

**WORKPLACE PROTECTION AMENDMENTS**

2019 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Eric K. Hutchings**

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

---

---

**LONG TITLE**

**General Description:**

This bill amends the Utah Antidiscrimination Act.

**Highlighted Provisions:**

This bill:

- ▶ amends the definition of "employer";
- ▶ permits certain claims involving employers with fewer than 15 employees to proceed to an evidentiary hearing without a division investigation;
- ▶ provides additional remedies for claims involving employers with fewer than 15 employees;
- ▶ removes provisions establishing an exclusive remedy for certain employment discrimination claims;
- ▶ permits certain people to commence an action for civil enforcement of a final order under the Utah Antidiscrimination Act; and
- ▶ makes technical and conforming changes.

**Money Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:



28 34A-5-102, as last amended by Laws of Utah 2016, Chapters 330 and 370

29 34A-5-107, as last amended by Laws of Utah 2018, Chapter 317

30 34A-5-108, as last amended by Laws of Utah 2018, Chapter 317

31 

---

---

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

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

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

35 **Franchisors.**

36 (1) As used in this chapter:

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

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

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

42 (i) is necessary to the operation; or

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

44 (d) "Court" means:

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

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

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

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

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

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

54 (i) (i) "Employer" means:

55 (A) the state;

56 (B) a political subdivision;

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

59 (D) a person employing [~~15~~] one or more employees within the state for each working  
60 day in each of 20 calendar weeks or more in the current or preceding calendar year.

61 (ii) "Employer" does not include:

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

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

68 (C) the Boy Scouts of America or [~~its~~] councils, chapters, or subsidiaries of the Boy  
69 Scouts of America.

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

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

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

74 (k) "Federal executive agency" means an executive agency, as defined in 5 U.S.C. Sec.  
75 105, of the federal government.

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

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

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

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

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

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

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

- 90 (i) collective bargaining;
- 91 (ii) dealing with employers concerning grievances, terms or conditions of employment;
- 92 or
- 93 (iii) other mutual aid or protection in connection with employment.
- 94 (r) "National origin" means the place of birth, domicile, or residence of an individual or
- 95 of an individual's ancestors.
- 96 (s) "On-the-job-training" means a program designed to instruct a person who, while
- 97 learning the particular job for which the person is receiving instruction:
- 98 (i) is also employed at that job; or
- 99 (ii) may be employed by the employer conducting the program during the course of the
- 100 program, or when the program is completed.
- 101 (t) "Person" means:
- 102 (i) one or more individuals, partnerships, associations, corporations, legal
- 103 representatives, trusts or trustees, or receivers;
- 104 (ii) the state; and
- 105 (iii) a political subdivision of the state.
- 106 (u) "Pregnancy, childbirth, or pregnancy-related conditions" includes breastfeeding or
- 107 medical conditions related to breastfeeding.
- 108 (v) "Presiding officer" means the same as that term is defined in Section [63G-4-103](#).
- 109 (w) "Prohibited employment practice" means a practice specified as discriminatory,
- 110 and therefore unlawful, in Section [34A-5-106](#).
- 111 (x) "Religious leader" means an individual who is associated with, and is an authorized
- 112 representative of, a religious organization or association or a religious corporation sole,
- 113 including a member of clergy, a minister, a pastor, a priest, a rabbi, an imam, or a spiritual
- 114 advisor.
- 115 (y) "Retaliate" means the taking of adverse action by an employer, employment agency,
- 116 labor organization, apprenticeship program, on-the-job training program, or vocational school
- 117 against one of its employees, applicants, or members because the employee, applicant, or
- 118 member:
- 119 (i) opposes an employment practice prohibited under this chapter; or
- 120 (ii) files charges, testifies, assists, or participates in any way in a proceeding,

121 investigation, or hearing under this chapter.

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

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

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

129 (i) an individual;

130 (ii) a corporation; or

131 (iii) publicly traded.

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

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

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

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

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

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

148 (A) the unincorporated entity; or

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

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

151 (i) "active manager";

- 152 (ii) "directly or indirectly holds at least an 8% ownership interest"; and
- 153 (iii) "subject to supervision or control in the performance of work."

154 (3) For purposes of determining whether two or more persons are considered joint  
 155 employers under this chapter, an administrative ruling of a federal executive agency may not be  
 156 considered a generally applicable law unless that administrative ruling is determined to be  
 157 generally applicable by a court of law, or adopted by statute or rule.

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

- 159 (i) a franchisee; or
- 160 (ii) a franchisee's employee.

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

166 Section 2. Section 34A-5-107 is amended to read:

167 **34A-5-107. Procedure for aggrieved person to file claim -- Investigations --**  
 168 **Adjudicative proceedings -- Settlement -- Reconsideration -- Determination.**

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

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

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

175 (d) The division may transfer a request for agency action filed with the division  
 176 pursuant to this section to the federal Equal Employment Opportunity Commission;

177 (i) in accordance with a work-share agreement that is:

178 [(i)] (A) between the division and the Equal Employment Opportunity Commission;

179 and

180 [(ii)] (B) in effect on the day on which the request for agency action is transferred[-];

181 and

182 (ii) if the request for agency action is against an employer with 15 or more employees.

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

187 (3) (a) Before an investigation begins into allegations of discriminatory or prohibited  
188 employment practice, the division shall promptly assign a mediator to offer mediation services  
189 between the parties by conference.

190 (b) (i) ~~[Hf]~~ Except as described in Subsection (3)(b)(ii), if mediation services are  
191 refused or no settlement is reached, the division shall promptly assign an investigator.

192 (ii) If mediation services are refused or no settlement is reached, the following apply if  
193 the employer employs fewer than 15 employees:

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

195 (B) the division may not promptly assign an investigator as described in Subsection  
196 (b)(i);

197 (C) the division may not conduct an investigation described in Subsection (3)(c);

198 (D) the director or director's designee may not issue a determination and order  
199 described in Subsection (4) or (5); and

200 (E) the person requesting agency action may file a request for an evidentiary hearing  
201 before a presiding officer, as described under Subsections (7) through (9), within 30 days after  
202 the day on which the division notifies the parties in accordance with Subsection (3)(b)(ii)(A).

203 ~~[(f)]~~ (c) (i) The investigator described in Subsection (3)(b)(i) shall make a prompt  
204 impartial investigation of all allegations made in the request for agency action.

205 ~~[(e)]~~ (ii) The division and the division's staff, agents, and employees shall conduct  
206 [every] the investigation in fairness to [all] the parties and agencies involved.

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

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

213 (b) (i) Upon receipt of the investigator's report described in Subsection (4)(a), the

214 director or the director's designee may issue a determination and order for dismissal of the  
215 adjudicative proceeding.

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

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

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

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

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

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

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

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

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

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

240 (C) include a notice of the right to request an evidentiary hearing under Subsection  
241 (5)(c); and

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



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

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

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

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

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

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

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

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

265 (i) (A) reinstatement; or

266 (B) front pay for up to two years, if the respondent employs fewer than 15 employees  
267 and the front pay is awarded in lieu of reinstatement;

268 (ii) back pay and benefits;

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

270 (iv) costs[-]; and

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

273 (9) If a discriminatory practice described in Subsection (8) includes discrimination in  
274 matters of compensation, the presiding officer may provide, to the complaining party, in  
275 addition to the amount available to the complaining party under Subsection (8)(b), an

276 additional amount equal to the amount of back pay available to the complaining party under  
277 Subsection (8)(b)(ii) unless a respondent shows that:

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

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

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

- 286 (i) Section 63G-4-301; and
- 287 (ii) Chapter 1, Part 3, Adjudicative Proceedings.

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

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

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

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

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

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

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

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

306 (d) Information may be disclosed for information and reporting requirements of the

307 federal government.

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

310 ~~[(a) race;]~~

311 ~~[(b) color;]~~

312 ~~[(c) sex;]~~

313 ~~[(d) retaliation;]~~

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

315 ~~[(f) age;]~~

316 ~~[(g) religion;]~~

317 ~~[(h) national origin;]~~

318 ~~[(i) disability;]~~

319 ~~[(j) sexual orientation; or]~~

320 ~~[(k) gender identity.]~~

321 ~~[(16)]~~ (15) (a) The commencement of an action under federal law for relief based upon  
 322 an act prohibited by this chapter bars the commencement or continuation of an adjudicative  
 323 proceeding before the commission in connection with the same claim under this chapter.

324 (b) The transfer of a request for agency action to the Equal Employment Opportunity  
 325 Commission in accordance with Subsection (1)(d) is considered the commencement of an  
 326 action under federal law for purposes of Subsection ~~[(16)]~~ (15)(a).

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

329 Section 3. Section **34A-5-108** is amended to read:

330 **34A-5-108. Judicial enforcement of division findings.**

331 (1) The commission or the attorney general at the request of the commission shall, or a  
 332 person whose interests are directly impaired or threatened by the failure of the commission to  
 333 enforce an order may, commence an action under Section **63G-4-501** for civil enforcement of a  
 334 final order of the commission issued under Section **34A-5-107** if:

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

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

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

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

344 (ii) the respondent has not conciliated or complied with the final order of the  
345 commission within 30 days [~~from the date~~] after the day on which the order is issued.

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