

JAN 23 2020

A BILL FOR AN ACT

RELATING TO EMPLOYMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that the employment
2 practices laws under sections 378-2, 378-2.3, 378-2.5, and
3 378-2.7, Hawaii Revised Statutes, relate to discriminatory
4 practices, unequal pay due to sex discrimination, and employer
5 investigations into criminal conviction records and credit
6 history, respectively. These sections were enacted to prohibit
7 employment discrimination against individuals based upon
8 protected categories but were not intended to prevent employers
9 from taking employment action for reasons unrelated to the
10 categories protected by the legislature in those sections.

11 Pursuant to a 2015 Hawaii Supreme Court decision, *Adams v.*
12 *CDM Media USA, Inc.*, 135 Haw. 1, 346 P.3d 70 (2015), an employer
13 is prohibited from carrying its burden of production to support
14 that the employer legitimately refused to hire an applicant
15 solely by alleging that the applicant did not meet a non-
16 mandatory core job function that was stated in the posting for
17 the open position. The legislature believes that this ruling



1 unreasonably narrows the basis upon which an employer can
2 decline to hire applicants. This narrowing may result in costly
3 litigation even if a non-discriminatory reason that is not based
4 on a protected classification supports the disqualification of
5 an applicant.

6 Accordingly, the purpose of this Act is to state the
7 legislature's intent and to clarify that Hawaii's anti-
8 discrimination law, as set forth in part I of chapter 378,
9 Hawaii Revised Statutes, does not prohibit refusals to hire or
10 refer or terminations of employment that are not based on any
11 prohibited discriminatory practices in section 378-2, Hawaii
12 Revised Statutes; unequal pay due to sex discrimination as
13 prohibited in section 378-2.3, Hawaii Revised Statutes; criminal
14 conviction record inquiries prohibited in section 378-2.5,
15 Hawaii Revised Statutes; and credit history inquiries prohibited
16 in section 378-2.7, Hawaii Revised Statutes.

17 SECTION 2. Section 378-3, Hawaii Revised Statutes, is
18 amended to read as follows:

19 "**§378-3 Exceptions.** Nothing in this part shall be deemed
20 to:



S.B. NO. 2785

- 1 (1) Repeal or affect any law, ordinance, or government
2 rule having the force and effect of law;
- 3 (2) Prohibit or prevent the establishment and maintenance
4 of bona fide occupational qualifications reasonably
5 necessary to the normal operation of a particular
6 business or enterprise, and that have a substantial
7 relationship to the functions and responsibilities of
8 prospective or continued employment;
- 9 (3) Prohibit or prevent an employer, employment agency, or
10 labor organization from refusing to hire, from
11 refusing to refer, or [~~discharge~~] from discharging any
12 individual for reasons relating to the ability of the
13 individual to perform the work in question[+] or
14 unrelated to any practices or actions prohibited by
15 sections 378-2, 378-2.3, 378-2.5, or 378-2.7;
- 16 (4) Affect the operation of the terms or conditions of any
17 bona fide retirement, pension, employee benefit, or
18 insurance plan that is not intended to evade the
19 purpose of this chapter; provided that this exception
20 shall not be construed to permit any employee plan to



- 1 set a maximum age requirement for hiring or a
2 mandatory retirement age;
- 3 (5) Prohibit or prevent any religious or denominational
4 institution or organization, or any organization
5 operated for charitable or educational purposes, that
6 is operated, supervised, or controlled by or in
7 connection with a religious organization, from giving
8 preference to individuals of the same religion or
9 denomination or from making a selection calculated to
10 promote the religious principles for which the
11 organization is established or maintained;
- 12 (6) Conflict with or affect the application of security
13 regulations or rules in employment established by the
14 United States or the State;
- 15 (7) Require the employer to execute unreasonable
16 structural changes or expensive equipment alterations
17 to accommodate the employment of a person with a
18 disability;
- 19 (8) Prohibit or prevent the department of education or
20 private schools from considering criminal convictions



- 1 in determining whether a prospective employee is
2 suited to working in close proximity to children;
- 3 (9) Prohibit or prevent any financial institution in which
4 deposits are insured by a federal agency having
5 jurisdiction over the financial institution from
6 denying employment to or discharging from employment
7 any person who has been convicted of any criminal
8 offense involving dishonesty or a breach of trust,
9 unless it has the prior written consent of the federal
10 agency having jurisdiction over the financial
11 institution to hire or retain the person;
- 12 (10) Preclude any employee from bringing a civil action for
13 sexual harassment or sexual assault and infliction of
14 emotional distress or invasion of privacy related
15 thereto; provided that notwithstanding section 368-12,
16 the commission shall issue a right to sue on a
17 complaint filed with the commission if it determines
18 that a civil action alleging similar facts has been
19 filed in circuit court; or
- 20 (11) Require the employer to accommodate the needs of a
21 nondisabled person associated with or related to a



S.B. NO. 2785

1 person with a disability in any way not required by
2 title I of the Americans with Disabilities Act."

3 SECTION 3. Statutory material to be repealed is bracketed
4 and stricken. New statutory material is underscored.

5 SECTION 4. This Act shall take effect upon its approval.

6

INTRODUCED BY: *Mark D. W.*

By Request



S.B. NO. 2785

Report Title:

Employment Practices; Discriminatory Practices

Description:

Clarifies that Hawaii's anti-discrimination law does not prohibit or prevent an employer, employment agency, or labor organization from refusing to hire or refer or from discharging an individual for reasons unrelated to unlawful discriminatory practices.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

