

# HOUSE BILL REPORT

## EHB 1506

---

### As Reported by House Committee On: Labor & Workplace Standards

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

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

**Sponsors:** 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].

#### **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.

---

### 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.

---

*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.*

**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.

**Second Substitute Bill Compared to Engrossed Bill:**

The second substitute bill:

- rearranges the defenses so that the seniority, merit, and quantity or quality of production defenses are examples of bona fide job-related factors and adds that the business necessity and other criteria apply to these defenses; adds the specification that more than one factor may account for the differential; adds the defense of a differential based in good faith on a local government ordinance; and adds that the employer has the burden of proof on the defenses;
- refers to career advancement rather than employment opportunities and removes the reference to career tracking; makes the parallel change to the provision protecting certain inquiries by employees; strikes the definition of "less favorable employment opportunities" and sets forth the examples of discrimination with respect to career advancement opportunities; and modifies defenses to advancement to refer to bona fide job-related factors that meet the criteria for the equal pay defense;
- adds "retaliate" to prohibited types of discrimination for making a complaint and taking other actions;
- modifies the remedies by: (1) adding the pattern or practice requirements for a career advancement violation; (2) adding the conference and conciliation requirement; (3) adding the provision that the Department's authority to initiate an investigation is upon complaint; (4) changing the maximum penalty for a repeat violation; (5) changing the time period for a back-pay award; and (6) adding the provision specifying when a violation occurs;
- changes "comparable" to "similar" in the definition of "similarly employed;"
- adds the language for the definitions in the newly created chapter rather than cross-referencing the definitions;
- removes the definition section from the rule-making provision; and
- modifies the intent section by removing references to data, removing the finding that wage gaps are a form of gender discrimination, removing a reference to comparable jobs, adding a reference to a gap in advancement opportunities, and making other changes.

**Appropriation:** None.

**Fiscal Note:** Requested on January 8, 2018.

**Effective Date of Second Substitute Bill:** 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.