

LEGISLATURE OF NEBRASKA
ONE HUNDRED FOURTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 627

FINAL READING

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 define and redefine terms;
5 to prohibit employment practices discriminating against individuals
6 who are pregnant, have given birth, or have a related medical
7 condition as prescribed; to change provisions relating to lawful
8 employment practices; to provide requirements for reports by the
9 Equal Opportunity Commission; to eliminate provisions relating to
10 membership in certain organizations; to harmonize provisions; to
11 repeal the original sections; and to outright repeal section
12 48-1109, Reissue Revised Statutes of Nebraska.
13 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, childbirth, or related medical
16 conditions, shall include acquisition of equipment for sitting, more
17 frequent or longer breaks, periodic rest, assistance with manual labor,
18 job restructuring, light-duty assignments, modified work schedules,
19 temporary transfers to less strenuous or hazardous work, time off to
20 recover from childbirth, or break time and appropriate facilities for
21 breast-feeding or expressing breast milk. Reasonable accommodation shall
22 not include accommodations which the covered entity can demonstrate
23 require significant difficulty or expense thereby posing an undue
24 hardship upon the covered entity. Factors to be considered in determining
25 whether an accommodation would pose an undue hardship shall include:

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

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

1 facility;

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

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

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

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

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

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

28 (16) Drug shall mean a controlled substance as defined in section
29 28-401; ~~and~~

30 (17) Illegal use of drugs shall mean the use of drugs, the
31 possession or distribution of which is unlawful under the Uniform

1 Controlled Substances Act, but shall not include the use of a drug taken
2 under supervision by a licensed health care professional or any other use
3 authorized by the Uniform Controlled Substances Act or other provisions
4 of state law; and -

5 (18) Individual who is pregnant, who has given birth, or who has a
6 related medical condition shall mean an individual with a known
7 limitation who, with or without reasonable accommodation, can perform the
8 essential functions of the employment position that such individual
9 holds, desires, or may be temporarily assigned to. Consideration shall be
10 given to the employer's judgment as to what functions of a job are
11 essential, and if an employer has prepared a written description before
12 advertising or interviewing applicants for the job, this description
13 shall be considered evidence of the essential functions of the job.

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

16 48-1107.01 It shall be an unlawful employment practice for a covered
17 entity to:

18 (1) Discriminate ~~discriminate~~ against a qualified individual with a
19 disability because of the disability of such individual in regard to job
20 application procedures, the hiring, advancement, or discharge of
21 employees, employee compensation, job training, and other terms,
22 conditions, and privileges of employment; or -

23 (2) Discriminate against an individual who is pregnant, who has
24 given birth, or who has a related medical condition in regard to job
25 application procedures, the hiring, advancement, or discharge of
26 employees, employee compensation, job training, and other terms,
27 conditions, and privileges of employment.

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

30 48-1107.02 (1) When referring to a qualified individual with a
31 disability, discrimination shall include:

1 (a 1) Limiting, segregating, or classifying a job applicant or
2 employee in a way that adversely affects the opportunities or status of
3 the applicant or employee because of the disability of the applicant or
4 employee;

5 (b 2) Participating in a contractual or other arrangement or
6 relationship that has the effect of subjecting a qualified individual
7 with a disability to discrimination in the application or employment
8 process, including a relationship with an employment agency, a labor
9 union, an organization providing fringe benefits to an employee of the
10 covered entity, or an organization providing training and apprenticeship
11 programs;

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

16 (d 4) Excluding or otherwise denying equal jobs or benefits to a
17 qualified individual with a disability because of the known disability of
18 an individual with whom the qualified individual with a disability is
19 known to have a relationship or association;

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

25 (f 6) Denying employment opportunities to a job applicant or
26 employee who is otherwise a qualified individual with a disability if the
27 denial is based upon the need of such covered entity to make reasonable
28 accommodation to the physical or mental impairments of the employee or
29 applicant;

30 (g 7) Using qualification standards, employment tests, or other
31 selection criteria that screen out or tend to screen out an individual

1 with a disability or a class of individuals with disabilities unless the
2 standard, test, or other selection criteria, as used by the covered
3 entity, is shown to be job-related for the position in question and is
4 consistent with business necessity;

5 (h 8) Failing to select and administer tests concerning employment
6 in the most effective manner to ensure that, when the test is
7 administered to a job applicant or employee who has a disability that
8 impairs sensory, manual, or speaking skills, the test results accurately
9 reflect the skills, aptitude, or whatever other factor of the applicant
10 or employee that the test purports to measure rather than reflecting the
11 impaired sensory, manual, or speaking skills of the employee or applicant
12 except when such skills are the factors that the test purports to
13 measure;

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

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

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

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

25 (A i) All entering employees are subjected to such an examination
26 regardless of disability;

27 (B ii) Information obtained regarding the medical condition or
28 history of the applicant is collected and maintained on separate forms
29 and in separate medical files and is treated as a confidential medical
30 record, except that (I A) supervisors and managers may be informed
31 regarding necessary restrictions on the work or duties of the employee

1 and necessary accommodations, (~~II B~~) first-aid and safety personnel may
2 be informed, when appropriate, if the disability might require emergency
3 treatment, (~~III G~~) government officials investigating compliance with the
4 Nebraska Fair Employment Practice Act shall be provided relevant
5 information on request, and (~~IV D~~) information shall be made available in
6 accordance with the Nebraska Workers' Compensation Act; and

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

9 (~~j 10~~) Requiring a medical examination or making inquiries of an
10 employee as to whether the employee is an individual with a disability or
11 as to the nature or severity of the disability, unless the examination or
12 inquiry is shown to be job-related and consistent with business
13 necessity. A test to determine the illegal use of drugs shall not be
14 considered a medical examination. A covered entity may conduct voluntary
15 medical examinations, including voluntary medical histories, which are
16 part of an employee health program available to employees at the worksite
17 and may make inquiries into the ability of an employee to perform job-
18 related functions if the information obtained regarding the medical
19 condition or history of the employee is subject to the requirements in
20 subdivisions ~~(1)(i)(iii)(B)~~ ~~(9)(c)(ii)~~ and (~~C iii~~) of this section.

21 (2) When referring to an individual who is pregnant, who has given
22 birth, or who has a related medical condition, discrimination shall
23 include:

24 (a) Limiting, segregating, or classifying a job applicant or
25 employee in a way that adversely affects the opportunities or status of
26 the applicant or employee because of the pregnancy, childbirth, or
27 related medical conditions of the applicant or employee;

28 (b) Participating in a contractual or other arrangement or
29 relationship that has the effect of subjecting an individual who is
30 pregnant, who has given birth, or who has a related medical condition to
31 discrimination in the application or employment process, including a

1 relationship with an employment agency, a labor union, an organization
2 providing fringe benefits to an employee of the covered entity, or an
3 organization providing training and apprenticeship programs;

4 (c) Utilizing standards, criteria, or methods of administration (i)
5 that have the effect of discrimination on the basis of pregnancy,
6 childbirth, or related medical conditions or (ii) that perpetuate the
7 discrimination against others who are subject to common administrative
8 control;

9 (d) Not making reasonable accommodations to the known physical
10 limitations of an individual who is pregnant, who has given birth, or who
11 has a related medical condition and who is an applicant or employee
12 unless such covered entity can demonstrate that the accommodation would
13 impose an undue hardship on the operation of the business of the covered
14 entity;

15 (e) Denying employment opportunities to a job applicant or employee
16 who is pregnant, who has given birth, or who has a related medical
17 condition if the denial is based upon the need of such covered entity to
18 make reasonable accommodation to the physical limitations due to the
19 pregnancy, childbirth, or related medical conditions of the employee or
20 applicant;

21 (f) Using qualification standards, employment tests, or other
22 selection criteria that screen out or tend to screen out an individual or
23 a class of individuals who are pregnant, who have given birth, or who
24 have a related medical condition unless the standard, test, or other
25 selection criteria, as used by the covered entity, is shown to be job-
26 related for the position in question and is consistent with business
27 necessity;

28 (g) Conducting a medical examination or making inquiries of a job
29 applicant as to whether the applicant is pregnant, has given birth, or
30 has a related medical condition, except that:

31 (i) A covered entity may make preemployment inquiries into the

1 ability of an applicant to perform job-related functions;

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

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

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

9 (B) Information obtained regarding the medical condition or history
10 of the applicant is collected and maintained on separate forms and in
11 separate medical files and is treated as a confidential medical record,
12 except that (I) supervisors and managers may be informed regarding
13 necessary restrictions on the work or duties of the employee and
14 necessary accommodations, (II) first-aid and safety personnel may be
15 informed, when appropriate, if the pregnancy, childbirth, or related
16 medical conditions might require emergency treatment, (III) government
17 officials investigating compliance with the Nebraska Fair Employment
18 Practice Act shall be provided relevant information on request, and (IV)
19 information shall be made available in accordance with the Nebraska
20 Workers' Compensation Act; and

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

23 (h) Requiring a medical examination or making inquiries of an
24 employee as to whether the employee is pregnant, has given birth, or has
25 a related medical condition unless the examination or inquiry is shown to
26 be job-related and consistent with business necessity. A test to
27 determine the illegal use of drugs shall not be considered a medical
28 examination. A covered entity may conduct voluntary medical examinations,
29 including voluntary medical histories, which are part of an employee
30 health program available to employees at the worksite and may make
31 inquiries into the ability of an employee to perform job-related

1 functions if the information obtained regarding the medical condition or
2 history of the employee is subject to the requirements in subdivisions
3 (2)(g)(iii)(B) and (C) of this section;

4 (i) Requiring an employee to take leave under any leave law or
5 policy of the covered entity if another reasonable accommodation can be
6 provided to the known limitations related to the pregnancy, childbirth,
7 or related medical conditions of the employee; and

8 (j) Taking adverse action against an employee in the terms,
9 conditions, or privileges of employment for requesting or using a
10 reasonable accommodation to the known limitations related to the
11 pregnancy, childbirth, or related medical conditions of the employee.

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

14 48-1111 (1) Except as otherwise provided in the Nebraska Fair
15 Employment Practice Act, it shall not be an unlawful employment practice
16 for an employer to apply different standards of compensation, or
17 different terms, conditions, or privileges of employment pursuant to a
18 bona fide seniority or merit system or a system which measures earnings
19 by quantity or quality of production or to employees who work in
20 different locations, if such differences are not the result of an
21 intention to discriminate because of race, color, religion, sex,
22 disability, marital status, or national origin, nor shall it be an
23 unlawful employment practice for an employer to give and to act upon the
24 results of any professionally developed ability test if such test, its
25 administration, or action upon the results is not designed, intended, or
26 used to discriminate because of race, color, religion, sex, disability,
27 marital status, or national origin.

28 It shall not be an unlawful employment practice for a covered entity
29 to deny privileges of employment to an individual with a disability when
30 the qualification standards, tests, or selection criteria that screen out
31 or tend to screen out or otherwise deny a job or benefit to an individual

1 with a disability:

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

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

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

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

19 This section shall not require an employer to provide employee
20 benefits for abortion except when medical complications have arisen from
21 an abortion.

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

25 Sec. 5. Section 48-1117, Revised Statutes Cumulative Supplement,
26 2014, is amended to read:

27 48-1117 The commission shall have the following powers and duties:

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

30 (2) To hold hearings, subpoena witnesses, compel their attendance,
31 administer oaths, and take the testimony of any person under oath and, in

1 connection therewith, to require the production for examination of any
2 books and papers relevant to any allegation of unlawful employment
3 practice pending before the commission. The commission may make rules as
4 to the issuance of subpoenas, subject to the approval by a constitutional
5 majority of the elected members of the Legislature;

6 (3) To cooperate with the federal government and with local agencies
7 to effectuate the purposes of the Nebraska Fair Employment Practice Act,
8 including the sharing of information possessed by the commission on a
9 case that has also been filed with the federal government or local
10 agencies if both the employer and complainant have been notified of the
11 filing;

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

14 (5) To require that every employer, employment agency, and labor
15 organization subject to the act shall (a) make and keep such records
16 relevant to the determinations of whether unlawful employment practices
17 have been or are being committed, (b) preserve such records for such
18 periods, and (c) make such reports therefrom, as the commission shall
19 prescribe by regulation or order, after public hearing, as reasonable,
20 necessary, or appropriate for the enforcement of the act or the
21 regulations or orders thereunder. The commission shall, by regulation,
22 require each employer, labor organization, and joint labor-management
23 committee subject to the act which controls an apprenticeship or other
24 training program to maintain such records as are reasonably necessary to
25 carry out the purposes of the act, including, but not limited to, a list
26 of applicants who wish to participate in such program, including the
27 chronological order in which such applications were received, and to
28 furnish to the commission, upon request, a detailed description of the
29 manner in which persons are selected to participate in the apprenticeship
30 or other training program. Any employer, employment agency, labor
31 organization, or joint labor-management committee which believes that the

1 application to it of any regulation or order issued under this section
2 would result in undue hardship may either apply to the commission for an
3 exemption from the application of such regulation or order or bring a
4 civil action in the district court for the district where such records
5 are kept. If the commission or the court, as the case may be, finds that
6 the application of the regulation or order to the employer, employment
7 agency, or labor organization in question would impose an undue hardship,
8 the commission or the court, as the case may be, may grant appropriate
9 relief;

10 (6) To report, not less than once every two years, to the Clerk of
11 the Legislature and the Governor, on the hearings it has conducted and
12 the decisions it has rendered, the other work performed by it to carry
13 out the purposes of the act, and to make recommendations for such further
14 legislation concerning abuses and discrimination because of race, color,
15 religion, sex, disability, marital status, or national origin, as may be
16 desirable. The report shall also include the number of complaints filed
17 under the act alleging a violation of subdivision (2) of section
18 48-1107.01 and the resolution of such complaints. The report submitted to
19 the Clerk of the Legislature shall be submitted electronically. Each
20 member of the Legislature shall receive an electronic copy of the report
21 required by this subdivision by making a request for it to the
22 chairperson of the commission; and

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

25 Sec. 6. Original sections 48-1102, 48-1107.01, 48-1107.02, and
26 48-1111, Reissue Revised Statutes of Nebraska, and section 48-1117,
27 Revised Statutes Cumulative Supplement, 2014, are repealed.

28 Sec. 7. The following section is outright repealed: Section
29 48-1109, Reissue Revised Statutes of Nebraska.