

HOUSE BILL REPORT

ESHB 1795

As Passed House:

February 9, 2022

Title: An act relating to prohibiting nondisclosure and nondisparagement provisions from employers regarding illegal acts of discrimination, harassment, retaliation, wage and hour violations, and sexual assault.

Brief Description: Prohibiting nondisclosure and nondisparagement provisions from employers regarding illegal acts of discrimination, harassment, retaliation, wage and hour violations, and sexual assault.

Sponsors: House Committee on Labor & Workplace Standards (originally sponsored by Representatives Berry, Walen, Sells, Fitzgibbon, Bateman, Davis, Macri, Tharinger, Valdez, Pollet, Ormsby, Hackney and Frame).

Brief History:

Committee Activity:

Labor & Workplace Standards: 1/18/22, 1/26/22 [DPS].

Floor Activity:

Passed House: 2/9/22, 56-40.

Brief Summary of Engrossed Substitute Bill

- Makes void and unenforceable provisions in agreements between an employer and employee that prohibit the disclosure of conduct that is illegal discrimination, harassment, retaliation, a wage and hour violation, or sexual assault, or that is against a clear mandate of public policy, occurring in the workplace.

HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

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

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

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Minority Report: Without recommendation. Signed by 3 members: Representatives Hoff, Ranking Minority Member; Mosbrucker, Assistant Ranking Minority Member; Harris.

Staff: Trudes Tango (786-7384).

Background:

A nondisclosure agreement is a form of contract that restricts the disclosure of material or information to third parties. In general, state contract law governs nondisclosure agreements; however, a nondisclosure agreement may contain a choice of law provision that controls which jurisdiction's law applies.

Employers are prohibited from requiring an employee, as a condition of employment, to sign a nondisclosure agreement that prevents the employee from disclosing sexual harassment or sexual assault occurring in the workplace, at work-related events coordinated by or through the employer, or between employees, or between an employer and an employee, off the employment premises. This prohibition does not apply to confidential settlement agreements. It is an unfair practice under the Washington Law Against Discrimination for an employer to retaliate against an employee for disclosing or discussing sexual harassment or sexual assault occurring in the workplace.

Summary of Engrossed Substitute Bill:

The statute prohibiting nondisclosure agreements regarding sexual harassment and sexual assault occurring in the workplace is repealed and replaced.

A provision in an agreement by an employer and employee not to disclose conduct, or a settlement involving conduct, that the employee reasonably believed under state, federal, or common law to be illegal discrimination, illegal harassment, illegal retaliation, a wage and hour violation, or sexual assault, or that is recognized as against a clear mandate of public policy, is void and unenforceable.

Prohibited nondisclosure and nondisparagement provisions concern conduct that occurs at the workplace, at work-related events coordinated by or through the employer, between employees, or between an employer and an employee, whether on or off the employment premises.

Prohibited provisions include those contained in employment agreements, independent contractor agreements, agreements to pay compensation in exchange for the release of a legal claim, or any other agreement between an employer and employee. "Employee" means current, former, and prospective employees or independent contractors.

It is a violation of the act for an employer to:

- discharge or otherwise discriminate or retaliate against an employee for disclosing or discussing conduct that the employee is allowed to disclose or discuss under the act;
- request or require an employee to agree to a prohibited provision; or
- attempt to enforce a prohibited provision.

An employer who violates the act is liable in a civil cause of action for actual or statutory damages of \$10,000, whichever is more, as well as reasonable attorneys' fees and costs.

Enforcement of provisions prohibiting disclosure of the amount paid in a settlement of a claim is still allowed. Agreements protecting trade secrets, proprietary information, or confidential information that does not involve illegal acts are allowed.

The repeal of the statute on nondisclosures of sexual harassment and sexual assault does not affect any existing right or liability or obligation acquired or incurred under the repealed statute and does not affect any proceeding instituted under that statute.

Nondisclosure or nondisparagement provisions in agreements signed by an employee who is a Washington resident is governed by Washington law.

The provisions of the bill are to be liberally construed to fulfill its remedial purpose.

The act applies retroactively to invalidate provisions in agreements created before the effective date of the act and that were agreed to at the outset of employment or during the course of employment. The retroactivity clause allows recovery of damages only to prevent enforcement of those provisions. The retroactivity clause does not apply to a nondisclosure or nondisparagement provision in an agreement to settle a legal claim.

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.

Staff Summary of Public Testimony:

(In support) This bill will end nondisclosure agreements (NDAs) that prevent employees from speaking openly and raising concerns about illegal conduct. Victims should not be forced to remain silent. Keeping silent allows harassers in the workplace to continue and employers to cover up unlawful employment practices. This bill expands the current law beyond sexual harassment and includes settlement agreements, which is where NDAs are seen most often. The current law only applies to agreements at the outset of employment.

This bill would encourage more transparency in the workplace.

(Opposed) This is a confusing bill. The bill repeals a recently-enacted statute that many stakeholders spent a long time working on. The standard in the bill is not clear and it's unclear how the provisions fit together. Amending the current law would be a better approach.

(Other) There is great concern about how this bill is drafted. Reasonable minds can differ on what is reasonable and what constitutes a wage violation. Wage disputes should not be in the bill.

Persons Testifying: (In support) Representative Liz Berry, prime sponsor; Darin Dorsey; Kelli Carson, Washington State Association for Justice; Katherine Chamberlain, Washington Employment Lawyers Association; Cher Scarlett; Andrew Kashyap, Legal Voice; Riddhi Mukhopadhyay, Sexual Violence Law Center; Chelsey Glasson; and Blanca Rodriguez, Columbia Legal Services.

(Opposed) Bruce Beckett, Washington Retail Association.

(Other) Robert Battles, Association of Washington Business.

Persons Signed In To Testify But Not Testifying: None.