

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: _____

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 between 5 and 14 employees to proceed to an evidentiary hearing without a division investigation;
- ▶ provides additional remedies for claims involving employers with between 5 and 14 employees;
- ▶ requires the Division of Antidiscrimination and Labor to make certain resources available to employers and employees;
- ▶ 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



26 **Utah Code Sections Affected:**

27 AMENDS:

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

29 **34A-5-104**, as last amended by Laws of Utah 2018, Chapter 317

30 **34A-5-107**, as last amended by Laws of Utah 2018, Chapter 317

31 **34A-5-108**, as last amended by Laws of Utah 2018, Chapter 317



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

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

35 **34A-5-102. Definitions -- Unincorporated entities -- Joint employers --**

36 **Franchisors.**

37 (1) As used in this chapter:

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

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

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

43 (i) is necessary to the operation; or

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

45 (d) "Court" means:

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

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

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

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

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

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

55 (i) (i) "Employer" means:

56 (A) the state;

57 (B) a political subdivision;

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

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

62 (ii) "Employer" does not include:

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

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

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

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

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

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

75 (k) "Federal executive agency" means an executive agency, as defined in 5 U.S.C. Sec.
76 105, of the federal government.

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

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

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

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

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

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

88 program.

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

91 (i) collective bargaining;

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

93 or

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

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

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

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

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

102 (t) "Person" means:

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

105 (ii) the state; and

106 (iii) a political subdivision of the state.

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

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

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

112 (x) "Religious leader" means an individual who is associated with, and is an authorized
113 representative of, a religious organization or association or a religious corporation sole,
114 including a member of clergy, a minister, a pastor, a priest, a rabbi, an imam, or a spiritual
115 advisor.

116 (y) "Retaliate" means the taking of adverse action by an employer, employment agency,
117 labor organization, apprenticeship program, on-the-job training program, or vocational school
118 against one of its employees, applicants, or members because the employee, applicant, or

119 member:

120 (i) opposes an employment practice prohibited under this chapter; or

121 (ii) files charges, testifies, assists, or participates in any way in a proceeding,
122 investigation, or hearing under this chapter.

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

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

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

130 (i) an individual;

131 (ii) a corporation; or

132 (iii) publicly traded.

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

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

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

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

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

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

149 (A) the unincorporated entity; or

- 150 (B) a person with whom the unincorporated entity contracts.
- 151 (c) As part of the rules made under Subsection (2)(b), the commission may define:
- 152 (i) "active manager";
- 153 (ii) "directly or indirectly holds at least an 8% ownership interest"; and
- 154 (iii) "subject to supervision or control in the performance of work."
- 155 (3) For purposes of determining whether two or more persons are considered joint
- 156 employers under this chapter, an administrative ruling of a federal executive agency may not be
- 157 considered a generally applicable law unless that administrative ruling is determined to be
- 158 generally applicable by a court of law, or adopted by statute or rule.
- 159 (4) (a) For purposes of this chapter, a franchisor is not considered to be an employer of:
- 160 (i) a franchisee; or
- 161 (ii) a franchisee's employee.
- 162 (b) With respect to a specific claim for relief under this chapter made by a franchisee or
- 163 a franchisee's employee, this Subsection (4) does not apply to a franchisor under a franchise
- 164 that exercises a type or degree of control over the franchisee or the franchisee's employee not
- 165 customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks
- 166 and brand.

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

168 **34A-5-104. Powers.**

- 169 (1) (a) The commission has jurisdiction over the subject of employment practices and
- 170 discrimination made unlawful by this chapter.
- 171 (b) The commission may adopt, publish, amend, and rescind rules, consistent with, and
- 172 for the enforcement of this chapter.
- 173 (2) The division may:
- 174 (a) appoint and prescribe the duties of an investigator, other employee, or agent of the
- 175 commission that the commission considers necessary for the enforcement of this chapter;
- 176 (b) receive, reject, investigate, and pass upon complaints alleging:
- 177 (i) discrimination in:
- 178 (A) employment;
- 179 (B) an apprenticeship program;
- 180 (C) an on-the-job training program; or

- 181 (D) a vocational school; or
- 182 (ii) the existence of a discriminatory or prohibited employment practice by:
- 183 (A) a person;
- 184 (B) an employer;
- 185 (C) an employment agency;
- 186 (D) a labor organization;
- 187 (E) an employee or member of an employment agency or labor organization;
- 188 (F) a joint apprenticeship committee; and
- 189 (G) a vocational school;
- 190 (c) investigate and study the existence, character, causes, and extent of discrimination
- 191 in employment, apprenticeship programs, on-the-job training programs, and vocational schools
- 192 in this state by:
- 193 (i) employers;
- 194 (ii) employment agencies;
- 195 (iii) labor organizations;
- 196 (iv) joint apprenticeship committees; and
- 197 (v) vocational schools;
- 198 (d) formulate plans for the elimination of discrimination by educational or other
- 199 means;
- 200 (e) issue publications and reports of investigations and research that:
- 201 (i) promote good will among the various racial, religious, and ethnic groups of the
- 202 state; and
- 203 (ii) minimize or eliminate discrimination in employment because of race, color, sex,
- 204 religion, national origin, age, disability, sexual orientation, or gender identity;
- 205 (f) prepare and transmit to the governor, at least once each year, reports describing:
- 206 (i) division proceedings and investigations;
- 207 (ii) decisions the division renders; and
- 208 (iii) other work performed by the division;
- 209 (g) recommend policies to the governor, and submit recommendation to employers,
- 210 employment agencies, and labor organizations to implement those policies;
- 211 (h) recommend legislation to the governor that the division considers necessary

212 concerning discrimination because of:

- 213 (i) race;
- 214 (ii) sex;
- 215 (iii) color;
- 216 (iv) national origin;
- 217 (v) religion;
- 218 (vi) age;
- 219 (vii) disability;
- 220 (viii) sexual orientation; or
- 221 (ix) gender identity; and

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

226 (3) In addition to processing complaints made in accordance with this chapter, the
227 division shall investigate an alleged discriminatory practice involving an officer or employee of
228 state government when requested by the Career Service Review Office.

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

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

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

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

238 (5) In 2018, before November 1, the division shall submit, in accordance with Section
239 [68-3-14](#), a written report to the Business and Labor Interim Committee on the effectiveness of
240 the commission and state law in addressing discrimination in matters of compensation.

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

243 under this chapter.

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

245 **34A-5-107. Procedure for aggrieved person to file claim -- Investigations --**
 246 **Adjudicative proceedings -- Settlement -- Reconsideration -- Determination.**

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

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

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

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

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

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

257 and

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

259 and

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

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

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

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

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

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

273 (B) the division may not promptly assign an investigator as described in Subsection

274 (b)(i);

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

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

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

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

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

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

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

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

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

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

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

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

303 (d) If the director or the director's designee receives no timely request for a hearing, the
304 determination and order issued by the director or the director's designee becomes the final order

305 of the commission.

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

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

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

314 (A) direct the respondent to cease any discriminatory or prohibited employment
315 practice;

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

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

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

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

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

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

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

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

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

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

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

343 (i) (A) reinstatement; or

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

346 (ii) back pay and benefits;

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

348 (iv) costs[-]; and

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

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

356 (a) the act or omission that gave rise to the order was in good faith; and

357 (b) the respondent had reasonable grounds to believe that the act or omission was not
358 discrimination in matters of compensation under this chapter.

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

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

364 (i) Section [63G-4-301](#); and

365 (ii) Chapter 1, Part 3, Adjudicative Proceedings.

366 (b) If there is no timely request for review, the order issued by the presiding officer

367 becomes the final order of the commission.

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

370 (a) Section [63G-4-403](#); and

371 (b) Chapter 1, Part 3, Adjudicative Proceedings.

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

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

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

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

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

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

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

388 (a) race;

389 (b) color;

390 (c) sex;

391 (d) retaliation;

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

393 (f) age;

394 (g) religion;

395 (h) national origin;

396 (i) disability;

397 (j) sexual orientation; or

398 (k) gender identity.

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

402 (b) The transfer of a request for agency action to the Equal Employment Opportunity
403 Commission in accordance with Subsection (1)(d) is considered the commencement of an
404 action under federal law for purposes of Subsection (16)(a).

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

407 Section 4. Section **34A-5-108** is amended to read:

408 **34A-5-108. Judicial enforcement of division findings.**

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

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

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

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

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

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

424 (2) If the respondent seeks judicial review of the final order under Section **63G-4-403**,
425 pursuant to Section **63G-4-405** the commission may stay seeking civil enforcement pending the
426 completion of the judicial review.