
Judiciary Committee

ESSB 6068

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 Summary of Engrossed Substitute Bill

- Provides that neither discovery nor the availability of witness testimony regarding past instances of sexual harassment or assault by a party to a civil action relating to sexual harassment or assault is affected by a nondisclosure policy or agreement that purports to limit the ability of any person to produce such evidence.
- Declares that any provision of a nondisclosure policy or agreement that limits, prevents, or punishes such disclosure is contrary to public policy and unenforceable.

Hearing Date: 2/20/18

Staff: Cece Clynch (786-7195).

Background:

A nondisclosure agreement is a contract between parties that limits the disclosure of information to third parties. Generally, state law governs contracts. Washington courts have held that contracts that are contrary to public policy are void and unenforceable. There are also statutes that provide that particular contractual terms are contrary to public policy and therefore void and unenforceable.

Both the Washington Law Against Discrimination (WLAD) and the federal Title VI of the Civil Rights Act of 1964 prohibit discrimination in employment based on sex. Sexual harassment is

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considered a type of sex discrimination and can take two forms, either: (1) unwelcome (not invited or solicited) language or conduct of a sexual nature, or that occurred because of the plaintiff's sex or gender, that was so offensive or pervasive that it altered the conditions of the plaintiff's employment; or (2) quid pro quo sexual harassment. To establish a claim of quid pro quo sexual harassment under the WLAD, a plaintiff has the burden of proving that:

- she or he was subject to unwelcome sexual conduct or advances; and
- the harasser expressly or implicitly threatened a change in the plaintiff's employment status or conditions of employment unless she or he submitted to the conduct or advances, or promised a change in the plaintiff's employment status or conditions of employment if she or he submitted.

In the civil context, assault is an intentional tort, defined as an attempt by a defendant to cause apprehension by the plaintiff of a harmful or offensive contact. The plaintiff's apprehension must be reasonable and be of an immediate or imminent harm. To be liable, the defendant must have acted intentionally.

Summary of Bill:

Neither discovery nor the availability of witness testimony regarding past instances of sexual harassment or assault by a party to a civil action relating to sexual harassment or assault is affected by a nondisclosure policy or agreement, including an arbitration agreement, that purports to limit the ability of any person to produce such evidence. Any provision of a nondisclosure policy or agreement that limits, prevents, or punishes disclosure in this context is declared contrary to public policy and unenforceable.

Upon motion by a party, supported by affidavit or sworn declaration, or on the court's own motion, the court may enter appropriate orders to ensure that the identity of any person who is, or is alleged to be, a victim of sexual harassment or assault is not made public as a result of disclosure, absent that person's consent.

Admissibility of any evidence of this sort remains a determination that a court makes after considering whether the probative value outweighs the potential prejudice.

Appropriation: None.

Fiscal Note: Not requested.

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