

LABOR REMEDY AMENDMENTS

2016 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Jani Iwamoto

House Sponsor: Sophia M. DiCaro

LONG TITLE

General Description:

This bill amends provisions related to discriminatory employment practices.

Highlighted Provisions:

This bill:

- ▶ amends a definition;
- ▶ provides that a person who is subject to discrimination in matters of compensation

may receive a remedy in an additional amount equal to the back pay amount already available; and

- ▶ requires the Division of Antidiscrimination and Labor to report to the Business and Labor Interim Committee annually regarding discrimination in matters of compensation.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

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

34A-5-104, as last amended by Laws of Utah 2015, Chapter 13

34A-5-107, 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 **34A-5-102** is amended to read:

31 **34A-5-102. Definitions -- Unincorporated entities.**

32 (1) As used in this chapter:

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

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

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

38 (i) is necessary to the operation; or

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

40 (d) "Court" means:

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

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

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

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

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

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

50 (i) (i) "Employer" means:

51 (A) the state;

52 (B) a political subdivision;

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

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

57 (ii) "Employer" does not include:

58 (A) a religious organization, a religious corporation sole, a religious association, a

59 religious society, a religious educational institution, or a religious leader, when that individual
60 is acting in the capacity of a religious leader;

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

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

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

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

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

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

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

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

79 (i) collective bargaining;

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

81 or

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

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

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

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

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

90 (p) "Person" means:

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

93 (ii) the state; and

94 (iii) a political subdivision of the state.

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

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

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

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

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

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

109 (ii) files charges, testifies, assists, or participates in any way in a proceeding,
110 investigation, or hearing under this chapter[-]; or

111 (iii) inquires about, discusses, or discloses the employee's wages or another employee's
112 wages.

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

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

117 (i) an individual;

118 (ii) a corporation; or

119 (iii) publicly traded.

120 (x) "Vocational school" means a school or institution conducting a course of

121 instruction, training, or retraining to prepare individuals to follow an occupation or trade, or to
122 pursue a manual, technical, industrial, business, commercial, office, personal services, or other
123 nonprofessional occupations.

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

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

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

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

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

136 (A) the unincorporated entity; or

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

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

139 (i) "active manager";

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

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

142 Section 2. Section **34A-5-104** is amended to read:

143 **34A-5-104. Powers.**

144 (1) (a) The commission has jurisdiction over the subject of employment practices and
145 discrimination made unlawful by this chapter.

146 (b) The commission may adopt, publish, amend, and rescind rules, consistent with, and
147 for the enforcement of this chapter.

148 (2) The division may:

149 (a) appoint and prescribe the duties of an investigator, other employee, or agent of the
150 commission that the commission considers necessary for the enforcement of this chapter;

151 (b) receive, reject, investigate, and pass upon complaints alleging:

- 152 (i) discrimination in:
- 153 (A) employment;
- 154 (B) an apprenticeship program;
- 155 (C) an on-the-job training program; or
- 156 (D) a vocational school; or
- 157 (ii) the existence of a discriminatory or prohibited employment practice by:
- 158 (A) a person;
- 159 (B) an employer;
- 160 (C) an employment agency;
- 161 (D) a labor organization;
- 162 (E) an employee or member of an employment agency or labor organization;
- 163 (F) a joint apprenticeship committee; and
- 164 (G) a vocational school;
- 165 (c) investigate and study the existence, character, causes, and extent of discrimination
- 166 in employment, apprenticeship programs, on-the-job training programs, and vocational schools
- 167 in this state by:
- 168 (i) employers;
- 169 (ii) employment agencies;
- 170 (iii) labor organizations;
- 171 (iv) joint apprenticeship committees; and
- 172 (v) vocational schools;
- 173 (d) formulate plans for the elimination of discrimination by educational or other
- 174 means;
- 175 (e) hold hearings upon complaint made against:
- 176 (i) a person;
- 177 (ii) an employer;
- 178 (iii) an employment agency;
- 179 (iv) a labor organization;
- 180 (v) an employee or member of an employment agency or labor organization;
- 181 (vi) a joint apprenticeship committee; or
- 182 (vii) a vocational school;

- 183 (f) issue publications and reports of investigations and research that:
- 184 (i) promote good will among the various racial, religious, and ethnic groups of the
- 185 state; and
- 186 (ii) minimize or eliminate discrimination in employment because of race, color, sex,
- 187 religion, national origin, age, disability, sexual orientation, or gender identity;
- 188 (g) prepare and transmit to the governor, at least once each year, reports describing:
- 189 (i) the division's proceedings, investigations, and hearings;
- 190 (ii) the outcome of those hearings;
- 191 (iii) decisions the division renders; and
- 192 (iv) the other work performed by the division;
- 193 (h) recommend policies to the governor, and submit recommendation to employers,
- 194 employment agencies, and labor organizations to implement those policies;
- 195 (i) recommend legislation to the governor that the division considers necessary
- 196 concerning discrimination because of:
- 197 (i) race;
- 198 (ii) sex;
- 199 (iii) color;
- 200 (iv) national origin;
- 201 (v) religion;
- 202 (vi) age;
- 203 (vii) disability;
- 204 (viii) sexual orientation; or
- 205 (ix) gender identity; and
- 206 (j) within the limits of appropriations made for its operation, cooperate with other
- 207 agencies or organizations, both public and private, in the planning and conducting of
- 208 educational programs designed to eliminate discriminatory practices prohibited under this
- 209 chapter.
- 210 (3) The division shall investigate an alleged discriminatory practice involving an
- 211 officer or employee of state government if requested to do so by the Career Service Review
- 212 Office.
- 213 (4) (a) In a hearing held under this chapter, the division may:

214 (i) subpoena witnesses and compel their attendance at the hearing;
215 (ii) administer oaths and take the testimony of a person under oath; and
216 (iii) compel a person to produce for examination a book, paper, or other information
217 relating to the matters raised by the complaint.

218 (b) The division director or a hearing examiner appointed by the division director may
219 conduct a hearing.

220 (c) If a witness fails or refuses to obey a subpoena issued by the division, the division
221 may petition the district court to enforce the subpoena.

222 (d) If a witness asserts a privilege against self-incrimination, testimony and evidence
223 from the witness may be compelled pursuant to Title 77, Chapter 22b, Grants of Immunity.

224 (5) In 2018, before November 1, the division shall report to the Business and Labor
225 Interim Committee on the effectiveness of the commission and state law in addressing
226 discrimination in matters of compensation.

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

228 **34A-5-107. Procedure for aggrieved person to file claim -- Investigations --**
229 **Adjudicative proceedings -- Settlement -- Reconsideration -- Determination.**

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

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

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

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

- 239 (i) between the division and the Equal Employment Opportunity Commission; and
- 240 (ii) in effect on the day on which the request for agency action is transferred.

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

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

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

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

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

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

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

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

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

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

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

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

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

276 investigator's report.

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

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

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

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

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

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

291 (7) (a) Before the commencement of an evidentiary hearing:

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

294 (ii) the respondent may amend its answer.

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

296 (i) during or after a hearing; and

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

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

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

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

- 307 (a) cease any discriminatory or prohibited employment practice; ~~and~~
- 308 (b) provide relief to the complaining party, including:
- 309 (i) reinstatement;
- 310 (ii) back pay and benefits;
- 311 (iii) attorney fees; and
- 312 (iv) costs~~[-];~~ and
- 313 (c) except as provided in Subsection (10), if the discriminatory practice includes
- 314 discrimination in matters of compensation, provide, to the complaining party, in addition to the
- 315 amount available to the complaining party under Subsection (9)(b), an additional amount equal
- 316 to the amount of back pay available to the complaining party under Subsection (9)(b)(ii).
- 317 (10) The presiding officer shall award additional damages under Subsection (9)(c)
- 318 unless a respondent shows that:
- 319 (a) the act or omission that gave rise to the order was in good faith; and
- 320 (b) the respondent had reasonable grounds to believe that the act or omission was not
- 321 discrimination in matters of compensation under this chapter.
- 322 ~~[(10)]~~ (11) Conciliation between the parties is to be urged and facilitated at all stages of
- 323 the adjudicative process.
- 324 ~~[(11)]~~ (12) (a) Either party may file with the Division of Adjudication a written request
- 325 for review before the commissioner or Appeals Board of the order issued by the presiding
- 326 officer in accordance with:
- 327 (i) Section 63G-4-301; and
- 328 (ii) Chapter 1, Part 3, Adjudicative Proceedings.
- 329 (b) If there is no timely request for review, the order issued by the presiding officer
- 330 becomes the final order of the commission.
- 331 ~~[(12)]~~ (13) An order of the commission under Subsection ~~[(11)]~~ (12)(a) is subject to
- 332 judicial review as provided in:
- 333 (a) Section 63G-4-403; and
- 334 (b) Chapter 1, Part 3, Adjudicative Proceedings.
- 335 ~~[(13)]~~ (14) The commission may make rules concerning procedures under this chapter
- 336 in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.
- 337 ~~[(14)]~~ (15) The commission and its staff may not divulge or make public information

338 gained from an investigation, settlement negotiation, or proceeding before the commission
339 except as provided in Subsections [~~(14)~~] (15)(a) through (d).

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

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

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

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

349 [~~(15)~~] (16) The procedures contained in this section are the exclusive remedy under
350 state law for employment discrimination based upon:

- 351 (a) race;
- 352 (b) color;
- 353 (c) sex;
- 354 (d) retaliation;
- 355 (e) pregnancy, childbirth, or pregnancy-related conditions;
- 356 (f) age;
- 357 (g) religion;
- 358 (h) national origin;
- 359 (i) disability;
- 360 (j) sexual orientation; or
- 361 (k) gender identity.

362 [~~(16)~~] (17) (a) The commencement of an action under federal law for relief based upon
363 an act prohibited by this chapter bars the commencement or continuation of an adjudicative
364 proceeding before the commission in connection with the same claim under this chapter.

365 (b) The transfer of a request for agency action to the Equal Employment Opportunity
366 Commission in accordance with Subsection (1)(d) is considered the commencement of an
367 action under federal law for purposes of Subsection [~~(16)~~] (17)(a).

368 (c) Nothing in this Subsection [~~(16)~~] (17) is intended to alter, amend, modify, or impair

369 the exclusive remedy provision set forth in Subsection [~~(15)~~] (16).

Legislative Review Note
Office of Legislative Research and General Counsel