

SB 1586 -3, -4 STAFF MEASURE SUMMARY

Senate Committee On Labor and Business

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Meeting Dates: 2/3, 2/8, 2/10

WHAT THE MEASURE DOES:

Extends the prohibition regarding certain non-disclosure agreements (NDA) to cover former employees of private and public employers. Clarifies that the prohibition applies to current employees. Creates an unlawful employment practice for an employer or former employer to include certain provisions in a settlement, separation, or severance agreement unless the provision is made at the request of the person claiming or alleging a grievance, at least in part. Includes within the prohibited provisions those that prevent the disclosure of the amount of or fact of any settlement. Prohibits an employer or former employer from requesting or making an offer of settlement conditional upon the employee's request to enter into an NDA, and makes failure to provide a copy of the written policy a violation. Permits a person claiming or alleging a grievance to recover liquidated damages of \$5,000 for a violation. Permits mediation communications relating to an alleged violation to be admissible as evidence. Makes a prohibited NDA that is not permitted by an exception void and unenforceable.

ISSUES DISCUSSED:

EFFECT OF AMENDMENT:

-3 Replaces the measure. Extends the prohibition regarding certain non-disclosure agreements (NDA) to cover former employees of private and public employers. Clarifies that the prohibition applies to current employees. Provides that whenever an employer and employee enter into an agreement that releases a claim of unlawful conduct against the employer, the agreement may include one or more specified provisions only upon request of the employee. Specifies the provisions that may be included in the agreement to include a provision that prevents the disclosure of the amount of or fact of any settlement. Prohibits an employer from making an offer of settlement conditional upon a request to include a provision that prevents the disclosure of a settlement, and makes failure to provide a copy of the written policy a violation. Excludes agreements that are entered into after the employer makes a good faith determination that the employee has engaged in prohibited conduct. Permits a person to file a complaint with to recover liquidated damages of \$5,000 for a violation. Makes a prohibited NDA that is not permitted by an exception void and unenforceable. Permits an employer to enforce an NDA that is unrelated an agreement prohibited under the measure. Requires mediators to provide a copy of the model procedures and policies made available by the Bureau of Labor and Industries. Requires employers to make available the required written policies regarding workplace harassment.

-4 Replaces the measure. Extends the prohibition regarding certain non-disclosure agreements to cover former employees of private and public employers. Clarifies that the prohibition applies to current employees. Provides that whenever an employer and former, current, or prospective employee enter into an agreement that releases a claim of unlawful conduct constituting specified types of discrimination, including sexual assault, against the employer, the agreement may include one or more specified provisions only upon request of the employee. Includes within the specified provisions that may be included in the agreement a provision that prevents the disclosure of the amount of or fact of any settlement. Declares the offer of settlement by an employer that is conditional upon a request to include a provision that prevents the disclosure of a settlement to be a violation. Declares the failure by an employer to provide a copy of a required written policy regarding procedures and practices to reduce and prevent discrimination to a person with whom the employer seeks to enter into an agreement to be a violation. Provides an exclusion for agreements that are entered into following the employer's

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good faith determination that the employee engaged in prohibited conduct regarding specified forms of discrimination, including sexual assault. Permits a person who files complaint related to violations related to agreements to recover liquidated damages of \$5,000. Declares an agreement that is not permitted by an exception to be void and unenforceable. Clarifies that an employer may enforce an agreement that is unrelated to an agreement regarding alleged discrimination by an employer. Requires mediators to provide to an unrepresented party in a mediation related to alleged discrimination by an employer a copy of the model procedures and policies for the reduction and prevention of specified forms of discrimination made available by the Bureau of Labor and Industries. Requires employers to make available the required written policies regarding workplace harassment.

BACKGROUND:

The Legislative Assembly passed the Workplace Fairness Act (WFA) through Senate Bill 726 in 2019. Under the WFA, a private employer must adopt a written policy outlining their procedures and practices for reducing and preventing discrimination and sexual assault. The WFA also prohibits employers from entering into a nondisclosure agreement (NDA) as a condition of employment, continued employment, promotion, compensation, or receipt of benefits if the NDA prevents an employee or prospective employee from disclosing or discussing employment discrimination or sexual assault that occurred between employees or between the employer and the employee. Also in 2019, the Legislative Assembly passed Senate Bill 479 which applied the same requirements and prohibitions to public employers.

The law provides two exceptions that would permit an employer to enter into an otherwise prohibited NDA. First, an NDA is permitted if an employee claiming to be aggrieved by employment discrimination requests the NDA as part of a settlement, separation, or severance agreement. Second, an NDA is permitted if the employer makes a good faith determination that the employee engaged in employment discrimination. An aggrieved employee may file a complaint with the Commissioner of the Bureau of Labor and Industry (BOLI) and file a civil action, which can result in recovery of back pay for the prior two-year period as well as compensatory and punitive damages.

Senate Bill 1586 extends the prohibition regarding NDAs to cover former employees of private and public employers and clarifies that the prohibition applies to current employees. The measure creates an unlawful employment practice for an employer or former employer to include certain provisions in a settlement, separation, or severance agreement unless the provision is made at the request of the person claiming or alleging a grievance, at least in part. The prohibited provisions include those that prevent the disclosure of the amount of or fact of any settlement. The measure prohibits an employer or former employer from requesting or making an offer of settlement conditional upon the employee's request to enter into an NDA, and makes failure to provide a copy of the written policy a violation.

Under the measure, in addition to filing a complaint with BOLI and a civil action, a person may recover liquidated damages of \$5,000 for a violation. The measure permits mediation communications relating to an alleged violation to be admissible as evidence. Unless an NDA is permitted under a specified exception, Senate Bill 1586 makes the NDA void and unenforceable.