 375, Laws of Utah 1997

67-19-4, as last amended by Chapter 375, Laws of Utah 1997

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

Section 1. Section **17-33-10** is amended to read:

17-33-10. Grievance and appeals procedure -- Employees' complaints of discriminatory employment practice.

(1) Any county to which the provisions of this act apply shall establish in its personnel rules and regulations a grievance and appeals procedure. The procedure shall be used to resolve disputes arising from grievances as defined in the rules and regulations, including but not limited to acts of discrimination. The procedure may also be used by employees in the event of dismissal, demotion, suspension, or transfer.

(2) Any charge by a county career service employee of discriminatory or [unfair] prohibited employment practice as prohibited by Section 34A-5-106, can be filed with the Division of Antidiscrimination and Labor within the Labor Commission. Complaints shall be

filed within 30 days of the issuance of a written decision of the county career service council.

Section 2. Section **34A-5-105** is amended to read:

34A-5-105. Antidiscrimination and Labor Advisory Council -- Membership --

Appointment -- Term -- Powers and duties -- Chair.

(1) There is created an Antidiscrimination and Labor Advisory Council consisting of:

(a) [~~17~~] 13 voting members appointed by the commissioner as follows:

(i) [~~four~~] three employer representatives;

(ii) [~~four~~] three employee representatives;

(iii) two representatives of persons who seek to rent or purchase dwellings as defined in

Section 57-21-2;

(iv) two representatives of persons who:

(A) sell or rent dwellings; and

(B) are subject to Title 57, Chapter 21, Utah Fair Housing Act; and

(v) [~~five~~] three representatives of the general public; and

(b) the commissioner or the commissioner's designee as a nonvoting member of the council.

(2) In making the appointments under Subsection (1), the commissioner shall consider representation of the following protected classes:

(a) race;

(b) color;

(c) national origin;

(d) gender;

(e) religion;

(f) age;

(g) persons with disabilities;

(h) familial status as defined in Section 57-21-2; and

(i) source of income as defined in Section 57-21-2.

(3) The division shall provide any necessary staff support for the council.

(4) (a) Except as required by Subsection (4)(b), as terms of current council members expire, the commissioner shall appoint each new member or reappointed member to a four-year term.

(b) Notwithstanding the requirements of Subsection (4)(a), the commissioner shall, at the time of appointment or reappointment, adjust the length of terms to ensure that the terms of council members are staggered so that approximately half of the council is appointed every two years.

(5) (a) When a vacancy occurs in the membership for any reason, the replacement shall be appointed for the unexpired term.

(b) The commissioner shall terminate the term of a council member who ceases to be representative as designated by the original appointment.

(6) (a) (i) Members who are not government employees shall receive no compensation or benefits for their services, but may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

(ii) Members may decline to receive per diem and expenses for their service.

(b) (i) State government officer and employee members who do not receive salary, per diem, or expenses from their agency for their service may receive per diem and expenses incurred in the performance of their official duties from the council at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

(ii) State government officer and employee members may decline to receive per diem and expenses for their service.

(7) (a) The advisory council shall:

(i) offer advice on issues requested by:

(A) the commission~~[-]~~;

(B) the division~~[-and]~~; or

(C) the Legislature; and ~~[also]~~

(ii) make recommendations to the commission and division regarding issues related to:

~~[(i) of]~~ (A) employment discrimination;

~~[(ii)]~~ (B) housing discrimination; and

~~[(iii) related to]~~ (C) the administration by the commission of:

~~[(A)]~~ (I) the provisions of Title 34, Labor in General, that are administered by the commission;

~~[(B)]~~ (II) Title 34A, Chapter 5, Utah Antidiscrimination Act; and

~~[(C)]~~ (III) Title 57, Chapter 21, Utah Fair Housing Act.

(b) The council shall confer at least quarterly for the purpose of advising the commission, division, and the Legislature regarding issues described in Subsection (7)(a).

(8) (a) The commissioner or the commissioner's designee shall serve as chair of the council.

(b) The chair is charged with the responsibility of calling the necessary meetings.

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

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

(1) It is a discriminatory or prohibited employment practice to take any action described in Subsections (1)(a) through (f).

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

(A) race;

(B) color;

(C) sex;

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

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

(F) religion;

(G) national origin; or

(H) disability.

(ii) ~~[An applicant or candidate for any job or position]~~ A person may not be considered "otherwise qualified," unless ~~[the applicant or candidate]~~ that person possesses the following required by an employer for any particular job, job classification, or position:

(A) education[;];

(B) training[;];

(C) ability, with or without reasonable accommodation;

(D) moral character[;];

(E) integrity[;];

(F) disposition to work[;];

(G) adherence to reasonable rules and regulations[;]; and

(H) other job related qualifications required by an employer ~~[for any particular job, job classification, or position to be filled or created].~~

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

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

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

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

(b) An employment agency may not:

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

(A) race;

(B) color;

- (C) sex;
- (D) pregnancy, childbirth, or pregnancy-related conditions;
- (E) religion;
- (F) national origin;
- (G) age, if the individual is 40 years of age or older; or
- (H) disability; or

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

- (A) race;
- (B) color;
- (C) sex;
- (D) pregnancy, childbirth, or pregnancy-related conditions;
- (E) religion;
- (F) national origin;
- (G) age, if the individual is 40 years of age or older; or
- (H) disability.

(c) A labor organization may not exclude any individual otherwise qualified from full membership rights in the labor organization, expel the individual from membership in the labor organization, or otherwise discriminate against or harass any of [~~its~~] the labor organization's members in full employment of work opportunity, or representation, because of:

- (i) race;
- (ii) sex;
- (iii) pregnancy, childbirth, or pregnancy-related conditions;
- (iv) religion;
- (v) national origin;
- (vi) age, if the individual is 40 years of age or older; or
- (vii) disability.

(d) Unless based upon a bona fide occupational qualification, or required by[;] and given to[;] an agency of government for security reasons, an employer, employment agency, or labor organization may not print, or circulate, or cause to be printed or circulated, any statement, advertisement, or publication, use any form of application for employment or membership, or make any inquiry in connection with prospective employment or membership that expresses, either directly or indirectly:

- (i) any limitation, specification, or discrimination as to:
 - (A) race;
 - (B) color;
 - (C) religion;
 - (D) sex;
 - (E) pregnancy, childbirth, or pregnancy-related conditions;
 - (F) national origin;
 - (G) age, if the individual is 40 years of age or older; or
 - (H) disability;

(ii) the intent to make any limitation, specification, or discrimination described in Subsection (1)(d)(i).

(e) A person, whether or not an employer, an employment agency, a labor organization, or the employees or members [~~thereof~~] of an employer, employment agency, or labor organization, may not:

- (i) aid, incite, compel, or coerce the doing of an act defined in this section to be a discriminatory or prohibited employment practice;
- (ii) obstruct or prevent any person from complying with this chapter, or any order issued under [it] this chapter; or
- (iii) attempt, either directly or indirectly, to commit any act prohibited in this section.

(f) (i) An employer, labor organization, joint apprenticeship committee, or vocational school, providing, coordinating, or controlling apprenticeship programs, or providing, coordinating, or controlling on-the-job-training programs, instruction, training, or retraining

programs may not:

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

- [(A)] (I) race;
- [(B)] (II) color;
- [(C)] (III) sex;
- [(D)] (IV) pregnancy, childbirth, or pregnancy-related conditions;
- [(E)] (V) religion;
- [(F)] (VI) national origin;
- [(G)] (VII) age, if the individual is 40 years of age or older; or
- [(H)] (VIII) disability;

[(†)] (B) discriminate against or harass any qualified person in that person's pursuit of [such] programs described in Subsection (1)(f)(i)(A), or to discriminate against such a person in the terms, conditions, or privileges of [such] programs described in Subsection (1)(f)(i)(A), because of:

- [(A)] (I) race;
- [(B)] (II) color;
- [(C)] (III) sex;
- [(D)] (IV) pregnancy, childbirth, or pregnancy-related conditions;
- [(E)] (V) religion;
- [(F)] (VI) national origin;
- [(G)] (VII) age, if the individual is 40 years of age or older; or
- [(H)] (VIII) disability; or

[(†)] (C) except as provided in Subsection (1)(f)(ii), print, publish, or cause to be printed or published, any notice or advertisement relating to employment by the employer, or membership in or any classification or referral for employment by a labor organization, or relating to any classification or referral for employment by an employment agency, indicating any

preference, limitation, specification, or discrimination based on:

- (I) race[;];
- (II) color[;];
- (III) sex[;];
- (IV) pregnancy, childbirth, or pregnancy-related conditions[;];
- (V) religion[;];
- (VI) national origin[;];
- (VII) age, if the individual is 40 years of age or older[;]; or
- (VIII) disability [~~except that~~].

(ii) Notwithstanding Subsection (1)(f)(i)(C), if the following is a bona fide occupational qualification for employment, a notice or advertisement described in Subsection (1)(f)(i)(C) may indicate a preference, limitation, specification, or discrimination based on:

- (A) race[;];
- (B) color[;];
- (C) religion[;];
- (D) sex[;];
- (E) pregnancy, childbirth, or pregnancy-related conditions[;];
- (F) age[;];
- (G) national origin[;]; or
- (H) disability [~~when religion, race, color, sex, age, national origin, or disability is a bona~~

~~fide occupational qualification for employment].~~

(2) Nothing contained in Subsections (1)(a) through (1)(f) shall be construed to prevent:

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

(b) the variance of insurance premiums[~~, of~~] or coverage on account of age; or

(c) a restriction on the activities of individuals licensed by the liquor authority with respect to persons under 21 years of age.

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

(i) for an employer to hire and employ employees, for an employment agency to classify or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of religion, sex, pregnancy, childbirth, or pregnancy-related conditions, age, national origin, or disability in those certain instances where religion, sex, pregnancy, childbirth, or pregnancy-related conditions, age, if the individual is 40 years of age or older, national origin, or disability is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise;

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

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

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

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

(A) the employer's:

(I) spouse;

(II) child; or

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

(B) any person for whom the employer is or would be liable to furnish financial support if those persons were unemployed;

(C) any person to whom the employer during the preceding six months has furnished more than one-half of total financial support regardless of whether or not the employer was or is legally obligated to furnish support; or

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

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

(c) Nothing in this chapter shall be interpreted to require any employer, employment agency, labor organization, vocational school, joint labor-management committee, or apprenticeship program subject to this chapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, age, national origin, or disability of the individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, age, national origin, or disability employed by any employer, referred or classified for employment by an employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of that race, color, religion, sex, age, national origin, or disability in any community or county or in the available work force in any community or county.

(4) It is not a discriminatory or prohibited practice with respect to age to observe the terms of a bona fide seniority system or any bona fide employment benefit plan such as a retirement, pension, or insurance plan that is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire an individual.

(5) Notwithstanding Subsection (4), or any other statutory provision to the contrary, a person may not be subject to involuntary termination or retirement from employment on the basis of age alone, if the individual is 40 years of age or older, except:

- (a) under Subsection (6);
 - (b) under Section 67-5-8; and
 - (c) when age is a bona fide occupational qualification.
- (6) Nothing in this section prohibits compulsory retirement of an employee who has

attained at least 65 years of age, and who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if:

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

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

Section 4. Section **34A-5-107** is amended to read:

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

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

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

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

(d) The division may transfer a request for agency action filed with the division pursuant to this section to the federal Equal Employment Opportunity Commission in accordance with the provisions of any work-share agreement that is:

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

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

(2) Any employer, labor organization, joint apprenticeship committee, or vocational school who has ~~[employees or members]~~ an employee or member who ~~[refuse]~~ refuses or ~~[threaten]~~ threatens to refuse to comply with this chapter may file with the division a request for agency action asking the division for assistance to obtain ~~[their]~~ the employee's or member's compliance by conciliation or other remedial action.

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

(b) If no settlement is reached, the investigator shall make a prompt impartial investigation of all allegations made in the request for agency action.

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

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

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

(d) An aggrieved party may withdraw the request for agency action prior to the issuance of a final order.

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

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

(c) A party may make a written request to the Division of Adjudication for an evidentiary hearing to review de novo the director's or the director's designee's determination and order within 30 days of the date the determination and order for dismissal is issued.

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

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

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

report.

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

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

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

(c) A party may file a written request to the Division of Adjudication for an evidentiary hearing to review de novo the director's or the director's designee's determination and order within 30 days of the date the determination and order is issued.

(d) If the director or the director's designee receives no timely request for a hearing, the determination and order issued by the director or the director's designee [~~requiring the respondent to cease any discriminatory or prohibited employment practice and to provide relief to the aggrieved party~~] in accordance with Subsection (5)(b) becomes the final order of the commission.

(6) In any adjudicative proceeding to review the director's or the director's designee's determination that a prohibited employment practice has occurred, the division shall present the factual and legal basis of [~~its~~] the determination or order issued under Subsection (5).

(7) (a) Prior to commencement of an evidentiary hearing[;]:

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

(ii) the respondent may amend its answer. [~~Those amendments~~]

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

(i) during or after a hearing [~~but~~]; and

(ii) only with permission of the presiding officer.

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

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

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

- (a) cease any discriminatory or prohibited employment practice; and
- (b) provide relief to the complaining party, including:
 - (i) reinstatement~~[-]~~;
 - (ii) back pay and benefits~~[-and]~~;
 - (iii) attorneys' fees; and
 - (iv) costs.

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

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

- (i) Section 63-46b-12; and
- (ii) Chapter 1, Part 3, Adjudicative Proceedings.

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

(12) An order of the commission under Subsection (11)(a) is subject to judicial review as provided in:

- (a) Section 63-46b-16; and
- (b) Chapter 1, Part 3, Adjudicative Proceedings.

(13) The commission shall have authority to make rules concerning procedures under this chapter in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(14) The commission and its staff may not divulge or make public any information gained from any investigation, settlement negotiation, or proceeding before the commission

except as provided in Subsections (14)(a) through (d).

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

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

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

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

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

(a) race[;];

(b) color[;];

(c) sex[;];

(d) retaliation[;];

(e) pregnancy, childbirth, or pregnancy-related conditions[;];

(f) age[;];

(g) religion[;];

(h) national origin[;]; or

(i) disability.

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

(b) The transfer of a request for agency action to the Equal Employment Opportunity Commission in accordance with Subsection (1)(d) is considered the commencement of an action under federal law for purposes of Subsection (16)(a).

(c) Nothing in this Subsection (16) is intended to alter, amend, modify, or impair the

exclusive remedy provision set forth in Subsection (15).

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

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

(1) The commission or the attorney general at the request of the commission shall commence an action under Section 63-46b-19 for civil enforcement of a final order of the commission issued under Subsection 34A-5-107[~~(12)~~] (11) if:

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

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

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

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

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

(2) If the respondent seeks judicial review of the final order under Section 63-46b-16, pursuant to Section 63-46b-18 the commission may stay seeking civil enforcement pending the completion of the judicial review.

Section 6. Section **67-19-4** is amended to read:

67-19-4. Discriminatory or prohibited employment practices.

The state, its officers, and employees shall be governed by the provisions of Section 34A-5-106 of the Utah Antidiscrimination Act concerning discriminatory or [~~unfair~~] prohibited employment practices.