

# HB0390S01 compared with HB0390

~~{deleted text}~~ shows text that was in HB0390 but was deleted in HB0390S01.

Inserted text shows text that was not in HB0390 but was inserted into HB0390S01.

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Representative Eric K. Hutchings proposes the following substitute bill:

## WORKPLACE PROTECTION AMENDMENTS

2019 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Eric K. Hutchings**

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

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### 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}~~between 5 and 14 employees to proceed to an evidentiary hearing without a division investigation;
- ▶ provides additional remedies for claims involving employers with ~~{fewer than 15}~~between 5 and 14 employees;
- ▶ ~~{removes provisions establishing an exclusive remedy for certain employment discrimination claims}~~requires the Division of Antidiscrimination and Labor to make certain resources available to employers and employees;

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- ▶ 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:

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

**34A-5-104**, as last amended by Laws of Utah 2018, Chapter 317

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

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

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

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

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

#### **Franchisors.**

(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).

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(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.

(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~~ five] 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 of the Boy Scouts of America.

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

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

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

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

(o) (i) "Gender identity" has the meaning provided in the Diagnostic and Statistical

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Manual (DSM-5).

(ii) 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.

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

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

(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.

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

(s) "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.

(t) "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.

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

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

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

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(x) "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.

(y) "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, investigation, or hearing under this chapter.

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

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

(bb) "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.

(cc) "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

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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";

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

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

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

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

- (i) a franchisee; or

- (ii) a franchisee's employee.

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

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:

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(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;

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

(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;

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

- (i) division proceedings and investigations;
- (ii) decisions the division renders; and
- (iii) other work performed by the division;

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

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

(i) within the limits of appropriations made for 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) 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 when requested by the Career Service Review Office.

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

- (i) cooperate and participate in an interview; or
- (ii) produce for examination a book, paper, or other information relating to the matters raised by the complaint.

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



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(c) If a 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.

(6) The division shall make available through the division's website resources designed to educate employers and employees regarding discriminatory practices prohibited under this chapter.

Section ~~(2)~~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.**

(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:

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

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

and

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

and

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

(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 an investigation begins into allegations of discriminatory or prohibited employment practice, the division shall promptly assign a mediator to offer mediation services

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between the parties by conference.

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

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

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

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

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

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

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

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

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

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

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

(b) (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

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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 [~~from~~ after] 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;

(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

(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 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.

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(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 and order issued under Subsection (5).

(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 attorney fees and costs.

(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; and

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

(i) (A) reinstatement; or

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

(ii) back pay and benefits;

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

(iv) costs[-]; and

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

(9) If a discriminatory practice described in Subsection (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 (8)(b), an additional amount equal to the amount of back pay available to the complaining party under Subsection (8)(b)(i) 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.

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

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adjudicative process.

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

- (i) Section 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.

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

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

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

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

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

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

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

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

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

~~§§~~(a) race; ~~§§~~

~~§§~~(b) color; ~~§§~~

~~§§~~(c) sex; ~~§§~~

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~~(d)~~ retaliation;~~(f)~~

~~(e)~~ pregnancy, childbirth, or pregnancy-related conditions;~~(f)~~

~~(f)~~ age;~~(f)~~

~~(g)~~ religion;~~(f)~~

~~(h)~~ national origin;~~(f)~~

~~(i)~~ disability;~~(f)~~

~~(j)~~ sexual orientation; or~~(f)~~

~~(k)~~ gender identity.~~(f)~~

~~(16)~~~~(15)~~ (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 ~~(16)~~~~(15)~~(a).

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

Section ~~(3)~~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, or a person whose interests are directly impaired or threatened by the failure of the commission to enforce an order may, commence an action under Section 63G-4-501 for civil enforcement of a final order of the commission issued under Section 34A-5-107 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

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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~~] after the day on which 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.