

RESOLUTION 12-07-2017 (REVISED AS AMENDED)

DIGEST

FEHA: Change of Definition of Employer Under the Fair Employment and Housing Act
Amends Government Code section 12926 to change the definition of an employer under the Fair Employment and Housing Act to exclude a majority owner.

RESOLUTIONS COMMITTEE COMMENTS

History:

No similar resolutions found.

Reasons:

This resolution amends Government Code section 12926 to change the definition of an employer under the Fair Employment and Housing Act to exclude a majority owner.

The Resolutions Committee initially recommended disapproval of this resolution. The amendments taken on the Conference floor addressed the Resolutions Committee concerns, and the full Conference voted to approve the amended resolution.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code section 12926 to read as follows:

- 1 § 12926
2 As used in this part in connection with unlawful practices, unless a different meaning
3 clearly appears from the context:
4 (a) “Affirmative relief” or “prospective relief” includes the authority to order
5 reinstatement of an employee, awards of backpay, reimbursement of out-of-pocket expenses,
6 hiring, transfers, reassignments, grants of tenure, promotions, cease and desist orders, posting of
7 notices, training of personnel, testing, expunging of records, reporting of records, and any other
8 similar relief that is intended to correct unlawful practices under this part.
9 (b) “Age” refers to the chronological age of any individual who has reached his or her
10 40th birthday.
11 (c) Except as provided by Section 12926.05, “employee” does not include any individual
12 employed by his or her parents, spouse, or child or any individual employed under a special
13 license in a nonprofit sheltered workshop or rehabilitation facility, or any individual who owns
14 greater than fifty percent (50%) of the ownership interest in the employer.
15 (d) “Employer” includes any person regularly employing five or more ~~persons~~
16 employees, or any person acting as an agent of an employer, directly or indirectly, the state or
17 any political or civil subdivision of the state, and cities, except as follows:
18 “Employer” does not include a religious association or corporation not organized for private
19 profit.
20 (e) “Employment agency” includes any person undertaking for compensation to procure
21 employees or opportunities to work.

22 (f) “Essential functions” means the fundamental job duties of the employment position
23 the individual with a disability holds or desires. “Essential functions” does not include the
24 marginal functions of the position.

25 (1) A job function may be considered essential for any of several reasons, including, but
26 not limited to, any one or more of the following:

27 (A) The function may be essential because the reason the position exists is to perform
28 that function.

29 (B) The function may be essential because of the limited number of employees available
30 among whom the performance of that job function can be distributed.

31 (C) The function may be highly specialized, so that the incumbent in the position is hired
32 for his or her expertise or ability to perform the particular function.

33 (2) Evidence of whether a particular function is essential includes, but is not limited to,
34 the following:

35 (A) The employer’s judgment as to which functions are essential.

36 (B) Written job descriptions prepared before advertising or interviewing applicants for
37 the job.

38 (C) The amount of time spent on the job performing the function.

39 (D) The consequences of not requiring the incumbent to perform the function.

40 (E) The terms of a collective bargaining agreement.

41 (F) The work experiences of past incumbents in the job.

42 (G) The current work experience of incumbents in similar jobs.

43 (g) (1) “Genetic information” means, with respect to any individual, information about
44 any of the following:

45 (A) The individual’s genetic tests.

46 (B) The genetic tests of family members of the individual.

47 (C) The manifestation of a disease or disorder in family members of the individual.

48 (2) “Genetic information” includes any request for, or receipt of, genetic services, or
49 participation in clinical research that includes genetic services, by an individual or any family
50 member of the individual.

51 (3) “Genetic information” does not include information about the sex or age of any
52 individual.

53 (h) “Labor organization” includes any organization that exists and is constituted for the
54 purpose, in whole or in part, of collective bargaining or of dealing with employers concerning
55 grievances, terms or conditions of employment, or of other mutual aid or protection.

56 (i) “Medical condition” means either of the following:

57 (1) Any health impairment related to or associated with a diagnosis of cancer or a record
58 or history of cancer.

59 (2) Genetic characteristics. For purposes of this section, “genetic characteristics” means
60 either of the following:

61 (A) Any scientifically or medically identifiable gene or chromosome, or combination or
62 alteration thereof, that is known to be a cause of a disease or disorder in a person or his or her
63 offspring, or that is determined to be associated with a statistically increased risk of development
64 of a disease or disorder, and that is presently not associated with any symptoms of any disease or
65 disorder.

66 (B) Inherited characteristics that may derive from the individual or family member, that
67 are known to be a cause of a disease or disorder in a person or his or her offspring, or that are

68 determined to be associated with a statistically increased risk of development of a disease or
69 disorder, and that are presently not associated with any symptoms of any disease or disorder.

70 (j) "Mental disability" includes, but is not limited to, all of the following:

71 (1) Having any mental or psychological disorder or condition, such as intellectual
72 disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities,
73 that limits a major life activity. For purposes of this section:

74 (A) "Limits" shall be determined without regard to mitigating measures, such as
75 medications, assistive devices, or reasonable accommodations, unless the mitigating measure
76 itself limits a major life activity.

77 (B) A mental or psychological disorder or condition limits a major life activity if it makes
78 the achievement of the major life activity difficult.

79 (C) "Major life activities" shall be broadly construed and shall include physical, mental,
80 and social activities and working.

81 (2) Any other mental or psychological disorder or condition not described in paragraph
82 (1) that requires special education or related services.

83 (3) Having a record or history of a mental or psychological disorder or condition
84 described in paragraph (1) or (2), which is known to the employer or other entity covered by this
85 part.

86 (4) Being regarded or treated by the employer or other entity covered by this part as
87 having, or having had, any mental condition that makes achievement of a major life activity
88 difficult.

89 (5) Being regarded or treated by the employer or other entity covered by this part as
90 having, or having had, a mental or psychological disorder or condition that has no present
91 disabling effect, but that may become a mental disability as described in paragraph (1) or (2).
92 "Mental disability" does not include sexual behavior disorders, compulsive gambling,
93 kleptomania, pyromania, or psychoactive substance use disorders resulting from the current
94 unlawful use of controlled substances or other drugs.

95 (k) "Military and veteran status" means a member or veteran of the United States Armed
96 Forces, United States Armed Forces Reserve, the United States National Guard, and the
97 California National Guard.

98 (l) "On the bases enumerated in this part" means or refers to discrimination on the basis
99 of one or more of the following: race, religious creed, color, national origin, ancestry, physical
100 disability, mental disability, medical condition, genetic information, marital status, sex, age,
101 sexual orientation, or military and veteran status.

102 (m) "Physical disability" includes, but is not limited to, all of the following:

103 (1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or
104 anatomical loss that does both of the following:

105 (A) Affects one or more of the following body systems: neurological, immunological,
106 musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular,
107 reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

108 (B) Limits a major life activity. For purposes of this section:

109 (i) "Limits" shall be determined without regard to mitigating measures such as
110 medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating
111 measure itself limits a major life activity.

112 (ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical
113 loss limits a major life activity if it makes the achievement of the major life activity difficult.

114 (iii) “Major life activities” shall be broadly construed and includes physical, mental, and
115 social activities and working.

116 (2) Any other health impairment not described in paragraph (1) that requires special
117 education or related services.

118 (3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement,
119 anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the
120 employer or other entity covered by this part.

121 (4) Being regarded or treated by the employer or other entity covered by this part as
122 having, or having had, any physical condition that makes achievement of a major life activity
123 difficult.

124 (5) Being regarded or treated by the employer or other entity covered by this part as
125 having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or
126 health impairment that has no present disabling effect but may become a physical disability as
127 described in paragraph (1) or (2).

128 (6) “Physical disability” does not include sexual behavior disorders, compulsive
129 gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the
130 current unlawful use of controlled substances or other drugs.

131 (n) Notwithstanding subdivisions (j) and (m), if the definition of “disability” used in the
132 federal Americans with Disabilities Act of 1990 (Public Law 101-336) would result in broader
133 protection of the civil rights of individuals with a mental disability or physical disability, as
134 defined in subdivision (j) or (m), or would include any medical condition not included within
135 those definitions, then that broader protection or coverage shall be deemed incorporated by
136 reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (j)
137 and (m).

138 (o) “Race, religious creed, color, national origin, ancestry, physical disability, mental
139 disability, medical condition, genetic information, marital status, sex, age, sexual orientation, or
140 military and veteran status” includes a perception that the person has any of those characteristics
141 or that the person is associated with a person who has, or is perceived to have, any of those
142 characteristics.

143 (p) “Reasonable accommodation” may include either of the following:

144 (1) Making existing facilities used by employees readily accessible to, and usable by,
145 individuals with disabilities.

146 (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant
147 position, acquisition or modification of equipment or devices, adjustment or modifications of
148 examinations, training materials or policies, the provision of qualified readers or interpreters, and
149 other similar accommodations for individuals with disabilities.

150 (q) “Religious creed,” “religion,” “religious observance,” “religious belief,” and “creed”
151 include all aspects of religious belief, observance, and practice, including religious dress and
152 grooming practices. “Religious dress practice” shall be construed broadly to include the wearing
153 or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item
154 that is part of the observance by an individual of his or her religious creed. “Religious grooming
155 practice” shall be construed broadly to include all forms of head, facial, and body hair that are
156 part of the observance by an individual of his or her religious creed.

157 (r) (1) “Sex” includes, but is not limited to, the following:

158 (A) Pregnancy or medical conditions related to pregnancy.

159 (B) Childbirth or medical conditions related to childbirth.

160 (C) Breastfeeding or medical conditions related to breastfeeding.
161 (2) “Sex” also includes, but is not limited to, a person’s gender. “Gender” means sex, and
162 includes a person’s gender identity and gender expression. “Gender expression” means a
163 person’s gender-related appearance and behavior whether or not stereotypically associated with
164 the person’s assigned sex at birth.
165 (s) “Sexual orientation” means heterosexuality, homosexuality, and bisexuality.
166 (t) “Supervisor” means any individual having the authority, in the interest of the
167 employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or
168 discipline other employees, or the responsibility to direct them, or to adjust their grievances, or
169 effectively to recommend that action, if, in connection with the foregoing, the exercise of that
170 authority is not of a merely routine or clerical nature, but requires the use of independent
171 judgment.
172 (u) “Undue hardship” means an action requiring significant difficulty or expense, when
173 considered in light of the following factors:
174 (1) The nature and cost of the accommodation needed.
175 (2) The overall financial resources of the facilities involved in the provision of the
176 reasonable accommodations, the number of persons employed at the facility, and the effect on
177 expenses and resources or the impact otherwise of these accommodations upon the operation of
178 the facility.
179 (3) The overall financial resources of the covered entity, the overall size of the business
180 of a covered entity with respect to the number of employees, and the number, type, and location
181 of its facilities.
182 (4) The type of operations, including the composition, structure, and functions of the
183 workforce of the entity.
184 (5) The geographic separateness or administrative or fiscal relationship of the facility or
185 facilities.
186 (v) “National origin” discrimination includes, but is not limited to, discrimination on the
187 basis of possessing a driver’s license granted under Section 12801.9 of the Vehicle Code.

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

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: The Fair Employment Housing Act (FEHA) applies to employers with 5 or more employees, but is silent as to the application of FEHA if one of those 5 employees is the owner of the business. This results in uncertainty as to the application of FEHA where a business has four employees plus an owner who is also on payroll.

The Solution: This resolution would exclude a majority owner of the business (who is likely making the hiring and firing decisions anyway) as an employee for purposes of determining if FEHA applies. Since the definition of majority owner would be more than fifty percent, it could only exclude one employee from the count, but would provide guidance to small businesses in which the owner may be deemed an employee for purposes of FEHA.

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION:

None known.

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