

SENATE BILL REPORT

SB 5260

As of January 24, 2023

Title: An act relating to protecting and assisting Washington employers that provide access to, or benefits for, reproductive health care services.

Brief Description: Protecting and assisting Washington employers that provide access to, or benefits for, reproductive health care services.

Sponsors: Senators Keiser, Robinson, Saldaña, Conway, Stanford, Kuderer, Randall, Billig, Cleveland, Hunt, Lias, Lovelett, Nguyen, Nobles, Valdez, Van De Wege and Wilson, C..

Brief History:

Committee Activity: Labor & Commerce: 1/24/23.

Brief Summary of Bill

- Establishes a cause of action for a Washington-based employer to recover damages and costs incurred from a judgment entered in another state based on the provision, assistance, or support for reproductive health care services (RHS), with certain limitations and exceptions.
- Establishes a cause of action for a Washington-based employer to recover damages and costs incurred from certain prohibited retaliatory actions related to RHS.
- Provides a public utility or business and occupation tax credit for charitable contributions made to certain organizations providing RHS.

SENATE COMMITTEE ON LABOR & COMMERCE

Staff: Matt Shepard-Koningsor (786-7627)

Background: Post-Roe v. Wade and Planned Parenthood v. Casey Abortion Rights. In

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.

1973, the U.S. Supreme Court (Court) decided *Roe v. Wade*, 410 U.S. 113 (*Roe*), where it struck down a number of Texas laws and held, in part, the 14th Amendment's implied right to privacy protects a pregnant woman's choice whether to have an abortion. The Court explained further that this right must be balanced against certain state interests, and established a trimester framework to govern state abortion laws. In 1992, the Court reaffirmed *Roe* in *Planned Parenthood v. Casey*, 505 U.S. 833 (*Casey*), and protected the constitutional right to abortion, but rejected the trimester framework. In addition, the Court held that a state cannot ban pre-viability abortions.

Post-*Dobbs v. Jackson Women's Health Organization* Abortion Rights. In June 2022, the Court decided *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (*Dobbs*), which overruled *Roe* and *Casey*. The Court stated, in part, the U.S. Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision. Under *Dobbs*, states are free to regulate and prohibit abortion if there is a rational basis on which the Legislature could have thought that it would serve legitimate state interests. Rational basis review is the lowest standard of judicial review courts use to determine the constitutionality of certain laws. The other two standards are intermediate and strict scrutiny.

Abortion Rights in Washington. Abortion is legal and protected in Washington State. A person of any age has the right to have an abortion up to the point of fetal viability, which is defined in statute and generally considered around 24 to 26 weeks into pregnancy. A person may also independently consent for their own abortion care. Washington law has other provisions on reproductive privacy, unauthorized abortions, state-provided benefits, and health insurance regarding abortion coverage.

Abortion Rights in Other States. After *Dobbs*, some states prohibited or limited abortion access, either through new legislation or "trigger laws." State prohibitions vary on whether an exception exists and at what gestational age an abortion is banned. As of January 2023, abortion is fully, or partially-prohibited in 16 states; state courts have blocked abortion bans in eight states; and it remains legal, in some manner, in 23 states. Texas and Idaho passed laws prohibiting the assistance of abortion and authorizing certain individuals to sue health care providers or anyone else assisting a person receiving abortion care. Based on these abortion bans in certain states, some companies announced they would provide abortion travel coverage for employees traveling out-of-state to receive abortion care. In its recent law protecting abortion, Connecticut, among other things, allows a person to recover specified damages in-state for certain out-of-state judgments regarding the provision, receipt, or support for reproductive health care services.

Health Insurance Requirements. Health carriers are required to offer health plans including certain benefits mandated by state and federal law. The federal Patient Protection and Affordable Care Act requires individual and small group market health plans to offer a package of benefits known as the essential health benefits. State law requires health plans to provide contraceptive services and other reproductive health related services. If a health

plan provides maternity care coverage, it must also provide abortion coverage, with some exceptions. If an employer objects to providing these services to their employees, the insurer must provide the services at no cost to the employees.

Taxes. The state business and occupation (B&O) tax is a gross receipts tax. It is measured on the value of products, gross proceeds of sale, or gross income of the business. The tax rate a business pays varies based on its classification. Credits are subtracted from the B&O tax due on a business' excise tax return. The state public utility tax is a tax on public service businesses, depends on specific utility activity, and is in lieu of the B&O tax.

Tax Preferences. In 2013, the Legislature established new tax preference transparency requirements. New tax preferences automatically expire in ten years unless an express expiration date applies. All bills that enact, extend, or expand a tax preference must include a performance statement unless an explicit exemption is included. The amount claimed by a taxpayer for a new tax preference may be publicly disclosed 24 months after the preference is claimed, with some exceptions.

Summary of Bill: Definitions. The definitions of charitable corporation and domestic nonprofit corporation from the Washington Nonprofit Corporation Act are referenced. Employee means an individual employed by an employer. Employer means an individual, business, partnership, association, limited liability company, corporation, or other legal entity, whether public or private, with a principal place of business in the state of Washington that employs at least one employee. Person includes similar individuals and entities, whether such individual or entity has a principal place of business in the state of Washington or not. Reproductive health care services (RHS) means any medical services or treatments, including pharmaceutical and preventive care services or treatments, directly involved in the reproductive system and its processes, functions, and organs involved in reproduction, in all stages of life. It does not include infertility treatment. Retaliate means taking an adverse action, which includes, without limitation, prohibiting business operations, prohibiting or limiting tax preferences, or other actions intended to penalize.

Out-of-State Judgments. When an employer has had a judgment entered against it, in any state, where liability, in whole or in part, is based on the alleged provision, assistance, material support for, or any theory of vicarious, joint, several, or conspiracy liability derived from such allegation, for RHS permitted under Washington law, the employer may recover damages from any person who brought the action leading to the judgment or has sought to enforce the judgment.

Recoverable damages include, without limitation:

- monetary damages in the amount of the judgment, and costs, expenses, and reasonable attorneys' fees spent in defending the action in the other state; and
- costs, expenses, and reasonable attorneys' fees incurred due to bringing an action in this state.

An employer may not bring an action in this state to recover damages based on an out-of-state judgment if the underlying action:

- was brought by the employee who received the RHS or their legal representative and a similar claim exists under Washington law, for damages suffered by the employee or damages derived from an individual's loss of consortium;
- was brought by a person with a contractual relationship with the employer and a similar claim exists under Washington law, to enforce such a contractual agreement;
- or
- had no part of the acts that formed the basis for liability occurring in Washington.

Unlawful Retaliation. It is unlawful for a person to retaliate against an employer for:

- providing access to, or benefits for, RHS to its employees, whether through a health insurance plan, travel benefits, or otherwise; or
- contributing to a domestic nonprofit corporation or charitable corporation providing access to, or benefits for, RHS in Washington or elsewhere.

An employer may file a civil action against the retaliating person to recover damages, which include, without limitation:

- actual or compensatory damages;
- costs, expenses, and reasonable attorneys' fees; and
- equitable relief, and other damages the court deems reasonable.

Tax Preferences. Until January 1, 2033, a public utility or B&O tax credit is provided for charitable contributions made to certain organizations providing RHS. Other requirements regarding claiming, reporting, and carrying over tax credits are provided. No refunds may be granted for these tax credits.

Other. The bill contains a state severability clause.

Appropriation: None.

Fiscal Note: Requested on January 14, 2023.

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: We have seen the fallout from the *Dobbs* decision, where some states are threatening to retaliate against companies that offer reproductive services and costs to employees who have an abortion. In Texas, a legislator said he would be withdrawing tax preferences to these companies. Washington should create a safe harbor for these companies who are assisting employees in anti-abortion states. This is a controversial issue and many companies do not want to make themselves known.

CON: It took me a long time to understand what section two means. Do Washington legislators think a Washington law can protect against retaliation occurring in Texas, where abortion is illegal, and further, that employers can recover damages? The bill would give preferential treatment to businesses in Washington that make charitable donations to organizations such as Planned Parenthood. This is not fair and equal treatment and the tax credit should be given to businesses that donate to pregnancy resource centers helping mothers who choose life.

Persons Testifying: PRO: Senator Karen Keiser, Prime Sponsor.

CON: Jeannie Magdua, Conservative Ladies of Washington.

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