

HOUSE BILL REPORT

2SHB 1506

As Amended by the Senate

Title: An act relating to workplace practices to achieve gender pay equity.

Brief Description: Addressing workplace practices to achieve gender pay equity.

Sponsors: House Committee on Labor & Workplace Standards (originally sponsored by Representatives Senn, Pellicciotti, Slatter, Macri, Peterson, Chapman, Ortiz-Self, Bergquist, Sawyer, Frame, Gregerson, Farrell, Kilduff, Kagi, Dolan, Clibborn, Pollet, McBride, Stanford, Doglio, Appleton, Robinson, Fitzgibbon, Sells, Goodman, Tharinger, Hudgins, Ormsby, Riccelli, Fey and Pettigrew).

Brief History:

Committee Activity:

Labor & Workplace Standards: 1/24/17, 1/30/17, 1/8/18, 1/9/18 [DP2S];

Appropriations: 2/16/17, 2/24/17 [DPS].

Floor Activity:

Passed House: 3/8/17, 61-36.

First Special Session

Floor Activity:

Passed House: 5/2/17, 61-31.

First Special Session

Floor Activity:

Passed House: 5/25/17, 61-33.

Floor Activity:

Passed House: 1/17/18, 69-28.

Senate Amended.

Passed Senate: 3/1/18, 37-12.

Brief Summary of Second Substitute Bill

- Modifies the Equal Pay Act by defining "similarly employed," referring to gender, modifying defenses, providing an administrative remedy, and making other changes.
- Prohibits discrimination in providing career advancement opportunities based on gender.
- Prohibits retaliation for certain workplace discussions about wages and other matters.

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.

HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass. Signed by 4 members: Representatives Sells, Chair; Gregerson, Vice Chair; Doglio and Frame.

Minority Report: Do not pass. Signed by 3 members: Representatives McCabe, Ranking Minority Member; Pike, Assistant Ranking Minority Member; Manweller.

Staff: Joan Elgee (786-7106).

Background:

Under the state's Equal Pay Act (EPA), an employer who discriminates in the payment of wages as between sexes or who pays any female a less wage than males similarly employed is guilty of a misdemeanor. The EPA further provides that if a female receives less compensation because of sex discrimination, she may sue and recover the difference in compensation she should have received. It is a defense that the difference in wages is based in good faith on a factor or factors other than sex.

The Washington Law Against Discrimination, administered by the Human Rights Commission (Commission), also makes it an unfair employment practice to discriminate in compensation because of sex. Discrimination in promotions or other terms and conditions is also prohibited. Under a work-sharing agreement with the Equal Employment Opportunity Commission (EEOC), complaints alleging a violation of the EPA filed with the Commission are investigated by the EEOC.

The National Labor Relations Act protects the right of some employees to discuss the terms and conditions of employment. Employees who believe their rights have been violated may file a complaint with the National Labor Relations Board (NLRB).

Washington is a "state plan" state for purpose of the federal Occupational Safety and Health Administration. As a state plan state, Washington assumes responsibility for occupational safety and health under the Washington Industrial Safety and Health Act (WISHA). The Department of Labor and Industries adopts rules and otherwise administers the WISHA.

Summary of Second Substitute Bill:

Equal Pay.

The Equal Pay Act is modified in several respects. Employees are "similarly employed" if the performance of the job requires similar skill, effort, and responsibility, and the jobs are performed under similar working conditions. Job titles alone are not determinative.

The employer defense is changed to provide that discrimination does not include a differential based in good faith on a bona fide job-related factor or factors that: (1) are consistent with business necessity; (2) are not based on or derived from a gender-based differential; and (3) account for the entire differential. More than one factor may account for the differential.

Bona fide factors include:

- education, training, or experience;
- a seniority system;
- a merit system;
- a system that measures earnings by quantity or quality of production; or
- a regional difference in compensation levels.

A differential based in good faith on a local government minimum wage law is also a defense. An employee's previous wage or salary history is not a defense.

References are changed from "sex" to "gender," "wage" is changed to "compensation," and compensation is defined to include benefits. Language referring to "males" and "females" is deleted.

Career Advancement Opportunities.

Limiting or depriving an employee of career advancement opportunities based on gender is prohibited, including by failing to announce or provide access to career advancement opportunities, or failing to provide training that is under the employer's control. Employer defenses are the same as for EPA defenses except that the defenses based on regional compensation differences or a minimum wage ordinance do not apply.

Wage Discussions.

An employer may not engage in the following practices:

- require employee nondisclosure of wages as a condition of employment;
- require an employee to sign a document that prevents the employee from disclosing his or her wages; or
- retaliate against an employee for:
 - inquiring about, disclosing, comparing, or otherwise discussing the employee's wages or the wages of another employee;
 - asking the employer to provide a reason for the employee's wages or lack of opportunity for advancement; or
 - aiding or encouraging an employee to exercise their rights.

An employer may prohibit an employee who has access to the compensation of others as part of the employee's essential job functions from disclosing wages of others, with some exceptions. The provisions do not allow an employee to violate the WISHA. An employee is not required to disclose the employee's compensation.

Retaliation.

An employer may not discharge or otherwise discriminate against an employee for filing a complaint or taking other specified actions under the EPA, or the career advancement opportunities or wage discussions provisions.

Enforcement.

An employee may file a complaint with the Department of Labor and Industries (Department), and the Department must investigate complaints. The Director of the Department (Director), upon complaint, may also initiate an investigation. If the Director

determines a violation occurred, the Director must attempt to resolve the violation by conference and conciliation. If the issue is not resolved, the Director may issue a citation to the employer. In addition, a private cause of action is available for the career advancement, wage discussion, and retaliation provisions, in addition to the EPA.

With respect to career advancement opportunity violations, the employee is entitled to administrative and judicial remedies if it is determined that the employer committed a pattern of violations as to an employee or committed a violation through application of a formal or informal employer policy or practice.

The Director or the court may order actual damages; statutory damages equal to the actual damages or \$5,000, whichever is greater; and interest. Costs and reasonable attorneys' fees are available on appeal from the Director's determination and in a civil action. Any wages and interest owed must be calculated from four years before the administrative complaint or the civil action was instituted. The Director may also impose a civil penalty of not more than \$200 for a first violation and the greater of \$1,000 or 10 percent of damages for a repeat violation, payment for the cost of the Department's investigation and enforcement, and any other appropriate relief. The court may also order reinstatement and injunctive relief.

Other.

Rule-making by the Department regarding most provisions is authorized.

EFFECT OF SENATE AMENDMENT(S):

The Senate amendment:

- strikes the examples stated of the prohibition on limiting or depriving an employee of career advancement opportunities (failing to announce or provide access to career advancement opportunities or failing to provide training that is under the employer's control);
- adds a three year statute of limitations for the civil cause of action;
- changes the back pay period from four to 10 years; and
- prohibits local governments from creating a gender pay equity program that alters or amends the provisions for any private employer, or provides for local enforcement of or requires private employers to supplement the provisions.

Appropriation: None.

Fiscal Note: Requested on January 8, 2018.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Stakeholders have worked to create a bill with strong standards and enforcement. The bill will not solve the pay gap but it is a good start. In 35 years, the wage gap has improved by only 10 cents. The disparity is even worse for women of color. Examples of the gap include a study finding that male nurses out-earned female nurses by \$8,000 a year

and the fact that there is a \$14,000 per year difference in wages between Washington men and women. The wage gap cost women \$18 billion in 2015. Older women are more likely to live in poverty than men. Women fear retaliation and do not speak up.

Equal pay helps families of all ages, including single mothers and women trapped in low wage jobs. Workers are disciplined for talking about salaries. The bill reduces pay secrecy and also improves career advancement opportunities. In the grocery industry, for example, women tend to be hired into the lower paying positions.

It is past time to update Washington's law. Most states have already passed bills. Passing the bill will signal that Washington is a good place for women to work in technology. Bona fide business reasons will be required for defenses. There are low-cost remedies. Preemption should not be included. The authority of local governments to create stronger bills should be protected.

The lack of preemption is problematic for small employers. Subsection 4(2)(a) should be changed to refer to criteria for promotion and subsection 4(2)(b) may mean some programs for women will have to end.

(Opposed) Equal pay is supported but there is concern with the remedies. Allowing both administrative and court actions could lead to double jeopardy. There should be a three-year rather than a four-year look back. The Wage Payment Act is a good model. It is hard for an employer to comply with different requirements.

(Other) The basic principle of inclusion is supported. Progress has been made and the stakeholders continue to work together. There are areas of concern. The business necessity standard may effectively eliminate all of the defenses. Regarding sections 4(2) (a) and (b), few employers announce promotional opportunities so the language potentially creates an unnatural obligation. Also, the language could be read to prohibit women's leadership networking and similar initiatives and affect training programs. Subsections (a) and (b) are redundant.

Preemption is important. It is costly to have different laws. Advocates may try to have cities pass what the state did not. There could be inconsistencies and small businesses may be harmed. The precedent for preemption was set with paid family and medical leave insurance.

While the pattern or practice requirement is good, the double jeopardy should be eliminated. The look back for wages should be three years. It should be clarified that different wages for different shifts are permitted.

Persons Testifying: (In support) Representative Senn, prime sponsor; Representative Doglio; Casey Osborn-Hinman, Moms Rising; Marilyn Watkins, Economic Opportunity Institute; Samantha Grad, United Food and Commercial Workers; Matthew Caruchet; Amy Davis, League of Women Voters; Lynne Dodson, Washington State Labor Council; and Michael Schutzler, Washington Technology Industry Association.

(Opposed) Patrick Connor, National Federation for Independent Business.

(Other) Jo Deutsch, TechNet; Bruce Beckett, Washington Retail Association; Carolyn Logue, Washington Food Industry Association; and Bob Battles, Association of Washington Business.

Persons Signed In To Testify But Not Testifying: None.