

SENATE BILL REPORT

ESHB 1795

As Passed Senate, March 3, 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: Passed House: 2/9/22, 56-40.

Committee Activity: Labor, Commerce & Tribal Affairs: 2/17/22, 2/23/22 [DP, DNP].

Floor Activity: Passed Senate: 3/3/22, 29-20.

Brief Summary of 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.
- Repeals the statute prohibiting nondisclosure agreements regarding sexual harassment and sexual assault occurring in the workplace.

SENATE COMMITTEE ON LABOR, COMMERCE & TRIBAL AFFAIRS

Majority Report: Do pass.

Signed by Senators Keiser, Chair; Conway, Vice Chair, Labor; Stanford, Vice Chair,

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.

Commerce & Tribal Affairs; Robinson and Saldaña.

Minority Report: Do not pass.

Signed by Senators King, Ranking Member; Braun, Rivers and Schoesler.

Staff: Jarrett Sacks (786-7448)

Background: 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 Bill: A provision in an agreement by an employer and an employee not to disclose or discuss conduct, or the existence of a settlement involving conduct, that the employee reasonably believed 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 non-disparagement 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. The definition of 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 bill;
- request or require an employee to agree to a prohibited provision; or
- attempt to enforce a prohibited provision.

The bill does not prohibit:

- enforcement of provisions prohibiting disclosure of the amount paid in a settlement of a claim; and
- protecting trade secrets, proprietary information, or confidential information that does not involve illegal acts.

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.

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

The bill applies retroactively to invalidate provisions in agreements created before the effective date of the bill 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 non-disparagement provision in an agreement to settle a legal claim.

The current statute prohibiting nondisclosure agreements regarding sexual harassment and sexual assault occurring in the workplace is repealed. The repeal does not affect any existing right, liability, or obligation acquired or incurred under the repealed statute and does not affect any proceeding instituted under that statute.

Appropriation: None.

Fiscal Note: Not requested.

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: PRO: There is still a gap that remains after the previous legislation prohibiting non-disclosures, which are settlement agreements and additional types of misconduct. The bill allows those who wish to share their stories to do so. Some employers condition settlements on silencing workers from discussing their own mistreatment. The bill makes clear that non-disclosure agreements (NDAs) for misconduct are against public policy. Many bad actors have a history of misconduct and NDAs allow them to keep perpetrating the misconduct. With NDAs, employers do not know they are hiring individuals with a history of misconduct.

CON: The bill has a subjective standard and there is no way to know whether an agreement violates the law without going to court. An employee may reasonably believe something is illegal when it is not. Wage and hour disputes are already handled by the Department of Labor and Industries. SB 5520 is a more reasonable approach. This bill has a broad and ambiguous legal standards and repeals work already done by the stakeholders in the previous bill.

Persons Testifying: PRO: Representative Liz Berry, Prime Sponsor; Pamela Raphael; Keitha Bryson, Respectful Workplace Washington; Katherine Chamberlain, WA Employment Lawyers Association; Cher Scarlett; Riddhi Mukhopadhyay, Sexual Violence

Law Center; Blanca Rodriguez, Columbia Legal Services; Andrew Kashyap, Legal Voice; Kelli Carson, Washington State Association for Justice.

CON: Robert Battles, Association of Washington Business (AWB); Bruce Beckett, Washington Retail Association.

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