

# SENATE BILL REPORT

## ESHB 1646

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As of February 26, 2016

**Title:** An act relating to enacting the equal pay opportunity act by amending and enhancing enforcement of the equal pay act and protecting worker communications about wages and employment opportunities.

**Brief Description:** Enacting the equal pay opportunity act by amending and enhancing enforcement of the equal pay act and protecting worker communications about wages and employment opportunities.

**Sponsors:** House Committee on Labor & Workplace Standards (originally sponsored by Representatives Senn, Walsh, Lytton, Santos, Orwall, Wylie, Robinson, Reykdal, Gregerson, Appleton, Jinkins, Farrell, Van De Wege, Carlyle, McBride, Kagi, Goodman, Kilduff, Tarleton, Ortiz-Self, Cody, Riccelli, Clibborn, Ryu, Gregory, Walkinshaw, Springer, Sawyer, Fitzgibbon, Hudgins, Fey, Dunshee, Peterson, Moeller, Bergquist, S. Hunt, Moscoso, Pollet, Takko, Sells, Sullivan, Stanford, Morris, Tharinger and Ormsby).

**Brief History:** Passed House: 3/11/15, 55-43; 2/03/16, 56-41.

**Committee Activity:** Commerce & Labor: 3/30/15, 2/26/16.

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### SENATE COMMITTEE ON COMMERCE & LABOR

**Staff:** Richard Rodger (786-7461)

**Background:** The Industrial Welfare Act contains a number of wage and wage-related provisions. One provision prohibits discrimination in the payment of wages as between sexes, and provides that an employer who pays any female a lower wage than males similarly employed is guilty of a misdemeanor. A female who receives less compensation because of sex discrimination may sue and recover the difference in compensation. An employer may assert that the difference in wages is based in good faith on a factor or factors other than sex.

The Washington Law Against Discrimination, administered by the Human Rights Commission (Commission), also makes it an unfair employment practice to discriminate in compensation because of sex. Under a work-sharing agreement with the Equal Employment Opportunity Commission (EEOC), complaints alleging a violation of the Equal Pay Act filed with the Commission are investigated by the EEOC.

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

The National Labor Relations Act protects the right of some employees to discuss the terms and conditions of employment.

**Summary of Bill:** The statute prohibiting discrimination in the payment of wages is modified in several respects:

- Instead of payment of wages, the bill prohibits discrimination in compensation, which includes discretionary and nondiscretionary wages and benefits. An employer who discriminates in providing compensation based on gender is guilty of a misdemeanor.
- A new cause of action is created, allowing an employee to recover damages if the employee can show the employer provided less-favorable employment opportunities based on gender discrimination. Less-favorable employment opportunities means assigning or directing the employee into a less-favorable career track or position based on gender. Factors to be considered include failing to use reasonable means to provide the employee information about advancement in their career tracks or positions, including by posting information on websites, employee common areas, or at the human resources office.
- In a civil lawsuit, the employee is entitled to actual damages, interest of 1 percent per month on all compensation owed, costs and reasonable attorneys' fees, and statutory damages of twice the actual damages or \$5,000.
- The employer defense is changed to provide that the differential in compensation or employment opportunities must be based on a bona fide job-related factor, including education, training, or experience, that is not based on gender, unless the differential is otherwise permitted by law.

An employer may not engage in the following workplace practices:

- require nondisclosure of wages as a condition of employment;
- require an employee to sign a waiver that prevents the employee from disclosing the employee's wages; and
- discharge or retaliate against an employee for discussing wages of the employee or any other employee; for asking the employer to provide a reason for the employee's wages or lack of employment advancement; or for aiding or encouraging an employee to exercise their rights under the legislation.

An employer may prohibit a human resources manager from disclosing wages unless disclosure is required by law.

An employer may not discharge or otherwise discriminate against any employee for filing any complaint, instituting any proceeding, or testifying in a proceeding under the legislation; or because the employee exercised any right afforded by the legislation.

A civil cause of action is created, allowing an employee to recover damages for violations of workplace practices or retaliatory actions prohibited by the legislation.

**Appropriation:** None.

**Fiscal Note:** Available.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:** Testimony From 2016 Regular Session on Proposed Amendment. PRO: Washington State adopted the Equal Pay Act in 1943 and has not updated the law since then. The situation of women not being paid the same as men is still an issue. The underlying bill addresses secrecy, but does not address transparency. The House version is more employee friendly and the striking is more employer friendly. We hope to develop a bill that is both employee and employer friendly. The bill will allow women to speak to their employers about wage issues or find out if they are being paid less. This bill should have been passed years ago. Some of the provisions of the striker add subjectivity instead of using objective standards and add limitations to the ability to discuss wages. Research says that the wage gap will not be closed until 2070.

We support the striker and many tech companies have tried to close the gender pay gap. Neither of these versions are perfect, but we encourage the parties to work out a compromise bill. People need the ability to talk about their pay and address inequities.

There are three reasons why the underlying bill is not acceptable. It adopts a standard that compares people doing similar work. This is a new term which is difficult to define and will lead to litigation. The underlying bill also imposes an obligation to provide career counseling which has never been required before. The National Labor Relations Act already protects worker for concerted activity for a vast majority of employers. The striker prevents two bites of the apple for those who sought relief through the NLRB.

CON: We support the underlying bill, but not the striking amendment. It does not address the structural problems and allows employers to restrict discussions about pay. The striker takes us backwards by encouraging employers to practice wage secrecy. Unequal pay is hurting Washington women and undermining prosperity. Bias assumptions reduce the likelihood that all women and women of color will be hired to high-wage positions or be promoted. Sixty percent of workers are prohibited by their employers from discussing compensation. The striker focuses on "equal work" which is much too limiting in providing an appropriate comparison.

We should support the chance for opportunity, but not guarantee the outcomes. The striker improves the bill, but still sets up situations where litigation is encouraged.

OTHER: We support the concept and the striker, but want one simple addition under section 2(2) to clarify that it applies to the same services, when referring to the workplace.

Testimony From 2015 Regular Session on Engrossed Substitute Bill. PRO: With the passage of this bill Washington State can again be a leader in pay equality. The bill will let employees talk about pay issues without the fear of retaliation. Women in our state earn only 78 cents for every dollar earned by men, and women of color only earn 46 cents per dollar earned by men. Addressing the wage gap will cut poverty in half and save the state and economy money. This will create standards for transparency for gender equity and require a focus on job related factors, not gender-based factors. Studies have shown that male nurses, in a female dominated industry, earn \$8,000 more per year than female nurses. The lifetime differential for these nurses add up to \$150,000. The current laws are inadequate as an

employer can give any reason or no reason at all for wage differentials. The National Labor Relations Board (NLRB) provides some protections, but does not cover everybody. Many business require employees to sign contracts that prohibit them from discussing their salary.

CON: Federal law already protects workers when they are taking concerted activities. This bill creates conflicts, encourages litigation, and is a jobs bill for lawyers. The state's discrimination laws already prohibit gender discrimination and the workers already have protections under the NLRB process. The bill will increase costs and hurt small businesses. Our small businesses already work with their employees to resolve these types of issues.

**Persons Testifying:** Persons Testifying From 2016 Regular Session on Proposed Amendment. PRO: Representative Senn, Prime Sponsor; Rachel Senn; Sarah Bird, Moz/CEO; Michael Schutzler, Washington Tech Industry Assn / CEO; Tim O'Connell, AWB Legal Affairs; Stoel Rives; Bob Battles, AWB.

CON: Patrick Connor, NFIB/Washington; Joe kendo, Washington state labor council; Janet Chung, Legal Voice; Marilyn Watkins, Economic Opportunity Institute.

OTHER: Tammie Hetrick, Washington Retail Association.

Persons Testifying From 2015 Regular Session on Engrossed Substitute Bill. PRO: Representative Senn, Prime Sponsor; Melantha Jenkins, Bellevue College Associated Student Body President; Kristen Rowe-Finkbeiner, Janet Chung, Legal Voice, Keela Robison, and Megan Kaufman, Moms Rising; Marilyn Watkins, Economic Opportunity Institute; Sue Wilmot, Safeway employee/UFCW 21; Ben Crowther; Sofia Aragon, WA State Nurses Association; Briahna Taylor, Somerset Elementary; Tai Yang, Bellevue College.

CON: Patrick Connor, NFIB/Washington; Carolyn Logue, Washington Food Industry Association; Bob Battles, Association of Washington Business; Scott Dilley, Washington Farm Bureau.

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