

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2023-2024 Regular Session**

SB 731 (Ashby)  
Version: February 17, 2023  
Hearing Date: April 18, 2023  
Fiscal: Yes  
Urgency: No  
TSG

*[NOTE: This is an analysis of the bill as proposed to be amended. A mockup of the proposed amendments appears at the end.]*

**SUBJECT**

Employment discrimination: unlawful practices: disability: work from home

**DIGEST**

This bill requires employers to provide 30 days' advance notice before requiring employees to work in-person work if those employees have been working remotely pursuant to an employer policy. The bill also requires the notice to include specified text informing disabled employees of their right to request a reasonable accommodation.

**EXECUTIVE SUMMARY**

In response to public health orders, many employers instituted remote work policies during some or all of the height of the COVID-19 pandemic. At the same time, unemployment rates among people with disabilities fell. This trend may reverse as employers recall their employees to in-person work. To ensure that employees with disabilities who are called back to in-person work have the time and information they need to request continued remote work as a reasonable accommodation if they need it, this bill requires employers to provide employees with 30 days' advance notice when the employer intends to end a remote work policy and bring employees back in-person, including specific text about the right to request a reasonable accommodation. The bill does not alter the legal process for handling such a request and does not alter the legal standard by which such a request must be evaluated.

The bill is author-sponsored. Support comes from organizations who appreciate the intent to promote greater access to employment for people with disabilities. There is no opposition on file. If the bill passes out of this Committee, it will next be heard in the Senate Appropriations Committee.

**PROPOSED CHANGES TO THE LAW**

Existing federal law:

- 1) Requires, pursuant to the Americans with Disabilities Act (ADA), that all state and local government employers and all private employers with 15 or more employees, provide reasonable accommodation to qualified employees or applicants with disabilities, as defined, unless to do so would cause the employer undue hardship. (42 U.S.C. §§ 12101-12117, 12201-12213.)
- 2) Defines a “qualified individual” as an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job. (42 U.S.C. § 12111(8).)
- 3) States that “reasonable accommodation” may include making existing facilities used by employees readily accessible to and usable by individuals with disabilities, job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. (42 U.S.C. § 12111(9).)
- 3) Defines an “undue hardship” as an action requiring significant difficulty or expense, when considered in light of the following factors, among other things:
  - a) the nature and cost of the accommodation needed under this Act;
  - b) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
  - c) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
  - d) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity. (42 U.S.C. § 12111(10).)
- 4) Specifies that the ADA supersedes state law, except where state law provides greater protections for individuals with disabilities. (29 C.F.R. § 1630.1(c)(2).)

Existing state law:

- 1) Makes it an unlawful employment practice, unless based upon a bona fide occupational qualification, for an employer, because of physical disability, mental disability, or medical condition, as defined, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment. (Gov. Code § 12940(a).)
- 2) Clarifies that (1), above, does not prohibit an employer from refusing to hire or discharging an employee with a physical disability, mental disability, or medical condition, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical mental disability, if the employee, because of a physical disability, mental disability, or medical condition, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. (Gov. Code § 12940(a)(1) and (2).)
- 3) Defines "mental disability" to include, but not be limited to, all of the following:
  - a) having any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity, as specified;
  - b) any other mental or psychological disorder or condition that requires special education or related services;
  - c) having a record or history of a mental or psychological disorder or condition described in (a) or (b) which is known to the employer;
  - d) being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult;
  - e) being regarded or treated by the employer or other entity covered by this part as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability as described in (a) or (b). (Gov. Code 12926(j).)
- 4) Defines "physical disability" to include, but not be limited to, all of the following:
  - a) having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects specified body systems and limits major life activity, as specified;
  - b) a physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult;

- c) any other health impairment not described in (a) that requires special education or related services;
  - d) having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in (a) or (b), which is known to the employer or other entity covered by this part;
  - e) being regarded or treated by the employer or other entity covered by this part as having, or having had, any physical condition that makes achievement of a major life activity difficult;
  - f) being regarded or treated by the employer or other entity covered by this part as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in (a) and (b). (Gov. Code 12926(m).)
- 5) Excludes sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs from the definitions of “mental disability” and “physical disability.” (Gov. Code 12926(j) and (m).)
- 6) Defines “essential functions” to mean the fundamental job duties of the employment position the individual with a disability holds or desires and clarifies that marginal functions of the position are not included. (Gov. Code § 12926(f).)
- 7) Specifies that a job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:
- a) the reason the position exists is to perform that function;
  - b) the limited number of employees available among whom the performance of that job function can be distributed; and
  - c) the function may be highly specialized, so that the incumbent in the position is hired based on expertise or the ability to perform a particular function. (Gov. Code § 12926(f)(1).)
- 8) Specifies that evidence of whether a particular function is essential includes, but is not limited to, the following:
- a) the employer’s judgment as to which functions are essential;
  - b) written job descriptions prepared before advertising or interviewing applicants for the job;
  - c) the amount of time spent on the job performing the function;
  - d) the consequences of not requiring the incumbent to perform the function;
  - e) the terms of a collective bargaining agreement;
  - f) the work experiences of past incumbents in the job; and
  - g) the current work experience of incumbents in similar jobs. (Gov. Code § 12926(f)(2).)

- 9) Makes it an unlawful employment practice for an employer to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee but does not require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship, as defined, to its operation. (Gov. Code § 12940(m)(2).)
- 10) Makes it an unlawful employment practices for an employer to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition. (Gov. Code § 12940(n).)
- 11) Defines “reasonable accommodation” to include either of the following:
  - a) making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities; or
  - b) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. (Gov. Code § 12926(p).
- 12) Defines “undue hardship” to mean an action requiring significant difficulty or expense, when considered in light of the following factors:
  - a) the nature and cost of the accommodation needed;
  - b) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility;
  - c) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities;
  - d) the type of operations, including the composition, structure, and functions of the workforce of the entity; and
  - e) the geographic separateness or administrative or fiscal relationship of the facility or facilities. (Gov. Code § 12926(u).)
- 11) Makes it an unlawful employment practice for an employer to retaliate or otherwise discriminate against a person for requesting accommodation of a physical or mental disability, regardless of whether the request was granted. (Gov. Code § 12940(m)(2).)

This bill (as proposed to be amended):

- 1) Requires employers to provide employees working remotely pursuant to an employer policy with 30 days' advance notice before recalling those employees to in-person work.
- 2) Requires the notice to include the following text: "You have the right to ask your employer to allow you to continue working remotely as an accommodation if you have a disability. Your employer is required to engage in a timely, good faith, interactive process to determine if there are effective reasonable accommodations for your disability, including working remotely. If you are able to perform all of your essential job functions while working remotely, your employer must grant your request unless it would create an undue hardship for your employer, an alternative reasonable accommodation is available, or you do not meet the definition of disability under the law. You can learn more about your rights at <https://calcivilrights.ca.gov/accommodation/>."

### COMMENTS

1. The role of remote work in expanding employment opportunity for people with disabilities over the course of the COVID-19 pandemic

The unemployment rate among people with disabilities is disproportionately high. According to U.S. Bureau of Labor Statistics data, that rate is currently about twice as high as it is for the overall population.<sup>1</sup> Over the course of the last decade, levels of unemployment were generally trending lower, from highs around 15 percent down to around 7 percent when the COVID-19 pandemic struck in March 2020.<sup>2</sup> As it did for the overall population, unemployment among people with disabilities then spiked. Since then, however, the employment rate for people with disabilities has improved dramatically. By late 2022, it stood at a mere 5 percent.

While different factors may have contributed to this pattern, the author and several commentators point to the widespread adoption of remote working options as the key. Interviewed for a Los Angeles Times article on the subject, Rutgers University Associate Professor Mason Ameri, who studies disability employment, called remote work: "a total game changer."<sup>3</sup> Similarly, academic papers have drawn a link between the

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<sup>1</sup> *Employment Status of the Civilian Noninstitutional Population by Disability Status and Selected Characteristics, 2022 Annual Averages*. U.S. Bureau of Labor Statistics <https://www.bls.gov/news.release/disabl.t01.htm> (as of Mar. 12, 2023).

<sup>2</sup> These statistics and those that follow in this paragraph are derived from: *Labor Force Statistics from the Current Population Survey: Unemployment Rate - With a Disability, 16 Years and Over* [https://data.bls.gov/timeseries/LNU04074597&years\\_option=all\\_years](https://data.bls.gov/timeseries/LNU04074597&years_option=all_years) (as of Mar. 12, 2023).

<sup>3</sup> Lee, Surge in Remote Working Due to COVID Fuels Record Employment for People with Disabilities (Dec. 15, 2022) Los Angeles Times <https://www.latimes.com/politics/story/2022-12-15/long-left-out-of-job-market-people-with-disabilities-reap-benefits-of-covid-19s-teleworking-boom> (as of Mar. 12, 2023).

increase in workforce participation among people with disabilities and the rise of remote work. After examining employment data spanning the pre-pandemic and pandemic periods, two Harvard University researchers concluded that:

examination of the occupations where disabled employment growth has exceeded that of non-disabled suggests that these trends are not solely attributable to tight labor markets but may also be shaped by the structural shifts in the workforce brought about by COVID-19, in particular the shift towards telework.<sup>4</sup>

2. Opportunities for workers with disabilities to work remotely could recede with widespread return to work in-person

The author is concerned that, as many employers have or will soon migrate back to in-person work, opportunities for employees with disabilities to work remotely may begin to recede. As a result, the boom in employment for people with disabilities may start to fade if it has not done so already. Perhaps notably, after dropping precipitously over the course of the COVID-19 pandemic, the unemployment rate for people with disabilities has begun to tick upward again in the first two months of 2023.<sup>5</sup>

3. How this bill aims to help preserve remote work opportunities for at least some workers with disabilities

As proposed to be amended, this bill requires employers to give employees who are working remotely pursuant to their employer's policy at least 30 days' advance notice before ending that policy and recalling the employees to in-person work. While this notice has the added benefit of giving all employees time to make whatever arrangements are necessary to adjust back to in-person work, the author's primary intent is to make sure that workers with disabilities have sufficient time to submit a request for continued remote work as a reasonable accommodation. For this same reason, the notice must include specific text alerting employees of their right to make an accommodation request.

Importantly, however, the bill does not alter the process by which employers are supposed to respond to such a request nor does the bill change the legal standard under which such a request must be evaluated. Both workers with disabilities and their employers would have the same obligations and rights as they do under existing law, but the bill helps make certain that workers with disabilities are aware of these rights and that they have sufficient time to exercise those rights if they wish to do so. Thus, while the bill does not guarantee workers with disabilities that they will be allowed to

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<sup>4</sup> Ne'eman A, Maestas N. *How Has COVID-19 Impacted Disability Employment?* (Dec. 14, 2022) Disability Health Journal <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9747687/> (as of Mar. 12, 2023).

<sup>5</sup> *Labor Force Statistics from the Current Population Survey: Unemployment Rate - With a Disability, 16 Years and Over* [https://data.bls.gov/timeseries/LNU04074597&years\\_option=all\\_years](https://data.bls.gov/timeseries/LNU04074597&years_option=all_years) (as of Mar. 12, 2023).

continue working remotely, it should help to ensure that workers with disabilities do not lose employment when continued remote work was a viable option to enable them to remain on the job.

#### 4. Amendments

This analysis pertains to the bill as the author proposes to amend it through amendments to be offered in Committee. A mock-up of the amendments in context is attached to this analysis.

#### 5. Arguments in support of the bill

According to the author:

SB 731 ensures that disabled employees, who have demonstrated the ability to work with an accommodation during the pandemic, can continue to receive flexibility from their employers. After generations of being overlooked and sidelined in the job market, individuals with disabilities have experienced an unprecedented employment boom. The pandemic fueled record employment rates for people with disabilities, thanks to increased flexibility in the workplace. Disability employment rates are now the best they have been since the Great Recession. [...] Improving employment access and flexibility is essential to maintaining our workforce, and SB 731 seeks to continue to allow employees with disabilities the agency of a flexible work environment [...].

In support of the bill, the California Catholic Conference writes:

Working from home has always been a vital accommodation to help people with disabilities, particularly those with mobility impairments, remain part of the workforce. Hesitancy around how remote working might operate and lack of experience of seeing it in practice among employers has traditionally been a barrier for workers with disabilities to have to overcome. Historic opportunities for reasonable accommodation have allowed some of our most skilled and underutilized workers to obtain meaningful employment. [...] [SB 731] will allow our disabled individuals to remain part of our workforce and not have to choose between quitting their jobs and working without reasonable accommodations.

**SUPPORT**

California Catholic Conference  
The Arc and United Cerebral Palsy California Collaboration  
National Association of Social Workers, California Chapter

**OPPOSITION**

None known

**RELATED LEGISLATION**

Pending Legislation: None known.

Prior Legislation: None known.

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**Amended Mock-up for 2023-2024 SB-731 (Ashby (S))**

**Mock-up based on Version Number 99 - Introduced 2/17/23**

**THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:**

**SECTION 1.** Section 12940.2 is added to the Government Code, to read:

**12940.2.-** (a) It shall be an unlawful employment practice for an employer to fail to provide an employee who is working from home pursuant to an agreement with, or policy of, the employer with at least 30 days' advance notice before requiring that employee to return to work in person.

(b) The notice required pursuant to subdivision (a) shall include, at a minimum, the following text: "You have the right to ask your employer to allow you to continue working remotely as an accommodation if you have a disability. Your employer is required to engage in a timely, good faith, interactive process to determine if there are effective reasonable accommodations for your disability, including working remotely. If you are able to perform all of your essential job functions while working remotely, your employer must grant your request unless it would create an undue hardship for your employer, an alternative reasonable accommodation is available, or you do not meet the definition of disability under the law. You can learn more about your rights at <https://calcivilrights.ca.gov/accommodation/>."

~~(a) For purposes of this section "qualifying disability" means an employee's medical provider has determined that the employee has a disability that significantly impacts the employee's ability to work outside of their home.~~

~~(b) An employee with a qualifying disability may initiate a renewed reasonable accommodation request to perform their work remotely if all of the following requirements are met:~~

~~(1) The employee requested remote work as a reasonable accommodation before March 1, 2020, and that request was denied or an alternative accommodation was provided.~~

~~(2) The employee performed their essential job functions remotely for at least 6 of the 24 months preceding the renewed request.~~

~~(3) The employee's essential job functions are the same at the time of the renewed request as when the employee performed their work remotely as described in paragraph (2).~~

~~(c) An employer shall grant a renewed request made pursuant to subdivision (b) if the requirements in paragraphs (1) to (3), inclusive, of subdivision (b) are met.~~

~~(d) The employer shall not be obligated to provide remote work as a reasonable accommodation under this section if the employee can no longer perform all of their essential job functions remotely.~~

~~(e) If the employer denies a renewed request, the employer shall do both of the following:~~

~~(1) Provide written notice to the employee within 30 days of denial, including providing the employer's reasons for denial.~~

~~(2) Give the employee 30 days' notice to report back to inperson work.~~

~~(f) If the employee's renewed request under subdivision (b) is denied or revoked under subdivision (d), this section does not prohibit the employee from requesting remote work as a reasonable accommodation under subdivision (m) of Section 12940, and this section does not limit an employer's duty to comply with subdivisions (m) and (n) of Section 12940.~~

~~(g) The employer may request written notice from the employee's medical provider to determine if the employee has a qualifying disability.~~