

2019 -- S 0509

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STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2019

A N A C T

RELATING TO LABOR AND LABOR RELATIONS -- FAIR EMPLOYMENT PRACTICES

Introduced By: Senators Goldin, Ruggerio, Goodwin, Lawson, and Cano

Date Introduced: February 27, 2019

Referred To: Senate Labor

It is enacted by the General Assembly as follows:

1 SECTION 1. Legislative findings and intent. It is the intent of the general assembly to  
2 combat wage discrimination based on race or color, religion, sex, sexual orientation, gender  
3 identity or expression, disability, age, or country of ancestral origin by strengthening and closing  
4 gaps in existing wage discrimination laws.

5 SECTION 2. Sections 28-6-17, 28-6-18, 28-6-19, 28-6-20 and 28-6-21 of the General  
6 Laws in Chapter 28-6 entitled "Wage Discrimination Based on Sex" are hereby amended to read  
7 as follows:

8 **28-6-17. Definitions.**

9 As used in this chapter:

10 (a) "Age" means anyone who is at least forty (40) years of age.

11 (b) "Comparable work" means work that requires comparable skill, effort, and  
12 responsibility, and is performed under similar working conditions.

13 ~~(a)~~(c) "Director" means the director of labor and training.

14 ~~(b)~~(d) "Employee" ~~as used in §§ 28-6-17—28-6-21~~ means any person ~~employed for hire~~  
15 ~~by any employer in any lawful employment, but does not include persons engaged in domestic~~  
16 ~~service in the home of the employer, or employees of any social club, fraternal, charitable,~~  
17 ~~educational, religious, scientific, or literary association, no part of the net earnings of which~~  
18 ~~inures to the benefit of any private individual.~~ who works in the service of an employer under an  
19 express or implied contract of hire, when an employer has the right to control the details of work

1 performance.

2 ~~(e)~~(e) "Employer" includes any person acting in the interest of an employer directly or  
3 indirectly.

4 ~~(d)~~(f) "Employment" means any employment under contract of hire, expressed or  
5 implied, written or oral, including all contracts entered into by helpers and assistants of  
6 employees, whether paid by employer or employee, if employed with the knowledge, actual or  
7 constructive, of the employer in which all or the greater part of the work is to be performed  
8 within the state.

9 (g) "Fair-pay analysis" means an evaluation process to assess and correct wage disparities  
10 among employees who perform comparable work.

11 (h) "Occurrence of discriminatory practice" means when a discriminatory compensation  
12 decision or other practice is adopted; when an individual becomes subject to a discriminatory  
13 compensation decision or other practice; or when an individual is affected by the application of a  
14 discriminatory compensation decision or other practice.

15 (i) "Wage" means all amounts at which the labor or service rendered is recompensed,  
16 whether the amount is fixed or ascertained on a time, task, piece, commission basis, or other  
17 method of calculating the amount, and includes benefits.

18 (j) "Wage history" means the wages paid to an applicant for employment by the  
19 applicant's current employer and/or previous employer or employers.

20 (k) "Wage range" means the lower and upper bounds that an employer is willing to pay  
21 an applicant for employment or does pay an employee.

22 **28-6-18. ~~Wage differentials based on sex prohibited.~~ Wage differentials based on**  
23 **protected characteristics prohibited.**

24 (a) No employer shall ~~discriminate in the payment of wages as between the sexes or shall~~  
25 ~~pay any female in his or her employ salary or wage rates less than the rates paid to male~~  
26 ~~employees for equal work or work on the same operations.~~ pay any of its employees at a wage  
27 rate less than the rate paid to employees of another race or color, religion, sex, sexual orientation,  
28 gender identity or expression, disability, age, country of ancestral origin, or any other  
29 characteristics enumerated in § 28-5-5, for comparable work, except where the employer meets  
30 the standards set forth in subsection (b) of this section.

31 ~~(b) Nothing contained in this section shall prohibit a variation in rates of pay based upon~~  
32 ~~either difference in:~~

33 ~~(1) Seniority, experience, training, skill, or ability;~~

34 ~~(2) Duties and services performed, either regularly or occasionally;~~

1           ~~(3) The shift or time of day worked; or~~

2           ~~(4) Availability for other operations or any other reasonable differentiation except~~  
3 ~~difference in sex.~~

4           ~~(e) Except as provided in this section, any provision in any contract, agreement, or~~  
5 ~~understanding entered into after passage of this act establishing a variation in rates of pay as~~  
6 ~~between the sexes, shall be null and void.~~

7           (b) A wage differential is permitted when the employer demonstrates that:

8           (1) The systems are fair and are not being used as a pretext for an unlawful wage  
9 differential;

10          (2) The differential is based upon one or more of the following factors:

11          (i) A seniority system; provided, however, that time spent on leave due to a pregnancy-  
12 related condition or parental, family and medical leave shall not reduce seniority;

13          (ii) A merit system;

14          (iii) A system that measures earnings by quantity or quality of production; or

15          (iv) A bona fide factor, other than those characteristics identified in § 28-6-18(a), such as  
16 education, training, or experience; work-related travel, if the travel is regular and a business  
17 necessity; or reasonable shift differentials, which is not based upon or derived from a differential  
18 in compensation based on characteristics identified in § 28-6-18(a); which is job-related with  
19 respect to the position in question; and which is consistent with business necessity. This factor  
20 shall not apply if the employee demonstrates that an alternative business practice exists that  
21 would serve the same business purpose without producing the wage differential and that the  
22 employer has refused to adopt such alternative practice;

23          (3) Each factor is relied upon reasonably; and

24          (4) The factor or factors relied upon account for the entire wage differential.

25          (c) An individual's wage history cannot, by itself, justify an otherwise unlawful wage  
26 differential.

27          (d) An employer who discriminates in violation of this section shall not, in order to  
28 comply with the provisions of this section, reduce the wage rate of any employee.

29          (e) The agreement of an employee to work for less than the wage to which the employee  
30 is entitled under this chapter is not a defense to an action under this chapter.

31          (f) No employer shall prohibit an employee from inquiring about, discussing, or  
32 disclosing the wages of such employee or another employee, or retaliate against an employee who  
33 engages in such activities. No employer shall require an employee to enter into a waiver or other  
34 agreement that purports to deny an employee the right to disclose or discuss his or her wages. No

1 employer shall prohibit an employee from aiding or encouraging any other employee to exercise  
2 his or her rights under this subsection:

3 (1) Nothing in this subsection shall require an employee to disclose his or her wages;

4 (2) Nothing in this subsection shall be construed to limit the rights of an employee  
5 provided by any other provision of law or collective bargaining agreement.

6 (g) No employer shall discharge or in any other manner discriminate or retaliate against  
7 any applicant for employment or employee because the applicant or employee has opposed a  
8 practice made unlawful by this chapter or because the applicant or employee has made a charge  
9 or filed any complaint with the employer, the director of labor and training, or any other person,  
10 under or related to §§ 28-6-17 through 28-6-21; has instituted or caused to be instituted any  
11 investigation, proceeding, hearing, or any action under or related to §§ 28-6-17 through 28-6-21;  
12 has testified or is planning to testify; or has assisted or participated in any manner in any such  
13 investigation, proceeding, or hearing under §§ 28-6-17 through 28-6-21. No employer shall  
14 coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on  
15 account of their having exercised or enjoyed, or on account of their having aided or encouraged  
16 any other individual in the exercise or enjoyment of, any right granted or protected by §§ 28- 6-17  
17 through 28-6-21.

18 (h) Except as provided in this section, any provision in any contract entered into after  
19 passage of this chapter establishing a variation in rates of pay based on the characteristics  
20 identified by § 28-6-18(a) shall be null and void.

21 (i) Every employer subject to this chapter shall post, in a conspicuous place or places on  
22 its premises, a notice to be prepared or approved by the director which shall set forth excerpts of  
23 this chapter and any other relevant information which the director deems necessary to explain this  
24 chapter. Any employer who does not comply with the provisions of this section shall be fined not  
25 less than one hundred dollars (\$100) nor more than five hundred dollars (\$500).

26 **28-6-19. Enforcement of provisions.**

27 (a) The director of labor and training shall have the power and it shall be his or her duty  
28 to carry out the provisions of §§ 28-6-17 -- 28-6-21.

29 (b) In carrying out these provisions, the director shall have the same powers and duties as  
30 set forth in chapter 14 of title 28 to investigate, inspect, subpoena, and enforce through  
31 administrative hearings complaints.

32 (c) The director shall be entitled to the same rights and remedies as set forth in chapter 14  
33 of title 28 for an employer's effort to obstruct the director and authorized representatives in the  
34 performance of their duties.

1 (d) The department of labor and training and the commission for human rights shall  
2 cooperate in the investigation of charges filed under this section, when the allegations are within  
3 the jurisdiction of both agencies.

4 (e) At the request of any party aggrieved by a violation of § 28-6-18, et seq., the director  
5 of labor and training may take an assignment of the claim in trust for the assigning aggrieved  
6 party and may bring any legal action necessary to collect the claim. The director of labor and  
7 training shall not be required to pay the filing fee or other costs in connection with any action.  
8 The director of labor and training shall have the power to join various claimants against the  
9 employer, in one cause of action. If the director of labor and training prevails in an enforcement  
10 action, the aggrieved party shall be awarded damages and the department of labor and training  
11 shall be awarded penalties in accordance with §§ 28-6-20 and 28-6-21.

12 (f) An applicant for employment, employee, or former employee, for and on behalf of  
13 themselves and other similarly situated individuals, or any organization representing such an  
14 applicant, employee, or former employee, aggrieved by a violation of § 28-6-18, et seq., may file  
15 a complaint with the director of labor and training or may file a civil action in any court of  
16 competent jurisdiction to obtain relief.

17 (g) An aggrieved applicant for employment, employee, or former employee may not file  
18 a civil action under this section if they had also filed a complaint with the director of labor and  
19 training and the director has issued notice of an administrative hearing pursuant to § 28-6-19.

20 (h) The filing of a civil action under this section shall not preclude the director of the  
21 department of labor and training from investigating the matter and/or referring the matter to the  
22 attorney general.

23 (i) All claims filed under this chapter shall be filed within three (3) years after there is an  
24 occurrence of, or the discovery of an occurrence of, a discriminatory practice.

25 (j) All claims under this chapter also include each time wages, benefits, or other  
26 compensation are paid, resulting in whole or in part from such a decision or other practice.

27 **28-6-20. Civil liability of employer for sex differential --- Actions. Liability of**  
28 **employer for unlawful wage differentials.**

29 ~~An employer who violates the provisions of § 28-6-18 shall be liable to the employee or~~  
30 ~~employees affected in the amount of their unpaid wages, and in an additional equal amount of~~  
31 ~~liquidated damages. An action to recover the liability may be maintained in any court of~~  
32 ~~competent jurisdiction by any one or more employees for and in behalf of himself or herself or~~  
33 ~~themselves and other similarly situated employees. At the request of any employee paid less than~~  
34 ~~the wage to which he or she is entitled under §§ 28-6-17 --- 28-6-21, the director of labor and~~

1 ~~training may take an assignment of the wage claim in trust for the assigning employee and may~~  
2 ~~bring any legal action necessary to collect the claim, and the liquidated damages provided for~~  
3 ~~above. The director of labor and training shall not be required to pay the filing fee or other costs~~  
4 ~~in connection with the action. The director of labor and training shall have the power to join~~  
5 ~~various claimants against the employer in one cause of action.~~

6 (a) An employer who violates §§ 28-6-18(a) through (g) shall be liable for any unpaid  
7 wages and/or benefits; compensatory damages; liquidated damages in an amount up to three (3)  
8 times the amount of unpaid wages and/or benefits owed, exclusive of interest; an award of  
9 appropriate equitable relief, including reinstatement of employment, fringe benefits, and seniority  
10 rights; and reasonable attorneys' fees, expert fees, and other litigation costs. Where the aggrieved  
11 party demonstrates that the employer acted with malice or reckless indifference, punitive  
12 damages may be assessed.

13 (b) An employer who violates § 28-6-18.1 shall be liable for any compensatory damages;  
14 special damages not to exceed ten thousand dollars (\$10,000); an award of appropriate equitable  
15 relief; reasonable attorneys' fees; and other litigation costs. Where the aggrieved party  
16 demonstrates that the employer acted with malice or reckless indifference, punitive damages may  
17 be assessed. If special damages are available, an aggrieved party may only recover compensatory  
18 damages that exceed the amount of special damages.

19 **28-6-21. Penalty for violations.**

20 ~~Any employer who violates any provision of §§ 28-6-17—28-6-21, or who discharges or~~  
21 ~~in any other manner discriminates against any employee because the employee has made any~~  
22 ~~complaint to his or her employer, the director of labor and training, or any other person, or~~  
23 ~~instituted or caused to be instituted any proceeding under or related to §§ 28-6-17—28-6-21, or~~  
24 ~~has testified or is about to testify in any proceeding, shall, upon conviction, be punished by a fine~~  
25 ~~of not more than two hundred dollars (\$200) or by imprisonment for not more than six (6)~~  
26 ~~months, or by both fine and imprisonment.~~

27 (a) In addition to any other relief to which any aggrieved party may be entitled for such a  
28 violation, an employer who violates §§ 28-6-18 or 28-6-18.1 shall be liable for a civil penalty to  
29 be paid to the department of labor and training. That penalty shall be the greater amount of the  
30 total back wages due or the following:

- 31 (1) Two thousand five hundred dollars (\$2,500) for a first violation;  
32 (2) Three thousand dollars (\$3,000) for a second violation; or  
33 (3) Five thousand dollars (\$5,000) for a third or subsequent violation.

34 (b) In determining the amount of any penalty imposed under this section, the director or

1 the court shall consider the size of the employer's business, the good faith of the employer, the  
2 gravity of the violation, the history of previous violations, and whether or not the violation was an  
3 innocent mistake or willful. The director or the court may consider lowering any penalty imposed  
4 under this section if the employer demonstrates, by a preponderance of the evidence, that the  
5 employer:

6 (1) Completed in good faith, within three (3) years prior to the date that the plaintiff filed  
7 the action, a fair-pay analysis of the employer's pay practices that was reasonable in detail and in  
8 scope, in light of the size of the employer, and was related to the protected class asserted by the  
9 plaintiff in the action.

10 (2) Eliminated the wage differentials for the plaintiff and has made reasonable and  
11 substantial progress toward eliminating wage differentials for the protected class asserted by the  
12 plaintiff; and

13 (3) Gathered the same wage record data collected at the end of each year by the  
14 department of labor and training from employers with one hundred (100) or more Rhode Island  
15 employees.

16 (c) Information that an employer has not completed a fair-pay analysis may not be used  
17 as evidence of a violation of § 28-6-18 et seq.

18 SECTION 3. Chapter 28-6 of the General Laws entitled "Wage Discrimination Based on  
19 Sex" is hereby amended by adding thereto the following section:

20 **28-6-18.1. Wage history and wage range.**

21 (a) No employer shall:

22 (1) Rely on the wage history of an applicant when deciding whether to consider the  
23 applicant for employment;

24 (2) Require that an applicant's prior wages satisfy minimum or maximum criteria as a  
25 condition of being considered for employment;

26 (3) Rely on the wage history of an applicant in determining the wages such applicant is to  
27 be paid by the employer, upon hire; or

28 (4) Seek from an applicant or their current or former employer the wage history of an  
29 applicant.

30 (b) Provided, however, that after the employer makes an initial offer of employment with  
31 an offer of compensation to an applicant for employment, an employer may:

32 (1) Rely on wage history to support a wage higher than the wage offered by the  
33 employer, if wage history is voluntarily provided by the applicant for employment, without  
34 prompting from the employer;

1           (2) Seek to confirm the wage history of the applicant for employment to support a wage  
2 higher than the wage offered by the employer, when relying on wage history as permitted in  
3 subsection (b)(1) of this section; and

4           (3) Rely on wage history in these circumstances to the extent that the higher wage does  
5 not create an unlawful pay differential based on the characteristics identified in § 28-6-18(a).

6           (c) An employer shall provide an applicant for employment the wage range for the  
7 position for which the applicant is applying upon the earliest of the following: the applicant's  
8 request; prior to or at the time of inquiring about the applicant's wage expectations; or prior to or  
9 at the time of providing the applicant an offer of compensation. An employer shall provide an  
10 employee the wage range for the employee's job title and for comparable jobs upon hire and,  
11 thereafter, annually and upon request.

12           (d) The department of labor and training may provide guidance to employers for  
13 determining the information to be provided pursuant to subsection (c) of this section which may  
14 include definitions.

15           (e) An employer may not refuse to interview, hire, promote, or employ an applicant for  
16 employment or employee and may not retaliate against that individual because he or she did not  
17 provide wage history or because he or she requested the wage range for a position in accordance  
18 with this section.

19           SECTION 4. This act shall take effect on January 1, 2020.

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EXPLANATION  
BY THE LEGISLATIVE COUNCIL  
OF  
A N A C T  
RELATING TO LABOR AND LABOR RELATIONS -- FAIR EMPLOYMENT PRACTICES

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1           This act would comprehensively address wage discrimination by expanding employee  
2     protections and the scope of the remedies available to employees who have experienced wage  
3     discrimination.

4           This act would take effect on January 1, 2020.

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