

LEGISLATURE OF NEBRASKA
ONE HUNDRED SEVENTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 440

Introduced by Hansen, M., 26.

Read first time January 15, 2021

Committee: Business and Labor

1 A BILL FOR AN ACT relating to the Nebraska Fair Employment Practice Act;
2 to amend section 48-1118, Reissue Revised Statutes of Nebraska, and
3 section 48-1107.02, Revised Statutes Cumulative Supplement, 2020; to
4 change provisions relating to discrimination against a qualified
5 individual with a disability and enforcement of the act; to
6 harmonize provisions; and to repeal the original sections.
7 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 48-1107.02, Revised Statutes Cumulative
2 Supplement, 2020, is amended to read:

3 48-1107.02 (1) When referring to a qualified individual with a
4 disability, discrimination shall include:

5 (a) Limiting, segregating, or classifying a job applicant or
6 employee in a way that adversely affects the opportunities or status of
7 the applicant or employee because of the disability of the applicant or
8 employee;

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

16 (c) Utilizing standards, criteria, or methods of administration (i)
17 that have the effect of discrimination on the basis of disability or (ii)
18 that perpetuate the discrimination against others who are subject to
19 common administrative control;

20 ~~(d) Excluding or otherwise denying equal jobs or benefits to a~~
21 ~~qualified individual with a disability because of the known disability of~~
22 ~~an individual with whom the qualified individual with a disability is~~
23 ~~known to have a relationship or association;~~

24 (d) ~~(e)~~ Not making reasonable accommodations to the known physical
25 or mental limitations of an otherwise qualified individual with a
26 disability who is an applicant or employee unless such covered entity can
27 demonstrate that the accommodation would impose an undue hardship on the
28 operation of the business of the covered entity;

29 (e) ~~(f)~~ Denying employment opportunities to a job applicant or
30 employee who is otherwise a qualified individual with a disability if the
31 denial is based upon the need of such covered entity to make reasonable

1 accommodation to the physical or mental impairments of the employee or
2 applicant;

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

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

18 (h) ~~(i)~~ Conducting a medical examination or making inquiries of a
19 job applicant as to whether the applicant is an individual with a
20 disability or as to the nature or severity of the disability, except
21 that:

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

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

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

30 (A) All entering employees are subjected to such an examination
31 regardless of disability;

1 (B) Information obtained regarding the medical condition or history
2 of the applicant is collected and maintained on separate forms and in
3 separate medical files and is treated as a confidential medical record,
4 except that (I) supervisors and managers may be informed regarding
5 necessary restrictions on the work or duties of the employee and
6 necessary accommodations, (II) first-aid and safety personnel may be
7 informed, when appropriate, if the disability might require emergency
8 treatment, (III) government officials investigating compliance with the
9 Nebraska Fair Employment Practice Act shall be provided relevant
10 information on request, and (IV) information shall be made available in
11 accordance with the Nebraska Workers' Compensation Act; and

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

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

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

29 (a) Limiting, segregating, or classifying a job applicant or
30 employee in a way that adversely affects the opportunities or status of
31 the applicant or employee because of the pregnancy, childbirth, or

1 related medical conditions of the applicant or employee;

2 (b) Participating in a contractual or other arrangement or
3 relationship that has the effect of subjecting an individual who is
4 pregnant, who has given birth, or who has a related medical condition to
5 discrimination in the application or employment process, including a
6 relationship with an employment agency, a labor union, an organization
7 providing fringe benefits to an employee of the covered entity, or an
8 organization providing training and apprenticeship programs;

9 (c) Utilizing standards, criteria, or methods of administration (i)
10 that have the effect of discrimination on the basis of pregnancy,
11 childbirth, or related medical conditions or (ii) that perpetuate the
12 discrimination against others who are subject to common administrative
13 control;

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

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

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

1 necessity;

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

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

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

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

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

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

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

28 (h) Requiring a medical examination or making inquiries of an
29 employee as to whether the employee is pregnant, has given birth, or has
30 a related medical condition unless the examination or inquiry is shown to
31 be job-related and consistent with business necessity. A test to

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

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

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

17 (3) Discrimination shall include excluding or otherwise denying
18 equal jobs or benefits to a qualified individual because of the known
19 disability of an individual with whom the qualified individual is known
20 to have a relationship or association.

21 Sec. 2. Section 48-1118, Reissue Revised Statutes of Nebraska, is
22 amended to read:

23 48-1118 (1) Whenever it is charged in writing under oath or
24 affirmation by or on behalf of a person or persons claiming to be
25 aggrieved and such charge sets forth the facts upon which it is based
26 that an employer, employment agency, or labor organization has engaged in
27 an unlawful employment practice, the commission staff shall furnish such
28 employer, employment agency, or labor organization with a copy of such
29 charge within ten business days, including a statement of the date,
30 place, and circumstances of the alleged unlawful employment practice.
31 Prior to initiating any investigation, the commission staff shall screen

1 a charge pursuant to an established, clearly defined prescreening
2 procedure to determine subject matter jurisdiction to handle such charge.
3 Any charge without sufficient subject matter jurisdiction shall not be
4 investigated and notice of such prescreening determination shall be
5 promptly conveyed by the executive director to the person claiming to be
6 aggrieved. When a charge is determined to be within the subject matter
7 jurisdiction of the commission, the commission staff shall make an
8 investigation of such charge, but such charge shall not be made public by
9 the commission. If the executive director determines after such
10 investigation that there is not reasonable cause to believe that the
11 charge is true, the executive director shall dismiss the charge and
12 promptly notify the person claiming to be aggrieved and the respondent of
13 his or her action. If the executive director determines after such
14 investigation that there is reasonable cause to believe that the charge
15 is true, the commission shall endeavor to eliminate any such alleged
16 unlawful employment practice and settle any claim by informal methods of
17 conference, conciliation, persuasion, mediation, or arbitration. The
18 settlement efforts shall be scheduled and completed within thirty days of
19 the probable cause finding. Nothing said or done during and as a part of
20 such endeavors may be made public by the commission without the written
21 consent of the parties or used as evidence in a subsequent proceeding.
22 Any officer or employee of the commission who makes public in any manner
23 whatever any information in violation of this subsection shall be guilty
24 of a Class III misdemeanor except as provided in subdivision (3) of
25 section 48-1117.

26 (2) A written charge of violation of the Nebraska Fair Employment
27 Practice Act shall be filed within three hundred days after the
28 occurrence of the alleged unlawful employment practice and notice of the
29 charge, including a statement of the date, place, and circumstances of
30 the alleged unlawful employment practice, shall be served upon the person
31 against whom such charge is made within ten business days thereafter.

1 (3) A respondent shall be required to file with the commission a
2 written response to the written charge of violation within thirty days
3 after service upon the respondent. ~~Failure to file a written response~~
4 ~~within thirty days, except for good cause shown, shall result in a~~
5 ~~mandatory reasonable cause finding against the respondent by the~~
6 ~~executive director.~~ Failure by any complainant to cooperate with the
7 commission, its investigators, or staff, except for good cause shown,
8 shall result in dismissal of the complaint by the executive director.

9 (4) In connection with any investigation of a charge filed under
10 this section, the commission or its authorized agents may, at any time
11 after a charge is filed, issue or cause to be served interrogatories and
12 shall have at all reasonable times access to, for the purposes of
13 examination, and the right to copy any evidence or records of any person
14 being investigated or proceeded against that relate to unlawful
15 employment practices covered by the act and are relevant to the charge
16 under investigation. The commission may seek preparation of and judicial
17 enforcement of any legal process or interrogatories through the office of
18 the Attorney General.

19 Sec. 3. Original section 48-1118, Reissue Revised Statutes of
20 Nebraska, and section 48-1107.02, Revised Statutes Cumulative Supplement,
21 2020, are repealed.