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HOUSE BILL NO. 1848

Offered January 13, 2021

Prefiled January 7, 2021

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 in Chapter 39 of Title 2.2 a section numbered 2.2-3910, relating to the Virginia Human Rights Act; discrimination on the basis of disability.*

Patrons—Sickles, Adams, D.M., Levine, Roem, Tran, Askew, Ayala, Bulova, Carr, Carter, Cole, J.G., Cole, M.L., Delaney, Gooditis, Guzman, Hayes, Helmer, Hope, Hudson, Hurst, Jenkins, Keam, Kory, Krizek, Lopez, McQuinn, Mugler, Mullin, Mundon King, Murphy, Plum, Price, Rasoul, Reid, Samirah, Scott, Simon, Simonds, Subramanyam, Tyler, Watts and Willett; Senator: McClellan

Referred to Committee on General Laws

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 in Chapter 39 of Title 2.2 a section numbered 2.2-3910 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

56 concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of
57 employment. "Labor organization" includes employee representation committees, groups, or associations
58 in which employees participate.

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

61 B. It is an unlawful employment practice for:

62 1. An employer to:

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

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

73 2. An employment agency to:

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

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

80 3. A labor organization to:

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

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

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

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

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

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

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

111 8. An employer, labor organization, employment agency, or joint apprenticeship committee
112 controlling an apprenticeship or other training program to print or publish, or cause to be printed or
113 published, any notice or advertisement relating to (i) employment by such an employer, (ii) membership
114 in or any classification or referral for employment by such a labor organization, (iii) any classification or
115 referral for employment by such an employment agency, or (iv) admission to, or employment in, any
116 program established to provide apprenticeship or other training by such a joint apprenticeship committee
117 that indicates any preference, limitation, specification, or discrimination based on race, color, religion,

118 sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical
119 conditions, age, status as a veteran, *disability*, or national origin, except that such a notice or
120 advertisement may indicate a preference, limitation, specification, or discrimination based on religion,
121 sex, age, or national origin when religion, sex, age, or national origin is a bona fide occupational
122 qualification for employment.

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

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

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

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

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

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

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

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

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

171 § 2.2-3910. *Causes of action for failure to provide reasonable accommodation for persons with*
172 *disabilities.*

173 A. *As used in this section:*

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

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

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

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

179 "Otherwise qualified person with a disability" means the term as defined in subsection A of
180 § 51.5-41.

181 B. No employer shall:

182 1. Refuse to make reasonable accommodation to the known physical and mental impairments of an
183 otherwise qualified person with a disability, if necessary to assist such person in performing a particular
184 job, unless the employer can demonstrate that the accommodation would impose an undue hardship on
185 the employer. In determining whether an accommodation would constitute an undue hardship upon the
186 employer, the following shall be considered:

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

189 b. Size of the facility where employment occurs;

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

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

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

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

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

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

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

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

210 E. An employee or applicant who has been denied any of the rights afforded under subsection B may
211 bring an action in a general district or circuit court having jurisdiction over the employer that allegedly
212 denied such rights. Any such action shall be brought within two years from the date of the unlawful
213 denial of rights or, if the employee or applicant has filed a complaint with the Division of Human
214 Rights of the Department of Law or a local human rights or human relations agency or commission
215 within two years of the unlawful denial of rights, such action shall be brought within 90 days from the
216 date that the Division or a local human rights or human relations agency or commission has rendered a
217 final disposition on the complaint.

218 If the court or jury finds that an unlawful denial of rights afforded under subsection B has occurred,
219 the court or jury may award to the plaintiff, as the prevailing party, compensatory damages, back pay,
220 and other equitable relief. The court may also award reasonable attorney fees and costs and may grant
221 as relief any permanent or temporary injunction, temporary restraining order, or other order, including
222 an order enjoining the defendant from engaging in such practice, or order such affirmative action as
223 may be appropriate.

224 **§ 51.5-41. Discrimination against otherwise qualified persons with disabilities by employers**
225 **prohibited.**

226 A. No employer shall discriminate in employment or promotion practices against an otherwise
227 qualified person with a disability solely because of such disability. For the purposes of this section, an
228 "otherwise qualified person with a disability" means a person qualified to perform the ~~duties of a~~
229 ~~particular job or position and whose disability is unrelated to the person's ability to perform such duties~~
230 ~~or position or is unrelated to the person's qualifications for employment or promotion essential functions~~
231 ~~of a job with or without reasonable accommodations.~~

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

237 C. An employer shall make reasonable accommodation to the known physical and mental
238 impairments of an otherwise qualified person with a disability, if necessary to assist such person in
239 performing a particular job, unless the employer can demonstrate that the accommodation would impose
240 an undue burden on the employer. For the purposes of this section, "mental impairment" does not

241 include active alcoholism or current drug addiction and does not include any mental impairment, disease,
242 or defect that has been successfully asserted by an individual as a defense to any criminal charge.

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

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

247 b. Size of the facility where employment occurs;

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

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

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

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

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

255 4. 3. Nothing in this section shall require accommodations when the authority to make such
256 accommodations is precluded under the terms of a lease or otherwise prohibited by statute, ordinance, or
257 other regulation.

258 5. 4. Building modifications made for the purposes of such reasonable accommodation may be made
259 without requiring the remainder of the existing building to comply with the requirements of the Uniform
260 Statewide Building Code.

261 D. Nothing in this section shall prohibit an employer from refusing to hire or promote, from
262 disciplining, transferring, or discharging or taking any other personnel action pertaining to an applicant
263 or an employee who, because of his disability, is unable to adequately perform his duties, or cannot
264 perform such duties in a manner which would not endanger his health or safety or the health or safety
265 of others. Nothing in this section shall subject an employer to any legal liability resulting from the
266 refusal to employ or promote or from the discharge, transfer, discipline of, or the taking of any other
267 personnel action pertaining to a person with a disability who, because of his disability, is unable to
268 adequately perform his duties, or cannot perform such duties in a manner that would not endanger his
269 health or safety or the health or safety of others.

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

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

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

275 2. That the Division of Human Rights of the Department of Law shall develop and publish the
276 notice required by subsection D of § 2.2-3910 of the Code of Virginia, as created by this act,
277 within 120 days of the effective date of this act.