

New Washington Laws on Equal Pay and Sexual Harassment NDAs Become Effective in June

Washington's Amended Equal Pay Act

The Washington Equal Pay Opportunity Act will go into effect on June 7, 2018. House Bill 1506, signed by Governor Jay Inslee on March 21, 2018, amends the Washington Equal Pay Act, RCW 49.12.175, to "address income disparities, employer discrimination, and retaliation practices, and to reflect the equal status of all workers in Washington state." This statute goes beyond federal equal pay legislation by providing additional protections for employees and imposing restrictions on employers. An employer who discriminates based on gender in providing compensation is guilty of a misdemeanor.

Definition of "Similarly Employed" Employees

The new legislation prohibits employers from paying different wages based on gender between "similarly employed" employees. The term "similarly employed" means the performance of the job requires similar skill, effort and responsibility, and the jobs are performed under similar working conditions for the same employer.

Higher Bar for Bona Fide Factors

The act raises the bar for justifying a pay differential. According to the act, a pay differential is acceptable as long as the employer can show the existence of a good faith bona fide job-related factor or factors that meet three criteria: (1) they must account for the entire differential; (2) they are not based on a gender-based differential; and (3) they are consistent with business necessity. The third requirement, proving the factor is consistent with business necessity, appears to set a particularly high standard for employers. Examples of bona fide factors provided in the legislation include education, training, experience, a seniority system, a merit system, a system that measures earnings by quantity or quality of production, and a bona fide regional difference in compensation levels.

An employee's previous wage or salary history is not a bona fide factor justifying pay disparity. Deciding an employee's pay based in part on consideration of previous salary would leave employers vulnerable to claims.

Coverage of LGBTQ Employees

The act replaces the term "sex" in RCW 49.12.175 with the term "gender," which would appear to protect LGBTQ employees from pay discrimination as well.

Equal Advancement Opportunities

Employers may not deprive an employee of career advancement opportunities on the basis of gender. A differential in career advancement based on the bona fide factors that meet the requirements set forth above does not constitute discrimination.

Pay Disclosure and Transparency

Employers may not prohibit employees from discussing their wages or require employees to sign a waiver that prevents them from disclosing the amount of their wages. Employers may not discharge or retaliate against an employee for asking about or discussing the wages of another employee or for asking the employer to provide a reason for the employee's pay or lack of advancement opportunity.

Employee Action Against Employer and Penalties

Employees may bring direct civil action against their employers within three years of the date of the alleged violation. Employees may file complaints with the Washington State Department of Labor and Industries, which must then investigate the complaint.

If the employer is found to have violated the act, the employer may be liable for actual or statutory damages equal to the actual damages or \$5,000, whichever is greater, in addition to one-percent interest per month owed on all compensation owed. The employer may also be liable for the costs of investigation and enforcement by the department. If the department determines that the employer committed a pattern of violation or violation through formal or informal employer policy or practice, the employer may be liable for a civil penalty to the department. An employer may have to pay a civil penalty of no more than \$500 for the first violation and no more than \$1,000 or 10 percent of the damages, whichever is greater for subsequent violations.

For a civil action, the employer may also be liable for costs and reasonable attorneys' fees, and the court may order reinstatement and injunctive relief. Filing a civil action will terminate the processing of a complaint by the department. Actual damages may be calculated back four years prior to the last violation before the filing of the lawsuit.

Washington's Ban on Sexual Harassment Nondisclosure Agreements

Senate Bill 5996 was signed by Governor Inslee on March 21, 2018 and goes into effect on June 7, 2018. The legislation bans employers from requiring employees to sign nondisclosure agreements that prevent employees from "disclosing sexual harassment or sexual assault occurring in the workplace, at work-related events coordinated by or through the employer, or between employees, or between an employer and an employee, off the employment premises" as a condition of employment. The act renders any such nondisclosure agreements signed prior to the law's enactment void and unenforceable as a violation of public policy.

While such preemptive nondisclosure agreements are now prohibited, confidentiality provisions within settlement agreements between an employer and employee or former employee alleging sexual harassment are not prohibited by this legislation.

The act amends the Washington State Law Against Discrimination (WLAD) by adding a provision that prohibits employers from discharging or retaliating against employees who disclose sexual harassment or sexual assault occurring at work or committed by an employee or employer.

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