

SENATE BILL REPORT

SB 5520

As Reported by Senate Committee On:
Labor, Commerce & Tribal Affairs, January 20, 2022

Title: An act relating to disclosing harassment and discrimination.

Brief Description: Disclosing harassment and discrimination.

Sponsors: Senators Keiser, Stanford, Hasegawa, Kuderer, Nguyen and Wilson, C..

Brief History:

Committee Activity: Labor, Commerce & Tribal Affairs: 1/17/22, 1/20/22 [DP, DNP, w/oRec].

Brief Summary of Bill

- Prohibits an employer from requiring an employee, as a condition of employment, to sign a document preventing the disclosure of harassment or discrimination occurring in certain work environments.
- Provides that an employer retaliating against an employee disclosing or discussing harassment or discrimination is an unfair labor practice.

SENATE COMMITTEE ON LABOR, COMMERCE & TRIBAL AFFAIRS

Majority Report: Do pass.

Signed by Senators Keiser, Chair; Conway, Vice Chair, Labor; Stanford, Vice Chair, Commerce & Tribal Affairs; Rivers, Robinson and Saldaña.

Minority Report: Do not pass.

Signed by Senator Schoesler.

Minority Report: That it be referred without recommendation.

Signed by Senators King, Ranking Member; Braun.

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.

Staff: Matt Shepard-Koningsor (786-7627)

Background: Washington Law Against Discrimination. Under the Washington Law Against Discrimination (WLAD), a person has the right to be free from discrimination related to a protected status, such as race, national origin, sex, veteran or military status, sexual orientation, and disability. An employer may not discriminate against a person because of one's protected status. Sexual harassment is a form of sex discrimination under WLAD and Title VII of the Civil Rights Act of 1964.

WLAD is administered by the Washington State Human Rights Commission (HRC). HRC investigates complaints alleging unfair practices in violation of WLAD. If HRC finds there is reasonable cause to believe discrimination has occurred, it must first try to eliminate the unfair practice via conference and conciliation. If the parties do not reach an agreement, HRC must refer the matter to an administrative judge for a determination.

Definitions. "Sexual assault" means any type of sexual contact or behavior that occurs without the explicit consent of the recipient. "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

"Sexual harassment" means unwelcome sexual advances, requests for sexual favors, sexually-motivated physical contact, or other verbal or physical conduct or communication of a sexual nature if:

- submission to that conduct or communication is made a term or condition of obtaining an education or employment;
- submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's education or employment; or
- that conduct or communication has the purpose or effect of substantially interfering with an individual's educational or work performance, or of creating an intimidating, hostile, or offensive educational or work environment.

Nondisclosure Agreements. A nondisclosure agreement (NDA) is a contract between two or more parties that restricts the disclosure of confidential material or information to third parties. In general, state contract law governs NDAs, however, an NDA may contain a choice of law provision that controls which jurisdiction's law applies.

Prohibited Acts. Employers may not require an employee, as a condition of employment, to sign an NDA, waiver, or other document preventing the employee from disclosing sexual harassment or sexual assault occurring in the workplace, at work-related events, between employees, or between an employer and an employee off the employment premises. Any NDA, waiver, or other document signed by an employee as a condition of employment preventing the disclosure or discussion of sexual harassment or sexual assault is against public policy and is void and unenforceable. It is an unfair practice under WLAD for an employer to retaliate against an employee for disclosing or discussing sexual harassment or

sexual assault. Settlement agreements between an employee or former employee and an employer may contain confidentiality provisions.

Employers may prohibit certain human resources staff, supervisors, or managers expected to maintain confidentiality as part of their job duties and certain individuals participating in open and ongoing investigations regarding alleged sexual harassment from disclosing such information until the investigation concludes.

Summary of Bill: Definitions. "Harassment" means without lawful authority:

- the person knowingly threatens:
 - to cause bodily injury immediately or in the future to the person threatened or to any other person;
 - to cause physical damage to the property of another person;
 - to subject the person threatened or any other person to physical confinement or restraint; or
 - maliciously to do any other act intended to substantially harm the person threatened or another with respect to their physical or mental health or safety; and
- the person by words or conduct (including through electronic communication) places the person threatened in reasonable fear that the threat will be carried out.

"Discrimination" means employment discrimination prohibited by WLAD.

Prohibited Acts. Harassment and discrimination are included in the employer prohibitions. Specifically, employers may not require an employee, as a condition of employment, to sign an NDA, waiver, or other document preventing the employee from disclosing harassment or discrimination occurring in the workplace, at work-related events, between employees, or between an employer and an employee off the employment premises. Any NDA, waiver, or other document signed by an employee as a condition of employment preventing the disclosure or discussion of harassment or discrimination is against public policy and is void and unenforceable. It is an unfair practice under WLAD for an employer to retaliate against an employee for disclosing or discussing harassment or discrimination.

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: PRO: As a software engineer for nearly two decades, I have had to sign confidentiality agreements in every company I've worked. In some positions, I witnessed harassment and when I reported, I was intimidated by the

company. I was reported to security for leaking confidential information in violation of the NDA I signed. The barriers to survivor healing and justice are numerous. We know that disclosure in a survivor's own time can be the catalyst for healing trauma, opening the door for opportunities and support. One of the most important things for a survivor is the ownership of their story. NDAs have the effect of silencing survivors from sharing their harm and have become common in employee-employer relationships. NDAs allow harassment to persist in the workplace. When sexual misconduct is kept secret, employers cannot find the perpetrators and prevent continuing misconduct. With NDAs, employers may have no idea they are hiring someone with a history of sexual misconduct. This is a good bill, but we would suggest also preventing employers from requesting NDAs as a part of settlement agreements. All individuals should be treated with dignity, respect, and fairness in the workplace.

Persons Testifying: PRO: Senator Karen Keiser, Prime Sponsor; Michelle Dixon-Wall, Washington Coalition of Sexual Assault Programs; Sexual Assault Working Group; Cher Scarlett; Keitha Bryson, Respectful Workplace Washington; Pamela Raphael, LMHC; Kelli Carson, Washington State Association for Justice.

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