

# SENATE BILL REPORT

## SB 5140

---

As of January 4, 2018

**Title:** An act relating to enacting the equal pay opportunity act by amending and enhancing enforcement of the equal pay act and protecting worker communications about wages and employment opportunities.

**Brief Description:** Concerning enforcement of the equal pay act and worker communications about wages and employment opportunities.

**Sponsors:** Senators Cleveland, Keiser, Frockt, Ranker, Conway, Nelson, Takko, Darneille, Hunt, Palumbo, Chase, Saldaña, Liias, Rolfes, McCoy, Kuderer, Billig, Wellman, Mullet, Carlyle, Hasegawa and Pedersen.

**Brief History:**

**Committee Activity:** Commerce, Labor & Sports: 2/01/17.

**Brief Summary of Bill**

- Modifies the Equal Pay Act to include prohibiting the provision of less favorable employment opportunities based on gender and grants additional remedies.
- Prohibits retaliation for certain workplace wage discussions and other matters.

---

### SENATE COMMITTEE ON COMMERCE, LABOR & SPORTS

**Staff:** Susan Jones (786-7404)

**Background:** The Industrial Welfare Act contains a number of wage and wage-related provisions. One provision, the Equal Pay Act (EPA), provides that an employer who discriminates in the payment of wages as between sexes or who pays any female a lesser 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.

---

*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.*

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

The National Labor Relations Act protects the right of some employees to discuss the terms and conditions of employment.

**Summary of Bill:** The bill as referred to committee not considered.

**Summary of Bill (Proposed Substitute):** Equal Pay Provisions. The statute prohibiting discrimination in the payment of wages is modified in several respects.

Instead of payment of wages, discrimination in compensation is prohibited, which includes discretionary and nondiscretionary wages and benefits. An employer who discriminates in providing compensation based on gender is guilty of a misdemeanor.

A new cause of action is created, allowing an employee to recover damages if the employee can show the employer provided less-favorable employment opportunities based on gender discrimination. "Less-favorable employment opportunities" is defined as assigning or directing the employee into a less-favorable career track or position based on gender. Factors to be considered include assigning work less likely to lead to promotion or future opportunities, placement in positions with lower pay or a lower pay scale, or placement in positions with fewer benefits, including less available hours, flexibility, and autonomy.

In a civil lawsuit, the employee is entitled to actual damages, interest of 1 percent per month on all compensation owed, costs and reasonable attorneys' fees, and whichever is greater of statutory damages of twice the actual damages or \$5,000.

The employer defense is changed to provide that the differential in compensation or employment opportunities must be based on a bona fide job-related factor, including education, training, or experience, that is consistent with business necessity, and is not based on or derived from a gender-based differential.

Workplace Practices. An employer may not engage in the following workplace practices:

- require nondisclosure of wages as a condition of employment;
- require an employee to sign a waiver that prevents the employee from disclosing the employee's wages; and
- discharge or retaliate against an employee (1) for discussing wages of the employee or any other employee, (2) for asking the employer to provide a reason for the employee's wages or lack of employment advancement, or (3) for aiding or encouraging an employee to exercise their rights under the legislation.

An employer may prohibit a human resources manager from disclosing wages of other employees, unless disclosure is otherwise required by law.

An employer may not discharge or otherwise discriminate against any employee for filing any complaint, instituting any proceeding, or testifying in a proceeding under the legislation; or because the employee exercised any right afforded by the legislation.

The Director (Director) of the Department of Labor and Industries (Department) may investigate complaints under the EPA, and the workplace practices and retaliation provisions. The Director may require the testimony of witnesses and production of documents. If the Director has good cause to believe the employer has a pattern of complaints or violations of the EPA, the Director may require the provision of data, including data identifying the gender, race, compensation, and job classifications of employees. An employer who fails to provide the data within a reasonable time may not use the data in any appeal to challenge a determination by the Department.

If the Director finds a violation occurred, the Director may order the employer to pay the complainant actual damages; whichever is greater of statutory damages of twice the actual damages or \$5,000; and interest. The Director may also impose a civil penalty of not more than \$200 for a first violation and \$1,000 for a repeat violation, and order payment of the costs of investigation and enforcement and any other appropriate relief to the Department. Civil penalties are deposited into the Supplemental Pension Fund.

A civil cause of action is created, allowing an employee to recover damages for violations of workplace practices or retaliatory actions prohibited by the legislation.

The Director may include notice of these provisions in the Department's employment posters. The Department may adopt rules to implement this act.

**Appropriation:** None.

**Fiscal Note:** Available.

**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 Proposed Substitute:** PRO: Our state's equal pay act has not been updated since 1943. If changes are not made, it will be 2070 before the gap is closed. There continues to be an unfair wage gap of \$0.78 for every dollar earned by men, and for some women of color the gap is \$0.46 for every dollar. Washington once was a leader but now is fourth from the bottom in updating equal pay. Women who are mothers face increased discrimination. Many women have stories about unequal pay and benefits. Men get further and further ahead because of the discrimination in starting salaries. The bill helps remove systemic barriers.

Washington women lost \$11 billion to the wage gap last year. The bill will improve existing law and close loopholes. The administrative remedy makes it easier for individuals, especially low-wage workers. The change to the bona fide defense will make sure reasons are job related. Pay secrecy perpetuates discrimination. Transparency gives women the

information they need to know if they are being discriminated against. Equal opportunity is not a burden for employers. Please move this bill and we will continue to work on it.

CON: The bill is confusing, the definitions and legal standards are unclear, as are the remedies. With these definitions the bill is un-implementable. Performance and location of work should be addressed. Reasonable time, place, and manner limits are needed for wage discussions. It can be very difficult to determine less favorable opportunities with shift work. We encourage you to consider the concepts in SB 5344.

OTHER: The notion of a manager determining "less favorable opportunities" is perplexing. It is unclear what kind of documentation an employer would need to show under this bill.

**Persons Testifying:** PRO: Senator Annette Cleveland, Prime Sponsor; Janet Chung, Legal Voice; Marilyn Watkins, citizen; Maggie Humphreys, citizen; Cherie Reeves Sperr, YWCA; Lynn Dodson, Washington State Labor Council.

CON: Michael Schutzler, Washington Technology Industry Association; Carolyn Logue, Washington Retail Association; Holli Johnson, Washington Food Industry Association; Bob Battles, AWB.

OTHER: Patrick Connor, NFIB/Washington.

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