
Judiciary Committee

SSB 6102

Title: An act relating to enacting the employee reproductive choice act.

Brief Description: Enacting the employee reproductive choice act.

Sponsors: Senate Committee on Health & Long Term Care (originally sponsored by Senators Ranker, Cleveland, Saldaña, Darneille, Palumbo, Nelson, Wellman, Dhingra, Keiser, Billig, Kuderer, Rolfes, Frockt, Takko, McCoy, Carlyle, Hasegawa, Mullet, Pedersen, Conway, Chase, Liias, Van De Wege and Hunt).

Brief Summary of Substitute Bill

- Creates the Employee Reproductive Choice Act which makes it an unfair practice under the Washington Law Against Discrimination:
 - for employers that provide health insurance to their employees as part of a benefit package to fail to provide contraceptive coverage at no cost to employees or, if state regulation is preempted, comply with federal requirements and rules on barrier-free access to contraceptive coverage; and
 - for employers to discharge, expel, or otherwise discriminate against an employee in the terms and conditions of employment based on that employee's reproductive decisions.

Hearing Date: 2/22/18

Staff: Cece Clynch (786-7195).

Background:

Washington Law Against Discrimination.

The Washington Law Against Discrimination (WLAD) recognizes the right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability

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or the use of a trained dog guide or service animal by a person with a disability. This right includes:

- the right to obtain and hold employment without discrimination;
- the right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;
- the right to engage in real estate transactions without discrimination, including discrimination against families with children;
- the right to engage in credit transactions without discrimination;
- the right to engage in insurance transactions or transactions with health maintenance organizations without discrimination;
- the right to engage in commerce free from any discriminatory boycotts or blacklists; and
- the right of a mother to breastfeed her child in any place of public resort, accommodation, assemblage, or amusement.

Under the WLAD, "employer" includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit.

In the event a WLAD complaint is filed alleging an unfair practice, the Human Rights Commission (HRC) must investigate and issue written findings of fact, as well as a finding as to whether there is or is not reasonable cause to believe that an unfair practice has been or is being committed. Upon a finding of reasonable cause, the HRC staff must endeavor to eliminate the unfair practice by conference, conciliation, and persuasion. If an agreement is reached, the HRC issues an order setting forth the terms of the agreement. If no agreement is reached, the HRC requests the appointment of an administrative law judge (ALJ) to hear the complaint. An ALJ is empowered to: award damages requiring that wrongful conduct cease and desist; and order affirmative action so as to effectuate the purposes of the law. There is a right of judicial review from the ALJ's final order.

A person deeming himself or herself injured may also file a civil suit against the alleged wrongdoer. Available relief includes an injunction against further violations, the recovery of actual damages, and reasonable attorneys' fees.

Insurance Coverage for Contraception.

Federal Law.

Under the federal Patient Protection and Affordable Care Act (ACA), most health plans must cover preventive services with no cost-sharing. Under federal rules, preventive services include all federal Food and Drug Administration (FDA)-approved contraceptive methods. Drugs that induce abortions and vasectomies are not included in this coverage mandate.

Pursuant to federal rules, a health plan purchased or offered by a religious employer, such as a church, is not required to cover contraceptives. A health plan purchased or offered by a nonprofit religious organization, such as a religiously affiliated hospital, is not required to cover contraceptives if the organization certifies that it has religious objections (in which case the carrier covers the cost of the coverage). A health plan purchased by an organization or small business that has an objection based on moral convictions is also not required to cover contraceptives.

In *Burwell v. Hobby Lobby*, the United States Supreme Court ruled that requiring a closely held corporation to cover contraceptives with no cost-sharing violates the Religious Freedom Restoration Act (RFRA) when such coverage violates the corporation's religious beliefs. However, the RFRA does not apply to state laws.

State Law.

Under the ACA, each state must establish a Health Benefit Exchange (Exchange) in which consumers may compare and purchase individual and small group market health insurance. Individuals between 134 and 400 percent of the federal poverty level are eligible for federal premium and cost-sharing subsidies in the Exchange on a sliding scale.

The ACA requires nongrandfathered individual and small group market health plans to offer the "essential health benefits" both inside and outside of the Exchange. The essential health benefits are established by the states using a supplemented benchmark plan. Prescription drugs, including all FDA-approved contraceptive methods and prescription-based sterilization procedures for women, are included in Washington's essential health benefits package.

Rules adopted by the Office of the Insurance Commissioner (OIC) require a state-regulated health plan to cover prescription contraceptives if it provides generally comprehensive coverage of prescription drugs. This requirement applies to all state-regulated health plans, regardless of whether they are subject to the essential health benefits requirement. A health carrier may subject this contraceptive coverage to cost-sharing requirements.

Objections Based on Conscience or Religion under State Law.

No individual health care provider, religiously-sponsored health carrier, or health care facility may be required by law or contract in any circumstances to participate in the provision of or payment for a specific service if they object to so doing for reason of conscience or religion. No person may be discriminated against in employment or professional privileges because of such objection. No individual or organization with a religious or moral tenet opposed to a specific service may be required to purchase coverage for that service or services if they object to doing so for reason of conscience or religion.

The provisions allowing the exercise of conscientious objection are not intended to result in an enrollee being denied timely access to any services in the state's Basic Health Plan. A health carrier must:

- provide enrollees written notice of the services the carrier refuses to cover for reason of conscience or religion;
- provide written information describing how an enrollee may directly access services in an expeditious manner; and
- ensure that enrollees who are refused services have prompt access to information describing how they may directly access services in an expeditious manner.

The OIC must establish a mechanism to recognize the right of conscience while ensuring enrollees timely access to services and to ensure prompt payment to providers. Under rules adopted by the OIC, all carriers are required to file a description of the process they will use to recognize an organization or individual's exercise of conscience when purchasing coverage; the process may not affect a nonobjecting enrollee's access to coverage for those services. A religiously sponsored carrier that elects not to cover certain benefits because of religious beliefs

must file a description of the process by which its enrollees will have timely access to all Basic Health Plan services.

In 2006 the Attorney General issued an opinion regarding the OIC rule that requires carriers that cover prescription drugs to also cover contraceptives. According to the Attorney General's opinion, the rule did not supersede the statutory right of conscience; it only limited one of the ways in which the right could be exercised. This is because the rule did not require prescription drug coverage and did not apply directly to employers.

Summary of Bill:

Washington Law Against Discrimination.

The right to be free from discrimination under the Washington Law Against Discrimination (WLAD) includes:

- the right of an employee whose employer provides health insurance coverage as part of an employee benefit package to receive contraceptive coverage from that employer's health plan free of restrictions, exclusions, or reductions in coverage or benefits.

It is made an unfair practice under the WLAD for any employer who provides health insurance to an employee as part of an employee benefit package to fail to provide contraceptive coverage at no cost to the employee. In the event that state regulation with respect to a particular employer is preempted, that employer must comply with the federal Patient Protection and Affordable Care Act (ACA) requirements and rules on barrier-free access to contraceptive coverage. Failure to comply with these requirements and rules constitutes an unfair practice under the WLAD.

"Contraceptive coverage" is defined in the WLAD to include all federal Food and Drug Administration-approved contraceptive drugs, devices, and prescription barrier methods, and medical services associated with the prescribing, dispensing, delivery, distribution, administration, and removal of a prescription contraceptive to the same extent, and on the same terms, as other outpatient services.

It is also an unfair practice for any employer to discharge, expel, or otherwise discriminate against an employee in the terms and conditions of employment based on that employee's reproductive decisions, including whether to use any reproductive health care service, contraceptive drug, or contraceptive device.

An employee injured by any of these unfair practices may:

- file a complaint with the Human Rights Commission (HRC), and the HRC must investigate the complaint if the HRC determines that the complaint is subject to its jurisdiction; and
- pursue a civil action in court to either enjoin further violations, or recover actual damages sustained by the employee, or both, together with the cost of suit including reasonable attorneys' fees.

Objections Based on Conscience or Religion.

The statutory provision that allows the exercise of conscientious or religious objection is amended to strike references to basic health plan services and instead refer to services required

by law to be covered. Also stricken is the provision which authorizes the Office of the Insurance Commissioner to establish in rule a process by which health carriers may offer services to individuals and organizations with religious or moral objections while ensuring enrollees timely access to services.

Miscellaneous.

The act is named the Employee Reproductive Choice Act.

A severability clause is included, providing that if any provision of the act or its application to a particular person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on February 15, 2018.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.