

## SB0059S01 compared with SB0059

~~text~~ shows text that was in SB0059 but was deleted in SB0059S01.

text shows text that was not in SB0059 but was inserted into SB0059S01.

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Representative Rebecca P. Edwards proposes the following substitute bill:

### ANTIDISCRIMINATION ~~ACT~~ AND WORKPLACE

### ACCOMMODATIONS REVISIONS

2016 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Todd Weiler**

House Sponsor: ~~\_\_\_\_\_~~ Rebecca P. Edwards

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#### LONG TITLE

##### General Description:

This bill modifies ~~the Utah Antidiscrimination Act~~ provisions related to accommodations at the workplace.

##### Highlighted Provisions:

This bill:

- ▶ addresses a public employer accommodation for breastfeeding;
- ▶ amends the definition provision;
- ▶ provides for reasonable accommodations for an employee ~~for the known limitations~~ under certain circumstances related to pregnancy, childbirth, breastfeeding, or related conditions ~~unless it creates an undue hardship for the~~

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[employer](#)}; and

- ▶ makes technical changes.

### Money Appropriated in this Bill:

None

### Other Special Clauses:

None

### Utah Code Sections Affected:

AMENDS:

[34-49-202, as enacted by Laws of Utah 2015, Chapter 156](#)

**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

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

[Section 1. Section 34-49-202 is amended to read:](#)

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

(1) (a) A public employer shall:

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

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

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

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

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

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

(ii) shall:

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

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

(C) be available at the times and for a duration required by the public employee as

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determined in consultation with the public employee under Subsection (1)(a)(ii); and

(D) have an electrical outlet.

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

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

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

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

Section ~~{1}~~2. Section **34A-5-102** is amended to read:

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

(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.

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(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 15 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:

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

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

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

(j) "Employment agency" means a person:

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

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

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

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

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

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- (i) collective bargaining;
- (ii) dealing with employers concerning grievances, terms or conditions of employment;

or

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

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

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

- (i) is also employed at that job; or
- (ii) may be employed by the employer conducting the program during the course of the program, or when the program is completed.

(p) "Person" means:

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

(ii) the state; and

(iii) a political subdivision of the state.

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

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

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

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

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

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

(ii) files charges, testifies, assists, or participates in any way in a proceeding,

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investigation, or hearing under this chapter.

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

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

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

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

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

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

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

- (i) is an active manager of the unincorporated entity;
- (ii) directly or indirectly holds at least an 8% ownership interest in the unincorporated entity; or
- (iii) is not subject to supervision or control in the performance of work by:
  - (A) the unincorporated entity; or
  - (B) a person with whom the unincorporated entity contracts.
- (c) As part of the rules made under Subsection (2)(b), the commission may define:
  - (i) "active manager";

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

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

Section ~~2~~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 an action described in Subsections (1)(a) through ~~(f)~~ (g).

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

(H) disability;

(I) sexual orientation; or

(J) gender identity.

(ii) A person may not be considered "otherwise qualified," unless 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.

(iii) (A) As used in this chapter, "to discriminate in matters of compensation" means

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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 an increase in pay as a result of longevity with the employer, if the salary increase is 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;

(H) disability;

(I) sexual orientation; or

(J) gender identity; or

(ii) comply with a request from an employer for referral of an applicant 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;

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- (F) national origin;
- (G) age, if the individual is 40 years of age or older;
- (H) disability;
- (I) sexual orientation; or
- (J) gender identity.

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

(A) exclude an individual otherwise qualified from full membership rights in the labor organization;

(B) expel the individual from membership in the labor organization; or

(C) otherwise discriminate against or harass a member of the labor organization in full employment of work opportunity, or representation.

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

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

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

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

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

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

(ii) This Subsection (1)(d) applies to a statement, advertisement, publication, form, or

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inquiry that directly expresses a 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;
- (H) disability;
- (I) sexual orientation; or
- (J) gender identity.

(e) A person, whether or not an employer, an employment agency, a labor organization, or an employee or member 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 a person from complying with this chapter, or any order issued under this chapter; or
- (iii) attempt, either directly or indirectly, to commit an act prohibited in this section.

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

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

- (I) race;
- (II) color;
- (III) sex;
- (IV) pregnancy, childbirth, or pregnancy-related conditions;
- (V) religion;

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(VI) national origin;

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

(VIII) disability;

(IX) sexual orientation; or

(X) gender identity;

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

(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;

(VIII) disability;

(IX) sexual orientation; or

(X) gender identity;

(C) discriminate against a qualified person in the terms, conditions, or privileges of a program described in Subsection (1)(f)(i)(A), because of:

(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;

(VIII) disability;

(IX) sexual orientation; or

(X) gender identity; or

(D) except as provided in Subsection (1)(f)(ii), print, publish, or cause to be printed or published, a notice or advertisement relating to employment by the employer, or membership in

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or a classification or referral for employment by a labor organization, or relating to a classification or referral for employment by an employment agency, indicating a 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;
- (VIII) disability;
- (IX) sexual orientation; or
- (X) gender identity.

(ii) Notwithstanding Subsection (1)(f)(i)(D), if the following is a bona fide occupational qualification for employment, a notice or advertisement described in Subsection (1)(f)(i)(D) 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;
- (H) disability;
- (I) sexual orientation; or
- (J) gender identity.

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

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

- (A) if the employee requests ~~{the}~~ a reasonable accommodation; and
- (B) unless the employer demonstrates that the accommodation would create an undue

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hardship on the operations of the employer:

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

(iii) deny employment opportunities to an employee, if the denial is based on the need of the employer to make reasonable accommodations ~~to the known limitations~~ related to the pregnancy, childbirth, breastfeeding, or related conditions of ~~a job applicant or~~ an employee unless the employer demonstrates that the accommodation would create an undue hardship on the operations of the employer.

(2) Subsections (1)(a) through (1)~~(f)~~(g) may not 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 or coverage on account of age; or

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

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

(i) for an employer to hire and employ an employee, for an employment agency to classify or refer for employment an individual, for a labor organization to classify its membership or to classify or refer for employment an individual, or for an employer, labor organization, or joint labor-management committee controlling an apprenticeship or other training or retraining program to admit or employ an individual in the program on the basis of religion, sex, pregnancy, childbirth, or pregnancy-related conditions, age, national origin, disability, sexual orientation, or gender identity in those certain instances when religion, sex, pregnancy, childbirth, or pregnancy-related conditions, age, if the individual is 40 years of age or older, national origin, disability, sexual orientation, or gender identity 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 an employee of a particular religion if:

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(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

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

(C) a person to whom the employer during the preceding six months furnishes 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) a person whose education or training is substantially financed by the employer for a period of two years or more.

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

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

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persons of that race, color, religion, sex, age, national origin, disability, sexual orientation, or gender identity 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 an employee benefit plan may not excuse the failure to hire an individual.

(5) Notwithstanding Subsection (4), or another statute 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); and
- (b) 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.

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

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

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

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

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

(c) Notwithstanding Subsections (1)(g) and (7)(a), an employer may not require an employee to obtain a certification from the employee's health care provider, nor may an employer claim undue hardship, for the following accommodations:

(i) more frequent restroom, food, and/or water breaks; or

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~~(ii) limits on lifting over 20 pounds.~~

~~(d)~~ (d) An employer is not required under Subsection (1)(g) or this Subsection (7) to permit an employee to have the employee's child at the workplace for purposes of accommodating pregnancy, childbirth, breastfeeding, or related conditions.

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

~~f~~

**Legislative Review Note**

**Office of Legislative Research and General Counsel**