

21102987D

HOUSE BILL NO. 1848

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on General Laws
on January 19, 2021)

(Patron Prior to Substitute—Delegate Sickles)

A BILL to amend and reenact §§ 2.2-3902, 2.2-3905, and 51.5-41 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 2.2-3905.1, relating to the Virginia Human Rights Act; discrimination on the basis of disability.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3902, 2.2-3905, and 51.5-41 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 2.2-3905.1 as follows:

§ 2.2-3902. Construction of chapter; other programs to aid persons with disabilities, minors, and the elderly.

The provisions of this chapter shall be construed liberally for the accomplishment of its policies.

Conduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions including lactation, age, status as a veteran, *disability*, or national origin is an unlawful discriminatory practice under this chapter.

Nothing in this chapter shall prohibit or alter any program, service, facility, school, or privilege that is afforded, oriented, or restricted to a person because of disability or age from continuing to habilitate, rehabilitate, or accommodate that person.

In addition, nothing in this chapter shall be construed to affect any governmental program, law or activity differentiating between persons on the basis of age over the age of 18 years (i) where the differentiation is reasonably necessary to normal operation or the activity is based upon reasonable factors other than age or (ii) where the program, law or activity constitutes a legitimate exercise of powers of the Commonwealth for the general health, safety and welfare of the population at large.

Complaints filed with the Division of Human Rights of the Department of Law (the Division) in accordance with § 2.2-520 alleging unlawful discriminatory practice under a Virginia statute that is enforced by a Virginia agency shall be referred to that agency. The Division may investigate complaints alleging an unlawful discriminatory practice under a federal statute or regulation and attempt to resolve it through conciliation. Unsolved complaints shall thereafter be referred to the federal agency with jurisdiction over the complaint. Upon such referral, the Division shall have no further jurisdiction over the complaint. The Division shall have no jurisdiction over any complaint filed under a local ordinance adopted pursuant to § 15.2-965.

§ 2.2-3905. Nondiscrimination in employment; definitions; exceptions.

A. As used in this section:

"Age" means being an individual who is at least 40 years of age.

"Employee" means an individual employed by an employer.

"Employer" means a person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person. However, (i) for purposes of unlawful discharge under subdivision B 1 on the basis of race, color, religion, national origin, status as a veteran, sex, sexual orientation, gender identity, marital status, *disability*, pregnancy, or childbirth or related medical conditions including lactation, "employer" means any employer employing more than five persons and (ii) for purposes of unlawful discharge under subdivision B 1 on the basis of age, "employer" means any employer employing more than five but fewer than 20 persons.

"Employment agency" means any person, or an agent of such person, regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer.

"Joint apprenticeship committee" means the same as that term is defined in § 40.1-120.

"Labor organization" means an organization engaged in an industry, or an agent of such organization, that exists for the purpose, in whole or in part, of dealing with employers on behalf of employees concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment. "Labor organization" includes employee representation committees, groups, or associations in which employees participate.

"Lactation" means a condition that may result in the feeding of a child directly from the breast or the expressing of milk from the breast.

B. It is an unlawful ~~employment~~ discriminatory practice for:

1. An employer to:

60 a. Fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to
61 such individual's compensation, terms, conditions, or privileges of employment because of such
62 individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy,
63 childbirth or related medical conditions including lactation, age, status as a veteran, *disability*, or
64 national origin; or

65 b. Limit, segregate, or classify employees or applicants for employment in any way that would
66 deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect an
67 individual's status as an employee, because of such individual's race, color, religion, sex, sexual
68 orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions including
69 lactation, age, status as a veteran, *disability*, or national origin.

70 2. An employment agency to:

71 a. Fail or refuse to refer for employment, or otherwise discriminate against, any individual because of
72 such individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy,
73 childbirth or related medical conditions, age, status as a veteran, *disability*, or national origin; or

74 b. Classify or refer for employment any individual on the basis of such individual's race, color,
75 religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical
76 conditions, age, status as a veteran, *disability*, or national origin.

77 3. A labor organization to:

78 a. Exclude or expel from its membership, or otherwise discriminate against, any individual because
79 of such individual's race, color, religion, sex, sexual orientation, gender identity, marital status,
80 pregnancy, childbirth or related medical conditions, age, status as a veteran, *disability*, or national origin;

81 b. Limit, segregate, or classify its membership or applicants for membership, or classify or fail to or
82 refuse to refer for employment any individual, in any way that would deprive or tend to deprive such
83 individual of employment opportunities, or would limit such employment opportunities or otherwise
84 adversely affect an individual's status as an employee or as an applicant for employment, because of
85 such individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy,
86 childbirth or related medical conditions, age, status as a veteran, *disability*, or national origin; or

87 c. Cause or attempt to cause an employer to discriminate against an individual in violation of
88 subdivisions a or b.

89 4. An employer, labor organization, or joint apprenticeship committee to discriminate against any
90 individual in any program to provide apprenticeship or other training program on the basis of such
91 individual's race, color, religion, sex, sexual orientation, gender identity, pregnancy, childbirth or related
92 medical conditions, age, status as a veteran, *disability*, or national origin.

93 5. An employer, in connection with the selection or referral of applicants or candidates for
94 employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the
95 results of employment-related tests on the basis of race, color, religion, sex, sexual orientation, gender
96 identity, marital status, pregnancy, childbirth or related medical conditions, age, status as a veteran,
97 *disability*, or national origin.

98 6. Except as otherwise provided in this chapter, an employer to use race, color, religion, sex, sexual
99 orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, status
100 as a veteran, *disability*, or national origin as a motivating factor for any employment practice, even
101 though other factors also motivate the practice.

102 7. (i) An employer to discriminate against any employees or applicants for employment, (ii) an
103 employment agency or a joint apprenticeship committee controlling an apprenticeship or other training
104 program to discriminate against any individual, or (iii) a labor organization to discriminate against any
105 member thereof or applicant for membership because such individual has opposed any practice made an
106 unlawful employment ~~discriminatory~~ practice by this chapter or because such individual has made a
107 charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under
108 this chapter.

109 8. An employer, labor organization, employment agency, or joint apprenticeship committee
110 controlling an apprenticeship or other training program to print or publish, or cause to be printed or
111 published, any notice or advertisement relating to (i) employment by such an employer, (ii) membership
112 in or any classification or referral for employment by such a labor organization, (iii) any classification or
113 referral for employment by such an employment agency, or (iv) admission to, or employment in, any
114 program established to provide apprenticeship or other training by such a joint apprenticeship committee
115 that indicates any preference, limitation, specification, or discrimination based on race, color, religion,
116 sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical
117 conditions, age, status as a veteran, *disability*, or national origin, except that such a notice or
118 advertisement may indicate a preference, limitation, specification, or discrimination based on religion,
119 sex, age, or national origin when religion, sex, age, or national origin is a bona fide occupational
120 qualification for employment.

121 C. Notwithstanding any other provision of this chapter, it is not an unlawful employment

discriminatory practice:

1. For (i) an employer to hire and employ employees; (ii) an employment agency to classify, or refer for employment, any individual; (iii) a labor organization to classify its membership or to classify or refer for employment any individual; or (iv) an employer, labor organization, or joint apprenticeship committee to admit or employ any individual in any apprenticeship or other training program on the basis of such individual's religion, sex, or age in those certain instances where religion, sex, or age is a bona fide occupational qualification reasonably necessary to the normal operation of that particular employer, employment agency, labor organization, or joint apprenticeship committee;

2. For an elementary or secondary school or institution of higher education to hire and employ employees of a particular religion if such elementary or secondary school or institution of higher education is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society or if the curriculum of such elementary or secondary school or institution of higher education is directed toward the propagation of a particular religion;

3. For an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment, pursuant to a bona fide seniority or merit system, or a system that measures earnings by quantity or quality of production, or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, status as a veteran, *disability*, or national origin;

4. For an employer to give and to act upon the results of any professionally developed ability test, provided that such test, its administration, or an action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, status as a veteran, *disability*, or national origin;

5. For an employer to provide reasonable accommodations related to *disability*, pregnancy, childbirth or related medical conditions, and lactation, when such accommodations are requested by the employee; or

6. For an employer to condition employment or premises access based upon citizenship where the employer is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute or regulation of the federal government or any executive order of the President of the United States.

D. Nothing in this chapter shall be construed to require any employer, employment agency, labor organization, or joint apprenticeship committee to grant preferential treatment to any individual or to any group because of such individual's or group's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, status as a veteran, *disability*, or national origin on account of an imbalance that may exist with respect to the total number or percentage of persons of any race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, status as a veteran, *disability*, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to or employed in any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, status as a veteran, *disability*, or national origin in any community.

E. The provisions of this section shall not apply to the employment of individuals of a particular religion by a religious corporation, association, educational institution, or society to perform work associated with its activities.

§ 2.2-3905.1. Reasonable accommodations for persons with disabilities; unlawful discriminatory practice; notice of rights.

A. As used in this section:

"Employer" means any person, or agent of such person, employing more than five employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

"Person with a disability" means the term as defined in § 51.5-40.1.

"Physical impairment" means the term as defined in § 51.5-40.1.

"Mental impairment" means the term as defined in § 51.5-40.1.

"Otherwise qualified person with a disability" means the term as defined in subsection A of § 51.5-41.

B. It shall be an unlawful discriminatory practice for an employer to:

1. Refuse to make reasonable accommodation to the known physical and mental impairments of an otherwise qualified person with a disability, if necessary to assist such person in performing a particular

183 job, unless the employer can demonstrate that the accommodation would impose an undue hardship on
184 the employer. In determining whether an accommodation would constitute an undue hardship upon the
185 employer, the following shall be considered:

186 a. Hardship on the conduct of the employer's business, considering the nature of the employer's
187 operation, including composition and structure of the employer's workforce;

188 b. Size of the facility where employment occurs;

189 c. The nature and cost of the accommodations needed, taking into account alternative sources of
190 funding or technical assistance included under § 51.5-173;

191 d. The possibility that the same accommodations may be used by other prospective employees; and

192 e. Safety and health considerations of the person with a disability, other employees, and the public.

193 2. Take adverse action against an employee who requests or uses a reasonable accommodation
194 pursuant to this section.

195 3. Deny employment or promotion opportunities to an otherwise qualified applicant or employee
196 because such employer will be required to make reasonable accommodation for a person with a
197 disability.

198 4. Require an employee to take leave if another reasonable accommodation can be provided to the
199 known limitations related to the disability.

200 5. Fail to engage in a timely, good faith interactive process with an employee who has requested an
201 accommodation pursuant to this section to determine if the requested accommodation is reasonable and,
202 if such accommodation is determined not to be reasonable, discuss alternative accommodations that may
203 be provided.

204 C. An employer shall post in a conspicuous location and include in any employee handbook
205 information concerning an employee's rights to reasonable accommodation for disabilities. Such
206 information shall also be directly provided to (i) new employees upon commencement of their
207 employment and (ii) any employee within 10 days of such employee's providing notice to the employer
208 that such employee has a disability.

209 **§ 51.5-41. Discrimination against otherwise qualified persons with disabilities by employers**
210 **prohibited.**

211 A. No employer shall discriminate in employment or promotion practices against an otherwise
212 qualified person with a disability solely because of such disability. For the purposes of this section, an
213 "otherwise qualified person with a disability" means a person qualified to perform the duties of a
214 particular job or position and whose disability is unrelated to the person's ability to perform such duties
215 or position or is unrelated to the person's qualifications for employment or promotion essential functions
216 of a job with or without reasonable accommodations.

217 B. It is the policy of the Commonwealth that persons with disabilities shall be employed in the state
218 service, the service of the political subdivisions of the Commonwealth, in the public schools, and in all
219 other employment supported in whole or in part by public funds on the same terms and conditions as
220 other persons unless it is shown that the particular disability prevents the performance of the work
221 involved.

222 C. An employer shall make reasonable accommodation to the known physical and mental
223 impairments of an otherwise qualified person with a disability, if necessary to assist such person in
224 performing a particular job, unless the employer can demonstrate that the accommodation would impose
225 an undue burden on the employer. For the purposes of this section, "mental impairment" does not
226 include active alcoholism or current drug addiction and does not include any mental impairment, disease,
227 or defect that has been successfully asserted by an individual as a defense to any criminal charge.

228 1. In determining whether an accommodation would constitute an undue burden upon the employer,
229 the following shall be considered:

230 a. Hardship on the conduct of the employer's business, considering the nature of the employer's
231 operation, including composition and structure of the employer's work force;

232 b. Size of the facility where employment occurs;

233 c. The nature and cost of the accommodations needed, taking into account alternate sources of
234 funding or technical assistance included under § 51.5-173;

235 d. The possibility that the same accommodations may be used by other prospective employees;

236 e. Safety and health considerations of the person with a disability, other employees, and the public.

237 2. Notwithstanding the foregoing, any accommodation that would exceed \$500 in cost shall be
238 rebuttably presumed to impose an undue burden upon any employer with fewer than 50 employees.

239 3. The employer has the right to choose among equally effective accommodations.

240 4. Nothing in this section shall require accommodations when the authority to make such
241 accommodations is precluded under the terms of a lease or otherwise prohibited by statute, ordinance, or
242 other regulation.

243 5. 4. Building modifications made for the purposes of such reasonable accommodation may be made
244 without requiring the remainder of the existing building to comply with the requirements of the Uniform

245 Statewide Building Code.

246 D. Nothing in this section shall prohibit an employer from refusing to hire or promote, from
247 disciplining, transferring, or discharging or taking any other personnel action pertaining to an applicant
248 or an employee who, because of his disability, is unable to adequately perform his duties, or cannot
249 perform such duties in a manner which would not endanger his health or safety or the health or safety
250 of others. Nothing in this section shall subject an employer to any legal liability resulting from the
251 refusal to employ or promote or from the discharge, transfer, discipline of, or the taking of any other
252 personnel action pertaining to a person with a disability who, because of his disability, is unable to
253 adequately perform his duties, or cannot perform such duties in a manner that would not endanger his
254 health or safety or the health or safety of others.

255 E. Nothing in this section shall be construed as altering the provisions of the Virginia Minimum
256 Wage Act (§ 40.1-28.8 et seq.).

257 F. This section shall not apply to employers covered by the federal Rehabilitation Act of 1973.

258 G. ~~No employer who has hired any person because of the requirements of this section shall be liable~~
259 ~~for any alleged negligence in such hiring.~~

260 **2. That the Division of Human Rights of the Department of Law shall develop and publish the**
261 **notice required by subsection C of § 2.2-3905.1 of the Code of Virginia, as created by this act,**
262 **within 120 days of the effective date of this act.**

HOUSE
SUBSTITUTE

HB1848H1