S-4726.1

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**SUBSTITUTE SENATE BILL 6102**

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**State of Washington 65th Legislature 2018 Regular Session**

**By** Senate Health & Long Term Care (originally sponsored by Senators Ranker, Cleveland, Saldaña, Darneille, Palumbo, Nelson, Wellman, Dhingra, Keiser, Billig, Kuderer, Rolfes, Frockt, Takko, McCoy, Carlyle, Hasegawa, Mullet, Pedersen, Conway, Chase, Liias, Van De Wege, and Hunt)

AN ACT Relating to enacting the employee reproductive choice act; amending RCW 49.60.030 and 48.43.065; reenacting and amending RCW 49.60.040; adding new sections to chapter 49.60 RCW; and creating new sections.

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

NEW SECTION. **Sec.**  This act may be known and cited as the employee reproductive choice act.

NEW SECTION. **Sec.**  The legislature finds that the people of the state of Washington have long supported privacy rights of individuals and have repeatedly stated that discrimination based on sex or interference with a woman's fundamental right to choose or refuse birth control is against the public policy of the state. These policies began with adoption of the state Constitution and Article I, section 7 of the state Constitution, which provides that no one is to be disturbed in their private affairs without authority of law. In 1972, Washington voters went further by approving Article XXXI of the state Constitution, which provides that legal rights and responsibilities shall not be abridged or denied on the basis of sex. In 1991, Washington voters approved Initiative Measure No. 120, the reproductive privacy act. That act clearly states that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions and that every individual has the fundamental right to choose or refuse birth control.

The legislature further finds that access to contraceptive services provides economic and social benefits to women and their families. Women with reliable access to contraceptive services have forty percent higher earnings than those who lack such access, and access to contraception can significantly increase a woman's earning power. Women who use contraception to plan pregnancies tend to have healthier pregnancies and, by spacing births, have healthier outcomes for themselves as well as their babies.

The legislature also finds that the affordable care act requires health plans to offer a comprehensive package of items and services, known as essential health benefits. These benefits include the provision of preventative and wellness services, with specific services to be made available to women such as breast and cervical cancer screening, sexually transmitted disease screening, and access to all food and drug administration-approved contraceptive drugs and devices. Because certain religious employers objected to providing contraceptive coverage, an accommodation was developed through federal rule, under which the religious employer's health insurance carrier must provide separate payments for contraceptive coverage at no cost to the employee or the employer.

The legislature further finds that while this contraceptive coverage accommodation was originally available only to those religious employers organized and operated as nonprofit entities, the supreme court, in its June 30, 2014, decision in the matter of *Burwell, Secretary of Health and Human Services, et al. v. Hobby Lobby Stores, Inc.*, held that closely held for-profit corporations whose owners have sincerely held religious beliefs are not required to purchase contraceptive coverage for their employees under federal law and may avail themselves of the federal contraceptive coverage accommodation. In October 2017, the federal government issued interim final rules expanding the contraceptive coverage exemption to include nearly any for-profit entity that has moral or religious objections to providing their employees with contraceptive services. The federal rules also make the accommodation optional.

The legislature also finds that only those employers that qualify as a religious or sectarian organization not organized for private profit may claim an exemption to Washington's law against discrimination.

Therefore, the legislature intends to clarify that, in Washington, barrier free access to birth control remains a fundamental right and that discriminating against women through limitations on access to essential health benefits is against the public policy of this state and subject to the jurisdiction of the human rights commission and the state's law against discrimination.

NEW SECTION. **Sec.**  A new section is added to chapter 49.60 RCW to read as follows:

Except as provided in section 4 of this act, it is an unfair practice for any employer who provides health insurance to its employees as part of an employee's benefit package to fail to provide contraceptive coverage at no cost to the employee.

NEW SECTION. **Sec.**  A new section is added to chapter 49.60 RCW to read as follows:

Employers for which state regulation under section 3 of this act is preempted must, pursuant to the affordable care act, comply with affordable care act requirements and rules on barrier free access to contraceptive coverage. Failure to comply with affordable care act requirements and rules constitutes an unfair practice, subject to the jurisdiction of the human rights commission and the state's law against discrimination.

NEW SECTION. **Sec.**  A new section is added to chapter 49.60 RCW to read as follows:

It is an unfair practice for any employer to discharge, expel, or otherwise discriminate with respect to compensation, terms, conditions, or privileges of employment against any employee based on that employee’s reproductive decisions, including whether to use any reproductive health care service, contraceptive drug, or contraceptive device.

NEW SECTION. **Sec.**  A new section is added to chapter 49.60 RCW to read as follows:

Any employee injured by an act in violation of section 3, 4, or 5 of this act:

(1) May file a complaint with the commission and the commission must investigate the complaint if the commission determines that the complaint is subject to the jurisdiction of this chapter; and

(2) May pursue a civil action in a court of competent jurisdiction to either enjoin further violations, or recover actual damages sustained by the employee, or both, together with the cost of suit including reasonable attorneys' fees.

**Sec.**  RCW 49.60.030 and 2009 c 164 s 1 are each amended to read as follows:

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(a) The right to obtain and hold employment without discrimination;

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

(c) The right to engage in real estate transactions without discrimination, including discrimination against families with children;

(d) The right to engage in credit transactions without discrimination;

(e) The right to engage in insurance transactions or transactions with health maintenance organizations without discrimination: PROVIDED, That a practice which is not unlawful under RCW 48.30.300, 48.44.220, or 48.46.370 does not constitute an unfair practice for the purposes of this subparagraph;

(f) The right to engage in commerce free from any discriminatory boycotts or blacklists. Discriminatory boycotts or blacklists for purposes of this section shall be defined as the formation or execution of any express or implied agreement, understanding, policy or contractual arrangement for economic benefit between any persons which is not specifically authorized by the laws of the United States and which is required or imposed, either directly or indirectly, overtly or covertly, by a foreign government or foreign person in order to restrict, condition, prohibit, or interfere with or in order to exclude any person or persons from any business relationship on the basis of race, color, creed, religion, sex, honorably discharged veteran or military status, sexual orientation, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, or national origin or lawful business relationship: PROVIDED HOWEVER, That nothing herein contained shall prohibit the use of boycotts as authorized by law pertaining to labor disputes and unfair labor practices; ((~~and~~))

(g) The right of a mother to breastfeed her child in any place of public resort, accommodation, assemblage, or amusement; and

(h) The right of an employee whose employer provides health insurance coverage as part of an employee benefit package to receive contraceptive coverage from that employer's health plan free of restrictions, exclusions, or reductions in coverage or benefits.

(2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

(3) Except for any unfair practice committed by an employer against an employee or a prospective employee, or any unfair practice in a real estate transaction which is the basis for relief specified in the amendments to RCW 49.60.225 contained in chapter 69, Laws of 1993, any unfair practice prohibited by this chapter which is committed in the course of trade or commerce as defined in the Consumer Protection Act, chapter 19.86 RCW, is, for the purpose of applying that chapter, a matter affecting the public interest, is not reasonable in relation to the development and preservation of business, and is an unfair or deceptive act in trade or commerce.

**Sec.**  RCW 49.60.040 and 2009 c 187 s 3 are each reenacted and amended to read as follows:

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Aggrieved person" means any person who: (a) Claims to have been injured by an unfair practice in a real estate transaction; or (b) believes that he or she will be injured by an unfair practice in a real estate transaction that is about to occur.

(2) "Any place of public resort, accommodation, assemblage, or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps: PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution.

(3) "Commission" means the Washington state human rights commission.

(4) "Complainant" means the person who files a complaint in a real estate transaction.

(5) "Contraceptive coverage" includes all food and drug administration-approved contraceptive drugs, devices, and prescription barrier methods, and medical services associated with the prescribing, dispensing, delivery, distribution, administration and removal of a prescription contraceptive to the same extent, and on the same terms, as other outpatient services.

(6) "Covered multifamily dwelling" means: (a) Buildings consisting of four or more dwelling units if such buildings have one or more elevators; and (b) ground floor dwelling units in other buildings consisting of four or more dwelling units.

((~~(6)~~)) (7) "Credit transaction" includes any open or closed end credit transaction, whether in the nature of a loan, retail installment transaction, credit card issue or charge, or otherwise, and whether for personal or for business purposes, in which a service, finance, or interest charge is imposed, or which provides for repayment in scheduled payments, when such credit is extended in the regular course of any trade or commerce, including but not limited to transactions by banks, savings and loan associations or other financial lending institutions of whatever nature, stock brokers, or by a merchant or mercantile establishment which as part of its ordinary business permits or provides that payment for purchases of property or service therefrom may be deferred.

((~~(7)~~)) (8)(a) "Disability" means the presence of a sensory, mental, or physical impairment that:

(i) Is medically cognizable or diagnosable; or

(ii) Exists as a record or history; or

(iii) Is perceived to exist whether or not it exists in fact.

(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.

(c) For purposes of this definition, "impairment" includes, but is not limited to:

(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:

(i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or

(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.

(e) For purposes of (d) of this subsection, a limitation is not substantial if it has only a trivial effect.

((~~(8)~~)) (9) "Dog guide" means a dog that is trained for the purpose of guiding blind persons or a dog that is trained for the purpose of assisting hearing impaired persons.

((~~(9)~~)) (10) "Dwelling" means any building, structure, or portion thereof that is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land that is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

((~~(10)~~)) (11) "Employee" does not include any individual employed by his or her parents, spouse, or child, or in the domestic service of any person.

((~~(11)~~)) (12) "Employer" includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit.

((~~(12)~~)) (13) "Employment agency" includes any person undertaking with or without compensation to recruit, procure, refer, or place employees for an employer.

((~~(13)~~)) (14) "Families with children status" means one or more individuals who have not attained the age of eighteen years being domiciled with a parent or another person having legal custody of such individual or individuals, or with the designee of such parent or other person having such legal custody, with the written permission of such parent or other person. Families with children status also applies to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of eighteen years.

((~~(14)~~)) (15) "Full enjoyment of" includes the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons of any particular race, creed, color, sex, sexual orientation, national origin, or with any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, to be treated as not welcome, accepted, desired, or solicited.

((~~(15)~~)) (16) "Honorably discharged veteran or military status" means a person who is:

(a) A veteran, as defined in RCW 41.04.007; or

(b) An active or reserve member in any branch of the armed forces of the United States, including the national guard, coast guard, and armed forces reserves.

((~~(16)~~)) (17) "Labor organization" includes any organization which exists for the purpose, in whole or in part, of dealing with employers concerning grievances or terms or conditions of employment, or for other mutual aid or protection in connection with employment.

((~~(17)~~)) (18) "Marital status" means the legal status of being married, single, separated, divorced, or widowed.

((~~(18)~~)) (19) "National origin" includes "ancestry."

((~~(19)~~)) (20) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons; it includes any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof.

((~~(20)~~)) (21) "Premises" means the interior or exterior spaces, parts, components, or elements of a building, including individual dwelling units and the public and common use areas of a building.

((~~(21)~~)) (22) "Real estate transaction" includes the sale, appraisal, brokering, exchange, purchase, rental, or lease of real property, transacting or applying for a real estate loan, or the provision of brokerage services.

((~~(22)~~)) (23) "Real property" includes buildings, structures, dwellings, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein.

((~~(23)~~)) (24) "Respondent" means any person accused in a complaint or amended complaint of an unfair practice in a real estate transaction.

((~~(24)~~)) (25) "Service animal" means an animal that is trained for the purpose of assisting or accommodating a sensory, mental, or physical disability of a person with a disability.

((~~(25)~~)) (26) "Sex" means gender.

((~~(26)~~)) (27) "Sexual orientation" means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, "gender expression or identity" means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.

**Sec.**  RCW 48.43.065 and 1995 c 265 s 25 are each amended to read as follows:

(1) The legislature recognizes that every individual possesses a fundamental right to exercise their religious beliefs and conscience. The legislature further recognizes that in developing public policy, conflicting religious and moral beliefs must be respected. Therefore, while recognizing the right of conscientious objection to participating in specific health services, the state shall also recognize the right of individuals ((~~enrolled with plans containing the basic health plan services~~)) to receive the full range of services ((~~covered under the plan~~)) required by law to be covered.

(2)(a) No individual health care provider, religiously sponsored health carrier, or health care facility may be required by law or contract in any circumstances to participate in the provision of or payment for a specific service if they object to so doing for reason of conscience or religion. No person may be discriminated against in employment or professional privileges because of such objection.

(b) The provisions of this section are not intended to result in an enrollee being denied timely access to any service ((~~included in the basic health plan services~~)) required by law to be covered. Each health carrier shall:

(i) Provide written notice to enrollees, upon enrollment with the plan, listing services that the carrier refuses to cover for reason of conscience or religion;

(ii) Provide written information describing how an enrollee may directly access services in an expeditious manner; and

(iii) Ensure that enrollees refused services under this section have prompt access to the information developed pursuant to (b)(ii) of this subsection.

(c) The insurance commissioner shall establish by rule a mechanism or mechanisms to recognize the right to exercise conscience while ensuring enrollees timely access to services and to assure prompt payment to service providers.

(3)(a) No individual or organization with a religious or moral tenet opposed to a specific service may be required to purchase coverage for that service or services if they object to doing so for reason of conscience or religion.

(b) The provisions of this section shall not result in an enrollee being denied coverage of, and timely access to, any service or services excluded from their benefits package as a result of their employer's or another individual's exercise of the conscience clause in (a) of this subsection.

((~~(c) The insurance commissioner shall define by rule the process through which health carriers may offer the basic health plan services to individuals and organizations identified in (a) and (b) of this subsection in accordance with the provisions of subsection (2)(c) of this section.~~))

(4) Nothing in this section requires a health carrier, health care facility, or health care provider to provide any health care services without appropriate payment of premium or fee.

NEW SECTION. **Sec.**  If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

**--- END ---**