

SENATE BILL REPORT

ESSB 6068

As Amended by House, February 27, 2018

Title: An act relating to the applicability of nondisclosure agreements in civil actions for sexual harassment or assault.

Brief Description: Concerning the applicability of nondisclosure agreements in civil actions for sexual harassment or assault.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Frockt, Pedersen, Palumbo, Conway, Saldaña, Kuderer and Mullet).

Brief History:

Committee Activity: Law & Justice: 1/25/18, 1/30/18 [DPS, w/oRec].

Floor Activity:

Passed Senate: 2/08/18, 48-0.

Passed House: 2/27/18, 98-0.

Brief Summary of Engrossed First Substitute Bill

- Limits the use of nondisclosure agreements (NDA) in civil lawsuits related to sexual harassment or sexual assault.
- Clarifies that non-disclosure agreements include any arbitration agreement or decision.
- Permits the discovery of past instances of sexual harassment or sexual assault in a civil lawsuit notwithstanding any NDA.
- Permits witness testimony of past instances of sexual harassment or sexual assault in a civil lawsuit notwithstanding any NDA.
- Upon motion of any party supported by affidavit or declaration the court shall enter orders to protect the identity of any victim.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 6068 be substituted therefor, and the substitute bill do pass.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Angel, Assistant Ranking Member; Darneille, Frockt and Wilson.

Minority Report: That it be referred without recommendation.

Signed by Senator Padden, Ranking Member.

Staff: Tim Ford (786-7423)

Background: A NDA is a form of contract between two or more parties that restricts the disclosure of confidential material or information to third parties. In general, state contract law governs NDAs. Employers commonly use NDAs to protect trade secrets or intellectual property. NDAs may be required as a condition of employment when an applicant is first hired, and in severance or separation agreements when an employee leaves. NDAs are also used in settlements as a means to resolve disputes or civil lawsuits. Typically, in NDAs one party agrees to drop a lawsuit or potential lawsuit in return for payment and silence. Breaching a signed NDA contract may result in the loss of settlement money and gives the defendant the right to sue.

There are limitations on NDAs. NDAs may not restrict a person's right to report harassment, discrimination, and criminal activity to authorities. Under the Washington Law Against Discrimination (WLAD), a person has the right to be free from discrimination related to a protected status, such as race, national origin, sex, veteran or military status, sexual orientation, and disability. An employer may not discriminate against a person because of the person's protected status. Sexual harassment is a form of sex discrimination under WLAD and Title VII of the Civil Rights Act of 1964.

Summary of Engrossed First Substitute Bill: In civil lawsuits relating to sexual harassment or assault, a NDA does not affect discovery or the availability of witness testimony for past instances of sexual harassment or assault. NDAs include arbitration agreements or decisions. Any provision of a nondisclosure policy or agreement that would limit, prevent, or punish disclosure related to discovery and witness testimony is contrary to public policy and unenforceable.

Upon motion of any party supported by affidavit or sworn declaration, or without motion but upon the court's own accord, the court shall enter orders to protect the identity of any victim, unless such person consents to disclosure.

The bill does not alter the standard for admissibility of evidence.

Appropriation: None.

Fiscal Note: Not requested.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: People in power have demonstrated predatory behavior for sexual harassment and sexual assault. Non-disclosure agreements are used to hide sexual harassment and sexual assault. These NDAs are facilitating bad behavior by perpetual harassers. The bill protects victim's privacy and is good because it balances the need for privacy and also stopping sexual harassment. There needs to be further clarification with regard to arbitration agreements.

Persons Testifying: PRO: Senator David Frockt, Prime Sponsor; Nancy Sapiro, Legal Voice; Larry Shannon, Washington State Association for Justice.

Persons Signed In To Testify But Not Testifying: No one.

EFFECT OF HOUSE AMENDMENT(S):

- Makes the provisions applicable to both judicial and administrative actions.
- Reuses the term "sexual" in the conjunctive phrase "sexual harassment or assault" throughout the bill to now read "sexual harassment or sexual assault."
- Makes the act applicable to actions pending as of the effective date and actions filed after the effective date.