

Representative Rebecca P. Edwards proposes the following substitute bill:

WORKPLACE PROTECTION AMENDMENTS

2018 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Rebecca P. Edwards

Senate Sponsor: _____

LONG TITLE

General Description:

This bill amends the Utah Antidiscrimination Act.

Highlighted Provisions:

This bill:

- ▶ amends the definition of employer;
- ▶ requires the Division of Antidiscrimination and Labor to make certain resources available to employers and employees;
- ▶ requires certain claims involving employers with fewer than 15 employees to proceed to an evidentiary hearing without a division investigation;
- ▶ provides additional state remedies for claims involving employers with between 5 and 14 employees; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:



- 26 [34A-5-102](#), as last amended by Laws of Utah 2016, Chapters 330 and 370
- 27 [34A-5-102.5](#), as enacted by Laws of Utah 2015, Chapter 13
- 28 [34A-5-104](#), as last amended by Laws of Utah 2017, Chapter 18
- 29 [34A-5-107](#), as last amended by Laws of Utah 2016, Chapter 132
- 30 [34A-5-108](#), as last amended by Laws of Utah 2008, Chapter 382

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~~] five 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-5-102.5** is amended to read:

167 **34A-5-102.5. Supremacy over local regulations -- No special class created for**
168 **other purposes.**

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

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

175 Section 3. Section **34A-5-104** is amended to read:

176 **34A-5-104. Powers.**

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

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

- 181 (2) The division may:
- 182 (a) appoint and prescribe the duties of an investigator, other employee, or agent of the
- 183 commission that the commission considers necessary for the enforcement of this chapter;
- 184 (b) receive, reject, investigate, and pass upon complaints alleging:
- 185 (i) discrimination in:
- 186 (A) employment;
- 187 (B) an apprenticeship program;
- 188 (C) an on-the-job training program; or
- 189 (D) a vocational school; or
- 190 (ii) the existence of a discriminatory or prohibited employment practice by:
- 191 (A) a person;
- 192 (B) an employer;
- 193 (C) an employment agency;
- 194 (D) a labor organization;
- 195 (E) an employee or member of an employment agency or labor organization;
- 196 (F) a joint apprenticeship committee; and
- 197 (G) a vocational school;
- 198 (c) investigate and study the existence, character, causes, and extent of discrimination
- 199 in employment, apprenticeship programs, on-the-job training programs, and vocational schools
- 200 in this state by:
- 201 (i) employers;
- 202 (ii) employment agencies;
- 203 (iii) labor organizations;
- 204 (iv) joint apprenticeship committees; and
- 205 (v) vocational schools;
- 206 (d) formulate plans for the elimination of discrimination by educational or other
- 207 means;
- 208 (e) hold hearings upon complaint made against:
- 209 (i) a person;
- 210 (ii) an employer;
- 211 (iii) an employment agency;

- 212 (iv) a labor organization;
- 213 (v) an employee or member of an employment agency or labor organization;
- 214 (vi) a joint apprenticeship committee; or
- 215 (vii) a vocational school;
- 216 (f) issue publications and reports of investigations and research that:
 - 217 (i) promote good will among the various racial, religious, and ethnic groups of the
 - 218 state; and
 - 219 (ii) minimize or eliminate discrimination in employment because of race, color, sex,
 - 220 religion, national origin, age, disability, sexual orientation, or gender identity;
 - 221 (g) prepare and transmit to the governor, at least once each year, reports describing:
 - 222 (i) the division's proceedings, investigations, and hearings;
 - 223 (ii) the outcome of those hearings;
 - 224 (iii) decisions the division renders; and
 - 225 (iv) the other work performed by the division;
 - 226 (h) recommend policies to the governor, and submit recommendation to employers,
 - 227 employment agencies, and labor organizations to implement those policies;
 - 228 (i) recommend legislation to the governor that the division considers necessary
 - 229 concerning discrimination because of:
 - 230 (i) race;
 - 231 (ii) sex;
 - 232 (iii) color;
 - 233 (iv) national origin;
 - 234 (v) religion;
 - 235 (vi) age;
 - 236 (vii) disability;
 - 237 (viii) sexual orientation; or
 - 238 (ix) gender identity; and
 - 239 (j) within the limits of appropriations made for its operation, cooperate with other
 - 240 agencies or organizations, both public and private, in the planning and conducting of
 - 241 educational programs designed to eliminate discriminatory practices prohibited under this
 - 242 chapter.

243 (3) The division shall investigate an alleged discriminatory practice involving an
244 officer or employee of state government if requested to do so by the Career Service Review
245 Office.

246 (4) (a) In a hearing held under this chapter, the division may:

247 (i) subpoena witnesses and compel their attendance at the hearing;

248 (ii) administer oaths and take the testimony of a person under oath; and

249 (iii) compel a person to produce for examination a book, paper, or other information
250 relating to the matters raised by the complaint.

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

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

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

257 (5) In 2018, before November 1, the division shall submit, in accordance with Section
258 [68-3-14](#), a written report to the Business and Labor Interim Committee on the effectiveness of
259 the commission and state law in addressing discrimination in matters of compensation.

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

263 Section 4. Section **34A-5-107** is amended to read:

264 **34A-5-107. Procedure for aggrieved person to file claim -- Investigations --**
265 **Adjudicative proceedings -- Settlement -- Reconsideration -- Determination.**

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

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

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

272 (d) The division may transfer a request for agency action [~~filed~~], that an employer with
273 15 or more employees files with the division pursuant to this section, to the federal Equal

274 Employment Opportunity Commission in accordance with a work-share agreement that is:

275 (i) between the division and the Equal Employment Opportunity Commission; and

276 (ii) in effect on the day on which the request for agency action is transferred.

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

281 (3) (a) Before a hearing is set or held as part of ~~[any]~~ an adjudicative proceeding, the
282 division shall promptly assign an investigator to attempt a settlement between the parties by
283 conference, conciliation, or persuasion.

284 (b) If no settlement is reached~~[-]~~ and the employer employs:

285 (i) fewer than 15 employees:

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

287 (B) the division may not conduct an investigation described under Subsection (3)(c);

288 (C) the director or director's designee may not issue a determination and order

289 described in Subsection (4) or (5); and

290 (D) the person requesting agency action may file a request for an evidentiary hearing
291 before a presiding officer, as described under Subsections (7) through (10), within 30 days after
292 the day on which the division notifies the parties in accordance with Subsection (3)(b)(i)(A); or

293 (ii) 15 or more employees, the investigator shall make a prompt impartial investigation
294 of all allegations made in the request for agency action.

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

296 (i) shall conduct ~~[every]~~ the investigation in fairness to ~~[all]~~ the parties and agencies
297 involved; and

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

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

302 (4) (a) If the initial attempts at settlement are unsuccessful, and the investigator
303 uncovers insufficient evidence during the investigation to support the allegations of a
304 discriminatory or prohibited employment practice set out in the request for agency action, the

305 investigator shall formally report these findings to the director or the director's designee.

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

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

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

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

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

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

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

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

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

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

334 (6) In an adjudicative proceeding to review the director's or the director's designee's
335 determination that a prohibited employment practice has occurred, the division shall present the

336 factual and legal basis of the determination [~~or~~] and order issued under Subsection (5).

337 (7) (a) Before [~~the~~] commencement of an evidentiary hearing:

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

340 (ii) the respondent may amend its answer.

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

342 (i) during or after a hearing; and

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

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

348 (b) The presiding officer may order that the respondent be reimbursed by the
349 complaining party for the respondent's [~~attorneys'~~] attorney fees and costs.

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

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

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

355 [~~(i) reinstatement;~~]

356 (i) (A) reinstatement; or

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

359 (ii) back pay and benefits;

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

361 (iv) costs[-]; and

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

364 (A) \$15,000, if the respondent employs between five and nine employees; or

365 (B) \$25,000, if the respondent employs between 10 and 14 employees.

366 (10) If a discriminatory practice described in Subsection (9) includes discrimination in

367 matters of compensation, the presiding officer may provide, to the complaining party, in
368 addition to the amount available to the complaining party under Subsection (9)(b), an
369 additional amount equal to the amount of back pay available to the complaining party under
370 Subsection (9)(b)(ii) unless a respondent shows that:

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

374 (11) Conciliation between the parties is to be urged and facilitated at all stages of the
375 adjudicative process.

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

- 379 (i) Section [63G-4-301](#); and
- 380 (ii) Chapter 1, Part 3, Adjudicative Proceedings.

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

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

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

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

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

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

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

397 (c) Information may be disclosed for inspection by the attorney general or other legal

398 representatives of the state or the commission.

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

401 (16) The procedures contained in this section are the exclusive remedy under state law
402 for employment discrimination based upon:

403 (a) race;

404 (b) color;

405 (c) sex;

406 (d) retaliation;

407 (e) pregnancy, childbirth, or pregnancy-related conditions;

408 (f) age;

409 (g) religion;

410 (h) national origin;

411 (i) disability;

412 (j) sexual orientation; or

413 (k) gender identity.

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

417 (b) The transfer of a request for agency action to the Equal Employment Opportunity
418 Commission in accordance with Subsection (1)(d) is considered the commencement of an
419 action under federal law for purposes of Subsection (17)(a).

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

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

423 **34A-5-108. Judicial enforcement of division findings.**

424 (1) The commission or the attorney general at the request of the commission shall, or a
425 person whose interests are directly impaired or threatened by the failure of the commission to
426 enforce an order may, commence an action under Section **63G-4-501** for civil enforcement of a
427 final order of the commission issued under ~~[Subsection]~~ Section 34A-5-107~~[(11)]~~ if:

428 (a) the order finds that there is reasonable cause to believe that a respondent has

429 engaged or is engaging in discriminatory or prohibited employment practices made unlawful by
430 this chapter;

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

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

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

437 (ii) the respondent has not conciliated or complied with the final order of the
438 commission within 30 days from the date the order is issued.

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