

HB0030S01 compared with HB0030

~~{deleted text}~~ shows text that was in HB0030 but was deleted in HB0030S01.

Inserted text shows text that was not in HB0030 but was inserted into HB0030S01.

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Representative James A. Dunnigan proposes the following substitute bill:

UTAH ANTIDISCRIMINATION ACT AMENDMENTS

2018 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: James A. Dunnigan

Senate Sponsor: _____

LONG TITLE

~~{Committee Note:~~

~~—The Business and Labor Interim Committee recommended this bill.~~

~~{General Description:~~

This bill amends the Utah Antidiscrimination Act and the Utah Administrative Procedures Act.

Highlighted Provisions:

This bill:

- ▶ removes a provision relating to the Utah Labor Commission Antidiscrimination and Labor Division (UALD) holding hearings upon receiving complaints;
- ▶ grants the UALD subpoena power during an investigation;
- ▶ permits the Career Service Review Office to request an investigation in certain circumstances;

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- ▶ instructs the UALD to assign a mediator to offer mediation services between parties before an investigation begins;
- ▶ removes language instructing mediators to attempt a settlement between parties by conciliation and persuasion;
- ▶ requires notification to parties regarding the right to request an evidentiary hearing;
- ▶ excludes the issuance of a determination and order from the Utah Administrative Procedures Act;
- ▶ removes a provision requiring a finding before an investigation begins; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

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

34A-5-104, as last amended by Laws of Utah 2017, Chapter 18

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

63G-4-102, as last amended by Laws of Utah 2015, Chapter 441

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

Section 1. Section **34A-5-102.5** is amended to read:

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

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

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

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

34A-5-104. Powers.

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

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

(2) The division may:

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

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

(i) discrimination in:

(A) employment;

(B) an apprenticeship program;

(C) an on-the-job training program; or

(D) a vocational school; or

(ii) the existence of a discriminatory or prohibited employment practice by:

(A) a person;

(B) an employer;

(C) an employment agency;

(D) a labor organization;

(E) an employee or member of an employment agency or labor organization;

(F) a joint apprenticeship committee; and

(G) a vocational school;

(c) investigate and study the existence, character, causes, and extent of discrimination in employment, apprenticeship programs, on-the-job training programs, and vocational schools in this state by:

(i) employers;

(ii) employment agencies;

(iii) labor organizations;

(iv) joint apprenticeship committees; and

(v) vocational schools;

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(d) formulate plans for the elimination of discrimination by educational or other means;

~~[(e) hold hearings upon complaint made against:]~~

~~[(i) a person;]~~

~~[(ii) an employer;]~~

~~[(iii) an employment agency;]~~

~~[(iv) a labor organization;]~~

~~[(v) an employee or member of an employment agency or labor organization;]~~

~~[(vi) a joint apprenticeship committee; or]~~

~~[(vii) a vocational school;]~~

~~[(f)]~~ (e) issue publications and reports of investigations and research that:

(i) promote good will among the various racial, religious, and ethnic groups of the state; and

(ii) minimize or eliminate discrimination in employment because of race, color, sex, religion, national origin, age, disability, sexual orientation, or gender identity;

~~[(g)]~~ (f) prepare and transmit to the governor, at least once each year, reports describing:

(i) ~~[the division's]~~ division proceedings~~;~~ and investigations~~;~~ ~~and hearings~~;

~~[(ii) the outcome of those hearings;]~~

~~[(iii)]~~ (ii) decisions the division renders; and

~~[(iv) the]~~ (iii) other work performed by the division;

~~[(h)]~~ (g) recommend policies to the governor, and submit recommendation to employers, employment agencies, and labor organizations to implement those policies;

~~[(i)]~~ (h) recommend legislation to the governor that the division considers necessary concerning discrimination because of:

(i) race;

(ii) sex;

(iii) color;

(iv) national origin;

(v) religion;

(vi) age;

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- (vii) disability;
- (viii) sexual orientation; or
- (ix) gender identity; and

~~[(f)]~~ (i) within the limits of appropriations made for ~~[its]~~ the division's operation, cooperate with other agencies or organizations, both public and private, in the planning and conducting of educational programs designed to eliminate discriminatory practices prohibited under this chapter.

(3) ~~[The]~~ In addition to processing complaints made in accordance with this chapter, the division shall investigate an alleged discriminatory practice involving an officer or employee of state government ~~[if]~~ when requested ~~[to do so]~~ by the Career Service Review Office.

(4) (a) In ~~[a hearing]~~ an investigation held under this chapter, the division may subpoena a person to compel the person to:

(i) ~~[subpoena witnesses and compel their attendance at the hearing;]~~ cooperate and participate in an interview; or

~~[(ii) administer oaths and take the testimony of a person under oath; and]~~

~~[(iii)]~~ (ii) ~~[compel a person to]~~ produce for examination a book, paper, or other information relating to the matters raised by the complaint.

~~[(b) The division director or a hearing examiner appointed by the division director may conduct a hearing.]~~

~~[(c)]~~ (b) If a ~~[witness]~~ person fails or refuses to obey a subpoena issued by the division, the division may petition the district court to enforce the subpoena.

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

(5) In 2018, before November 1, the division shall submit, in accordance with Section 68-3-14, a written report to the Business and Labor Interim Committee on the effectiveness of the commission and state law in addressing discrimination in matters of compensation.

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

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

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(1) (a) A 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) A 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 occurs.

(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 a 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) An employer, labor organization, joint apprenticeship committee, or vocational school who has an employee or member who refuses or 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 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]~~ an investigation begins into allegations of discriminatory or prohibited employment practice, the division shall promptly assign ~~[an investigator to attempt a settlement]~~ a mediator to offer mediation services between the parties by conference~~[- conciliation, or persuasion].~~

(b) (i) If mediation services are refused or no settlement is reached, ~~[the]~~ the division shall promptly assign an investigator.

(ii) The investigator shall make a prompt impartial investigation of all allegations made in the request for agency action.

(c) The division and ~~[its]~~ the division's 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

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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 (4)(a), the director or the director's designee may issue a determination and order for dismissal of the adjudicative proceeding.

(ii) A determination and order issued under this Subsection (4)(b) shall include a notice:

(A) of the right to request an evidentiary hearing under Subsection (4)(c); and

(B) that failure to request an evidentiary hearing under Subsection (4)(c) will result in the determination and order becoming final, in accordance with Subsection (4)(d).

(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~~] from the day on which 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) include a notice of the right to request an evidentiary hearing under Subsection (5)(c); and

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(D) include a notice that failure to request an evidentiary hearing under Subsection (5)(c) will result in the determination and order becoming final, in accordance with Subsection (5)(d).

(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]~~ after the day on which 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 in accordance with Subsection (5)(b) becomes the final order of the commission.

(6) In an 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 the determination ~~[or]~~ and order issued under Subsection (5).

~~[(7)(a) Before the 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.]~~

~~[(b) An amendment permitted under this Subsection (7) may be made:]~~

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

~~[(ii) only with permission of the presiding officer.]~~

~~[(8)]~~ (7) (a) If, upon reviewing 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']~~ attorney fees and costs.

~~[(9)]~~ (8) If, upon reviewing 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;

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

(i) reinstatement;

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- (ii) back pay and benefits;
- (iii) attorney fees; and
- (iv) costs.

~~[(10)]~~ (9) If a discriminatory practice described in Subsection ~~[(9)]~~ (8) includes discrimination in matters of compensation, the presiding officer may provide, to the complaining party, in addition to the amount available to the complaining party under Subsection ~~[(9)]~~ (8)(b), an additional amount equal to the amount of back pay available to the complaining party under Subsection ~~[(9)]~~ (8)(b)(ii) unless a respondent shows that:

- (a) the act or omission that gave rise to the order was in good faith; and
- (b) the respondent had reasonable grounds to believe that the act or omission was not discrimination in matters of compensation under this chapter.

~~[(11)]~~ (10) Conciliation between the parties is to be urged and facilitated at all stages of the adjudicative process.

~~[(12)]~~ (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 63G-4-301; 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.

~~[(13)]~~ (12) An order of the commission under Subsection ~~[(12)]~~ (11)(a) is subject to judicial review as provided in:

- (a) Section 63G-4-403; and
- (b) Chapter 1, Part 3, Adjudicative Proceedings.

~~[(14)]~~ (13) The commission may make rules concerning procedures under this chapter in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

~~[(15)]~~ (14) The commission and its staff may not divulge or make public information gained from an investigation, settlement negotiation, or proceeding before the commission except as provided in Subsections ~~[(15)]~~ (14)(a) through (d).

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

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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.

~~[(16)]~~ (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;
- (i) disability;
- (j) sexual orientation; or
- (k) gender identity.

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

(c) Nothing in this Subsection ~~[(17)]~~ (16) is intended to alter, amend, modify, or impair the exclusive remedy provision set forth in Subsection ~~[(16)]~~ (15).

Section 4. 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

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commence an action under Section 63G-4-501 for civil enforcement of a final order of the commission issued under ~~[Subsection]~~ Section 34A-5-107~~[(11)]~~~~†(8)~~ 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 63G-4-403, pursuant to Section 63G-4-405 the commission may stay seeking civil enforcement pending the completion of the judicial review.

†

Legislative Review Note

~~Office of Legislative Research and General Counsel~~ Section 5. Section 63G-4-102 is amended to read:

63G-4-102. Scope and applicability of chapter.

(1) Except as set forth in Subsection (2), and except as otherwise provided by a statute superseding provisions of this chapter by explicit reference to this chapter, the provisions of this chapter apply to every agency of the state and govern:

(a) state agency action that determines the legal rights, duties, privileges, immunities, or other legal interests of an identifiable person, including agency action to grant, deny, revoke, suspend, modify, annul, withdraw, or amend an authority, right, or license; and

(b) judicial review of the action.

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(2) This chapter does not govern:

(a) the procedure for making agency rules, or judicial review of the procedure or rules;

(b) the issuance of a notice of a deficiency in the payment of a tax, the decision to waive a penalty or interest on taxes, the imposition of and penalty or interest on taxes, or the issuance of a tax assessment, except that this chapter governs an agency action commenced by a taxpayer or by another person authorized by law to contest the validity or correctness of the action;

(c) state agency action relating to extradition, to the granting of a pardon or parole, a commutation or termination of a sentence, or to the rescission, termination, or revocation of parole or probation, to the discipline of, resolution of a grievance of, supervision of, confinement of, or the treatment of an inmate or resident of a correctional facility, the Utah State Hospital, the Utah State Developmental Center, or a person in the custody or jurisdiction of the Division of Substance Abuse and Mental Health, or a person on probation or parole, or judicial review of the action;

(d) state agency action to evaluate, discipline, employ, transfer, reassign, or promote a student or teacher in a school or educational institution, or judicial review of the action;

(e) an application for employment and internal personnel action within an agency concerning its own employees, or judicial review of the action;

(f) the issuance of a citation or assessment under Title 34A, Chapter 6, Utah Occupational Safety and Health Act, and Title 58, Occupations and Professions, except that this chapter governs an agency action commenced by the employer, licensee, or other person authorized by law to contest the validity or correctness of the citation or assessment;

(g) state agency action relating to management of state funds, the management and disposal of school and institutional trust land assets, and contracts for the purchase or sale of products, real property, supplies, goods, or services by or for the state, or by or for an agency of the state, except as provided in those contracts, or judicial review of the action;

(h) state agency action under Title 7, Chapter 1, Part 3, Powers and Duties of Commissioner of Financial Institutions, Title 7, Chapter 2, Possession of Depository Institution by Commissioner, Title 7, Chapter 19, Acquisition of Failing Depository Institutions or Holding Companies, and Title 63G, Chapter 7, Governmental Immunity Act of Utah, or judicial review of the action;

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(i) the initial determination of a person's eligibility for unemployment benefits, the initial determination of a person's eligibility for benefits under Title 34A, Chapter 2, Workers' Compensation Act, and Title 34A, Chapter 3, Utah Occupational Disease Act, or the initial determination of a person's unemployment tax liability;

(j) state agency action relating to the distribution or award of a monetary grant to or between governmental units, or for research, development, or the arts, or judicial review of the action;

(k) the issuance of a notice of violation or order under Title 26, Chapter 8a, Utah Emergency Medical Services System Act, Title 19, Chapter 2, Air Conservation Act, Title 19, Chapter 3, Radiation Control Act, Title 19, Chapter 4, Safe Drinking Water Act, Title 19, Chapter 5, Water Quality Act, Title 19, Chapter 6, Part 1, Solid and Hazardous Waste Act, Title 19, Chapter 6, Part 4, Underground Storage Tank Act, or Title 19, Chapter 6, Part 7, Used Oil Management Act, or Title 19, Chapter 6, Part 10, Mercury Switch Removal Act, except that this chapter governs an agency action commenced by a person authorized by law to contest the validity or correctness of the notice or order;

(l) state agency action, to the extent required by federal statute or regulation, to be conducted according to federal procedures;

(m) the initial determination of a person's eligibility for government or public assistance benefits;

(n) state agency action relating to wildlife licenses, permits, tags, and certificates of registration;

(o) a license for use of state recreational facilities;

(p) state agency action under Title 63G, Chapter 2, Government Records Access and Management Act, except as provided in Section 63G-2-603;

(q) state agency action relating to the collection of water commissioner fees and delinquency penalties, or judicial review of the action;

(r) state agency action relating to the installation, maintenance, and repair of headgates, caps, valves, or other water controlling works and weirs, flumes, meters, or other water measuring devices, or judicial review of the action;

(s) the issuance and enforcement of an initial order under Section 73-2-25;

(t) (i) a hearing conducted by the Division of Securities under Section 61-1-11.1; and

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(ii) an action taken by the Division of Securities under a hearing conducted under Section 61-1-11.1, including a determination regarding the fairness of an issuance or exchange of securities described in Subsection 61-1-11.1(1); [and]

(u) state agency action relating to water well driller licenses, water well drilling permits, water well driller registration, or water well drilling construction standards, or judicial review of the action[-]; or

(v) the issuance of a determination and order under Title 34A, Chapter 5, Utah Antidiscrimination Act.

(3) This chapter does not affect a legal remedy otherwise available to:

(a) compel an agency to take action; or

(b) challenge an agency's rule.

(4) This chapter does not preclude an agency, prior to the beginning of an adjudicative proceeding, or the presiding officer during an adjudicative proceeding from:

(a) requesting or ordering a conference with parties and interested persons to:

(i) encourage settlement;

(ii) clarify the issues;

(iii) simplify the evidence;

(iv) facilitate discovery; or

(v) expedite the proceeding; or

(b) granting a timely motion to dismiss or for summary judgment if the requirements of Rule 12(b) or Rule 56 of the Utah Rules of Civil Procedure are met by the moving party, except to the extent that the requirements of those rules are modified by this chapter.

(5) (a) A declaratory proceeding authorized by Section 63G-4-503 is not governed by this chapter, except as explicitly provided in that section.

(b) Judicial review of a declaratory proceeding authorized by Section 63G-4-503 is governed by this chapter.

(6) This chapter does not preclude an agency from enacting a rule affecting or governing an adjudicative proceeding or from following the rule, if the rule is enacted according to the procedures outlined in Title 63G, Chapter 3, Utah Administrative Rulemaking Act, and if the rule conforms to the requirements of this chapter.

(7) (a) If the attorney general issues a written determination that a provision of this

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chapter would result in the denial of funds or services to an agency of the state from the federal government, the applicability of the provision to that agency shall be suspended to the extent necessary to prevent the denial.

(b) The attorney general shall report the suspension to the Legislature at its next session.

(8) Nothing in this chapter may be interpreted to provide an independent basis for jurisdiction to review final agency action.

(9) Nothing in this chapter may be interpreted to restrict a presiding officer, for good cause shown, from lengthening or shortening a time period prescribed in this chapter, except the time period established for judicial review.

(10) Notwithstanding any other provision of this section, this chapter does not apply to a special adjudicative proceeding, as defined in Section 19-1-301.5, except to the extent expressly provided in Section 19-1-301.5.