

2021 SPECIAL SESSION I

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HB1848ER

VIRGINIA ACTS OF ASSEMBLY — CHAPTER

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An Act 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.

[H 1848]

Approved

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:

57 1. An employer to:

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

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

68 2. An employment agency to:

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

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

75 3. A labor organization to:

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

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

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

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

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

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

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

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

118 qualification for employment.

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

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

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

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

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

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

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

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

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

168 **§ 2.2-3905.1. Reasonable accommodations for persons with disabilities; unlawful discriminatory  
169 practice; notice of rights.**

170 A. As used in this section:

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

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

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

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

176 "Otherwise qualified person with a disability" means the term as defined in subsection A of  
177 § 51.5-41.

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

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

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

186 b. Size of the facility where employment occurs;

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

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

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

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

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

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

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

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

207 **§ 51.5-41. Discrimination against otherwise qualified persons with disabilities by employers**  
 208 **prohibited.**

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

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

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

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

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

230 b. Size of the facility where employment occurs;

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

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

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

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

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

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

240 other regulation.

241 5. 4. Building modifications made for the purposes of such reasonable accommodation may be made  
242 without requiring the remainder of the existing building to comply with the requirements of the Uniform  
243 Statewide Building Code.

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

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

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

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

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