

RESOLUTION 02-01-2016 (As Amended)

DIGEST

Employment Law: Elimination of After-Acquired Evidence Defense in FEHA Cases

Amends Government Code section 12940 to prohibit the use of the After-Acquired Evidence Defense by employers in defense of Fair Employment and Housing Act claims for employment discrimination.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code section 12940 to read as follows:

§12940

1 It is an unlawful employment practice, unless based upon a bona fide occupational
2 qualification, or, except where based upon applicable security regulations established by the
3 United States or the State of California:

4 (a) For an employer, because of the race, religious creed, color, national origin, ancestry,
5 physical disability, mental disability, medical condition, genetic information, marital status, sex,
6 gender, gender identity, gender expression, age, sexual orientation, or military and veteran status
7 of any person, to refuse to hire or employ the person or to refuse to select the person for a
8 training program leading to employment, or to bar or to discharge the person from employment
9 or from a training program leading to employment, or to discriminate against the person in
10 compensation or in terms, conditions, or privileges of employment.

11 (1) This part does not prohibit an employer from refusing to hire or discharging an
12 employee with a physical or mental disability, or subject an employer to any legal liability
13 resulting from the refusal to employ or the discharge of an employee with a physical or mental
14 disability, where the employee, because of his or her physical or mental disability, is unable to
15 perform his or her essential duties even with reasonable accommodations, or cannot perform
16 those duties in a manner that would not endanger his or her health or safety or the health or
17 safety of others even with reasonable accommodations.

18 (2) This part does not prohibit an employer from refusing to hire or discharging an
19 employee who, because of the employee's medical condition, is unable to perform his or her
20 essential duties even with reasonable accommodations, or cannot perform those duties in a
21 manner that would not endanger the employee's health or safety or the health or safety of others
22 even with reasonable accommodations. Nothing in this part shall subject an employer to any
23 legal liability resulting from the refusal to employ or the discharge of an employee who, because
24 of the employee's medical condition, is unable to perform his or her essential duties, or cannot
25 perform those duties in a manner that would not endanger the employee's health or safety or the
26 health or safety of others even with reasonable accommodations.

27 (3) Nothing in this part relating to discrimination on account of marital status shall do
28 either of the following:

29 (A) Affect the right of an employer to reasonably regulate, for reasons of supervision,
30 safety, security, or morale, the working of spouses in the same department, division, or facility,
31 consistent with the rules and regulations adopted by the commission.

32 (B) Prohibit bona fide health plans from providing additional or greater benefits to
33 employees with dependents than to those employees without or with fewer dependents.

34 (4) Nothing in this part relating to discrimination on account of sex shall affect the right
35 of an employer to use veteran status as a factor in employee selection or to give special
36 consideration to Vietnam-era veterans.

37 (5) (A) This part does not prohibit an employer from refusing to employ an individual
38 because of his or her age if the law compels or provides for that refusal. Promotions within the
39 existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of
40 seniority and prior service with the employer, or hiring under an established recruiting program
41 from high schools, colleges, universities, or trade schools do not, in and of themselves, constitute
42 unlawful employment practices.

43 (B) The provisions of this part relating to discrimination on the basis of age do not
44 prohibit an employer from providing health benefits or health care reimbursement plans to
45 retired persons that are altered, reduced, or eliminated when the person becomes eligible for
46 Medicare health benefits. This subparagraph applies to all retiree health benefit plans and
47 contractual provisions or practices concerning retiree health benefits and health care
48 reimbursement plans in effect on or after January 1, 2011.

49 (b) For a labor organization, because of the race, religious creed, color, national origin,
50 ancestry, physical disability, mental disability, medical condition, genetic information, marital
51 status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and
52 veteran status of any person, to exclude, expel, or restrict from its membership the person, or to
53 provide only second-class or segregated membership or to discriminate against any person
54 because of the race, religious creed, color, national origin, ancestry, physical disability, mental
55 disability, medical condition, genetic information, marital status, sex, gender, gender identity,
56 gender expression, age, sexual orientation, or military and veteran status of the person in the
57 election of officers of the labor organization or in the selection of the labor organization's staff or
58 to discriminate in any way against any of its members or against any employer or against any
59 person employed by an employer.

60 (c) For any person to discriminate against any person in the selection or training of that
61 person in any apprenticeship training program or any other training program leading to
62 employment because of the race, religious creed, color, national origin, ancestry, physical
63 disability, mental disability, medical condition, genetic information, marital status, sex, gender,
64 gender identity, gender expression, age, sexual orientation, or military and veteran status of the
65 person discriminated against.

66 (d) For any employer or employment agency to print or circulate or cause to be printed or
67 circulated any publication, or to make any nonjob-related inquiry of an employee or applicant,
68 either verbal or through use of an application form, that expresses, directly or indirectly, any
69 limitation, specification, or discrimination as to race, religious creed, color, national origin,
70 ancestry, physical disability, mental disability, medical condition, genetic information, marital
71 status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and
72 veteran status, or any intent to make any such limitation, specification, or discrimination. This
73 part does not prohibit an employer or employment agency from inquiring into the age of an
74 applicant, or from specifying age limitations, where the law compels or provides for that action.

75 (e) (1) Except as provided in paragraph (2) or (3), for any employer or employment
76 agency to require any medical or psychological examination of an applicant, to make any
77 medical or psychological inquiry of an applicant, to make any inquiry whether an applicant has a

78 mental disability or physical disability or medical condition, or to make any inquiry regarding
79 the nature or severity of a physical disability, mental disability, or medical condition.

80 (2) Notwithstanding paragraph (1), an employer or employment agency may inquire into
81 the ability of an applicant to perform job-related functions and may respond to an applicant's
82 request for reasonable accommodation.

83 (3) Notwithstanding paragraph (1), an employer or employment agency may require a
84 medical or psychological examination or make a medical or psychological inquiry of a job
85 applicant after an employment offer has been made but prior to the commencement of
86 employment duties, provided that the examination or inquiry is job related and consistent with
87 business necessity and that all entering employees in the same job classification are subject to the
88 same examination or inquiry.

89 (f) (1) Except as provided in paragraph (2), for any employer or employment agency to
90 require any medical or psychological examination of an employee, to make any medical or
91 psychological inquiry of an employee, to make any inquiry whether an employee has a mental
92 disability, physical disability, or medical condition, or to make any inquiry regarding the nature
93 or severity of a physical disability, mental disability, or medical condition.

94 (2) Notwithstanding paragraph (1), an employer or employment agency may require any
95 examinations or inquiries that it can show to be job related and consistent with business
96 necessity. An employer or employment agency may conduct voluntary medical examinations,
97 including voluntary medical histories, which are part of an employee health program available to
98 employees at that worksite.

99 (g) For any employer, labor organization, or employment agency to harass, discharge,
100 expel, or otherwise discriminate against any person because the person has made a report
101 pursuant to Section 11161.8 of the Penal Code that prohibits retaliation against hospital
102 employees who report suspected patient abuse by health facilities or community care facilities.

103 (h) For any employer, labor organization, employment agency, or person to discharge,
104 expel, or otherwise discriminate against any person because the person has opposed any practices
105 forbidden under this part or because the person has filed a complaint, testified, or assisted in any
106 proceeding under this part.

107 (i) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts
108 forbidden under this part, or to attempt to do so.

109 (j) (1) For an employer, labor organization, employment agency, apprenticeship training
110 program or any training program leading to employment, or any other person, because of race,
111 religious creed, color, national origin, ancestry, physical disability, mental disability, medical
112 condition, genetic information, marital status, sex, gender, gender identity, gender expression,
113 age, sexual orientation, or military and veteran status, to harass an employee, an applicant, or a
114 person providing services pursuant to a contract. Harassment of an employee, an applicant, or a
115 person providing services pursuant to a contract by an employee, other than an agent or
116 supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have
117 known of this conduct and fails to take immediate and appropriate corrective action. An
118 employer may also be responsible for the acts of nonemployees, with respect to sexual
119 harassment of employees, applicants, or persons providing services pursuant to a contract in the
120 workplace, where the employer, or its agents or supervisors, knows or should have known of the
121 conduct and fails to take immediate and appropriate corrective action. In reviewing cases
122 involving the acts of nonemployees, the extent of the employer's control and any other legal
123 responsibility that the employer may have with respect to the conduct of those nonemployees

124 shall be considered. An entity shall take all reasonable steps to prevent harassment from
125 occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

126 (2) The provisions of this subdivision are declaratory of existing law, except for the new
127 duties imposed on employers with regard to harassment.

128 (3) An employee of an entity subject to this subdivision is personally liable for any
129 harassment prohibited by this section that is perpetrated by the employee, regardless of whether
130 the employer or covered entity knows or should have known of the conduct and fails to take
131 immediate and appropriate corrective action.

132 (4) (A) For purposes of this subdivision only, "employer" means any person regularly
133 employing one or more persons or regularly receiving the services of one or more persons
134 providing services pursuant to a contract, or any person acting as an agent of an employer,
135 directly or indirectly, the state, or any political or civil subdivision of the state, and cities. The
136 definition of "employer" in subdivision (d) of Section 12926 applies to all provisions of this
137 section other than this subdivision.

138 (B) Notwithstanding subparagraph (A), for purposes of this subdivision, "employer" does
139 not include a religious association or corporation not organized for private profit, except as
140 provided in Section 12926.2.

141 (C) For purposes of this subdivision, "harassment" because of sex includes sexual
142 harassment, gender harassment, and harassment based on pregnancy, childbirth, or related
143 medical conditions. Sexually harassing conduct need not be motivated by sexual desire.

144 (5) For purposes of this subdivision, "a person providing services pursuant to a contract"
145 means a person who meets all of the following criteria:

146 (A) The person has the right to control the performance of the contract for services and
147 discretion as to the manner of performance.

148 (B) The person is customarily engaged in an independently established business.

149 (C) The person has control over the time and place the work is performed, supplies the
150 tools and instruments used in the work, and performs work that requires a particular skill not
151 ordinarily used in the course of the employer's work.

152 (k) For an employer, labor organization, employment agency, apprenticeship training
153 program, or any training program leading to employment, to fail to take all reasonable steps
154 necessary to prevent discrimination and harassment from occurring.

155 (l) (1) For an employer or other entity covered by this part to refuse to hire or employ a
156 person or to refuse to select a person for a training program leading to employment or to bar or to
157 discharge a person from employment or from a training program leading to employment, or to
158 discriminate against a person in compensation or in terms, conditions, or privileges of
159 employment because of a conflict between the person's religious belief or observance and any
160 employment requirement, unless the employer or other entity covered by this part demonstrates
161 that it has explored any available reasonable alternative means of accommodating the religious
162 belief or observance, including the possibilities of excusing the person from those duties that
163 conflict with his or her religious belief or observance or permitting those duties to be performed
164 at another time or by another person, but is unable to reasonably accommodate the religious
165 belief or observance without undue hardship, as defined in subdivision (u) of Section 12926, on
166 the conduct of the business of the employer or other entity covered by this part. Religious belief
167 or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or
168 other religious holy day or days, reasonable time necessary for travel prior and subsequent to a

169 religious observance, and religious dress practice and religious grooming practice as described in
170 subdivision (q) of Section 12926.

171 (2) An accommodation of an individual's religious dress practice or religious grooming
172 practice is not reasonable if the accommodation requires segregation of the individual from other
173 employees or the public.

174 (3) An accommodation is not required under this subdivision if it would result in a
175 violation of this part or any other law prohibiting discrimination or protecting civil rights,
176 including subdivision (b) of Section 51 of the Civil Code and Section 11135 of this code.

177 (4) For an employer or other entity covered by this part to, in addition to the employee
178 protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a
179 person for requesting accommodation under this subdivision, regardless of whether the request
180 was granted.

181 (m) (1) For an employer or other entity covered by this part to fail to make reasonable
182 accommodation for the known physical or mental disability of an applicant or employee.
183 Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to
184 require an accommodation that is demonstrated by the employer or other covered entity to
185 produce undue hardship, as defined in subdivision (u) of Section 12926, to its operation.

186 (2) For an employer or other entity covered by this part to, in addition to the employee
187 protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a
188 person for requesting accommodation under this subdivision, regardless of whether the request
189 was granted.

190 (n) For an employer or other entity covered by this part to fail to engage in a timely, good
191 faith, interactive process with the employee or applicant to determine effective reasonable
192 accommodations, if any, in response to a request for reasonable accommodation by an employee
193 or applicant with a known physical or mental disability or known medical condition.

194 (o) For an employer or other entity covered by this part, to subject, directly or indirectly,
195 any employee, applicant, or other person to a test for the presence of a genetic characteristic.

196 (p) Nothing in this section shall be interpreted as preventing the ability of employers to
197 identify members of the military or veterans for purposes of awarding a veteran's preference as
198 permitted by law.

199 (q) The judicially created After Acquired Evidence Defense does not apply to bar or limit
200 damages to any FEHA claims arising under this Section §12940.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: The After Acquired Evidence Defense is used by employers in FEHA claims to either bar or limit damages for discriminatory conduct in the employment context by finding some act by the employee in the past that, if known by the employer, could have justified the employee's termination. Most times, these are minor issues that the employer would not have even discovered but for the litigation and access to the employee's entire history, including employment history, in discovery. This should not limit an employee's damages for illegal discriminatory conduct.

The Solution: Would eliminate use of the after acquired evidence defense in employment related discrimination claims under FEHA actions only. This resolution carves out an exception for employees who were not eligible to work in the United States at the time of hire, consistent with the holding in *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407.

IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

CURRENT OR PRIOR RELATED LEGISLATION

Not known.

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RESOLUTIONS COMMITTEE RECOMMENDATION

The CCBA’s Resolutions Committee recommended Disapproval of this resolution. The full Conference narrowly rejected that recommendation and approved the resolution.

COUNTERARGUMENTS

The **SACRAMENTO COUNTY BAR ASSOCIATION** delegation to the CCBA recommended Disapproval of this resolution. The full Conference narrowly rejected that recommendation and approved the resolution.