

SENATE BILL REPORT

SB 5226

As of February 8, 2019

Title: An act relating to the off-duty conduct of an employee or a prospective employee.

Brief Description: Concerning the off-duty conduct of an employee or a prospective employee.

Sponsors: Senators Kuderer, Conway and Keiser.

Brief History:

Committee Activity: Law & Justice: 2/07/19.

Brief Summary of Bill

- Prohibits an employer from refusing to hire someone, treating an employee unfairly, or firing an employee who participates in a lawful activity, or exercises their constitutional rights, on their own time and away from the workplace.
- Allows an employer to restrict an employee's participation if the activity relates to a valid work requirement, or creates an actual or apparent conflict of interest with the employee's job responsibilities.
- Exempts Washington law enforcement agencies, and an employing nonprofit organization, when the nonprofit's main purpose conflicts with the activity.

SENATE COMMITTEE ON LAW & JUSTICE

Staff: Melissa Burke-Cain (786-7755)

Background: Washington's law against discrimination (WLAD) prohibits employers from unfair and discriminating practices. WLAD applies to individuals who belong to a protected class and believe a prospective employer or employer has discriminated against them because of their protected class status. These individuals may file a discrimination charge with the Washington State Human Rights Commission (WSHRC) if the employer has at least eight employees. The claimant must file the charge with WSHRC within six months of the last alleged discrimination.

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.

A WSHRC staff member performs an initial interview. The claimant submits a questionnaire, and signs a written charge. WSHRC appoints an investigator to gather evidence. If the investigation shows WSHRC has jurisdiction, and there is sufficient evidence supporting the claim, a charge is issued. WSHRC provides the employer with a copy of the charge. The employer must send its written response to the charge within 15 days.

WSHRC acts as a neutral fact-finder, and uses alternative dispute resolution when possible. The WSHRC investigator makes a recommendation to the commission which determines the outcome of the charge. The party making the claim of employment discrimination also may decide to file a civil action in court as an alternative to the WSHRC process.

Unless the employer bases its decision on a bona fide occupational qualification, the employer or prospective employer commits an unfair employment practice by:

- refusing to hire someone because of their protected class status;
- discriminating against an employee in employment terms and conditions because of their protected class status; or
- firing an employee because of their protected class status.

The protected classes are:

- ages forty or more;
- sex, including pregnancy;
- marital status;
- sexual orientation including gender identity;
- race or color;
- creed;
- national origin;
- honorably discharged veteran or military status;
- presence of any sensory, mental, or physical disability;
- use of a trained service animal;
- state employee or health care whistleblower status;
- opposing a discriminatory practice; or
- HIV/AIDS and Hepatitis C status.

Summary of Bill: An employer commits an unfair employment practice under the WLAD when it refuses to hire someone, treats an employee differently in wages or employment terms and conditions, or fires an employee (1) because of participation in a lawful activity or exercise of their constitutional rights; and (2) when the prospective employee or employee is on their own time and away from the workplace.

An employer does not violate WLAD, and may restrict an employee's participation in an activity, when the activity relates to a valid work requirement, or creates an actual or apparent conflict of interest with the employee's job responsibilities. Washington's law enforcement agencies, and nonprofit organizations whose main purpose conflicts with the activity, are exempt.

Appropriation: None.

Fiscal Note: Requested on February 1, 2019.

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: With the widespread access to social media many employers search and find information about the private lives of employees and prospective employees as part of the hiring process. Currently there is no law specifically protecting employees from adverse employment actions even when the information the employer uses shows an employee engaged in legal activity on their own time. Approximately 29 states have laws protecting employees who engage in legal off duty conduct. Seven states protect some form of political activity. Washington employees have no protection. An employee should not be penalized because their employer disagrees with their viewpoint or other legal conduct. Employees have been fired because they are gun owners or they are pro life. This bill protects privacy and freedom for employees but also allows employers to make decisions when the conduct relates to genuine job duty or requirements. Employee protection should be expanded. Political speech should be protected. Employers should not be allowed to oversee the off duty activities of their employees. This bill balances employee and employer rights. Our cherished right to be left alone in our private affairs needs to be protected.

CON: Employers have a right to freedom of assembly too. An employer should be able to choose. Under this bill employers can not choose not to employ a homophobe, a racist, or a misogynist. With this bill there is no way to get around that.

OTHER: This draft appears to remove many of the concerns from past years. We have expressed our concerns in the past regarding protection for marijuana use. It is legal under state law, but not under federal law requirements. That puts many employers in a bind when they are subject to federal regulation, but that appears to be out of the bill. We do agree with the concept of protecting first amendment rights. For those who work in the media maintaining the appearance of fairness is a fundamental aspect of our job. I do not see that the bill clearly protects the appearance of fairness as one of the protected job requirements.

Persons Testifying: PRO: Senator Patty Kuderer, Prime Sponsor; Larry Shannon, Washington State Association for Justice; Anne Silver, Washington Employment Lawyers Association.

CON: James King, Independent Business Association.

OTHER: Rowland Thompson, Allied Daily Newspapers of Washington; Bob Battles, Association of Washington Business.

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