

LEGISLATURE OF NEBRASKA
ONE HUNDRED FOURTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 627

Introduced by Mello, 5; Bolz, 29; Brasch, 16; Crawford, 45; Davis, 43;
Gloor, 35; Hansen, 26; Harr, 8; Hilkemann, 4; Howard, 9;
Kuehn, 38; Larson, 40; Lindstrom, 18; Morfeld, 46;
Nordquist, 7.

Read first time January 21, 2015

Committee: Business and Labor

- 1 A BILL FOR AN ACT relating to the Nebraska Fair Employment Practice Act;
- 2 to amend sections 48-1102, 48-1107.01, 48-1107.02, and 48-1111,
- 3 Reissue Revised Statutes of Nebraska, and section 48-1117, Revised
- 4 Statutes Cumulative Supplement, 2014; to redefine a term; to provide
- 5 and change provisions relating to pregnancy; to harmonize
- 6 provisions; and to repeal the original sections.
- 7 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 48-1102, Reissue Revised Statutes of Nebraska, is
2 amended to read:

3 48-1102 For purposes of the Nebraska Fair Employment Practice Act,
4 unless the context otherwise requires:

5 (1) Person shall include one or more individuals, labor unions,
6 partnerships, limited liability companies, associations, corporations,
7 legal representatives, mutual companies, joint-stock companies, trusts,
8 unincorporated organizations, trustees, trustees in bankruptcy, or
9 receivers;

10 (2) Employer shall mean a person engaged in an industry who has
11 fifteen or more employees for each working day in each of twenty or more
12 calendar weeks in the current or preceding calendar year, any agent of
13 such a person, and any party whose business is financed in whole or in
14 part under the Nebraska Investment Finance Authority Act regardless of
15 the number of employees and shall include the State of Nebraska,
16 governmental agencies, and political subdivisions, but such term shall
17 not include (a) the United States, a corporation wholly owned by the
18 government of the United States, or an Indian tribe or (b) a bona fide
19 private membership club, other than a labor organization, which is exempt
20 from taxation under section 501(c) of the Internal Revenue Code;

21 (3) Labor organization shall mean any organization which exists
22 wholly or in part for one or more of the following purposes: Collective
23 bargaining; dealing with employers concerning grievances, terms, or
24 conditions of employment; or mutual aid or protection in relation to
25 employment;

26 (4) Employment agency shall mean any person regularly undertaking
27 with or without compensation to procure employees for an employer or to
28 procure for employees opportunities to work for an employer and shall
29 include an agent of such a person but shall not include an agency of the
30 United States, except that such term shall include the United States
31 Employment Service and the system of state and local employment services

1 receiving federal assistance;

2 (5) Covered entity shall mean an employer, an employment agency, a
3 labor organization, or a joint labor-management committee;

4 (6) Privileges of employment shall mean terms and conditions of any
5 employer-employee relationship, opportunities for advancement of
6 employees, and plant conveniences;

7 (7) Employee shall mean an individual employed by an employer;

8 (8) Commission shall mean the Equal Opportunity Commission;

9 (9) Disability shall mean (a) a physical or mental impairment that
10 substantially limits one or more of the major life activities of such
11 individual, (b) a record of such an impairment, or (c) being regarded as
12 having such an impairment. Disability shall not include homosexuality,
13 bisexuality, transvestism, transsexualism, pedophilia, exhibitionism,
14 voyeurism, gender-identity disorders not resulting in physical
15 impairments, other sexual behavior disorders, problem gambling,
16 kleptomania, pyromania, or psychoactive substance use disorders resulting
17 from current illegal use of drugs;

18 (10)(a) Qualified individual with a disability shall mean an
19 individual with a disability who, with or without reasonable
20 accommodation, can perform the essential functions of the employment
21 position that such individual holds or desires. Consideration shall be
22 given to the employer's judgment as to what functions of a job are
23 essential, and if an employer has prepared a written description before
24 advertising or interviewing applicants for the job, this description
25 shall be considered evidence of the essential functions of the job;

26 (b) Qualified individual with a disability shall not include any
27 employee or applicant who is currently engaged in the illegal use of
28 drugs when the covered entity acts on the basis of such use; and

29 (c) Nothing in this subdivision shall be construed to exclude as a
30 qualified individual with a disability an individual who:

31 (i) Has successfully completed a supervised drug rehabilitation

1 program or otherwise been rehabilitated successfully and is no longer
2 engaging in the illegal use of drugs;

3 (ii) Is participating in a supervised rehabilitation program and is
4 no longer engaging in such use; or

5 (iii) Is erroneously regarded as engaging in such use but is not
6 engaging in such use;

7 (11) Reasonable accommodation, with respect to disability, shall
8 include making existing facilities used by employees readily accessible
9 to and usable by individuals with disabilities, job-restructuring, part-
10 time or modified work schedules, reassignment to a vacant position,
11 acquisition or modification of equipment or devices, appropriate
12 adjustment or modification of examinations, training manuals, or
13 policies, the provision of qualified readers or interpreters, and other
14 similar accommodations for individuals with disabilities. Reasonable
15 accommodation, with respect to pregnancy, shall include acquisition of
16 equipment for sitting, more frequent or longer breaks, periodic rest,
17 assistance with manual labor, job restructuring, light duty assignments,
18 modified work schedules, temporary transfers to less strenuous or
19 hazardous work, time off to recover from childbirth, or break time and
20 appropriate facilities for breast-feeding. Reasonable accommodation shall
21 not include accommodations which the covered entity can demonstrate
22 require significant difficulty or expense thereby posing an undue
23 hardship upon the covered entity. Factors to be considered in determining
24 whether an accommodation would pose an undue hardship shall include:

25 (a) The nature and the cost of the accommodation needed under the
26 Nebraska Fair Employment Practice Act;

27 (b) The overall financial resources of the facility or facilities
28 involved in the provision of the reasonable accommodation, the number of
29 persons employed at such facility, the effect on expenses and resources,
30 or the impact otherwise of such accommodation upon the operation of the
31 facility;

1 (c) The overall financial resources of the covered entity, the
2 overall size of the business of a covered entity with respect to the
3 number of its employees, and the number, type, and location of its
4 facilities; and

5 (d) The type of operation or operations of the covered entity,
6 including the composition, structure, and functions of the work force of
7 such entity, and the geographic separateness and administrative or fiscal
8 relationship of the facility or facilities in question to the covered
9 entity;

10 (12) Marital status shall mean the status of a person whether
11 married or single;

12 (13) Because of sex or on the basis of sex shall include, but not be
13 limited to, because of or on the basis of pregnancy, childbirth, or
14 related medical conditions;

15 (14) Harass because of sex shall include making unwelcome sexual
16 advances, requesting sexual favors, and engaging in other verbal or
17 physical conduct of a sexual nature if (a) submission to such conduct is
18 made either explicitly or implicitly a term or condition of an
19 individual's employment, (b) submission to or rejection of such conduct
20 by an individual is used as the basis for employment decisions affecting
21 such individual, or (c) such conduct has the purpose or effect of
22 unreasonably interfering with an individual's work performance or
23 creating an intimidating, hostile, or offensive working environment;

24 (15) Unlawful under federal law or the laws of this state shall mean
25 acting contrary to or in defiance of the law or disobeying or
26 disregarding the law;

27 (16) Drug shall mean a controlled substance as defined in section
28 28-401; and

29 (17) Illegal use of drugs shall mean the use of drugs, the
30 possession or distribution of which is unlawful under the Uniform
31 Controlled Substances Act, but shall not include the use of a drug taken

1 under supervision by a licensed health care professional or any other use
2 authorized by the Uniform Controlled Substances Act or other provisions
3 of state law.

4 Sec. 2. Section 48-1107.01, Reissue Revised Statutes of Nebraska, is
5 amended to read:

6 48-1107.01 It shall be an unlawful employment practice for a covered
7 entity to:

8 (1) Discriminate ~~discriminate~~ against a qualified individual with a
9 disability because of the disability of such individual in regard to job
10 application procedures, the hiring, advancement, or discharge of
11 employees, employee compensation, job training, and other terms,
12 conditions, and privileges of employment; or -

13 (2) Discriminate against an individual who is pregnant in regard to
14 job application procedures, the hiring, advancement, or discharge of
15 employees, employee compensation, job training, and other terms,
16 conditions, and privileges of employment.

17 Sec. 3. Section 48-1107.02, Reissue Revised Statutes of Nebraska, is
18 amended to read:

19 48-1107.02 (1) When referring to a qualified individual with a
20 disability, discrimination shall include:

21 (a 1) Limiting, segregating, or classifying a job applicant or
22 employee in a way that adversely affects the opportunities or status of
23 the applicant or employee because of the disability of the applicant or
24 employee;

25 (b 2) Participating in a contractual or other arrangement or
26 relationship that has the effect of subjecting a qualified individual
27 with a disability to discrimination in the application or employment
28 process, including a relationship with an employment agency, a labor
29 union, an organization providing fringe benefits to an employee of the
30 covered entity, or an organization providing training and apprenticeship
31 programs;

1 (c 3) Utilizing standards, criteria, or methods of administration (i
2 a) that have the effect of discrimination on the basis of disability or
3 (ii b) that perpetuate the discrimination against others who are subject
4 to common administrative control;

5 (d 4) Excluding or otherwise denying equal jobs or benefits to a
6 qualified individual with a disability because of the known disability of
7 an individual with whom the qualified individual with a disability is
8 known to have a relationship or association;

9 (e 5) Not making reasonable accommodations to the known physical or
10 mental limitations of an otherwise qualified individual with a disability
11 who is an applicant or employee unless such covered entity can
12 demonstrate that the accommodation would impose an undue hardship on the
13 operation of the business of the covered entity;

14 (f 6) Denying employment opportunities to a job applicant or
15 employee who is otherwise a qualified individual with a disability if the
16 denial is based upon the need of such covered entity to make reasonable
17 accommodation to the physical or mental impairments of the employee or
18 applicant;

19 (g 7) Using qualification standards, employment tests, or other
20 selection criteria that screen out or tend to screen out an individual
21 with a disability or a class of individuals with disabilities unless the
22 standard, test, or other selection criteria, as used by the covered
23 entity, is shown to be job-related for the position in question and is
24 consistent with business necessity;

25 (h 8) Failing to select and administer tests concerning employment
26 in the most effective manner to ensure that, when the test is
27 administered to a job applicant or employee who has a disability that
28 impairs sensory, manual, or speaking skills, the test results accurately
29 reflect the skills, aptitude, or whatever other factor of the applicant
30 or employee that the test purports to measure rather than reflecting the
31 impaired sensory, manual, or speaking skills of the employee or applicant

1 except when such skills are the factors that the test purports to
2 measure;

3 (i 9) Conducting a medical examination or making inquiries of a job
4 applicant as to whether the applicant is an individual with a disability
5 or as to the nature or severity of the disability, except that:

6 (i a) A covered entity may make preemployment inquiries into the
7 ability of an applicant to perform job-related functions;

8 (ii b) A test to determine the illegal use of drugs shall not be
9 considered a medical examination; and

10 (iii e) A covered entity may require a medical examination after an
11 offer of employment has been made to a job applicant and prior to the
12 commencement of the employment duties of the applicant and may condition
13 an offer of employment on the results of the examination if:

14 (A ±) All entering employees are subjected to such an examination
15 regardless of disability;

16 (B ii) Information obtained regarding the medical condition or
17 history of the applicant is collected and maintained on separate forms
18 and in separate medical files and is treated as a confidential medical
19 record, except that (I A) supervisors and managers may be informed
20 regarding necessary restrictions on the work or duties of the employee
21 and necessary accommodations, (II B) first-aid and safety personnel may
22 be informed, when appropriate, if the disability might require emergency
23 treatment, (III E) government officials investigating compliance with the
24 Nebraska Fair Employment Practice Act shall be provided relevant
25 information on request, and (IV D) information shall be made available in
26 accordance with the Nebraska Workers' Compensation Act; and

27 (C iii) The results of the examination are used only in a manner not
28 inconsistent with the Nebraska Fair Employment Practice Act; and

29 (j ±0) Requiring a medical examination or making inquiries of an
30 employee as to whether the employee is an individual with a disability or
31 as to the nature or severity of the disability, unless the examination or

1 inquiry is shown to be job-related and consistent with business
2 necessity. A test to determine the illegal use of drugs shall not be
3 considered a medical examination. A covered entity may conduct voluntary
4 medical examinations, including voluntary medical histories, which are
5 part of an employee health program available to employees at the worksite
6 and may make inquiries into the ability of an employee to perform job-
7 related functions if the information obtained regarding the medical
8 condition or history of the employee is subject to the requirements in
9 subdivisions (1)(i)(iii)(B) ~~(9)(c)(ii)~~ and (C iii) of this section.

10 (2) When referring to an individual who is pregnant, discrimination
11 shall include:

12 (a) Limiting, segregating, or classifying a job applicant or
13 employee in a way that adversely affects the opportunities or status of
14 the applicant or employee because of the pregnancy of the applicant or
15 employee;

16 (b) Participating in a contractual or other arrangement or
17 relationship that has the effect of subjecting a pregnant individual to
18 discrimination in the application or employment process, including a
19 relationship with an employment agency, a labor union, an organization
20 providing fringe benefits to an employee of the covered entity, or an
21 organization providing training and apprenticeship programs;

22 (c) Utilizing standards, criteria, or methods of administration (i)
23 that have the effect of discrimination on the basis of pregnancy or (ii)
24 that perpetuate the discrimination against others who are subject to
25 common administrative control;

26 (d) Not making reasonable accommodations to the known physical
27 limitations of a pregnant individual who is an applicant or employee
28 unless such covered entity can demonstrate that the accommodation would
29 impose an undue hardship on the operation of the business of the covered
30 entity;

31 (e) Denying employment opportunities to a job applicant or employee

1 who is pregnant if the denial is based upon the need of such covered
2 entity to make reasonable accommodation to the physical limitations due
3 to the pregnancy of the employee or applicant;

4 (f) Using qualification standards, employment tests, or other
5 selection criteria that screen out or tend to screen out a pregnant
6 individual or a class of pregnant individuals unless the standard, test,
7 or other selection criteria, as used by the covered entity, is shown to
8 be job-related for the position in question and is consistent with
9 business necessity;

10 (g) Conducting a medical examination or making inquiries of a job
11 applicant as to whether the applicant is pregnant, except that:

12 (i) A covered entity may make preemployment inquiries into the
13 ability of an applicant to perform job-related functions;

14 (ii) A test to determine the illegal use of drugs shall not be
15 considered a medical examination; and

16 (iii) A covered entity may require a medical examination after an
17 offer of employment has been made to a job applicant and prior to the
18 commencement of the employment duties of the applicant and may condition
19 an offer of employment on the results of the examination if:

20 (A) All entering employees are subjected to such an examination;

21 (B) Information obtained regarding the medical condition or history
22 of the applicant is collected and maintained on separate forms and in
23 separate medical files and is treated as a confidential medical record,
24 except that (I) supervisors and managers may be informed regarding
25 necessary restrictions on the work or duties of the employee and
26 necessary accommodations, (II) first-aid and safety personnel may be
27 informed, when appropriate, if the pregnancy might require emergency
28 treatment, (III) government officials investigating compliance with the
29 Nebraska Fair Employment Practice Act shall be provided relevant
30 information on request, and (IV) information shall be made available in
31 accordance with the Nebraska Workers' Compensation Act; and

1 (C) The results of the examination are used only in a manner not
2 inconsistent with the Nebraska Fair Employment Practice Act;

3 (h) Requiring a medical examination or making inquiries of an
4 employee as to whether the employee is pregnant unless the examination or
5 inquiry is shown to be job-related and consistent with business
6 necessity. A test to determine the illegal use of drugs shall not be
7 considered a medical examination. A covered entity may conduct voluntary
8 medical examinations, including voluntary medical histories, which are
9 part of an employee health program available to employees at the worksite
10 and may make inquiries into the ability of an employee to perform job-
11 related functions if the information obtained regarding the medical
12 condition or history of the employee is subject to the requirements in
13 subdivisions (2)(g)(iii)(B) and (C) of this section;

14 (i) Requiring a job applicant or employee affected by pregnancy,
15 childbirth, or related medical conditions to accept an accommodation that
16 such applicant or employee chooses not to accept;

17 (j) Requiring an employee to take leave under any leave law or
18 policy of the covered entity if another reasonable accommodation can be
19 provided to the known limitations related to the pregnancy, childbirth,
20 or related medical conditions of the employee; and

21 (k) Taking adverse action against an employee in the terms,
22 conditions, or privileges of employment for requesting or using a
23 reasonable accommodation to the known limitations related to the
24 pregnancy of the employee.

25 Sec. 4. Section 48-1111, Reissue Revised Statutes of Nebraska, is
26 amended to read:

27 48-1111 (1) Except as otherwise provided in the Nebraska Fair
28 Employment Practice Act, it shall not be an unlawful employment practice
29 for an employer to apply different standards of compensation, or
30 different terms, conditions, or privileges of employment pursuant to a
31 bona fide seniority or merit system or a system which measures earnings

1 by quantity or quality of production or to employees who work in
2 different locations, if such differences are not the result of an
3 intention to discriminate because of race, color, religion, sex,
4 disability, marital status, or national origin, nor shall it be an
5 unlawful employment practice for an employer to give and to act upon the
6 results of any professionally developed ability test if such test, its
7 administration, or action upon the results is not designed, intended, or
8 used to discriminate because of race, color, religion, sex, disability,
9 marital status, or national origin.

10 It shall not be an unlawful employment practice for a covered entity
11 to deny privileges of employment to an individual with a disability when
12 the qualification standards, tests, or selection criteria that screen out
13 or tend to screen out or otherwise deny a job or benefit to an individual
14 with a disability:

15 (a) Have been shown to be job-related and consistent with business
16 necessity and such performance cannot be accomplished by reasonable
17 accommodation, as required by the Nebraska Fair Employment Practice Act
18 and the federal Americans with Disabilities Act of 1990; or

19 (b) Include a requirement that an individual shall not pose a direct
20 threat, involving a significant risk to the health or safety of other
21 individuals in the workplace, that cannot be eliminated by reasonable
22 accommodation.

23 It shall not be an unlawful employment practice to refuse employment
24 based on a policy of not employing both husband and wife if such policy
25 is equally applied to both sexes.

26 (2) Except as otherwise provided in the Nebraska Fair Employment
27 Practice Act, women ~~women~~ affected by pregnancy, childbirth, or related
28 medical conditions shall be treated the same for all employment-related
29 purposes, including receipt of employee benefits, as other persons not so
30 affected but similar in their ability or inability to work, and nothing
31 in this section shall be interpreted to provide otherwise.

1 This section shall not require an employer to provide employee
2 benefits for abortion except when medical complications have arisen from
3 an abortion.

4 Nothing in this section shall preclude an employer from providing
5 employee benefits for abortion under fringe benefit programs or otherwise
6 affect bargaining agreements in regard to abortion.

7 Sec. 5. Section 48-1117, Revised Statutes Cumulative Supplement,
8 2014, is amended to read:

9 48-1117 The commission shall have the following powers and duties:

10 (1) To receive, investigate, and pass upon charges of unlawful
11 employment practices anywhere in the state;

12 (2) To hold hearings, subpoena witnesses, compel their attendance,
13 administer oaths, and take the testimony of any person under oath and, in
14 connection therewith, to require the production for examination of any
15 books and papers relevant to any allegation of unlawful employment
16 practice pending before the commission. The commission may make rules as
17 to the issuance of subpoenas, subject to the approval by a constitutional
18 majority of the elected members of the Legislature;

19 (3) To cooperate with the federal government and with local agencies
20 to effectuate the purposes of the Nebraska Fair Employment Practice Act,
21 including the sharing of information possessed by the commission on a
22 case that has also been filed with the federal government or local
23 agencies if both the employer and complainant have been notified of the
24 filing;

25 (4) To attempt to eliminate unfair employment practices by means of
26 conference, mediation, conciliation, arbitration, and persuasion;

27 (5) To require that every employer, employment agency, and labor
28 organization subject to the act shall (a) make and keep such records
29 relevant to the determinations of whether unlawful employment practices
30 have been or are being committed, (b) preserve such records for such
31 periods, and (c) make such reports therefrom, as the commission shall

1 prescribe by regulation or order, after public hearing, as reasonable,
2 necessary, or appropriate for the enforcement of the act or the
3 regulations or orders thereunder. The commission shall, by regulation,
4 require each employer, labor organization, and joint labor-management
5 committee subject to the act which controls an apprenticeship or other
6 training program to maintain such records as are reasonably necessary to
7 carry out the purposes of the act, including, but not limited to, a list
8 of applicants who wish to participate in such program, including the
9 chronological order in which such applications were received, and to
10 furnish to the commission, upon request, a detailed description of the
11 manner in which persons are selected to participate in the apprenticeship
12 or other training program. Any employer, employment agency, labor
13 organization, or joint labor-management committee which believes that the
14 application to it of any regulation or order issued under this section
15 would result in undue hardship may either apply to the commission for an
16 exemption from the application of such regulation or order or bring a
17 civil action in the district court for the district where such records
18 are kept. If the commission or the court, as the case may be, finds that
19 the application of the regulation or order to the employer, employment
20 agency, or labor organization in question would impose an undue hardship,
21 the commission or the court, as the case may be, may grant appropriate
22 relief;

23 (6) To report, not less than once every two years, to the Clerk of
24 the Legislature and the Governor, on the hearings it has conducted and
25 the decisions it has rendered, the other work performed by it to carry
26 out the purposes of the act, and to make recommendations for such further
27 legislation concerning abuses and discrimination because of race, color,
28 religion, sex, disability, marital status, or national origin, as may be
29 desirable. The report shall also include the number of complaints filed
30 under the act alleging a violation of subdivision (2) of section
31 48-1107.01 and the resolution of such complaints. The report submitted to

1 the Clerk of the Legislature shall be submitted electronically. Each
2 member of the Legislature shall receive an electronic copy of the report
3 required by this subdivision by making a request for it to the
4 chairperson of the commission; and

5 (7) To adopt and promulgate rules and regulations necessary to carry
6 out the duties prescribed in the act.

7 Sec. 6. Original sections 48-1102, 48-1107.01, 48-1107.02, and
8 48-1111, Reissue Revised Statutes of Nebraska, and section 48-1117,
9 Revised Statutes Cumulative Supplement, 2014, are repealed.