
SUBSTITUTE SENATE BILL 5140

State of Washington

65th Legislature

2018 Regular Session

By Senate Labor & Commerce (originally sponsored by Senators Cleveland, Keiser, Frockt, Ranker, Conway, Nelson, Takko, Darneille, Hunt, Palumbo, Chase, Saldaña, Lias, Rolfes, McCoy, Kuderer, Billig, Wellman, Mullet, Carlyle, Hasegawa, and Pedersen)

1 AN ACT Relating to workplace practices to achieve gender pay
2 equity; amending RCW 49.12.175; adding a new chapter to Title 49 RCW;
3 recodifying RCW 49.12.175; and prescribing penalties.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** The legislature finds that despite
6 existing equal pay laws, there continues to be a gap in wages and
7 advancement opportunities among workers in Washington, especially
8 women. Income disparities limit the ability of women to provide for
9 their families, leading to higher rates of poverty among women and
10 children. The legislature finds that in order to promote fairness
11 among workers, employees must be compensated equitably. Further,
12 policies that encourage retaliation or discipline towards workers who
13 discuss or inquire about compensation prevent workers from moving
14 forward.

15 The legislature intends to update the existing Washington state
16 equal pay act, not modified since 1943, to address income
17 disparities, employer discrimination, and retaliation practices, and
18 to reflect the equal status of all workers in Washington state.

1 NEW SECTION. **Sec. 2.** The definitions in this section apply
2 throughout this chapter unless the context clearly requires
3 otherwise.

4 (1) "Compensation" means discretionary and nondiscretionary wages
5 and benefits provided by an employer to an employee as a result of
6 the employment relationship.

7 (2) "Department" means the department of labor and industries.

8 (3) "Director" means the director of the department of labor and
9 industries, or the director's designated representative.

10 (4) "Employee" means an employee who is employed in the business
11 of the employee's employer whether by way of manual labor or
12 otherwise.

13 (5) "Employer" means any person, firm, corporation, partnership,
14 business trust, legal representative, or other business entity which
15 engages in any business, industry, profession, or activity in this
16 state and employs one or more employees, and includes the state, any
17 state institution, state agency, political subdivisions of the state,
18 and any municipal corporation or quasi-municipal corporation.

19 **Sec. 3.** RCW 49.12.175 and 1943 c 254 s 1 are each amended to
20 read as follows:

21 (1) Any employer in this state~~((, employing both males and~~
22 ~~females, who shall discriminate in any way in the payment of wages as~~
23 ~~between sexes or who shall pay any female a less wage, be it time or~~
24 ~~piece work, or salary, than is being paid to males))~~ who
25 discriminates in any way in providing compensation based on gender
26 between similarly employed~~((, or in any employment formerly performed~~
27 ~~by males, shall be))~~ employees of the employer is guilty of a
28 misdemeanor. If any ~~((female))~~ employee ~~((shall))~~ receives less
29 compensation because of ~~((being discriminated against))~~
30 discrimination on account of ~~((her sex, and))~~ gender in violation of
31 this section, ~~((she shall be))~~ that employee is entitled to ~~((recover~~
32 ~~in a civil action the full amount of compensation that she would have~~
33 ~~received had she not been discriminated against))~~ the remedies in
34 sections 7 and 8 of this act. In such action, however, the employer
35 shall be credited with any compensation which has been paid to
36 ~~((her))~~ the employee upon account. ~~((A differential in wages between~~
37 ~~employees based in good faith on a factor or factors other than sex~~
38 ~~shall not constitute discrimination within the meaning of RCW~~
39 ~~49.12.010 through 49.12.180.))~~

1 (2) For purposes of this section, employees are similarly
2 employed if the individuals work for the same employer, the
3 performance of the job requires similar skill, effort, and
4 responsibility, and the jobs are performed under similar working
5 conditions. Job titles alone are not determinative of whether
6 employees are similarly employed.

7 (3)(a) Discrimination within the meaning of this section does not
8 include a differential in compensation based in good faith on a bona
9 fide job-related factor or factors that:

10 (i) Are consistent with business necessity;

11 (ii) Are not based on or derived from a gender-based
12 differential; and

13 (iii) Account for the entire differential. More than one factor
14 may account for the differential.

15 (b) Such bona fide factors include, but are not limited to:

16 (i) Education, training, or experience;

17 (ii) A seniority system;

18 (iii) A merit system;

19 (iv) A system that measures earnings by quantity or quality of
20 production; or

21 (v) A bona fide regional difference in compensation levels.

22 (c) A differential in compensation based in good faith on a local
23 government ordinance providing for a minimum wage different from
24 state law does not constitute discrimination under this section.

25 (d) An individual's previous wage or salary history is not a
26 defense under this section.

27 (e) The employer carries the burden of proof on these defenses.

28 NEW SECTION. Sec. 4. (1) The legislature finds that equality of
29 opportunity for advancement is key to reducing income disparities
30 based on gender. The legislature further finds that using gender as a
31 factor in advancement contributes to pay inequity.

32 (2) An employer may not limit or deprive an employee of career
33 advancement opportunities that would otherwise be available to the
34 employee but for the employee's gender, including by:

35 (a) Failing to announce or provide access to career advancement
36 opportunities on the basis of gender; or

37 (b) Failing to provide training that is under the employer's
38 control on the basis of gender.

1 (3) A differential in career advancement based on a bona fide
2 job-related factor or factors that meet the criteria in RCW
3 49.12.175(3)(a) (i) through (iii) (as recodified by this act) does
4 not constitute discrimination within the meaning of this section.
5 Such bona fide factors include, but are not limited to, the factors
6 specified in RCW 49.12.175(3)(b) (i) through (iv) (as recodified by
7 this act).

8 (4)(a) If it is determined that an employer committed a pattern
9 of violations of this section as to an employee or committed a
10 violation of this section through application of a formal or informal
11 employer policy or practice, the employee is entitled to the remedies
12 in this section and in section 8 of this act.

13 (b) Upon complaint by an employee, the director must investigate
14 to determine if there has been compliance with this section and the
15 rules adopted to implement this section. The director, upon
16 complaint, may also initiate an investigation on behalf of one or
17 more employees for a violation of this section and the rules adopted
18 to implement this section. The director may require the testimony of
19 witnesses and production of documents as part of an investigation.

20 (c) If the director determines that a violation occurred, the
21 director shall attempt to resolve the violation by conference and
22 conciliation.

23 (d) If no agreement is reached to resolve the violation and the
24 director determines that the employer committed a pattern of
25 violations of this section as to an employee or committed a violation
26 of this section through application of a formal or informal employer
27 policy or practice, the director may issue a citation and notice of
28 assessment and order the employer to pay to the employee actual
29 damages; statutory damages equal to the actual damages or five
30 thousand dollars, whichever is greater; interest of one percent per
31 month on all compensation owed; payment to the department of the
32 costs of investigation and enforcement; and any other appropriate
33 relief.

34 (e) In addition to the citation and notice of assessment, if the
35 director determines that the employer committed a pattern of
36 violations of this section as to an employee or committed a violation
37 of this section through application of a formal or informal employer
38 policy or practice, the director may order payment to the department
39 of a civil penalty. The violation as to each affected employee
40 constitutes a separate violation.

1 (i) For a first violation, the civil penalty may not exceed five
2 hundred dollars.

3 (ii) For a repeat violation, the civil penalty may not exceed one
4 thousand dollars or ten percent of the damages, whichever is greater.

5 (f) Sections 7 (3), (4), and (5) of this act applies to this
6 section.

7 NEW SECTION. **Sec. 5.** (1) An employer may not:

8 (a) Require nondisclosure by an employee of his or her wages as a
9 condition of employment; or

10 (b) Require an employee to sign a waiver or other document that
11 prevents the employee from disclosing the amount of the employee's
12 wages.

13 (2) An employer may not discharge or in any other manner
14 retaliate against an employee for:

15 (a) Inquiring about, disclosing, comparing, or otherwise
16 discussing the employee's wages or the wages of any other employee;

17 (b) Asking the employer to provide a reason for the employee's
18 wages or lack of opportunity for advancement; or

19 (c) Aiding or encouraging an employee to exercise his or her
20 rights under this section.

21 (3) An employer may prohibit an employee who has access to
22 compensation information of other employees or applicants as part of
23 such employee's essential job functions from disclosing the wages of
24 the other employees or applicants to individuals who do not otherwise
25 have access to such information, unless the disclosure is in response
26 to a complaint or charge, in furtherance of an investigation, or
27 consistent with the employer's legal duty to provide the information
28 and the disclosure is part of the employee's essential job functions.
29 An employee described in this subsection otherwise has the
30 protections of this section, including to disclose the employee's
31 wages without retaliation.

32 (4) This section does not require an employee to disclose the
33 employee's compensation.

34 (5) This section does not permit an employee to violate the
35 requirements in chapter 49.17 RCW and rules adopted under that
36 chapter.

37 NEW SECTION. **Sec. 6.** An employer may not retaliate, discharge,
38 or otherwise discriminate against an employee because the employee

1 has filed any complaint, or instituted or caused to be instituted any
2 proceeding under this chapter, or has testified or is about to
3 testify in any such proceeding, or because of the exercise by such
4 employee on behalf of himself or herself or others of any right
5 afforded by this chapter.

6 NEW SECTION. **Sec. 7.** (1) Upon complaint by an employee, the
7 director must investigate to determine if there has been compliance
8 with RCW 49.12.175 (as recodified by this act), sections 5 and 6 of
9 this act, and the rules adopted under this chapter. The director,
10 upon complaint, may also initiate an investigation on behalf of one
11 or more employees for a violation of RCW 49.12.175 (as recodified by
12 this act), sections 5 and 6 of this act, and the rules adopted under
13 this chapter. The director may require the testimony of witnesses and
14 production of documents as part of an investigation.

15 (2) If the director determines that a violation occurred, the
16 director shall attempt to resolve the violation by conference and
17 conciliation.

18 (a) If no agreement is reached to resolve the violation, the
19 director may issue a citation and notice of assessment and order the
20 employer to pay to the complainant actual damages; statutory damages
21 equal to the actual damages or five thousand dollars, whichever is
22 greater; interest of one percent per month on all compensation owed;
23 payment to the department of the costs of investigation and
24 enforcement; and any other appropriate relief.

25 (b) In addition to the citation and notice of assessment, the
26 director may order payment to the department of a civil penalty. For
27 purposes of a civil penalty for violation of RCW 49.12.175 (as
28 recodified by this act) and section 6 of this act, the violation as
29 to each affected employee constitutes a separate violation.

30 (i) For a first violation, the civil penalty may not exceed five
31 hundred dollars.

32 (ii) For a repeat violation, the civil penalty may not exceed one
33 thousand dollars or ten percent of the damages, whichever is greater.

34 (3) An appeal from the director's determination may be taken in
35 accordance with chapter 34.05 RCW. An employee who prevails is
36 entitled to costs and reasonable attorneys' fees.

37 (4) The department must deposit civil penalties paid under this
38 section in the supplemental pension fund established under RCW
39 51.44.033.

1 (5) Any wages and interest owed must be calculated from four
2 years before the complaint.

3 NEW SECTION. **Sec. 8.** (1) Subject to subsection (2) of this
4 section, an employee may bring a civil action against an employer for
5 violation of RCW 49.12.175 (as recodified by this act) and sections 4
6 through 6 of this act for actual damages; statutory damages equal to
7 the actual damages or five thousand dollars, whichever is greater;
8 interest of one percent per month on all compensation owed; and costs
9 and reasonable attorneys' fees. The court may also order
10 reinstatement and injunctive relief. Any wages and interest owed must
11 be calculated from four years before the civil action was instituted.

12 (2) An employee alleging a violation of section 4 of this act is
13 entitled to relief only if the court determines that the employer
14 committed a pattern of violations as to the employee or committed a
15 violation through application of a formal or informal employer policy
16 or practice.

17 NEW SECTION. **Sec. 9.** A violation of this chapter occurs when a
18 discriminatory compensation decision or other practice is adopted,
19 when an individual becomes subject to a discriminatory compensation
20 decision or other practice, or when an individual is affected by
21 application of a discriminatory compensation decision or other
22 practice, including each time wages, benefits, or other compensation
23 is paid, resulting in whole or in part from such a decision or other
24 practice.

25 NEW SECTION. **Sec. 10.** The department shall include notice of
26 the provisions of this chapter in the next reprinting of employment
27 posters.

28 NEW SECTION. **Sec. 11.** The department may adopt rules to
29 implement sections 1 and 4 through 7 of this act and RCW 49.12.175
30 (as recodified by this act).

31 NEW SECTION. **Sec. 12.** RCW 49.12.175 is recodified as a section
32 in chapter 49.--- RCW (the new chapter created in section 13 of this
33 act).

1 NEW SECTION. **Sec. 13.** Sections 1, 2, and 4 through 11 of this
2 act constitute a new chapter in Title 49 RCW.

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